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**Datasheet for the decision
of 17 January 2014**

Case Number: T 2457/10 - 3.2.07

Application Number: 05075135.3

Publication Number: 1555240

IPC: B67D1/06, B67D1/14, B67D1/08

Language of the proceedings: EN

Title of invention:
Drink dispenser assembly

Patent Proprietor:
Heineken Supply Chain B.V.

Opponent:
Carlsberg Breweries A/S

Headword:

Relevant legal provisions:
EPC Art. 76(1), 123(2)

Keyword:
Amendments - added subject-matter (yes) - all requests

Decisions cited:
G 0002/10, T 0169/83, T 0284/94, T 1408/04, T 0906/97

Catchword:



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Boards of Appeal
Chambres de recours**

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Case Number: T 2457/10 - 3.2.07

**D E C I S I O N
of Technical Board of Appeal 3.2.07
of 17 January 2014**

Appellant: Heineken Supply Chain B.V.
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Appellant: Carlsberg Breweries A/S
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
21 October 2010 concerning maintenance of the
European Patent No. 1555240 in amended form.**

Composition of the Board:

Chairman: H. Meinders
Members: G. Patton
E. Kossonakou

Summary of Facts and Submissions

I. Appellant I (patent proprietor) lodged an appeal against the interlocutory decision of the Opposition Division maintaining European patent N° 1 555 240 in amended form.

Appellant II (opponent) likewise lodged an appeal against this interlocutory decision.

II. The Opposition Division held that the subject-matter of the main request (patent as granted) did not fulfil the requirements of Articles 76(1) and 123(2) EPC and that the claims according to the auxiliary request filed during the oral proceedings before the Opposition Division met the requirements of the EPC.

III. With its statement of grounds of appeal appellant I requested the maintenance of the patent on the basis of a main request (=patent as granted), or of a first auxiliary request (independent claims 1 and 5 of the patent as granted, the latter re-numbered claim 4, with dependent claims 2-3 as amended during the oral proceedings before the Opposition Division), or of a second auxiliary request (patent as maintained by the Opposition Division).

IV. The Board provided its preliminary non-binding opinion annexed to the summons for oral proceedings that the claims of appellant I's requests did not seem to fulfil the requirements of the EPC in view of Articles 56, 76(1) and/or 123(2) EPC.

In reaction thereto, appellant I filed with letter of 16 December 2013 further auxiliary requests 3 to 5.

During the oral proceedings before the Board held on 17 January 2014, claims 1 and 5 of the main request and claims 1 and 4 of auxiliary request 1 were discussed for compatibility with the requirements of Article 100(c) (Articles 123(2) and/or 76(1) EPC), regarding in particular the feature "curved upper end" of the column and of the guide tube. Claims 1 and 4 of auxiliary request 2 were then discussed in the light of the requirements of Articles 123(2) and/or 76(1) EPC, regarding in particular the issues in point 6.1.2 of the Board's communication annexed to the summons for oral proceedings. Claims 1 of auxiliary requests 3 to 5 were then discussed in the light of the requirements of Article 123(2) EPC, regarding in particular the feature "tapered curved lower end" of the guide tube.

The present decision was announced at the end of the oral proceedings.

- V. Appellant I requests with its statement of grounds of appeal of 28 February 2011 that the decision under appeal be set aside and the patent in suit maintained either as granted (main request) or in amended form pursuant to auxiliary request 1 or that the appeal of the opponent be dismissed (auxiliary request 2). Further subsidiarily, appellant I requests the maintenance of the patent in amended form pursuant to one of auxiliary requests 3 to 5 submitted with the letter of 16 December 2013.
- VI. Appellant II requests that the appeal of the patent proprietor be dismissed, that the decision under appeal be set aside and that the European patent No. 1 555 240 be revoked.

VII. Claim 1 of the **main request** reads as follows (=patent as granted):

"Drink dispenser assembly (25, 27) comprising a dispenser device (25) with a cooling chamber (26) with a container (27) containing carbonated drink therein, a flexible dispensing line (28), a hollow tap column (30) provided with a guide tube (35) and fixed to the cooling chamber, and a dispensing head (29) on the tap column (30) for accommodating the flexible dispensing line (28), and a container (27) being connected during use to the dispensing line (28) which can with an outlet end (41) be detachably connected to the dispensing head (29), and

- the cooling chamber (26) comprises an opening of the guide tube (35) having a dimension substantially larger than a diameter of the dispensing line (28),

- the guide tube (35) provided in the hollow tap column (30) having a cross sectional opening having a dimension substantially larger than a diameter of the dispensing line (28),

characterized in that,

- the column having a curved upper end forming a guide channel for leading the dispensing line to the dispensing head,

- the flexible dispensing line (28) is provided with a shut-off valve (32) at the outlet end (41) for connection to the dispensing head (29),

- the guide tube (35) provided in the tap column (30) has a curved upper end forming a guide channel for leading the dispensing line to the dispensing head,

- wherein the opening of the guide tube (35) and the guide tube (35) provided in the tap column (30) form an unobstructed channel for guiding the dispensing line from the opening to the dispensing head (29), and the dispensing line (28) consists of a flexible plastic

material of a sufficient rigidity for allowing pushing the shut-off valve (32) and the outlet end (41) from the opening through the guide tube (35) provided in the hollow tap column (30) to the dispensing head (29)."

Claim 5 of the **main request** reads as follows (=patent as granted):

"Method of attaching a container (27) containing a carbonated beverage to a dispensing head (29) at the end of a hollow tap column (30) which is provided with a guide tube (35) and fixed to a cooling chamber (26) having an opening of the guide tube (35) communicating with the guide tube (35) provided in the hollow tap column (30) which has a curved upper end forming a guide channel for leading a flexible dispensing line, provided with a shut-off valve (32) at an outlet and (41) and consisting of a flexible plastic material of a sufficient rigidity, (28) to the dispensing head (29), the method comprising the steps of:

- releasing the shut-off valve (32) and the outlet end of a first flexible dispensing line from the dispensing head (29), removing said dispensing line from the hollow tap column (30) and removing a first container, attached to said dispensing line, from the cooling chamber (26),
- introducing a second container (27), connected or connectable to a second flexible dispensing line (28), into the cooling chamber (26),
- pushing the shut-off valve (32) and the outlet end (41) of the second dispensing line via the opening through the guide tube (35) provided in the hollow tap column (30) until the shut-off valve (32) and the outlet end (41) of the second dispensing line (28) reach the dispensing head (29), and

- engaging the shut-off valve (32) and the outlet end (41) of the dispensing line (28) with the dispensing head (29)."

Claims 1 and 4 of **auxiliary request 1** read the same, respectively, as claims 1 and 5 of the main request.

Claim 1 of **auxiliary request 2** reads as follows (in bold the amendments with respect to claim 1 of the patent as granted; emphasis added by the Board):

"Drink dispenser assembly (25, 27) comprising a dispenser device (25) with a cooling chamber (26) with a container (27) containing carbonated drink therein, a flexible dispensing line (28), a hollow tap column (30) provided with a guide tube (35) and fixed to the cooling chamber, and a dispensing head (29) on the tap column (30) for accommodating the flexible dispensing line (28), and a container (27) being connected during use to the dispensing line (28) which can with an outlet end (41) be detachably connected to the dispensing head (29), and

- the cooling chamber (26) comprises an opening of the guide tube (35) having a dimension substantially larger than a diameter of the dispensing line (28),

- the guide tube (35) provided in the hollow tap column (30) having a cross sectional opening having a dimension substantially larger than a diameter of the dispensing line (28),

characterized in that,

- the column having a curved upper end forming a guide channel for leading the dispensing line to the dispensing head,

- the flexible dispensing line (28) is provided with a shut-off valve (32) at the outlet end (41) for connection to the dispensing head (29),

- the guide tube (35) provided in the tap column (30) has a curved upper end forming a guide channel for leading the dispensing line to the dispensing head, **the curve of the upper ends of the column (30) and the guide tube (35) corresponding to a smooth bend of substantially 90 degrees from vertical to horizontal,**

- wherein the opening of the guide tube (35) and the guide tube (35) provided in the tap column (30) form an unobstructed channel for guiding the dispensing line from the opening to the dispensing head (29), and the dispensing line (28) consists of a flexible plastic material of a sufficient rigidity for allowing pushing the shut-off valve (32) and the outlet end (41) from the opening through the guide tube (35) provided in the hollow tap column (30) to the dispensing head (29)."

Claim 4 of **auxiliary request 2** reads as follows (in bold the amendments with respect to claim 5 of the patent as granted; emphasis added by the Board):

"Method of attaching a container (27) containing a carbonated beverage to a dispensing head (29) at the end of a hollow tap column (30) which is provided with a guide tube (35) and fixed to a cooling chamber (26) having an opening of the guide tube (35) communicating with the guide tube (35) provided in the hollow tap column (30) which has a curved upper end **corresponding to a smooth bend of substantially 90 degrees from vertical to horizontal** forming a guide channel for leading a flexible dispensing line, provided with a shut-off valve (32) at an outlet and (41) and consisting of a flexible plastic material of a sufficient rigidity, (28) to the dispensing head (29), the method comprising the steps of:

- releasing the shut-off valve (32) and the outlet end of a first flexible dispensing line from the dispensing

head (29), removing said dispensing line from the hollow tap column (30) and removing a first container, attached to said dispensing line, from the cooling chamber (26),

- introducing a second container (27), connected or connectable to a second flexible dispensing line (28), into the cooling chamber (26),

- pushing the shut-off valve (32) and the outlet end (41) of the second dispensing line via the opening through the guide tube (35) provided in the hollow tap column (30) until the shut-off valve (32) and the outlet end (41) of the second dispensing line (28) reach the dispensing head (29), and

- engaging the shut-off valve (32) and the outlet end (41) of the dispensing line (28) with the dispensing head (29)."

Claim 1 of **auxiliary request 3** reads as follows (in bold the amendments with respect to claim 1 of the patent as granted; emphasis added by the Board):

"Drink dispenser assembly (25, 27) comprising a dispenser device (25) with a cooling chamber (26) with a container (27) containing carbonated drink therein, a flexible dispensing line (28), a hollow tap column (30) provided with a guide tube (35) and fixed to the cooling chamber, and a dispensing head (29) on the tap column (30) for accommodating the flexible dispensing line (28), and a container (27) being connected during use to the dispensing line (28) which can with an outlet end (41) be detachably connected to the dispensing head (29), and

- the cooling chamber (26) comprises an opening of the guide tube (35) having a dimension substantially larger than a diameter of the dispensing line (28),

- the guide tube (35) provided in the hollow tap column (30) having a cross sectional opening having a dimension substantially larger than a diameter of the dispensing line (28),
characterised in that,
- the column having a curved upper end forming a guide channel for leading the dispensing line to the dispensing head,
- the flexible dispensing line (28) is provided with a shut-off valve (32) at the outlet end (41) for connection to the dispensing head (29),
- the guide tube (35) provided in the tap column (30) has **a tapered curved lower end and** a curved upper end forming a guide channel for leading the dispensing line to the dispensing head, **the curve of the upper end of the column (30) and the curves of the upper and lower ends of the guide tube (35) corresponding to a smooth bend of substantially 90 degrees from vertical to horizontal,**
- wherein the opening of the guide tube (35) and the guide tube (35) provided in the tap column (30) form an unobstructed channel for guiding the dispensing line from the opening to the dispensing head (29), and the dispensing line (28) consists of a flexible plastic material of a sufficient rigidity for allowing pushing the shut-off valve (32) and the outlet (41) from the opening through the guide tube (35) provided in the hollow tap column (30) to the dispensing head (29)."

Claim 4 of **auxiliary request 3** reads as follows (in bold the amendments with respect to claim 5 of the patent as granted; emphasis added by the Board):

"Method of attaching a container (27) containing a carbonated beverage to a dispensing head (29) at the end of a hollow tap column (30), which is provided with

a guide tube (35) **having a tapered curved lower end and a curved upper end** and fixed to a cooling chamber (26) having an opening of the guide tube (35) communicating with the guide tube (35) provided in the hollow tap column (30) which has a curved upper end, **the curve of the upper end or the column (30) and the curves of the upper and lower ends of the guide tube (35) corresponding to a smooth bend of substantially 90 degrees from vertical to horizontal, the guide tube (35)** forming a guide channel for leading a flexible dispensing line (28), provided with a shut-off valve (32) at an outlet end (41) and consisting of a flexible plastic material of a sufficient rigidity, (28) to the dispensing head (29), the method comprising the steps of:

- releasing the shut-off valve (32) and the outlet end of a first flexible dispensing line from the dispensing head (29), removing said dispensing line from the hollow tap column (30) and removing a first container, attached to said dispensing line, from the cooling chamber (26),
- introducing a second container (27), connected or connectable to a second flexible dispensing line (28), into the cooling chamber (26),
- pushing the shut-off valve (32) and the outlet end (41) of the second dispensing line via the opening through the guide tube (35) provided in the hollow tap column (30) until the shut-off valve (32) and the outlet end (41) of the second dispensing line (28) reach the dispensing head (29), and
- engaging the shut-off valve ~~(32)~~ and the outlet end (41) of the dispensing line (28) with the dispensing head (29)."

Claims 1 and 2 of **auxiliary request 4** read the same, respectively, as claims 1 and 4 of auxiliary request 3.

Claim 1 of **auxiliary request 5** reads the same as claim 4 of auxiliary request 3 (method claim only).

VIII. The following document of the opposition proceedings is of relevance for the present decision:

D9: DE-U1-79 16 347

IX. Appellant I argued essentially as follows:

Main request (patent as granted)

The features of independent claims 1 and 5 that the tap column and the guide tube have a "curved upper end" are based on figure 2 of the earlier application or of the divisional application, both as originally filed. They are essential to the invention and their structure and function is derivable from each of these applications. The exact shape of the curves is, however, not essential for the easy insertion and replacement of the flexible dispensing line and, hence, does not need to be specified in the independent claims for the requirements of Articles 76(1) and 123(2) EPC to be fulfilled.

It is allowable to isolate these features from figure 2 since they provide, together with a flexible dispensing line, a complete solution to the problem of "easy replacement of the flexible dispensing line for improved hygiene" which is evident from these applications. The skilled person will learn from each of the applications as a whole that the invention does not require a 90° bend nor a straight-line connection via a straight guide tube and column. A curved upper end in a more or less horizontal direction leads to an

easier insertion of the flexible dispensing line to the dispensing head.

Auxiliary request 1

The arguments for auxiliary request 1 are the same as for the main request.

Auxiliary request 2 (patent as maintained by the Opposition Division)

The particular features of the lower end of the guide tube are disclosed only as a preferred embodiment and are not essential to the invention, so that they do not need to be included in the independent claims when taking up the features of the curved upper ends of the column and the guide tube for the requirements of Articles 76(1) and 123(2) EPC to be fulfilled.

The guide tube has to follow the tap column. Therefore, it is implicit in claim 4 that it has, like the tap column, a smooth bend of substantially 90° from vertical to horizontal.

Auxiliary requests 3

The only necessary feature of the lower end of the guide tube to take up in the claim is that its cross-section is larger than the diameter of the dispensing line, which is already included in independent claims 1 and 4.

The cooling system is only optional in the application as originally filed and the device shown in figure 2 clearly functions without it.

Consequently, the features related to the tapering type of the lower end of the guide tube, i.e. inwardly or outwardly, and to the cooling system do not need to be included in the independent claims for the requirements of Article 123(2) EPC to be fulfilled.

Auxiliary requests 4 and 5

The arguments for auxiliary requests 4 and 5 are the same as for auxiliary request 3.

X. Appellant II argued essentially as follows:

Main request (patent as granted)

The features of independent claims 1 and 5 that both the column and the guide tube have a "curved upper end" are isolated from the combination of features shown in the embodiment of figure 2. These features now imply that claims 1 and 5 encompass embodiments which were foreseen neither in the earlier nor in the divisional application as filed, contrary to Articles 76(1) and 123(2) EPC.

There is no indication anywhere in the contested patent suggesting a technical relevance or technical effect of both these curved ends. They appear in fact to be more of a problem than a solution to the problem of replacement of the flexible dispensing line, in particular in case of complex shapes of the upper ends.

Auxiliary request 1

The arguments regarding auxiliary request 1 are the same as in respect of the main request.

Auxiliary request 2 (patent as maintained by the Opposition Division)

The feature of the upper end of the guide tube is disclosed in combination with the particular lower end of that tube in the earlier as well as the divisional application as originally filed. They are also functionally linked to solve the same problem of facilitating the insertion and replacement of the dispensing line. Furthermore, it is not directly and unambiguously derivable from the said applications that the feature of the upper end of the guide tube would be essential for the invention while that of the lower end would not. Consequently, omitting in claim 1 the features of the lower end of the guide tube while including those of its curved upper end contravenes Articles 76(1) and 123(2) EPC.

The omission in claim 4 that the guide tube has a smooth bend of substantially 90° from vertical to horizontal also contravenes Articles 76(1) and 123(2) EPC.

Auxiliary request 3

Claims 1 and 4 encompass embodiments, such as the lower end of the guide tube being inwardly tapered towards its end, which are not directly or unambiguously derivable from the divisional application as originally filed, contrary to Article 123(2) EPC.

The tapered lower end of the guide tube is functionally linked to the cooling system in the divisional application as originally filed, since the cooled air has to enter the guide tube. Since the cooling system

is not included in the independent claims together with the tapered lower end of the guide tube, the requirements of Article 123(2) EPC are not fulfilled.

Auxiliary requests 4 and 5

The arguments concerning auxiliary requests 4 and 5 are the same as in respect of auxiliary request 3.

Reasons for the Decision

1. *Main request (patent as granted) - Added subject-matter (Articles 76(1) and 123(2)EPC)*

The contested patent was granted on a divisional application of the earlier application N° 01 938 827.1. Therefore, it has to be examined whether the requirements of Articles 76(1) **and** 123(2) EPC are fulfilled.

In the impugned decision, point 2.2.1.1, the features of granted claims 1 and 5 that:

- a) - the column has a "curved upper end"; and
- b) - the guide tube has a "curved upper end"

were objected to with respect to Articles 76(1) and 123(2) EPC on the ground that they were disclosed neither in the earlier nor in the divisional application as originally filed. The features were regarded as an unallowable generalisation of the particular embodiment shown in figure 2 of each application as originally filed to which appellant I has referred as sole basis.

The Board notes that feature a) is literally present in claim 1 of the divisional application as originally filed. Hence, this feature does not contravene Article 123(2) EPC in respect of that application. Feature b) is as such not present in the divisional application as originally filed.

For this decision it suffices that the following discussion and conclusion(s) relate only to whether feature a) contravenes Article 76(1) EPC and whether feature b) contravenes Article 123(2) EPC.

- 1.1 Appellant I argues that the wording of features a) and b) "relate to the content of the description as a whole in such a way as to be manifestly **part of the invention**". Citing T 169/83 (OJ EPO 1985, 193), it considers that their **structure** (curved) is fully derivable from figure 2 of either application. Their **function** (to allow easy insertion of the flexible dispensing line) is derivable from either application as a whole. Appellant I is of the opinion that "the requirement that the curve should correspond to a 90° bend" is in no way dictated to the skilled person by figure 2 and that such an exact shape of the guide tube and column at their upper ends is not essential for the easy insertion and replacement of the flexible dispensing line. Consequently, there is no need to further specify said shapes in the independent claims and, hence, the requirements of Article 76(1) and 123(2) EPC are fulfilled.

Appellant I further argues that features taken from a drawing are to be treated on the same footing as if taken from the description. Therefore, the principles of T 284/94 (OJ EPO 1999, 464) are applicable in the sense that a feature taken in isolation from a specific

embodiment of the description is allowable if it is clear for the skilled reader that it provides a **complete solution** to a technical problem recognizable from the application. In the present case, features a) and b) together with the flexible dispensing line mentioned in the claim present the complete solution to the problem of "*easy replacement of the flexible dispensing line for improved hygiene*" so as to avoid soiling (divisional application, paragraphs [0005] and [0008]). The skilled person will learn from the application as a whole that the invention does not require a 90° bend and does not involve a straight-line connection via a straight guide tube and column. Appellant I holds the view that a curved upper end in a more or less horizontal direction leads to an easier insertion of the flexible dispensing line towards the dispensing head.

- 1.2 The Board shares appellant II's opinion, however, that the case law in general, T 169/83 (*supra*) in particular, does not allow for full freedom when isolating or generalising a feature from an embodiment, in particular from a drawing.

Features a) and b) are indeed isolated from the combination of features only shown in the embodiment of figure 2, the description mentioning nothing of this kind. However, they are so broadly formulated that claims 1 and 5 now encompass embodiments which were foreseen neither in the earlier nor in the divisional application as originally filed, each taken as a whole.

Indeed, **any level of curvature**, such as a bend of a few degrees up to more than 90° from vertical to horizontal, **any form of the tap column and guide tube**, such as inverted-U (vertical upwards-horizontal-

vertical downwards) or semi-circle shapes, or any form of the column upstream or downstream of the curve are now encompassed by the claims (see in this respect T 1408/04, not published in OJ EPO, reasons, point 1, third paragraph, and the decisions citing this decision for the same reason). These forms were not be derivable from the said applications as originally filed.

Contrary to what figure 2 clearly shows, the tap column and guide tube can now also comprise **differences in curvature**, possibly even at **locations different** from one another, in particular if the tap column's inner diameter is considerably larger than the guide tube's outer diameter, which is not excluded from the claims. As a matter of fact, contrary to appellant I's view, there is no feature in the claims which would make the guide tube follow the curvature of the tap column although shown that way in figure 2. The fact that they both lead the dispensing line to the dispensing head does not necessarily imply that they follow the same curve.

Features a) and b) result, therefore, in a generalisation of features isolated from an embodiment. This generalisation is, however, not directly and unambiguously derivable by the skilled person using common general knowledge from the earlier or the divisional application as originally filed, contrary to Article 76(1) EPC (features a) and b)) and Article 123(2) EPC (feature b)) according to the principles established in G 2/10 (OJ EPO 2012, 376, points 4.3, 4.5.1, 4.5.4 and 4.6 of the reasons).

- 1.3 Further, as put forward by appellant II, the function (or advantages) of the curved upper ends remain(s) obscure. There is no indication in the earlier

application suggesting a technical relevance or technical effect of the curved ends. Consequently, even the requirements set out in T 169/83 (*supra*) are not fulfilled (see also T 906/97, not published in OJ EPO, point 5 of the reasons).

In the impugned decision, point 2.4.1, the technical effect mentioned by the Opposition Division relates to a limitation in the type of dispensing line to be used. However, as argued by appellant II, the "curved end" appears to be more of a problem in itself than a solution to a problem. The Board shares indeed appellant II's opinion that a straight guide tube and column would facilitate even more the replacement and insertion of the flexible dispensing line, especially when the latter does not show sufficient flexibility.

1.4 The Board is further not convinced by appellant I's arguments that the curved ends of the guide tube and column play a role in the guiding of the flexible dispensing line. This is all the more true since the level of curvature(s), if it were to play a role, is not specified in claims 1 and 5. This means that curvatures with a small radius, such as inverted-U or more complex shapes, are also encompassed by claims 1 and 5 of the patent as granted. Such curvatures would certainly not provide an "easy replacement of the flexible dispensing line" but rather render difficult its insertion when pushing upward its shut-off valve and outlet end.

