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**Datasheet for the decision
of 3 November 2015**

Case Number: T 0009/13 - 3.2.07

Application Number: 08718074.1

Publication Number: 2129595

IPC: B65D85/804

Language of the proceedings: EN

Title of invention:
BEVERAGE INGREDIENT CAPSULE

Patent Proprietor:
Nestec S.A.

Opponent:
Patentwerk B.V.

Headword:

Relevant legal provisions:
EPC Art. 52, 54, 56, 87
RPBA Art. 15(3)

Keyword:
Priority - validity of priority date for claim 10 (no)
Novelty - (yes)
Inventive step - (yes)

Decisions cited:
G 0009/92, T 1704/06

Catchword:



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Case Number: T 0009/13 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 3 November 2015

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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
28 November 2012 concerning maintenance of the
European Patent No. 2129595 in amended form.

Composition of the Board:

Chairman H. Meinders
Members: K. Poalas
I. Beckedorf

Summary of Facts and Submissions

- I. The patent proprietor (appellant) lodged an appeal against the interlocutory decision maintaining European patent No. 2 129 595 in amended form.
- II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and inventive step).
- III. The opposition division found that the subject-matters of claims 1 and 9 according to the second auxiliary request filed during the oral proceedings meet the requirements of the EPC.
- IV. With its statement setting out the grounds of appeal the appellant requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), or in the alternative, that the patent be maintained according to one of the sets of claims filed with said statement as auxiliary requests 1 to 4.
- V. The opponent (respondent) requested in its reply that the patent be maintained in the form as decided by the opposition division (i.e. that the appeal be dismissed), or otherwise, that the patent be revoked.
- VI. In its communication pursuant to Article 15(1) RPBA the Board informed the parties under point 1.3 that according to the principle of prohibition of *reformatio in peius* and as established by the decision G 9/92, OJ 1994, 875, if the patent proprietor is the sole appellant against an interlocutory decision maintaining a patent in amended form, neither the Board of Appeal nor the non-appealing opponent as a party to the

proceedings as of right under Article 107, second sentence, EPC, i.e. the present respondent, may challenge the maintenance of the patent as amended in accordance with the interlocutory decision. In that same communication the Board gave its provisional opinion concerning the novelty of the subject-matter of claim 1 of the patent as granted.

VII. The respondent's submission dated 2 October 2015 informed the Board that the respondent will not be represented at the oral proceedings.

VIII. Oral proceedings before the Board took place on 3 November 2015.

As announced with its above-mentioned submission, the duly summoned respondent did not attend.

Oral proceedings were continued without the respondent according to Rule 115(2) EPC and Article 15(3) RPBA.

The appellant repeated its requests from the written proceedings that the decision under appeal be set aside and that the patent be maintained as granted (main request), or in the alternative, that the patent be maintained according to one of the sets of claims filed as auxiliary requests 1 to 4 with its statement setting out its grounds of appeal dated 27 March 2013.

In the written proceedings the respondent had requested that the patent be maintained in the form as decided by the opposition division (i.e. the appeal be dismissed), or otherwise, that the patent be revoked, see point V above.

IX. Independent claims 1 and 10 of the patent as granted (**main request**) read as follows:

"1. A capsule (1) containing ingredients for producing a beverage, wherein the ingredients are housed in a compartment (3), wherein the capsule (1) comprises a contoured opening plate (5) designed for opening a face (4) of the ingredient compartment (3) when the pressure inside the ingredient compartment (5) presses the face against the opening plate (5) of the capsule (1), characterized in that the opening plate (5) is provided with one or several capillary through holes (100, 101, 102, 103) connecting two opposing sides (104, 105) of the opening plate (5)".

"10. A capsule containing ingredients for producing a beverage, wherein the ingredients are housed in a compartment, wherein the capsule comprises an insert placed between the compartment and an outlet, wherein the insert comprises or is part of a valve means, characterized in that the insert is provided with one or several capillary through-holes connecting two opposing sides of the insert".

In view of the Board's decision in respect with the appellant's main request, see points 2, 3, 5 and 6 below, the wording of the independent claims of the auxiliary requests 1 to 4 is not of relevance for the present case.

X. The following documents from the opposition proceedings are mentioned in the present decision:

D2: EP 1 472 156 B1

D3: EP 1 731 063 A1

D7: EP 1 767 467 A1, published on 28 March 2007

D8: EP 1 864 917 A1, published on 12 December 2007

D9: EP 0710481.6, filing date 23 March 2007, the
priority of which has been claimed for the patent
in suit

D11: WO 02/081337 A1.

XI. The appellant's arguments, in so far as they are
relevant to the present decision, may be summarised as
follows:

*Claim 1 of the patent as granted - Novelty, Articles 52
and 54(2) EPC*

Neither D2 nor D11 discloses the contoured opening
plate provided with one or several capillary through
holes connecting two opposing sides of the opening
plate according to claim 1.

*Claim 1 of the patent as granted - Inventive step,
Articles 52 and 56 EPC*

*Combination of the teaching of either D2 or D11 with
the teaching of D3*

D3 does not provide any solution to the problem of
providing a cleaner beverage production process which
is obtained by the features of the characterising part
of claim 1.

Further, D3 refers to an internal duct provided in an
injector nozzle and not to through holes provided in
opening means on the capsule outlet side. The capillary
effect provided by the internal duct is for preventing
the introduction of air into the capsule.

For the above-mentioned reasons a combination of the
teaching of either D2 or D11 with the teaching of D3

would not lead to the subject-matter of claim 1.

Right to priority for claim 10 of the patent as granted, Article 87 EPC

In independent claim 10 of the patent as granted the term "insert" has been introduced in place of the term "contoured opening plate" used in independent claim 1 of D9.

D9 discloses a capsule 1 containing ingredients for producing a beverage, wherein the ingredients are housed in a compartment 3, see claim 1. D9 discloses further an opening means 5, which is arranged between the compartment 3 and an outlet opening 7, see figure 1. The opening means 5 is thus placed or inserted between the compartment 3 and the outlet opening 7, and can be regarded as an "insert". The opening means 5 can be provided with a flexible lip 15, which can open or shut off a flow path for a beverage and thus functions as a valve means, see page 11, lines 9 to 30 of D9. Finally, the opening means 5 is provided with through holes 100-103 that are preferably dimensioned as capillary holes, and connect the two sides of the opening means 5, see page 15, lines 10 to 19 and claim 1 of D9.

In conclusion, claim 10 does not disclose any new subject-matter when compared with the disclosure of D9; therefore the claim to priority of D9 is valid.

Claim 10 of the patent as granted - Novelty, Articles 52 and 54(2) EPC

D2 does not disclose an insert provided with one or several capillary through holes as claimed in claim 10.

The slit or orifice 26 in the capsule of D7 is a valve means through which beverage flows during the beverage production process. On the other hand, said slit or orifice 26 cannot release pressure at the end of the beverage production process and thus it cannot be considered as a capillary through hole which exists in parallel to the valve means.

Claim 10 of the patent as granted - Inventive step, Articles 52 and 56 EPC

None of documents D2, D8 or D11 discloses an insert having one or several holes connecting two opposite sides of said insert. Therefore, also a combination of the teaching of D8 with the teaching of either D2 or D11 cannot lead to the subject-matter of claim 10.

XII. The respondent's arguments of the written proceedings, in so far as they are relevant to the present decision, may be summarised as follows:

Claim 1 of the patent as granted - Novelty, Articles 52 and 54(2) EPC

Element 28 depicted in figure 5 of D2 is provided with holes for the passage of the beverage and the holes implicitly connect the two sides of said element. Given that all holes are capillary to some extent the characterising feature of claim 1 is known from D2.

Plunger 38 depicted in figures 6 and 7 of D11 is contoured by the lance 36 and has filtering through holes 39 as depicted in figure 8. Common coffee ground has a size between 250 and 600 μm , therefore the holes, which act as a filter should be able to stop the coffee

grounds. These holes 39 of the plunger 38 of D11 are thus capillary holes in the sense of the characterising feature of claim 1.

Claim 1 of the patent as granted - Inventive step, Articles 52 and 56 EPC

Combination of the teaching of either D2 or D11 with the teaching of D3

According to paragraphs [0093] and [0094] of D3 an internal duct portion 781 with small diameter retains fluid in an injector by capillary attraction. The size of this diameter can be in the order of 0.6 to 0.4 mm and corresponds to the ranges claimed in the patent in suit. Such an internal duct portion provides an air seal effect to prevent the problem of liquid drips or leaks which escape through the bottom of the capsule.

A person skilled in the art trying to prevent dripping from a capsule known from D2 or D11 would consider capillarity and thus consider the teaching of D3. The combination of the teaching of either D2 or D11 with the teaching of D3 would thus be obvious to the person skilled in the art and would result in the subject-matter of claim 1.

Right to priority for claim 10 of the patent as granted, Article 87 EPC

There is no disclosure anywhere in D9 of an insert that comprises or is part of any valve means having one or several capillary through holes connecting two opposing sides of the insert. Therefore, claim 10 is not entitled to the claimed priority. The effective date for claim 10 is therefore the filing date of the patent

as granted, namely 20 March 2008.

Claim 10 of the patent as granted - Novelty, Articles 52 and 54(2) EPC

Element 28 depicted in figure 5 of D2 can be considered as an "insert" as claimed in claim 10 of the patent in suit. The same lack of novelty reasoning presented in respect with claim 1 of the patent as granted is therefore applicable to claim 10 of the patent as granted.

Claim 10 of the patent as granted - Inventive step, Articles 52 and 56 EPC

D8 discloses a capsule similar to the one disclosed in the patent in suit but without capillary through holes connecting two opposing sides of the capsule.

D2 and D11 are both concerned with the objective technical problem of providing a cleaner beverage production process.

A person skilled in the art would therefore look at D2 or D11 for alternatives for the beverage production process, and finds alternatives for the flow path of the beverage. When a person skilled in the art would combine the teaching of D8 with that of D2 or D11 he would end up with the subject-matter of claim 10 of the patent as granted.

Reasons for the Decision

1. Although the respondent did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that

Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see the explanatory note to Article 15(3) RPBA cited in T 1704/06, not published in OJ EPO, see also the Case Law of the Boards of Appeal, 7th edition 2013, section IV.E.4.2.3.c)).

Notwithstanding the respondent's absence at the oral proceedings, the Board in coming to the following conclusions takes into consideration the respondent's written submissions (Article 15(3) RPBA).

2. *Claim 1 of the patent as granted - Novelty, Articles 52 and 54(2) EPC*

2.1 As stated under point VI above the Board, in its communication annexed to the summons, gave its provisional opinion concerning the novelty of the subject-matter of claim 1 of the patent as granted. The relevant parts of said communication read as follows:

"4.1.1 The Board notes that claim 1 is directed to a **capsule** containing **ingredients** for producing a beverage, wherein the ingredients are housed in a compartment, wherein the capsule comprises a contoured **opening plate** provided with one or several **capillary** through **holes** connecting two opposing sides of the opening plate.

4.1.2 The Board notes further that according to paragraph [0059] of the patent specification "capillary holes" are holes designed such that they are capable of "**holding a liquid volume against the gravitational force such that such liquid volume will not drip from the holes**". The Board follows in this respect the appellant arguing that the capillary effect of "capillary through holes" depends on intermolecular

forces, which act between the liquid within the hole and the solid surfaces of the hole surrounding the liquid and that these intermolecular forces depend again largely on the properties of the material into which the hole is provided. Further, the surface properties (e.g. surface roughness) of the inner walls of the hole are of importance for the strength of the capillary effect.

4.1.3 Accordingly, claim 1 defines an **opening plate - hole(s) dimensions** combination which provides said holes with the capability of "holding a liquid volume against the gravitational force such that such liquid volume will not drip from the hole".

4.1.4 The Board is of the preliminary opinion that even accepting the respondent's argument that common coffee ground is of the size between 250 and 600 μm , and that therefore the diameters of the holes of the corresponding coffee filters would be within the range of 0.1 to 0.7 mm, the teaching of claim 1 concerning the above-mentioned specific opening plate - hole(s) combination seems not to be directly and unambiguously derivable from the prior art documents in the file. D11 nor D2 mention anything relating to capillary effects".

2.2 The above-mentioned preliminary finding of the Board has not been commented on nor has it been contested by the respondent during the appeal proceedings, see point VII above.

2.3 Under these circumstances, the Board - having once again taken into consideration all the relevant aspects concerning said issue - sees no reason to deviate from its above-mentioned finding, namely that neither D2 nor D11 discloses a contoured opening plate provided with

one or several capillary through holes connecting two opposing sides of said plate.

2.4 As a consequence, the subject-matter of claim 1 is novel and the requirements of Articles 52 and 54(2) EPC are fulfilled.

3. *Claim 1 of the patent as granted - Inventive step, Articles 52 and 56 EPC*

3.1 *Combination of the teaching of either D2 or D11 with the teaching of D3*

3.1.1 The capsule according to claim 1 differs from the capsules known from D2 or D11 in that it *inter alia* comprises a contoured opening plate provided with one or several capillary through holes connecting two opposing sides of said plate, see point 2.3 above.

3.1.2 The capillary through hole(s) of the contoured opening plate prevent(s) liquid dripping from the through holes after dispensing the product and achieve(s) thereby a cleaner beverage production process, see paragraphs [0063] and [0067] of the patent in suit.

3.1.3 The objective problem solved by the subject-matter of claim 1 is therefore the provision of a cleaner beverage production process.

3.1.4 Paragraphs [0093] and [0094] of D3 refer to an internal capillary duct 781 provided in an injector nozzle 70, but not to capillary through holes provided in a contoured opening plate on the capsule outlet side. Further, the internal duct has a capillary effect only for the purpose of not introducing air into the

- capsule, but not with respect to preventing dripping.
- 3.1.5 Accordingly, even if the person skilled in the art seeking to solve the problem mentioned under point 3.1.3 above would have taken the teaching of D3 into consideration, that would have led to a capillary duct provided in the injector nozzle and not to a contoured opening plate on the capsule outlet side being provided with capillary through hole(s) according to the characterising part of claim 1.
- 3.1.6 It follows that the teaching of either document D2 or D11 in combination with the teaching of document D3 cannot lead to the subject-matter of claim 1. The latter is also not obvious to the person skilled in the art because the Board fails to see a reason why a teaching for the injector nozzle would be transposed to the contoured opening plate.
- 3.2 For the above-mentioned reasons the subject-matter of claim 1 involves an inventive step and meets the requirements of Articles 52 and 56 EPC.
4. *Right to priority for claim 10 of the patent as granted, Article 87 EPC*
- 4.1 The Board stated in respect with the effective date of claim 10 of the patent as granted in its above-mentioned communication annexed to the summons that "claim 1 of D9 refers to a **"contoured opening plate"** designed for opening a face of the ingredient compartment when the pressure inside the ingredient compartment presses the face against the opening plate of the capsule". No basis can be found in D9 for replacing such a **"contoured opening plate"** with the

term **"insert"**, as it is the case in claim 10".

4.2 The appellant argues that the subject-matter of claim 10 including the "insert" claimed therein is directly and unambiguously derivable from document D9. The Board does not follow said appellant's argument for the following reasons:

4.2.1 It is undisputed that there is no literal disclosure of the term "insert" in D9. Furthermore, the term "insert" means by definition a first item which is "inserted" into a second item, whereby supports, customarily in the form of depressions, for the insertion of said first item are usually foreseen in said second item.

4.2.2 Figure 1 of D9 in combination with the corresponding part of the description shows opening means 5 in the form of a contoured opening plate housed in the capsule between the compartment 3 and the outlet opening 7, see page 6, lines 29 to 30 of D9. Due to the fact that D9 describes the opening means 5 as being housed within the capsule and that also no supports for an insertion of said opening means are depicted in figure 1, the Board sees no direct and unambiguous disclosure in D9 for an "insertion" of the opening means 5 into the capsule.

Accordingly, the disclosure of D9 provides no basis for considering the opening means 5 as being "inserted" and thus as an "insert" in the sense of claim 10.

For this reason an "insert" according to claim 10 is not directly and unambiguously derivable from D9.

4.3 Not only that, but claim 1 and the whole disclosure of D9 consistently refer to the presence of opening means

for opening a face of the ingredient compartment when the pressure inside the ingredient compartment presses the face against said opening means. In the capsule according to claim 10 such opening means are missing.

In case of the opening means being external to the capsule according to page 6, lines 30 to 31 of D9, and given the fact that an opening of a face of the ingredient compartment when the pressure inside the ingredient compartment presses the face against the opening means is an indispensable feature of the disclosure of D9 then the above-mentioned passage of D9 discloses a capsule - external opening means combination and only such a combination can be claimed in the absence of internal opening means.

Since no opening means nor a capsule - external opening means combination are claimed in claim 10, the subject-matter of claim 10 is not directly and unambiguously derivable from D9.

- 4.4 For the above-mentioned reasons, claim 10 is not entitled to the claimed priority and its effective date is the patent's filing date, namely 20 March 2008.

Accordingly, each of D7 and D8 represents a state-of-the-art according to Article 54(2) EPC.

5. *Claim 10 of the patent as granted - Novelty, Articles 52 and 54(2) EPC*

- 5.1 The Board's consideration under points 2.1 to 2.3 in respect of the absence in D2 or D11 of a contoured opening plate having one or several capillary through holes holds also true for the insert claimed in claim

10.

5.2 D7 discloses a septum 24, which can be considered an insert that is placed between a compartment 4 and an outlet 38 of a capsule 1. The septum 24 may be a rubber-like, elastomeric or plastic pad or disc having a narrow through slit or orifice 26 formed therein, and connecting a top surface to a bottom surface of the pad, see paragraph [0044]. If no axial pressure is applied to the septum, the slit or orifice provides for an air-tight seal, whereas if pressure is applied during a beverage production process, a portion of the septum 24 bends and the slit or orifice 26 slightly widens, thus allowing the passage of a beverage.

Therefore, the slit or orifice 26 can be regarded as a valve means.

Claim 10 of the patent as granted requires that the insert not only comprises or is part of a valve means but that it is additionally provided with one or several capillary through-holes connecting two opposing sides of said insert. No additional capillary through holes are disclosed in D7.

5.3 In view of the above, the subject-matter of claim 10 is novel over the disclosure of D2, D7 or D11.

6. *Claim 10 of the patent as granted - Inventive step, Articles 52 and 56 EPC*

Combination of the teaching of D8 with the teaching of either D2 or D11

6.1 It is undisputed that D8 does not disclose an insert having one or several capillary through holes

connecting two opposite sides of the insert.

6.2 Given that neither D2 nor D11 disclose an insert having one or several capillary through holes connecting to opposite sides of the insert, see point 5.1 above, also a combination of the teaching of D8 with the teaching of either D2 or D11 cannot lead to the subject-matter of claim 10.

6.3 For the above-mentioned reasons, the subject-matter of claim 10 involves inventive step and fulfils the requirements of Articles 52 and 56 EPC.

7. *Procedural matters*

Due to the principle of prohibition of *reformatio in peius* the respondent's request for revocation of the patent cannot succeed, see point VI above.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated