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Datasheet for the decision of 30 July 2026

Case Number: T 0977/25 - 3.5.06

Application Number: 16719088.3

Publication Number: 3288403

IPC: A24F40/42, A24F40/46, A24F40/485, A24F40/70, H05B3/26

Language of the proceedings: EN

Title of invention:
CARTRIDGE FOR AN AEROSOL-GENERATING SYSTEM

Patent Proprietor:
Philip Morris Products S.A.

Opponent:
Nicoventures Trading Limited

Headword:
Heater element/PHILIP MORRIS

Relevant legal provisions:
EPC Art. 54(3), 123(2)
RPBA 2020 Art. 11

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Keyword:

Manufacturing method - implicit disclosure (yes)
Novelty - main request (no) - auxiliary request 1' (yes)
Amendments - added subject-matter - auxiliary request 1 (yes)
Late-filed auxiliary request 1' - admitted (yes)
Remittal to the department of first instance
Remittal - (yes)

Decisions cited:

G 0002/10, G 0001/24, G 0001/25, T 1791/16, T 0367/20, T 2488/22, T 1999/23, T 0847/24, T 0873/24

Catchword:

Leaving an ambiguity in a claim unresolved is not tantamount to leaving its interpretation open. An unresolved ambiguity may simply result in a broader interpretation (Reasons 30 to 32).

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Case Number: T 0977/25 - 3.5.06

D E C I S I O N
of Technical Board of Appeal 3.5.06
of 30 July 2026

Appellant: (Patent Proprietor)	Philip Morris Products S.A. Quai Jeanrenaud 3 2000 Neuchâtel (CH)
Representative:	Reddie & Grose LLP The White Chapel Building 10 Whitechapel High Street London E1 8QS (GB)
Respondent: (Opponent)	Nicoventures Trading Limited Globe House 1 Water Street London WC2R 3LA (GB)
Representative:	D Young & Co LLP 3 Noble Street London EC2V 7BQ (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted/ electronically transmitted on 26 May 2025 concerning maintenance of the European Patent No. 3288403 in amended form.**

Composition of the Board:

Chairman	M. Müller
Members:	R. Moser
	K. Kerber-Zubrzycka

Summary of Facts and Submissions

I. The appeal by the patent proprietor (Appellant) is directed against the interlocutory decision of the Opposition Division to maintain the European patent No. 3 288 403 in amended form on the basis of auxiliary request 2 with claims filed on 23 January 2025 and a description adapted during oral proceedings on 25 March 2025.

II. The following documents are relevant to the present decision:

D3: WO 2015/117701 Al
D4: WO 2015/117704 Al

III. In the statement of grounds of appeal, the Appellant requested that the interlocutory decision be set aside and that the patent be maintained as granted or, alternatively, based on auxiliary requests 1 or 2, filed in the opposition proceedings and re-filed with the grounds of appeal.

In its reply to the appeal, the opponent (Respondent) requested that the appeal be dismissed.

IV. The Board summoned the parties to in-person oral proceedings to be held on 30 July 2026.

In the communication under Article 15(1) RPBA accompanying the summons, the Board indicated, *inter alia*, that the main request and first auxiliary request met the requirements of Article 123(2) EPC and that the subject-matter of claim 1 of these requests was also novel over D3 and D4. As these requests had not been

examined for inventive step, the Board further indicated that it tended to remit the case to the Opposition Division for further prosecution.

V. Both parties requested that the oral proceedings be held as video-conference. These requests were refused by the Board having regard to the parties' substantive replies to the Board's preliminary opinion.

VI. Oral proceedings were held on 30 July 2026. During the oral proceedings, the Appellant filed a new auxiliary request ("auxiliary request 1'"), in which claims 12 and 13 of auxiliary request 1 are deleted.

The Appellant's final requests were that the decision under appeal be set aside and the patent be maintained as granted, alternatively on the basis of the auxiliary request 1, 1' or 2.

The Respondent maintained its initial request.

At the end of the oral proceedings, the Chairman announced the Board's decision.

VII. Claim 1 of the main request (patent as granted) reads as follows (feature labelling as in the interlocutory decision, see point 7):

"[1.1] A cartridge for use in an aerosol-generating system, comprising:
[1.2] a storage portion comprising a housing for holding an aerosol-forming substrate,
[1.3] the housing having an open end such that an opening of the housing is defined by the open end; and
[1.4] a heater assembly comprising at least one heater element fixed to the housing

[1.5] and extending across the opening of the housing,
[1.6] wherein the at least one heater element of the heater assembly defines a plurality of apertures for allowing fluid to pass through the at least one heater element,
[1.7] and wherein the plurality of apertures have different sizes."

VIII. Claim 12 of the main request reads as follows:

"[12.1] A method of manufacturing a cartridge for use in an aerosol-generating system, the method comprising the steps of:
[12.2] providing a storage portion comprising a housing having an open end such that an opening of the housing is defined by the open end;
[12.3] filling the storage portion with aerosol-forming substrate; and
[12.4] providing a heater assembly comprising at least one heater element extending across the opening of the housing,
[12.5] wherein the at least one heater element of the heater assembly has a plurality of apertures for allowing fluid to pass through the at least one heater element,
[12.6] and wherein the plurality of apertures have different sizes."

IX. Claims 1 and 12 of auxiliary request 1 differ from claims 1 and 12 of the main request merely in the following underlined additions:

in feature 1.4, "a heater assembly comprising at least one heater element fixed to the open end of the housing",

and in feature 12.4, "fixing a heater assembly comprising at least one heater element to the open end of the housing so that it extends across the opening of the housing".

X. The claims of auxiliary request 1' correspond to claims 1 to 11 of auxiliary request 1.

XI. The parties' arguments insofar as relevant to this decision, are summarised in the Reasons for the Decision below.

Reasons for the Decision

Context of the invention

1. The invention according to claim 1 of the granted patent concerns a cartridge (20) for use in an aerosol-generating device (11), such as an e-cigarette, which comprises an aerosol-forming substrate storage portion and a heater assembly. Such cartridge is commonly known as cartomiser (see Figure 1A of the patent).

2. The heater assembly comprises at least one heater element "fixed to the housing and extending across the opening of the housing".

3. The heater element (36) defines a plurality of apertures of different sizes through which the (vaporised) liquid can pass (see Figure 2). The generated vapour is entrained in the airflow inhaled by the user and forms an aerosol before exiting through the mouthpiece outlet (15) (see Figure 1D).

Main request

Interpretation of claim 12

4. Claim 12 defines a method of manufacturing a cartridge for use in an aerosol-generating device. The method comprises the steps of providing a storage portion having a housing with an opening, filling the storage portion with an aerosol-forming substrate and providing a heater assembly comprising at least one heater element extending across the opening of the housing.

The claim further specifies the location of the opening, namely at an open end of the housing, and the structure of the heater element, namely that it has apertures of different sizes to allow fluid to pass through.

5. The method contains very little detail of what is normally considered "manufacturing". Claim 12 only defines that two components are "provided" and that the storage portion is filled. The notion of "providing" *per se* covers the mere act of "making available".

6. The Appellant argued that the skilled person would understand claim 12 as relating to the manufacture of a cartridge comprising a heater assembly fixed to a storage component. This was the only technically reasonable interpretation, and was, moreover, supported by the description.

7. The Board is not convinced. While it is evident that the manufactured cartridge comprises two distinct components, it cannot be derived that they are fixed to each other.

7.1 In particular, the term "providing" *per se* does not imply that the heater assembly be fixed to the housing. It could, for example, rest against the housing, be held by another cartridge component, or be attached to a separate support.

7.2 Nor does the only passage in the description assist in this regard. Paragraph [0103], which specifically relates to the manufacturing method, does not state or imply that the heater assembly is to be fixed to the housing during manufacture. Paragraph [0038] discloses that, during manufacture, the heater assembly may be fixed "to other parts" of the system, not necessarily to the housing of the storage portion. While the same paragraph discloses that this fixing may make the heater assembly "part of a removable cartridge", this is only disclosed as an option ("in particular"). The only passage in the description that expressly states that the heater assembly is to be fixed to the housing is paragraph [0117]. Elsewhere, the description discloses the heater elements - not necessarily the entire heater assembly - as being fixed to the housing (e.g. paragraph [0058]).

7.3 Claim 12 has thus deliberately been formulated without indicating how the "provided" components are further handled in the claimed manufacturing method and, specifically, whether they are fixed to each other.

7.4 Therefore, and also after having consulted the description (G 1/24, Headnote), the Board cannot find a reason to interpret claim 12 so as to require such fixing.

7.5 The Board notes that this decision was taken before G 1/25 was issued (on 3 September 2026). However, the

Board considers its decision to be consistent with G 1/25. Specifically, the patent does not contain a definition of the notions of "providing" or "manufacturing" on which the Board could have relied in interpreting claim 12, nor has it used the description or drawings to impose on claim 12 a limitation for which the claim wording provides no basis (see G 1/25, Reasons, point 10).

Novelty of claim 12

8. The Board judges that claim 12 lacks novelty over D3.

It is undisputed that D3 discloses a cartridge for use in an e-cigarette comprising a storage portion, filled with an aerosol-forming substrate, with an opening at one end to convey the substrate to a heater assembly (see for instance page 6, lines 15 to 29). It is further common ground that D3 discloses a heater assembly comprising a heater element, for instance in the form of a woven or non-woven mesh of filaments which define interstices through which the aerosol-forming substrate can flow (see page 4, lines 4 to 11 and page 6, lines 22 to 29). Such a heater element may extend entirely over the opening of a substrate (page 15, lines 19 and 20), which is arranged flush with the end of the cartridge and, thus, extends across the (necessary) opening of the cartridge (page 10, lines 19 to 24). Features 12.2 to 12.5 are therefore (at least implicitly) known from D3 (see also interlocutory decision, points 11.1 to 11.3).

9. The Board judges that D3, given the broad scope of claim 12 (see points 5. and 7. above), also discloses feature 12.1, namely a method of manufacturing the claimed cartridge, and feature 12.6, namely a plurality

of apertures of different sizes.

Feature 12.1

10. D3 does not, as argued by the Appellant, explicitly disclose a method of manufacturing a cartridge comprising a storage portion and a heater assembly. However, first, claim 12 does not require the manufactured cartridge to comprise these components as components fixed to one another so as to form a single unit. Second, it is at least implicitly derivable from D3 that the components disclosed therein are manufactured or provided in the course of manufacturing the cartridge. This is also consistent with the various manufacturing steps described throughout the description (see, for example, page 16, lines 20 to 23 and page 20, lines 16 to 19), which indicate that the components of the cartridge are manufactured.

11. Although a strict approach must be taken to assessing novelty (see e.g. Case Law of the Boards of Appeal 11. edition / 2026 revision, I.C.5.1), in the present case, the skilled person would understand claim 12 as merely requiring the storage portion and the heater assembly to be provided as components of the manufactured cartridge. However, the claim does not prescribe any particular manner of manufacturing or assembling these components.

D3, on the other hand, discloses "a storage portion comprising a housing for holding a liquid aerosol-forming substrate, wherein the housing has an open end" and a "heater assembly [...] arranged next to the housing such that the filament arrangement of the fluid permeable heater assembly is arranged over the open end of the housing" (page 20, lines 8 to 11). These

components can be considered a cartridge and correspond to the storage portion and heater assembly specified in claim 12. The fact that D3 does not expressly describe the provision of these components using the terminology of a "manufacturing step" does not distinguish the claimed method, since the claim does not require any particular manufacturing operation beyond providing the specified components.

Feature 12.6

12. During oral proceedings the Appellant argued that Figure 11a of D3 did not disclose different mesh densities, because the Figure was a mere schematic drawing which used hatchings to distinguish the central portion from the side portions but not to depict different aperture sizes. Furthermore, page 7, lines 4 to 7 mentioned different mesh sizes/width of interstices, but this was related, as outlined in the subsequent paragraph, to a percentage of an open area of the mesh which defined different electrical resistance. No common definition of mesh density had been provided or evidenced. Different mesh sizes also did not imply apertures having different sizes as this presupposed a constant thickness of filaments which was not derivable from D3.

The Appellant further argued that the side portions 1103 in Figure 11a, illustrated as higher density mesh, were covered by clamps when in use and had no heating function and could therefore not be regarded as forming part of the heater element.

13. The Board is not persuaded by these arguments.

Although Figure 11a is a schematic drawing, from which

no measurements or specific ratios can be directly taken, the Board disagrees with the Appellant's opinion that it shows merely meaningless hatchings. Rather, in the Board's judgment, it contains information which, read in conjunction with the description (the afore-mentioned passage on page 7 or page 19, lines 8 to 11), makes it possible to derive that the interstices defined by the mesh in portions 1103 and in portion 1101 have different aperture sizes.

Furthermore, the description leaves no doubt that the outer portions 1103 of the mesh in Figure 11a form part of the heater element. Page 17, line 8, for instance, refers to a "mesh heater"; the penultimate paragraph on page 6 and the paragraph bridging pages 6 and page 7 refer to filament arrangements producing heat and forming a mesh of different sizes. Even if it were assumed, *arguendo*, that in the assembled state, the outer portions were completely obstructed by the fixing clamps and hence did not allow any fluid to pass through, this would still fall within the scope of claim 12, which does not require fluid to pass through each and every aperture. Thus, D3 would still disclose a heater element with a plurality of apertures for allowing fluid to pass through, the apertures being of different sizes.

Moreover, the skilled person clearly understands that mesh densities are specified in US mesh size (see D3, page 7, first paragraph), a common way of specifying the fineness, i.e. the aperture size, of a mesh.

D3 does not mention that the thickness of the filaments could or should be varied; rather, the aforementioned paragraphs on page 6 and 7 refer to "the filaments" forming meshes of different sizes. The skilled person

would read this as implying that the filaments within a given mesh are of the same thickness.

14. In view of the above considerations, the Board judges that the subject-matter of claim 12 is not novel over D3.

Auxiliary request 1

Novelty of claims 12 and 1

15. In substance, the claims of auxiliary request 1 differ from those of the main request in that feature 12.4 in claim 12 specifies that the heater assembly is fixed to the open end of the housing.

16. The Respondent argued that the wording "adapted to the shape of an end of a cartridge" on page 4, lines 20 to 23 of D3, and the wording "attachment face" allowing for a "flush arrangement of cartridge and heater assembly" on page 10, line 19 to 24, implied that the heater assembly was attached, and thus fixed, to the cartridge, thereby becoming a structural part of the cartridge as required by claim 12. Any other interpretation would be meaningless, since an attachment face was technically useful only if the two components were joined together.

Furthermore, the term "fixing" was very broad and comprised any form of attachment to the housing, whether direct or indirect. For instance, a temporary attachment by force, such as by using clips or clamps, fell also within the scope of the claim.

17. In the Appellant's view, the wording "planar attachment face" did not imply any fixing of the two components,

but rather suggested the opposite. "Fixing" meant preventing relative movement or a permanent joining, whereas an attachment face suggested a surface of one component intended to be brought into contact with another component. In that sense, it supported the understanding that the heater assembly and the cartridge were separate components.

18. The Board agrees with the Appellant.

The expressions "attachment face to be arranged facing a cartridge" and "contact surface" suggest two surfaces belonging to different components that are brought into contact. If the heater assembly and cartridge were a single integral component, describing one as having an attachment or contact face facing the other would be rather unnatural.

For instance, in D3 the heater assembly might be pressed against the cartridge only when in use. Claim 12, however, requires that the heater assembly is permanently attached to the cartridge. This is not directly and unambiguously derivable from D3.

19. In summary, the Board judges that claim 12, and for the same reasons also claim 1, is novel over D3.

Added subject matter, claims 1 and 5

20. During oral proceedings, the Respondent argued that feature 1.3 in claim 1 represented an unallowable intermediate generalisation. This feature was described on page 22, last two paragraphs, in relation to the embodiment depicted in Figure 2. However, this passage mentioned a number of features interrelated with feature 1.3, which were not included in the claim. This

was not allowable.

21. The Board agrees with the Appellant's view that, in this case, extracting the feature "the housing having an open end such that an opening of the housing is defined by the open end" in isolation from the above-mentioned passage of the description is permissible.

This feature merely clarifies the position of the housing's opening. The Board cannot see how this position would be inextricably linked with the remaining features such as the shape of the housing, the heater assembly or the aerosol-forming substrate. Nor could the Respondent indicate any such inextricable link.

22. In relation to the added subject matter objection against claim 5, both parties relied on their written submissions.

The application as originally filed contained two claims numbered "3". In the Respondent's view, the renumbering of the second claim numbered "3", and of claim 4, to become claims 4 and 5 respectively, constituted a new teaching and thus contravened the requirements of Article 123(2) EPC (see Respondent's reply, points 7.3.1 to 7.3.5).

The Board is not convinced by this argument. Only the second claim numbered "3" comprises the feature "an array of electrically conductive filaments", to which original claim 4 expressly refers. In the Board's view, it can therefore be directly and unambiguously deduced that original claim 4 can only depend on the second claim numbered "3"; any other claim dependency would not make technical sense. Even if this were not the case, that is, even if claim 4 were made dependent on

the first claim numbered "3", this would not amount to a new teaching and would therefore not infringe Article 123(2) EPC.

23. In summary, the Board judges that claims 1 and 5 meet the requirements of Article 123(2) EPC.

Added subject matter, claim 12

24. In its reply, the Respondent argued that the amendment to claim 12, in particular the term "it", rendered the claim unclear.

Moreover, the amendment was not directly and unambiguously derivable from the basis relied upon by the Appellant, namely page 22, line 32 of the original application.

Furthermore, the wording "so that" in claim 12 implied that the step of fixing caused the heater element to extend across the opening of the housing, thereby broadening the claim.

25. The Appellant argued that these objections related to a new line of attack and were not directed to the arguments on which the interlocutory decision was based. They should therefore not be admitted under Article 12(4) RPBA.

Moreover, the wording "so that" in claim 12 merely expressed the result of the manufacturing step, i.e. that the heater assembly was fixed to the housing and, as a result, the heater element extended across the opening. This did not add any new technical information.

26. The Board sees no issue with admittance, as Article 100 (c) EPC was a ground of opposition and the corresponding arguments form part of the decision (see points 8 to 10 and 13).

The Board also agrees with the Appellant's interpretation of the wording "so that" in claim 12 which, therefore, does not introduce added subject-matter.

27. However, the Board considers that the term "it" in claim 12 is indeed ambiguous. Grammatically, it may refer either to the heater assembly or to the heater element. Furthermore, both possibilities are compatible with the technical context provided by the description and convey a clear technical teaching to the skilled person.

Thus, claim 12 covers two technically reasonable scenarios:

Either the heater assembly (scenario A) or merely the heater element (scenario B) extends across the opening of the housing.

28. Article 123(2) EPC requires a comparison between the "subject-matter" of the amended patent and the "content" of the application as filed. Evidently, therefore, whether amended claim 12 contains added subject-matter can only be decided once claim 12 has been interpreted.

29. The original application directly and unambiguously discloses scenario B (see page 20, lines 3 to 7). Regarding scenario A, the application discloses the option that the heater assembly is fixed to the housing (page 22, line 22), but neither explicitly nor

implicitly that the heater assembly extends across the opening.

30. The Board is aware that there are conflicting approaches as to how claim interpretation and the assessment of Article 123(2) EPC interact in the case of ambiguous claims. The Board is also aware of decision T 873/24, which referred pertinent questions to the Enlarged Board of Appeal. Neither party has, however, requested that the present appeal proceedings be stayed pending the decision in case G 1/26.

31. One of the mentioned approaches requires that all technically reasonable "interpretations" must comply with Article 123(2) EPC (see e.g. T 1791/16, Catch-word). Another appears to require that an ambiguity first be resolved by interpretation before compliance with Article 123(2) EPC can be assessed (see T 367/20, Reasons 1.3.9; T 847/24, Reasons 3.5). This Board does not agree with the latter approach. Specifically, it disagrees with its apparent implication that, in case of ambiguities, a claim must be interpreted in such a way that no violation of Article 123(2) EPC arises. In other words, compliance with Article 123(2) EPC cannot be a precondition for the correct claim interpretation, but must instead be assessed after that interpretation has been established (see also T 2488/22, Reasons 21 and 22). Otherwise, this would contradict the underlying rationale of Article 123(2) EPC and the "gold standard" (G 2/10, OJ 2012, 376).

32. At the same time, the Board does not share the view that leaving an ambiguity in a claim unresolved is tantamount to leaving its interpretation open (as was apparently assumed in the case considered in T 367/20,

Reasons 1.3.9). Rather, an unresolved ambiguity may simply result in a broader interpretation.

33. In the present case, the Board interprets claim 12 as encompassing a situation in which either the heater assembly or the heater element extends across the opening of the housing, i.e. as equivalent to a claim which expressly states, in the relevant part, "fixing a heater assembly (30) comprising at least one heater element (36) to the open end of the housing so that [the heater assembly **or** the heater element] extends across the opening of the housing (24)".

34. Since this interpretation covers a scenario which is not directly and unambiguously derivable from the application as filed, the Board judges that claim 12 infringes Article 123(2) EPC.

Auxiliary request 1'

Admittance

35. During oral proceedings the Appellant filed, in order to address the objection under Article 123(2) EPC in relation to claim 12 of auxiliary request 1, an auxiliary request 1' based on auxiliary request 1 with claims 12 and 13 deleted.

36. The Respondent argued that the request was inadmissible, as it had been filed late and could have been filed earlier by the Appellant.

37. The Board considers that the amendments, i.e. the deletion of claims 12 and 13, are simple and do not run counter to procedural economy. They overcome the outstanding objection under Article 123(2) EPC and give

not rise to any new objections. Furthermore, the objection under Article 123(2) EPC resulting from the ambiguity of the amendment in claim 12 of auxiliary request 1, was raised for the first time during oral proceedings. It is thus a matter of procedural fairness to allow the Appellant to file a new request in response to this new development.

In the Board's view, these considerations constitute exceptional circumstances within the meaning of Article 13(2) RPBA. The Board, therefore, exercises its discretion to admit auxiliary request 1' into the appeal proceedings.

Novelty

38. Claim 1 of auxiliary request 1' corresponds to claim 1 of auxiliary request 1. Consequently, auxiliary request 1' is novel over D3 (see point 19. above).

39. During oral proceedings the Respondent submitted that claim 1 was, in any event, not novel over D4.

In the Respondent's view, the heater element shown in Figure 9 of D4 corresponded to that described in paragraph [0028] (see also [0013] and [0017]) of the patent in suit. Both the filaments 38 and the electrical contacts 39, which were formed from a single conductive sheet, had to be regarded as heater element, since in operation both contributed to heating (see page 22, last paragraph). It followed that the gaps between filaments 38 and the gaps 33 formed between the electrical contact and the outer filament represented apertures of different sizes allowing fluid to pass through, as required by the claim. This was all the more so as claim 1 did not specify the location, or any

other details, of apertures; these could be internal or peripheral to the heater element. This reading was further supported by the fact that only claim 4 specified that the apertures were defined by interstices between filaments; claim 1 therefore had to be interpreted more broadly, not as a mesh with apertures only between filaments, but as also encompassing the possibility that fluid could pass around, and not only between, heater elements. Finally, other embodiments in D4, such as the one shown in Figure 5b, also clearly showed a gap adjacent to a filament allowing fluid to pass through.

40. The Appellant argued that the claim required fluid to pass through, not around the heater element. Furthermore, it could not be derived from claim 4 that apertures were located outside the heater element. Gap 33 in Figure 9 might allow fluid to pass through, but it lay outside the heater element, and the skilled person would not derive from Figure 9 any technical function attributable to this gap. Furthermore, the Respondent's submissions relied merely on a schematic drawing, without scale, which was insufficient to support its conclusions. The contacts in Figure 9 were not intended for heating, but for establishing a conductive connection and maintaining current flow. They formed part of the heater assembly, but could not be regarded as forming part of the heater element. Finally, Figure 5 related to a different embodiment and could not be combined with the embodiment of Figure 9 for the purpose of assessing novelty.

41. The Board agrees with the Appellant.

The embodiment shown in Figure 9 of D4 differs from the other embodiments, such as that of Figure 8, in that

the conductive filaments and the contacts are etched from a single piece of metal foil.

This manner of manufacture necessarily results in a gap, designated 33, between the filaments and the contacts. In the Board's view, this gap is a structural necessity of the etching process, but its size appears arbitrary. Nothing in D4 indicates that the gap could not equally well have been made larger, so as to resemble the spacing between the contacts shown in Figure 8.

The Board is not persuaded that the skilled person would attribute to this gap any particular significance, or any function different from that of the contact gaps present in the other embodiments, such as in Figure 8, namely to prevent a short-circuit.

It follows, by analogy with the other embodiments of D4, that in Figure 9 the heater element consists of the filaments, whereas the contacts are distinct therefrom and, together with the substrate and other components, form the heater assembly.

As a consequence, the apertures of the heater element correspond, in Figure 9 as in Figure 8, to the spaces between the filaments. These apertures are not of different sizes. Nor does fluid which may pass outside the heater element - this depends on whether the heater element covers the entire opening of the substrate - qualify as fluid passing through the apertures of the heater element within the meaning of claim 1.

The Board further notes that the fact that the contacts generate a certain amount of heat does not detract from this conclusion. The generation of some heat is an

unavoidable consequence of current flow through any conductive component, including the contacts, and does not thereby render the contacts part of the heater element. This reasoning applies equally to the other embodiments disclosed in D4, in respect of which it would likewise not be maintained that the contacts form part of the heater element.

42. For these reasons, the Board concludes that D4 does not disclose a heater element as required by claim 1, and that the subject-matter of claim 1 is accordingly novel over D4.

Remittal

43. The opposition division found that the main and first auxiliary request lacked novelty over D3, which constitutes prior art under Article 54(3) EPC.

Claim 1 of auxiliary request 1' corresponds to claim 1 of auxiliary request 1. Since the Board concluded that the latter is novel both over D3 and D4, it would have to decide on inventive step and assess further prior art documents D1 and D2 for the first time. The present situation thus constitutes "special reasons" within the meaning of Article 11 RPBA to justify 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:

L. Stridde Martin Müller

Decision electronically authenticated