In view of the above, the Board can also not see that there is any technical problem solved by features a) and b). Hence, said features cannot be seen as providing a complete solution to any problem, contrary to appellant I's view.

2. *Auxiliary request 1*

Since claims 1 and 4 of auxiliary request 1 correspond to claims 1 and 5 of the main request respectively, they do not fulfill the requirements of Articles 76(1) and 123(2) EPC for the same reasons as those given under point 1 above.

3. *Auxiliary request 2 (patent as maintained by the Opposition Division) - Added subject-matter (Article 123(2) EPC)*

3.1 In comparison with claim 1 of the patent as granted, claim 1 of the second auxiliary request comprises the following additional feature:

c) "the curve of the upper ends of the column (30) and the guide tube (35) corresponds to a smooth bend of substantially 90 degrees from vertical to horizontal"

In comparison with claim 5 of the patent as granted, claim 4 of the second auxiliary request comprises the following additional feature:

d) the column (30) has a curved upper end
"corresponding to a smooth bend of substantially 90 degrees from vertical to horizontal"

3.2 The Board shares appellant II's view that the features of the **lower end of the guide tube**, it being outwardly tapered towards its open end and having a smooth bend of 90° towards the beverage container, are disclosed in figure 2 of the divisional application as originally filed in close combination with the curved upper end of

the guide tube. These features of the lower end are functionally linked with the smooth curvature of the guide tube at its upper end, particularly in view of facilitating the insertion and replacement of the dispensing line from the bottom up, the essential feature of the invention according to appellant I. Consequently, selecting in claim 1 only the features relating to the upper end of the guide tube while omitting those relating to its lower end contravenes Article 123(2) EPC.

During the oral proceedings, appellant I, referring to [0033] of the divisional application (A-publication), argued that the features of the lower end of the guide tube are disclosed as a preferred embodiment. It also cited paragraph [0017] of that application to put forward that the features of the lower end of the guide tube are not essential for solving the problem of easily pushing the shut-off valve through the guide tube. Therefore, it considers that the particular features of the lower end do not need to be included in the independent claims together with the other features of the guide tube now incorporated.

The Board can, however, not share appellant I's view as it could not provide any reason for selecting to incorporate that the upper end of the guide tube is curved while leaving out the features of its lower end. Contrary to the appellant I's view, in these passages of the divisional application as originally filed it is not explicitly disclosed that the features of the lower end of the guide tube are a preferred embodiment **on their own**, i.e. without the other features of the guide tube. On the contrary, how the guide tube is formed is only disclosed in figure 2. If the introduction and guiding of the dispensing line is so essential to the

invention, as argued by appellant I, the skilled reader will see the tapered lower end directed towards the container and the smooth curve of the lower end of the guide tube as equally necessary as the smooth upper curve of this tube.

Paragraph [0017] of the divisional application (A-publication) concerns the cited Dutch application NL 1015359, which, as admitted by appellant I during the oral proceedings, is not "incorporated by reference" in the contested patent for any of its features. Its teaching can therefore not be combined with the rest of the disclosure. In addition, even this passage does not infer that the features of the lower end of the guide tube should be seen on their own as a preferred embodiment.

3.3 Furthermore, as argued by appellant II, the Board considers that the omission in claim 4 that also the guide tube has a smooth bend of substantially 90° from vertical to horizontal, also contravenes Article 123(2) EPC.

The Board cannot follow appellant I's argument that the guide tube has to follow by nature the tap column so that this feature would be implicit with the present wording of claim 4. Indeed, as already put forward under point 1.2 above for the main request, it is not excluded from claim 4 that the tap column's inner diameter is considerably larger than the guide tube's outer diameter, so that with the present wording the tap column and guide tube can have a difference in curvature or have their curves possibly at locations different from one another. These embodiments which are now encompassed by claim 4 were not disclosed in the divisional application as originally filed.

For this reason as well, auxiliary request 2 does not fulfill the requirements of Article 123(2) EPC.

4. *Auxiliary request 3*

4.1 Both independent claims 1 and 4 of auxiliary request 3 comprise now the following features that (see point VII above):

- the curve of the upper end of the column (30) corresponds to a smooth bend of substantially 90 degrees from vertical to horizontal;
- the guide tube (35) provided in the tap column (30) has a **tapered** curved lower end and a curved upper end forming a guide channel for leading the dispensing line to the dispensing head; and
- the curves of the upper and lower ends of the guide tube (35) correspond to a smooth bend of substantially 90 degrees from vertical to horizontal.

Therefore, the previous objections raised against auxiliary request 2 based on Article 123(2) EPC are as such overcome.

4.2 However, the Board shares appellant II's view as put forward during the oral proceedings that the only basis in the divisional application as originally filed for the tapering of the lower end of the guide tube is figure 2 which discloses it as being **outwardly tapered** towards its end. Since claims 1 and 4 now encompass embodiments, such as the lower end of the guide tube being inwardly tapered towards its end, which are not directly or unambiguously derivable from the

application as filed, the requirements of Article 123(2) EPC are not fulfilled.

- 4.3 Appellant I argues that the only necessary feature for solving the problem of facilitating the insertion and replacement of the dispensing line is that the cross-section at the lower end opening of the guide tube has a dimension substantially larger than the diameter of the dispensing line. As this feature is included in independent claims 1 and 4 the requirements of Article 123(2) EPC are fulfilled. Furthermore, the tapering type, inwardly or outwardly, of the lower end of the guide tube is of no technical relevance, in particular it has no influence on the feeding of cooling air in the guide tube as described in [0033] and figure 2 of the divisional application (A-publication).

These arguments are, however, not convincing to the Board as they do not enable overcoming the fact that with the present wording, further embodiments, not foreseen in the divisional application as originally filed, are now encompassed by claims 1 and 4 of auxiliary request 3. As shown for instance in document D9, figure 1, the opening of the guide tube (16) for the introduction of the dispensing line (14) is not tapered outwardly towards its end but inwardly. With the present wording a guide tube being inwardly tapered would not be excluded, contrary to appellant I's opinion.

- 4.4 Furthermore, the Board also shares the appellant II's view that the outwardly tapered lower end of the guide tube is **functionally linked to the cooling system** described in [0033] and figure 2 of the divisional application (A-publication). Indeed, it is clear that the lower end of the guide tube being **outwardly tapered**

towards its end enables to feed cold air into the guide tube (see arrows in figure 2 showing the cooling air path). The air circulates in the guide tube around the dispensing line up to the dispensing head and is drawn back through the tap column by a fan (34).

Consequently, isolating the feature of the tapered lower end of the guide tube from the rest of these features relating to the bottom end of the guide tube and of the cooling system leads to an inadmissible intermediate generalisation, contrary to Article 123(2) EPC.

- 4.5 Appellant I argues that the cooling system is only mentioned as optional in the disclosure of the divisional application as originally filed and that the drink dispenser assembly shown in figure 2 would clearly function without it. This is clear from the embodiment of figure 1, originally within the scope of the invention, which does not comprise a cooling system.

The Board cannot share appellant I's view as the cooling system and the outwardly tapered lower end of the guide tube are always **disclosed in combination** in the divisional application as originally filed in a clear **functional relationship**, as shown by the air flow arrows in figure 2.

5. *Auxiliary requests 4 and 5*

Since claims 1 and 2 of auxiliary request 4 correspond to claims 1 and 4 of auxiliary request 3 respectively, and claim 1 of auxiliary request 5 corresponds to claim 4 of auxiliary request 3, they do not fulfill the requirements of Article 123(2) EPC for the same reasons as those given under point 4 above.

Order

For these reasons it is decided that:

1. The appeal of the patent proprietor is dismissed.
2. The decision under appeal is set aside.
3. The patent is revoked.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated