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**Datasheet for the decision  
of 21 June 2017**

**Case Number:** T 1724/12 - 3.2.04

**Application Number:** 09008307.2

**Publication Number:** 2098145

**IPC:** A47J31/44, A47J31/60

**Language of the proceedings:** EN

**Title of invention:**

Device for producing a milk-based drink

**Patent Proprietor:**

DE' LONGHI S.p.A.

**Opponents:**

Saeco International Group S.P.A.  
Caffitaly System S.P.A.

**Headword:**

**Relevant legal provisions:**

EPC Art. 56, 76(1), 123(2), 123(3)  
RPBA Art. 13(3)

**Keyword:**

Added subject-matter - main and first auxiliary requests (yes)  
Admission - second and third auxiliary requests (no)  
Added subject-matter - fourth auxiliary request (no)  
Inventive step - fourth auxiliary request (yes)

**Decisions cited:**

T 0051/08, T 0415/12

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 1724/12 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 21 June 2017**

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**Decision under appeal:** **Interlocutory decision of the Opposition**  
**Division of the European Patent Office posted on**  
**18 June 2012 concerning maintenance of the**  
**European Patent No. 2098145 in amended form.**

**Composition of the Board:**

**Chairman**            A. de Vries  
**Members:**            E. Frank  
                              C. Heath

## Summary of Facts and Submissions

- I. The appeals lie from the interlocutory decision of the opposition division, dated 25 April 2012 and posted on 18 June 2012, to maintain the European patent No. 2 098 145 in amended form pursuant to Article 101(3) (a) EPC. The appellant proprietor filed a notice of appeal on 6 August 2012, paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 17 October 2012. The appellant opponent 1 filed a notice of appeal on 31 July 2012, also paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 22 October 2012.
- II. Two oppositions were filed against the patent as a whole and based on Article 100(a) in conjunction with Articles 52(1) and 56, and Article 100(c) in conjunction with Article 76(1) EPC.

The opposition division held that the 2nd auxiliary request submitted during the oral proceedings met the requirements of the EPC. In its decision the division considered the following prior art, amongst others:

E1 = WO 01/26520 A2  
E2 = US 5,473,972  
E3 = US 5,628,239  
E4 = US 5,423,245  
E5 = EP 1 374 748 A2  
E6 = EP 0 919 176 A1  
E7 = DE 44 45 436 A1  
E8 = WO 03/043472 A1  
E9 = EP 0 195 750 A2

III. After a summons to attend oral proceedings, a communication pursuant to Article 15(1) RPBA was issued. The Board indicated in its communication that the independent claims in former appeal T0415/12 and the present case were not identical, so that the Board was in principle not bound by its earlier decision (cf. T0051/08). However, insofar as for the issues contested the facts were the same and the parties' main arguments were the same the Board saw no reason to depart from its earlier decision, see also Case Law of the Board of Appeal, 8th edition, 2016, II.F.2.4.3. These underlying reasons also applied to sibling divisional applications and patents therefrom. In response, the appellant opponent 1 stated that it would not attend the oral proceedings and also requested that a decision be made based on the written submissions on file.

IV. The oral proceedings were duly held on 21 June 2017. As announced by letters dated 6 June 2017 and 18 April 2017, respectively, no one was present on behalf of the opponents 1 and 2.

V. The appellant proprietor requests that the decision under appeal be set aside and that the patent be maintained as granted (main request), or in the form of auxiliary request 1 filed with the grounds of appeal, or auxiliary requests 2 and 3 filed during oral proceedings before the board, or that the appeal by the appellant opponent 1 be dismissed (auxiliary request 4).

The appellant opponent 1 requests that the decision under appeal be set aside and that the patent be revoked.

The opponent 2, as party as of right and respondent to

the appeal of the proprietor, did not make any submissions or file requests.

VI. The wording of claim 1 of the requests reads as follows, amendments with respect to claim 1 as granted have been emphasised by the Board:

Main request (as granted):

"Coffee machine having a steam or hot water dispenser (5) and a dispenser group for dispensing brewed coffee in a cup positionable in a zone below said dispenser group, and a device for producing a milk-based drink, wherein said device comprises an inlet pathway (4) into which said steam or water dispenser (5) is horizontally introduced and a container (2) for the milk including a cover (26) that carries a collector body (3) that defines an inner recess (300) into which a connection pathway (401) to said dispenser (5), a milk suction pathway (7) in said container (2) and an air suction pathway (10) open, a discharge nozzle (9) being connected to a discharge pathway (8) of said collector body (3), in a working position said discharge nozzle (9) being directed towards said zone below said dispenser group for conveying the milk into said cup to be mixed with said brewed coffee, said Container (2) being removably associated with said dispenser (5) so as to be able to be separated from it for conservation of the milk present in said container (2) together with said cover (26), said collector body (3) and said discharge nozzle(9)."

First auxiliary request:

"Coffee machine having a steam or hot water dispenser (5) and a dispenser group for dispensing brewed coffee

in a cup positionable in a zone below said dispenser group, and a device for producing a milk-based drink, wherein said device comprises an inlet pathway (4) into which said steam or water dispenser (5) is horizontally introduced and a container (2) for the milk including a cover (26) that carries a collector body (3) that defines an inner recess (300) into which a connection pathway (401) to said dispenser (5), a milk suction pathway (7) in said container (2) and an air suction pathway (10) open, a discharge nozzle (9) being connected to a discharge pathway (8) of said collector body (3), ~~in a working position~~ said discharge nozzle (9) being directed towards said zone below said dispenser group for conveying the milk into said cup to be mixed with said brewed coffee, said Container (2) being removably associated with said dispenser (5) so as to be able to be separated from it for conservation of the milk present in said container (2) together with said cover (26), said collector body (3) and said discharge nozzle(9)."

Second auxiliary request:

"Coffee machine having a steam ~~or hot water~~ dispenser (5) and a dispenser group for dispensing brewed coffee in a cup positionable in a zone below said dispenser group, and a device for producing a milk-based drink, wherein said device comprises an inlet pathway (4) into which said steam dispenser (5) is horizontally introduced and a container (2) for the milk including a cover (26) that carries a collector body (3) that defines an inner recess (300) into which a connection pathway (40 1 ) to said dispenser (5), a milk suction pathway (7) in said container (2) and an air suction pathway (10) open, a discharge nozzle (9) being connected to a discharge pathway (8) of said collector



body (3), in a working position said discharge nozzle (9) being directed towards said zone below said dispenser group for conveying the milk into said cup to be mixed with said brewed coffee, wherein in said working position with a single command of the coffee machine carrying out the brewing of coffee into a cup, the withdrawal of a predetermined amount of milk contained in the milk container (2) through the action of a steam flow sent by the steam dispenser (5) of said coffee machine through the collector body (3), the frothing of said predetermined amount of milk through injection of air to said collector body (3), the interruption of said flow of steam when said predetermined amount of milk has been withdrawn, and the conveying of said predetermined amount of frothed milk into the cup occur automatically, said container (2) being removably associated with said dispenser (5) so as to be able to be separated from it for conservation of the milk present in said container (2) together with said cover (26), said collector body (3) and said discharge nozzle (9)."

Third auxiliary request:

"Coffee machine having a steam ~~or hot water~~ dispenser (5) and a dispenser group for dispensing brewed coffee in a cup positionable in a zone below said dispenser group, and a device for producing a milk-based drink, wherein said device comprises an inlet pathway (4) into which said steam dispenser (5) is horizontally introduced and a container (2) for the milk including a cover (26) that carries a collector body (3) that defines an inner recess (300) into which a connection pathway (401) to said dispenser (5), a milk suction pathway (7) in said container (2) and an air suction pathway (10) open, a discharge nozzle (9) being

connected to a discharge pathway (8) of said collector body (3), in a working position said discharge nozzle (9) being directed towards said zone below said dispenser group for conveying the milk into said cup to be mixed with said brewed coffee, wherein in said working position, when a button that enables the production of a cappuccino is pressed, a control unit of the coffee machine automatically commands the preparation of a dose of brewed coffee in said cup positioned below the dispenser (5) of the coffee machine, the withdrawal of a predetermined amount of milk contained in the container (2) through the action of a steam flow sent by the dispenser (5) and the consequent controlled frothing of the milk through the effect of the air entering through the air suction pathway (10) of the collecting body (3), the interruption of the flow of steam when the predetermined amount of milk has been withdrawn, and the final conveying of the milk into the cup for its to be mixed with the brewed coffee, said container (2) being removably associated with said dispenser (5) so as to be able to be separated from it for conservation of the milk present in said container (2) together with said cover (26), said collector body (3) and said discharge nozzle (9)."

Fourth auxiliary request (as upheld):

"Coffee machine having a steam or hot water dispenser (5) and a dispenser group for dispensing brewed coffee in a cup positionable in a zone below said dispenser group, and a device for producing a milk-based drink, wherein said device comprises an inlet pathway (4) into which said steam or water dispenser (5) is horizontally introduced and a container (2) for the milk including a cover (26) that carries a collector body (3) that

defines an inner recess (300) into which a connection pathway (401) to said dispenser (5), a milk suction pathway (7) in said container (2) and an air suction pathway (10) open, a discharge nozzle (9) being connected to a discharge pathway (8) of said collector body (3), in a working position said discharge nozzle (9) being directed towards said zone below said dispenser group for conveying the milk into said cup to be mixed with said brewed coffee, said Container (2) being removably associated with said dispenser (5) so as to be able to be separated from it for conservation of the milk present in said container (2) together with said cover (26), said collector body (3) and said discharge nozzle(9), wherein said discharge nozzle (9) is rotatably supported between a rest position adjacent to a side wall (14) of said container (2) and said work position distant from said side wall (14) of said container (2)."

VII. The appellant proprietor argued as follows:

(a) Amendments of main, first, and fourth auxiliary requests

The term "working position" in present claim 1 should be construed as labelling the position where milk and coffee are provided from the coffee machine, cf. parent application WO 2005/102126 A2, page 17, lines 3-4, and had no further technical effect. Therefore, the milk discharge nozzle did not need to be rotated from a "rest position" to the working position and, thus, this feature was optional only, see for example claim 28 of the parent as filed. Moreover, the contribution of a "horizontal introduction" of the dispenser 5 into the inlet pathway 4 could be seen in the ease of

assembly. As to this, a rotation of the inlet pathway 4 with respect to the dispenser 5 was impossible, based on the tight alignment shown between these two respective parts along a considerable length, see figures of the earlier application. There was also no functional or structural relationship between "horizontally introduced" and other parts visible in the drawings, e.g. the scraping means would also work if insertion was vertical. A submission in respect of the original disclosure of claim 1 of the then fourth auxiliary request was prima facie irrelevant.

Furthermore, the term "working position" of claim 1 is different from the "work position" as described on page 6, lines 22 to 27, and in claim 28 of the parent application. As opposed to "work position", the "working position" of claim 1 addresses the function of the machine, i.e. the position in which the coffee is made where the cup is positioned below the dispenser group. Although not literally disclosed, this is derivable from the paragraph bridging pages 16 and 17 of the parent as filed.

Therefore, the subject-matter of claim 1 of the present main, first, and fourth auxiliary requests does not infringe Article 76(1) EPC.

(b) Admission of second and third auxiliary requests

The "working position" which enables the production of a cappuccino by controlled frothing of the milk has been further specified in claim 1 of the second and third auxiliary requests, and is clearly based

on the 2nd paragraph of page 3 and the paragraph bridging pages 16 and 17, respectively, of the parent application.

Thus, the present second and third auxiliary requests should be admitted into the proceedings.

(c) Inventive step of fourth auxiliary request

E2 (see figure 7 embodiment: discharge nozzle 7, milk container 25) did not disclose that the discharge nozzle was rotatably supported between a rest position and a working position, adjacent to and distant from, respectively, a side wall of the horizontally connected milk container. E1 (see figure 5 embodiment), on the other hand, suggested a vertical connection of the steam dispenser. The entire construction group would have to be rotated by 90 degrees. Apart from that, when the jet/nozzle 25 was rotated by 90 degrees into the non-working "rest" position, the jet/nozzle was rather more distant from the side wall of the container. Thus, the skilled person starting from E1 or E2 and combining their teachings would not arrive at the subject-matter of claim 1 of the fourth auxiliary request. E3 also taught to introduce the steam dispenser vertically, while the milk foaming devices of E4 to E9, did not relate to coffee machines and thus differed completely from the claimed invention.

Therefore claim 1 of the present fourth auxiliary request involves an inventive step.

VIII. The appellant opponent 1 argued as follows:

(a) Amendments of main, first, and fourth auxiliary requests

In the parent application as filed, the feature "working position" was indicated as a position of the milk discharge nozzle with respect to the milk container. This working position always referred to a "rest position" of a rotatably supported milk discharge nozzle. Thus, a working position was not disclosed independently from this rest position of the nozzle. Furthermore, based on the direction of insertion indicated by the arrow in figure 4 of the earlier application, there was no unambiguous disclosure how the inlet axis might be inclined prior to being inserted. Moreover, many parts, such as the scraping means shown in the original figures and used to carry out an efficient cleaning scrape, were functionally and structurally related to the feature of horizontal alignment added to claim 1. These parts were missing from claim 1 of the requests on file, which had thus been generalized." In new claim 1 of the fourth auxiliary request horizontal orientation and movement between positions were now combined, which led to an intermediate generalization.

For these reasons, the subject-matter of claim 1 of the present main, first, and fourth auxiliary requests did not comply with Article 76(1) EPC.

(b) Inventive step of fourth auxiliary request

Starting from E2 (see figure 7), once the skilled person learned from E1 (see figure 5) that the milk spout can be supported by the cover of the milk container, all he needed to do was to remove the

milk spout of E2 from the machine, and put it onto the cover of E2's milk container in order to simplify the use of the apparatus. Moreover, starting from E1, the skilled person would try to reduce the complexity of the mechanism, and would consider a horizontal insertion as was suggested by E2 or E3, or by means of horizontal connection as in E4 to E9.

Therefore claim 1 of the present fourth auxiliary request was not inventive in the light of the prior art.

### **Reasons for the Decision**

1. Both appeals are admissible.
2. The patent that is the subject of this appeal is related to EP2047779 (EP'779 hereinafter), both originating as divisional applications from the same parent application WO 2005/102126 A2. EP'779 was the subject of appeal T0415/12 involving the same parties and decided by this Board in a different composition, and concerning the same or similar issues. The parties arguments are in fact largely the same as presented in that case for the corresponding requests. As has been set out in its communication prior to the oral proceedings, see point III above, insofar as for the issues contested the facts are the same and the parties' main arguments are the same, the Board sees no reason to depart from its earlier decision T0415/12.
3. Main request (claims as granted), Art 76(1) EPC
- 3.1 Claim 1 of the present main request (as granted) corresponds to claim 1 of the second auxiliary request

considered in T0415/12, but for the feature of the "cover (26) that carries [rather than integrated with] a collector body (3) ..." and minor editorial rephrasing.

3.2 In T0415/12, see reasons 2.3 to 2.4, the Board found that that version of the subject-matter of claim 1 did not comply with the requirements of Article 76(1) EPC:

"2.3 ....that, throughout the parent application as filed, the feature "working position" is indicated as a position of the milk discharge nozzle with respect to the milk container. Moreover, this working position is always mentioned in conjunction with a "rest position" of the rotatably supported milk discharge nozzle. The rest position is in turn also defined in relation to the container."

"In particular the working position is not disclosed independently from the rest position of a rotatable discharge nozzle. Rather, based on the original disclosure, the fact of directing the discharge nozzle towards the dispensing zone is consistently described or shown in the published parent application in connection with a rotation from a rest position, cf. page 6, lines 22-25, page 7, lines 1-2, claim 28, and figures 1 and 5. These passages are not so much concerned with the simple fact that there are two different positions, but also specify what the discharge nozzle actually does in those positions and that it is to be rotated between the two. It follows therefrom that the working position is defined structurally and functionally in relation to the rest position (and vice versa), and that therefore the two cannot be considered in isolation from one another. Finally, it is not evident from the wording, see page



7, lines 13-16 of the parent application, that the rest position might be optional."

"2.4 In the earlier application, therefore, the term "working position" cannot be simply construed as a general label where the coffee cup is positioned during coffee brewing, but has a clear technical meaning together with the "rest position" of a rotatable discharge nozzle. This technical context, however, is missing from the amended present claim 1."

The formulation "carries" and the other minor editorial changes in present claim 1 have no bearing on this finding, and are indeed not mentioned by the parties.

3.3 In the present case, the appellant proprietor advances the further argument that the term "working position" in claim 1 was a general term to designate the position when the beverage is produced and where the cup is placed below the dispenser group. During this working position several machine settings were carried out, such as pressing a button to enable the production of a cappuccino or the controlled frothing of the milk when the cappuccino is produced. Although not explicitly described, such a "working position" was thus clearly based on the paragraph bridging pages 16 and 17 of the parent application. As opposed to this, in the parent as filed the term "work position" simply stood for turning the discharge nozzle from a rest position to that work position, and was thus different from the meaning of "working position".

However, it is not directly and unambiguously derivable from the parent as filed that the wording "working position" must necessarily be understood as a position in which the machine is functioning and

produces coffee, let alone that in context with this working position all the machine settings described under the bridging paragraph on pages 16 and 17 of the parent as filed were actually encompassed. Nor is it implicitly or explicitly derivable for the skilled person, that the interpretation of the term "working position" in present claim 1 should be different from the term "work position" described on page 6, lines 22 to 27 and in claim 28 of the parent application.

Therefore, the Board cannot but conclude that the meaning of "working position" in present claim 1 and "work position" throughout the parent application as filed, respectively, for the person skilled in the art is synonymous.

3.4 As vis-a-vis appeal T0415/12, no other new arguments were presented, the Board sees no cogent reason why its finding for auxiliary request 2 in T0415/12 should not apply to claim 1 of the main request in the present appeal.

4. First auxiliary request, Art 76(1) EPC

4.1 Claim 1 of the present first auxiliary request deletes "in a working position" from claim 1 of the main request. It thus corresponds to claim 1 of the third auxiliary request considered in T0415/12, but for "carries" and minor editorial changes.

4.2 In T0415/12, the Board found that that version of claim 1 did not comply with the requirements of Article 76(1) as set out in reasons 2.5 in reference to reasons 2.3 to 2.4 recited above:

"2.5 Moreover, the feature "directing of said discharge

nozzle towards said zone below said dispenser group" of claim 1 is also functionally and structurally, i.e. inextricably, linked with that of the nozzle being rotatably supported so that it can be moved from a "rest position" to a "working position", see above. Thus, the simple deletion of the passage "in a working position", while retaining in the claim the action of directing of the discharge nozzle towards the dispensing zone in the wording of claim 1, in like manner results in a generalization of a specific disclosure of the parent as filed for which there is no basis."

As above, the differences in claim 1 of this request vis-a-vis claim 1 of the third auxiliary request considered in T0415/12 do not play any role in the parties' submissions and indeed do not affect this finding, which is thus maintained also for this request.

5. Admission of second and third auxiliary requests

The appellant proprietor filed its present second and third auxiliary requests at the latest possible stage, namely during the oral proceedings before the Board. However, the term "working position" in claim 1 of the second and third auxiliary requests cannot be linked to particular machine settings described under the bridging paragraph on pages 16 and 17 of the parent as filed, cf. point 3.3 above. Rather, as also set out above, based on the parent application as filed, the term "working position" in claim 1 corresponds to the "work position" as originally filed and is not disclosed independently from the rest position of a rotatable discharge nozzle. Thus, since the rest position together with a rotatable discharge nozzle has

been omitted from claim 1 of the present second and third auxiliary requests, its subject-matter apparently extends beyond the content of the parent as filed and hence does not meet the requirements of Article 76(1) EPC.

Without prejudice to the question of whether or not their belated filing is justified at that very late stage of the proceedings, the Board therefore holds that the present second and third auxiliary requests are not clearly allowable, Article 76(1) EPC. For this reason, it decided to exercise its discretion not to admit the late filed auxiliary requests 2 and 3 into the proceedings, Article 13(3) RPBA.

6. Fourth auxiliary request (claims as upheld)
  - 6.1 Claim 1 of the present fourth auxiliary request (as upheld) corresponds to claim 1 of the fourth auxiliary in T0415/12, but for "carries" (see above) and the following addition (indicated in italics): "said container (2) being removably associated with said dispenser (5) so as to separated from it ... *together with said cover (26), said collector body (3) and said discharge nozzle (9),*".
  - 6.2 The present fourth auxiliary request combines claims 1 and 28 of the parent application, and claims 1 and 3 of the divisional as filed, so that the requirements of Article 76(1) and 123(2) and (3) are met.
  - 6.3 In T0415/12, the Board came to the same conclusion for claim 1 of the then fourth auxiliary request, reasons 3.3 to 3.6 and 5. recited below:

"3.3 The Board concurs with the appellant proprietor

that the contribution of a "horizontal introduction" can be seen in the ease of assembly, i.e., to provide a simple operation of connecting two components."

"This is based on figures 1 to 3 of the parent application, where the inlet pathway 4 and dispenser 5 are shown in an assembled condition with the milk suction pathway 7 at right angle to them. The milk suction pathway 7 lies on the same axis as the vertical supply channel 23 of the container 2, cf. parent application, figure 7, and page 7, lines 17-20. Consequently, prior to being fixed in its assembled state, the dispenser 5 must have been inserted horizontally. This is irrespective of whether the arrow indicated in figure 4 of the parent application can form a basis for the unambiguous disclosure of a horizontal insertion of the dispenser, or not. As to whether or not before the end of insertion a rotation (tilting) of the inlet pathway 4 with respect to the dispenser 5 could take place, based on the tight alignment shown between these two respective parts along a considerable length (see also the plurality of toroidal rings as sealing elements), such a rotation does not seem to be suggested, or even possible."

"Moreover, the Board also follows the appellant proprietor's view in that there is no close functional or structural relationship between "horizontally introduced" and the other parts visible in the drawings. For example, whether or not the disclosed scraping means would still work is not considered to be inextricably linked to the direction of introduction. As argued by the appellant proprietor, if insertion would be vertical, the various scraping means of, cf. figures 1 to 3 (elastically engaging scraping tooth 413) or figures 6 and 7 (manually controlled leverism

27), would also work."

"3.4 To conclude, the Board holds that the addition of the feature "horizontally introduced" in present claim 1 of the fourth auxiliary request does not extend beyond the content of the earlier application as filed and, therefore, complies with the requirements of Article 76 (1) EPC."

"3.5 The Board therefore confirms the findings of the decision under appeal as regards the requirements of Article 76(1) EPC. As regards the requirements of Article 123(2) EPC no objections have been raised by the appellant opponent 1, nor does the Board have any compelling reason to deviate from the decision's positive finding in this regard. In particular it appears that the relevant passages are also included in the divisional application as filed so that the above arguments discussed for Article 76(1) EPC also apply in respect of Article 123(2) EPC."

"3.6 Finally, as the amendments are by way of further limitations, there is no doubt that the requirements of Article 123(3) EPC are also met."

"5. Late filed submission: fourth auxiliary request"

"The appellant opponent 1 belatedly alleges an intermediate generalisation of the feature "horizontally introduced" of claim 1 presently on file, using a new line of argument. However, the Board shares the appellant proprietor's view that, on the face of it, there is no indication in the original disclosure, that the particular manner of rotation of the discharge nozzle in claim 28 might be linked to the horizontal introduction movement."

"Thus, without prejudice to the question of whether or not its belated filing is justified at that very late stage during the oral proceedings, the Board holds that this new Article 76(1) EPC objection is prima facie irrelevant as to claim 1 of the fourth auxiliary request. For this reason, it decided to exercise its discretion not to admit the late submission into the proceedings, Article 13(3) RPBA."

The differences of claim 1 of the present fourth auxiliary request vis-a-vis claim 1 of the then fourth auxiliary request in T0415/12 do not figure in the parties' submissions and do not change this reasoning, which thus also applies to this claim version. Nor have any new arguments been put forward that might lead the Board to revise its prima facie finding in T0415/12 regarding the irrelevance of the objection of intermediate generalization in relation to "horizontally introduced".

6.4 In T0415/12, the Board also held that the subject-matter of claim 1 of the then fourth auxiliary request vis-a-vis the very same documents E1 to E9 cited in the same combinations as in the present case involved an inventive step (and was perforce novel), reasons 4:

"4.1 Novelty of claim 1 (as upheld) is not in dispute. Having regard to the assessment of inventive step of claim 1, it is common ground that document E2 forms a suitable starting point."

"The cappuccino coffee maker of E2, see figure 7 embodiment, discloses a milk container 25 having a container top 29 which is secured to the venturi unit above by means of a latch 23. Thus, the milk container 25 and the venturi unit are detachable as a unit, and

so form a cover of the milk container 25, which appears to be integrally formed with the collector body (i.e. the venturi unit) as required by claim 1 as upheld. See E2, column 2, lines 18-20 and lines 55-61."

"4.2 The subject-matter of claim 1 differs from E2's disclosure at least in that

- said discharge nozzle is rotatably supported between a rest position adjacent to a side wall of said container and said working position distant from said side wall of said container.

The underlying problem of these distinguishing features can thus be seen as how to simplify the use of the apparatus, cf. patent paragraph 0007."

"4.3 Document E1 concerns a coffee machine with an integrated steam delivery device, see E1, abstract and figure 5. It furthermore describes a discharge nozzle (jet 25) which can be rotatably turned by 90 degrees, thus to open a bore 37 between the steam intake 26 and an internal jet 35. In so doing, steam is directed into the receptacle 5 via the internal jet 35, so that foamed milk can be manually added to each cup of coffee, cf. also E1, page 6, line 31 to page 7, line 10. Thus, as argued by the appellant proprietor, this turned position can hardly be interpreted as a "rest position adjacent to a side wall of the container (receptacle 5)" as opposed to a "working position distant from said side wall"."

"4.4 The appellant opponent 1 argues that, once the skilled person learned from E1 that the milk spout can be supported by the cover of the milk container, rather than be integrated in the machine, all he needed to do



was to remove the milk spout of E2 from the machine (cf. E2 figure 7), and put it onto the cover of E2's milk container in order to simplify the use of the apparatus of E2."

"However, the Board holds that, even if the transversely turned jet 25 of E1 was considered to form a "rest position" within the meaning of claim 1, starting from E2 the skilled person would not, without exercising inventive skill, somehow adapt E2's milk spout 7, which is fixedly integrated into the housing 2 of E2's cappuccino maker, such that it would be rotatably mounted as in E1. The less so, since E1 teaches a complex function of the rotatable jet 25: it suggests that, when having been turned in its transversal "rest position", a bore 37 of the jet 25 is opened, thus to direct the steam intake of the cappuccino maker into the milk container (receptacle 5) by means of an internal jet 35, see above."

"4.5 Moreover, the appellant opponent 1 argues that starting from E1, the skilled person would try to reduce the complexity of the mechanism, whilst maintaining the remaining advantages of the device, and would consider horizontal insertion movements as was suggested by E2 or E3, or by the horizontal connections known from E4 to E9."

"In the Boards view, however, starting from E1 and taking into consideration E2's horizontally attached unit shown in figure 7, the skilled person would not deviate from the core concept of E1's vertical steam intake 26, let alone from the advantageously taught rotatable bore to connect the vertical steam intake 26 with an internal jet 35 for the receptacle 5. Finally, it also holds that the remaining documents cited (E3 to

E9) would not have led the skilled person to adapt E1 in such a way that he would arrive at a horizontal insertion of E1's steam dispenser (intake pipe 26): the coffee maker of E3 (see figure 4) suggests a vertical introduction of the inlet pipe unit 3 only. The Board considers the milk foaming devices of E4 to E9 to be too technically remote, and thus less relevant when starting from a coffee machine comprising a removably associated milk container."

"4.6 Thus, as also advanced by the appellant proprietor, in the light of the manifestly different structural concepts of E1 and E2 (or the other documents cited) the skilled person would not arrive, without hindsight, at the subject-matter of claim 1." "Therefore the subject-matter of claim 1 of the fourth auxiliary request (as upheld) involves an inventive step, Article 56 EPC."

The differences vis-a-vis claim 1 of the then fourth auxiliary request of T0415/12 do not feature in the above finding. That positive finding thus also applies to claim 1 of the fourth auxiliary request in the present case.

7. The Board finally notes that the differences between claim 1 of the present fourth auxiliary and that of the then fourth auxiliary request in T0415/12 mean that their subject-matters are not identical and do not concern the same invention. Thus, where claim 1 in the version upheld in T0415/12 has the cover (26) (of the milk container (2)) *integrally formed with* a collector body, in claim 1 of the current fourth auxiliary request cover (26) carries a collector body. The latter formulation expresses a different, broader relationship between cover and collector body.

8. In conclusion, the Board finds that insofar as the appellant proprietor's present requests have been admitted into the proceedings, its main and first auxiliary requests are not allowable. It also finds that the appellant opponent's arguments against the patent as upheld in amended form corresponding to the present fourth auxiliary request are without merit. Therefore, neither appeal can succeed and the Board thus confirms the decision under appeal.

**Order**

**For these reasons it is decided that:**

The appeals are dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated