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**Datasheet for the decision  
of 27 July 2018**

**Case Number:** T 0025/15 - 3.2.04

**Application Number:** 09796115.5

**Publication Number:** 2303077

**IPC:** A47J31/36

**Language of the proceedings:** EN

**Title of invention:**

CAPSULE, SYSTEM AND METHOD FOR PREPARING A PREDETERMINED  
QUANTITY OF BEVERAGE SUITABLE FOR CONSUMPTION

**Patent Proprietor:**

Koninklijke Douwe Egberts B.V.

**Opponent:**

Migros-Genossenschafts-Bund

**Headword:**

**Relevant legal provisions:**

EPC Art. 107, 54(3), 84, 56, 114(2)  
RPBA Art. 12(4)

**Keyword:**

Admissibility of appeal - party adversely affected by decision

Novelty - main request (no)

Claims - auxiliary request 1 clarity (no)

Late-filed document - admitted (no)

Inventive step - auxiliary request 2 (yes)

**Decisions cited:**

G 0009/91, G 0001/88, G 0003/14, T 0266/92, T 0455/92

**Catchword:**



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

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 0025/15 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 27 July 2018**

**Appellant:** Koninklijke Douwe Egberts B.V.  
(Patent Proprietor) Vleutensevaart 35  
3532 AD Utrecht (NL)

**Representative:** V.O.  
P.O. Box 87930  
2508 DH Den Haag (NL)

**Appellant:** Migros-Genossenschafts-Bund  
(Opponent) Limmatstrasse 152  
8005 Zürich (CH)

**Representative:** Hepp Wenger Ryffel AG  
Friedtalweg 5  
9500 Wil (CH)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
10 November 2014 concerning maintenance of the  
European Patent No. 2303077 in amended form.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** J. Wright  
W. Van der Eijk

## Summary of Facts and Submissions

- I. The appellant-opponent lodged an appeal, received 22 December 2014, against the interlocutory decision of the Opposition Division posted on 10 November 2014 concerning maintenance of the European Patent No. 2303077 in amended form, and paid the appeal fee at the same time. Their statement setting out the grounds of appeal was filed on 13 March 2015.

The appellant-proprietor also lodged an appeal against the above decision on 16 January 2016, paying the appeal fee at the same time. They filed their grounds of appeal on 20 March 2015.

- II. Opposition was based on lack of novelty and inventive step (Article 100(a) EPC together with Articles 52(1), 54 and 56 EPC).

The Opposition Division held that the ground for opposition of lack of novelty prejudiced the maintenance of the patent as granted (*vis-à-vis* D8), while amendments made to the claims according to an auxiliary request met all requirements of the EPC, *inter alia* novelty and inventive step, having regard to the following documents, amongst others:

D2: WO 2006/137737  
D5: DE 601 14 050  
D6: DE 76 12 169  
D7: DE 1 207 866  
D8: WO 2010/084475  
D9: US 4 775 048  
D11: WO 2007/137974

The appellant-opponent filed a further document with their grounds of appeal:

D14: FR 2 041 380

- III. The appellant-opponent requested that the decision under appeal be set aside and European patent Nr. 2303077 be revoked in its entirety.
- IV. The appellant-proprietor requested:
- that the appeal by the opponent be rejected as inadmissible, or alternatively
  - that the decision under appeal be set aside and the European patent No. 2303077 be maintained in amended form according to a main request, or alternatively according to a first auxiliary request, both filed on 12 September 2014,
  - alternatively, that the appeal by the opponent be dismissed and thus the patent be maintained in the form upheld in the decision under appeal (2nd auxiliary request in appeal, filed as fifth auxiliary request on 12 September 2014),
  - or alternatively, that the decision under appeal be set aside and the case be remitted to the department of first instance for further prosecution to consider auxiliary requests 3, 4 and 6-18, all filed on 12 September 2014, in the order listed in their letter of 28 May 2018.
- V. Claim 1 of the requests considered in this decision reads as follows:

Main request

"A capsule (2) for preparing a predetermined quantity of beverage suitable for consumption using an extractable product, the capsule being suitable and

intended for use in a beverage brewing device (4) comprising an enclosing member (6) for enclosing the capsule (2), the enclosing member having a leading edge (30) with a width, wherein the capsule (2) comprises:

a cup (12) comprising a circumferential wall (16), a bottom (18) closing the circumferential wall at a first end, and a flange-like rim (20) extending outwardly of the circumferential wall at a second end opposite the bottom, and

a lid (14) in use connected to the flange-like rim (20), wherein the wall, bottom and lid, in use, enclose an inner space (22) comprising the extractable product,

characterized in that the cup (12) further comprises a plurality of substantially concentric circumferential ridges (28.i) extending outwardly of the cup, wherein the ridges are made of the same material as the cup,

wherein the ridges (28.i) are arranged on the flange-like rim (20), wherein the ridges (28.i) are arranged on the side of the flange-like rim (20) facing away from the lid (14),

wherein the ridges (28.i) are integral with the flange-like rim (20) wherein, in use, at least one of the ridges (28.i) abuts against at least a portion of the enclosing member (6), such that a sealing engagement between the capsule and the enclosing member is formed,

wherein at least a portion of a leading edge (30) of the enclosing member (6) is arranged to abut against at least one of the ridges (28.i)".

First auxiliary request

"A capsule (2) for preparing a predetermined quantity of beverage suitable for consumption using an extractable product, the capsule being suitable and intended for use in a beverage brewing device (4) comprising an enclosing member (6) for enclosing the capsule (2), the enclosing member having a leading edge (30) with a width, wherein the capsule (2) comprises:

a cup (12) comprising a circumferential wall (16), a bottom (18) closing the circumferential wall at a first end, and a flange-like rim (20) extending outwardly of the circumferential wall at a second end opposite the bottom, and

a lid (14) in use connected to the flange-like rim (20), wherein the wall, bottom and lid, in use, enclose an inner space (22) comprising the extractable product,

characterized in that the cup (12) further comprises a plurality of substantially concentric circumferential ridges (28.i) extending outwardly of the cup, wherein the ridges are made of the same material as the cup,

wherein the ridges (28.i) are arranged on the flange-like rim (20), wherein the ridges (28.i) are arranged on the side of the flange-like rim (20) facing away from the lid (14),

wherein the ridges (28.i) are integral with the flange-like rim (20), wherein, in use, at least one of the ridges (28.i) abuts against at least a portion of the enclosing member (6), such that a sealing engagement between the capsule and the enclosing member is formed,

wherein at least a portion of a leading edge (30) of the enclosing member (6) is arranged to abut against at least one of the ridges (28.i),

wherein the ridges (28.i) each have an individual width that is less than the width of the leading edge (30) of the enclosing member (6)".

Second auxiliary request (as maintained)

"A capsule (2) for preparing a predetermined quantity of beverage suitable for consumption using an extractable product, comprising

a cup (12) comprising a circumferential wall (16), a bottom (18) closing the circumferential wall at a first end, and a flange-like rim (20) extending outwardly of the circumferential wall at a second end opposite the bottom, and

a lid (14) in use connected to the flange-like rim (20), wherein the wall, bottom and lid, in use, enclose an inner space (22) comprising the extractable product,

characterized in that the cup (12) further comprises a plurality of substantially concentric circumferential ridges (28.i) extending outwardly of the cup, wherein the ridges are made of the same material as the cup,

wherein the ridges (28.i) are arranged on the flange-like rim (20), wherein the ridges (28.i) are arranged on the side of the flange-like rim (20) facing away from the lid (14),

wherein the ridges (28.i) are integral with the flange-like rim (20) wherein a ridge of the plurality of



ridges (28.i) has a tapered, e.g. a substantially triangular, cross section.

VI. The appellant-proprietor argued as follows:

The appeal of the opponent is not admissible because they have not been adversely effected by the decision.

Main request

D8 does not take away novelty of claim 1 because D8 does not directly and unambiguously disclose sealing ridges as claimed, in particular these cannot be seen from figures 26 to 29 because the complete capsule is not shown.

First auxiliary request

Claim 1 is clear. The amended "width of ridge" feature is taken from a granted claim to a system. It makes no difference to the clarity of the claim whether it is in its original "system claim" context or its new "capsule claim" context.

Second auxiliary request

As the opponent did not argue against this request in first instance the Board can, if at all, at best examine it within the limited framework of the prima facie findings of the decision under appeal. The subject matter of claim 1 is new vis-à-vis D8 because D8 does not disclose an embodiment with more than one sealing ridge, whereby one is tapered.

The subject matter of claim 1 involves an inventive step. Document D14 should not be admitted into the

proceedings because it is late filed and not more relevant than documents already on file. The skilled person would not combine the teachings of D11 with D5 as these are from disparate technical fields. The same goes for the combination of D2 with D5.

VII. The appellant-opponent argued as follows:

The appeal is admissible because the patent was opposed in its entirety.

Main request

D8 takes away novelty of claim 1. In particular figures 26 to 29 show rotationally symmetrical capsules having a plurality of concentric ridges as claimed.

First auxiliary request

By changing the context of the "width of ridge" feature from its original "system claim" context and inserting it into a "capsule claim" context, the feature becomes ambiguous so the claim is unclear.

Second auxiliary request

The Board has the power to fully examine novelty and inventive step of this request. The subject matter of claim 1 is not new vis-à-vis D8. In the patent the word tapered has additional special meanings including semicircular and beam shaped. These are disclosed in D8.

The cited documents take away inventive step. Document D14 is highly relevant so should be admitted into the proceedings. The skilled person would combine

the teachings of D11 with D5 as they both relate to packaging. The same goes for the combination of D2 with D5. The combination would lead the skilled person to the subject matter of claim 1 in an obvious manner.

## **Reasons for the Decision**

### 1. Admissibility

1.1 Admissibility of the appellant-proprietor's appeal has not been contested, nor indeed is there any formal deficiency apparent that might warrant the rejection of the appeal as inadmissible under Rule 101 EPC. Therefore the appellant-proprietor's appeal is admissible.

1.2 The appellant-proprietor contests admissibility of the opponent's appeal, arguing that in first instance no objection was presented against the request on which the patent was maintained in amended form. Thus the opponent has not been adversely effected by the impugned decision. Moreover, so the argument goes, the arguments now presented in the appellant-opponent's appeal are outside the legal and factual framework of the opposition.

1.2.1 The impugned decision is appealable, Article 106 EPC, and the appellant-opponent filed a notice of appeal and reasoned grounds of appeal within the prescribed time limits, meeting the formal requirements of Article 108 and Rule 99 EPC.

1.2.2 The Board observes that the notice of opposition (form 2300E, page 2, point 5) states that opposition was against the patent in its entirety. Consistent with this, in the opposition notice itself, the appellant-

opponent argued that all claims dependent on claim 1, thus inter alia the subject matter of claim 1 as maintained - granted claims 2 to 4 and 14 - fail because claim 1 fails ("Nachdem der Anspruch 1 offensichtlich den Anforderungen des europäischen Patentübereinkommens nicht entspricht, fallen auch die abhängigen Ansprüche 2 bis 44 dahin"). Thus in the present case the notice of opposition leaves no doubt that the whole of the patent, including the subject matter of the appellant-proprietor's second auxiliary request, was opposed in the statement under Rule 76(1) (c) EPC (formerly Rule 55(c), EPC 1973), rather than the patent being opposed only to a certain extent (cf. G 9/91, reasons, point 8). By maintaining the patent in amended form the division did not accede to this request resulting in adverse effect for the appellant-opponent.

- 1.2.3 In this regard, in accordance with established jurisprudence of the Boards of Appeal, a party's silence regarding a request is not to be construed as giving consent to maintenance of the patent according to that request (see CLBA IV.E. 2.4.2 d and the cited decisions, in particular G 1/88).

Therefore, the fact that the then opponent withdrew their request for oral proceedings before the opposition division (see letter of 3 October 2014) and did not attend the oral proceedings cannot be construed as withdrawal of their request for revocation of the patent in its entirety, which indeed they reiterated in the above letter (cf. T 266/92, grounds, point 1).

The Board concludes that the appellant-opponent was adversely affected by the impugned decision within the

meaning of Article 107 EPC and in view of the above considerations, their appeal is admissible.

- 1.2.4 Furthermore, the appellant-opponent's case is not a "fresh case", that is one unconnected with the reasons given in the impugned decision. Both novelty and inventive step were raised in the opposition notice, and largely the same documents cited. The Opposition Division (see decision grounds pages 8 to 10) considered these issues in reaching their decision on the fifth auxiliary request in opposition proceedings (now second auxiliary request). The arguments presented in the appellant-opponent's statement of grounds address the reasoning of the decision. They do so in such a manner that the Board is able to understand the case being made by the appellant-opponent against the decision.

Therefore, in the Board's opinion, the appellant-opponent's appeal is within the same legal and factual framework as the Opposition Proceedings.

## 2. Background

The invention relates to a capsule, system and method for preparing a predetermined quantity of beverage suitable for consumption using an extractable product (see published patent specification, paragraph [0001]).

Such a capsule is used in a brewing device which commonly comprises an enclosing member for enclosing the capsule. In use a sealing engagement is provided between the capsule and the enclosing member, so as to prevent leaking of a liquid, e.g. water or the beverage. The sealing engagement is usually obtained by pressing the capsule and the enclosing member against

each other along a circumferential line of contact. (see specification paragraph [0002]). Sealing may be compromised if at the location of the sealing engagement, the enclosing member has irregularities, such as scratches, crevices, caked-on foul, protrusions or the like. The invention sets out to overcome this disadvantage (see specification, paragraphs [0004] and [0005]).

3. Main request, novelty of claim 1 vis-à-vis D8, Article 54(3) EPC
- 3.1 D8 falls within the terms of Article 153(3) EPC, and is post-published but claims an earlier priority so that it is prior art under Article 54(3) EPC and thus relevant for novelty only. It discloses (see abstract with figures 1b, 1,2, and 26 to 28) a capsule (hollow element) 1 for preparing a predetermined quantity of beverage suitable for consumption, namely coffee, thus it is using an extractable product. The capsule is suitable and intended for use in a beverage brewing device, see figures 6 and 7 for example. The brewing device comprises an enclosing member 8 for enclosing the capsule (see figure 1), the enclosing member having a leading edge 10 with a width.
- 3.2 The capsule (see for example figure 2) comprises: a cup, comprising a circumferential wall 2, a bottom 3 closing the circumferential wall at a first end, and a flange-like rim 6 extending outwardly of the circumferential wall at a second end opposite the bottom, and a lid 5 ("membrane d'extraction") that, in use, is connected to the flange-like rim 6, wherein the wall, bottom and lid enclose an inner space comprising the extractable product.

Certain embodiments of the capsule 1 have a plurality of ridges extending outwardly from the cup and arranged on the flange-like rim 6, namely on the side facing away from the lid (see figures 26 to 28). These figures show part of the capsules in cross section, where the rim and ridges are given the same hatching, thus shown as a single piece without interruption between them.

Therefore, the Board is of the opinion that D8 directly and unambiguously discloses the ridges as being integral with the flange-like rim.

- 3.3 In the Board's opinion, it is also implicit that, in use, at least one of the ridges abuts against at least a portion of the enclosing member, to form a sealing engagement between capsule and enclosing member. It is true that the description of these embodiments is sparse (page 5, last two lines). However, in the general description of the invention (pages 2 and 3), thickened portions ("surépaisseur") are described as being located on the rim of the capsule (page 2, lines 22 to 27), and the usual purpose of such thickened portions is to improve sealing tightness ("étanchité" see page 3, lines 8 to 18).

Given the position of the thickened ridges on the side of the rim which, in use, faces the leading edge of the closing member (cf. figures 1 and 2 for example), the Board considers it implicit that in use, at least one of the ridges will abut against at least a portion of the enclosing member, such that a sealing engagement between the capsule and the enclosing member is formed.

- 3.4 For reasons that will now be explained, the Board is also of the opinion that D8 (see figures 26 to 29) also

discloses the remaining features, of claim 1, namely that the ridges are:

- 1) substantially concentric circumferential ridges and
- 2) made of the same material as the cup.

3.4.1 To support their argument that the above features cannot be read from figures 26 to 29, the appellant-proprietor has prepared several drawings of hypothetical capsules (see grounds of appeal) that, if cut along certain diameters would have a cross section as shown, for example in figure 26, but which, when viewed in their entirety, do not have the features of claim 1. These drawings show capsules with ridges that for example split and rejoin, double back on themselves or are discontinuous.

3.4.2 It is true that figures 26 to 29 of D8 only show parts of the capsule in cross section, so they do not explicitly show how the ridges are arranged over the entire flange of the cup.

However, the skilled person interprets the prior art as they do the claims, that is with a mind willing to understand, not misunderstand and reading text and figures using normal reading skills. Thus they view the figures at face value and strive to meaningfully interpret what they see in the context of the whole disclosure on on the basis of usual drawing conventions with a view to visualising the capsule's complete shape. Where necessary they will use the description to help them.

3.4.3 D8 explains (see general description of the invention, page 3, lines 8 to 10) that, as a rule, a thickened part ("surépaisseur") aims to improve sealing. In this regard the Board notes that this is evidently not the



case in figure 32, which shows pyramid shaped thicker parts on the flange of a capsule. Unlike a continuous ridge, these are incapable of sealing. To communicate this information clearly the author of D8 has provided a clarifying perspective view of the flange, so that the skilled person immediately recognises that this embodiment is an exception to the above rule.

- 3.4.4 The absence of such a perspective view in figures 26, 27 and 28 can but mean that here the thickened parts require no additional explanation, but conform to the stated general rule that thickened areas are for sealing. Thus the skilled person interprets these ridges as continuing without gaps around the whole of the flange. Indeed, figures 26 to 28 show just this for the visible part of the flange, with the front sides of the ridges receding to the left, away from their cut-through parts, before disappearing behind the higher side wall of the capsule.
- 3.4.5 Furthermore, in the Board's view, it is not plausible that the shape of the ridges shown here could be anything but concentric rings.

In the Board's opinion, according to usual drawing convention, where a cross section of a rotationally symmetrical object is shown, a single cross sectional view will suffice, so only one is shown (whether complete or partial, cf. figures 26 to 28). With this in mind, where the skilled person sees a single such view they will extrapolate the complete rotationally symmetric shape in their mind's eye, thus directly and unambiguously arriving at a picture of the complete rotationally symmetric shape. If this were not so, such objects would need to have cross sections taken through

every conceivable cutting to communicate that they were rotationally symmetrical.

On the other hand, for non-symmetrical shapes or ones requiring more explanation, other views (e.g. a perspective view) will be needed to fully explain the shape. The skilled person sees this convention being followed in D8. For example, the spiral ridge on the side wall of figures 12 and 13, which is not rotationally symmetrical, is shown in perspective and from the side. By the same token and as already discussed, figure 32 presents a flange having more complex pyramid forms in two views. Therefore the skilled person interprets the single drawings of figures 26 to 28 as showing shapes that do not warrant more than a single (partial) cross section. In other words the skilled person directly and unambiguously derives the information that these show capsules having rotational symmetry, whereby the upwardly projecting ridges are separate seals that extend concentrically around the flange of the capsule.

- 3.4.6 In the Board's view, figures 26 to 28 also show the ridges to be made of the same material as the cup. Figures 26 to 28 show ridge and flange without any join line therebetween. Thus the skilled person interprets the parts to be integral and of the same material, not for example two materials joined together, where technical drawing convention would require showing an intermediate join line and different hatching. This is consistent with the general description of the capsules. In particular (see page 2, lines 22 to 27, page 3, lines 13 to 15) material ("matériau") for the capsule, thus the cup, its flange and thicker ridge parts, is referred to in the singular (le, du). Thus they can only be of a single material.

- 3.4.7 From the above, the Board concludes that D8 (in particular figures 26 to 28) discloses cups having all features of claim 1. Therefore, the Board confirms the finding of the Opposition Division (see decision, section bridging pages 5 and 6) that the subject matter of claim 1 lacks novelty vis-à-vis D8 and the main request must fail.
4. First auxiliary request, claim 1, clarity, Article 84 EPC
- 4.1 In the present case the division found the wording "the ridges each having an individual width that is less than the width of the leading edge of the enclosing member" introduced a lack of clarity (see decision, section bridging pages 7 and 8).
- 4.2 The Board agrees with the Opposition Division's finding of lack of clarity.
- 4.3 In accordance with established jurisprudence (see CLBA II.A.3.1 and the decisions cited therein) claims lack clarity if the exact distinctions which delimit the scope of protection cannot be learnt from them.
- 4.4 The Board first notes that this amendment is taken from granted claim 30, which defined (by back-reference to claim 28) a system comprising, inter alia, a capsule and a brewing device with an enclosing member. Thus there the "width" feature defined relative widths of two elements (capsule and enclosing member) of the claimed subject matter. In its new "capsule claim" context, the feature raises a new issue of compliance with Article 84 EPC, which the Board has the power to examine (cf. G 3/14, reasons 85).

In this respect, contrary to the appellant-proprietor's argument, it does make a difference that the claim defines a capsule, not a system comprising a coffee machine and a capsule. Whereas the feature in granted system claim 30 is used to define a system that can be directly compared to a prior art system, for example to establish novelty, this is not the case in the present claim. Here, just the capsule defined in the claim must be compared to a prior art capsule, not to a capsule in the context of a particular coffee machine, such as the Nespresso machine, as the appellant-proprietor has argued should be done.

4.5 In the present case (whether or not comparable to the approach in an infringement case), the issue of clarity boils down to whether comparison of the capsule according to claim 1 to a prior art capsule could unambiguously establish differing features. In the Board's opinion, it could not.

4.5.1 Firstly, the claim does not define any dimensions of the leading edge of the enclosing member of the coffee machine with which the claimed capsule is intended to be used, which could be used to unambiguously establish the presence or absence of the feature in a prior art capsule.

4.5.2 Secondly, in the Board's opinion, the leading edge of the enclosing member of coffee machines for capsules do not have standardised dimensions. Whether or not enclosing members of "Nespresso" machines might have standard dimensions, the claim does not specify such a machine, nor that it is indeed a coffee making machine, and may refer to other capsule machines for making beverages other than coffee of other dimensions .

In this regard, the Board notes that, contrary to the opinion of the appellant-proprietor, the present situation is different to that of T0455/92, which concerned a claim for a (straw) bail cover having dimensions defined by reference to the bail. According to that decision, bails have certain usual sizes (see points 2.2, 2.3 and 2.4 "üblicher Ballengrößen") so there the mere reference to the bail implied standard dimensions. As already explained, this is not the case for the width of the leading edge of an enclosing member of a coffee machine.

- 4.5.3 It follows that claim 1 neither explicitly nor implicitly defines the width of the leading edge of the enclosing member referred to in the claim.

Consequently, a certain capsule could be suitably dimensioned and intended for use with a coffee machine having an enclosing member whose leading edge was wider than the ridges of the capsule. However the same capsule could equally well be used with a coffee machine having a leading edge of the enclosing member that was for example of the same width as the ridges of the capsule. In both cases a seal between at least one ridge and the leading edge would be achievable.

Therefore, in this example it is ambiguous whether this hypothetical capsule has the features of the claim. Put differently, the widths of the ridges defined in the claim are ambiguous so the exact distinctions which delimit the scope of protection cannot be learnt from the claim itself.

- 4.5.4 Therefore, the Board confirms the findings of the Opposition Division (see impugned decision, section

bridging pages 7 and 8 regarding the present request, which was then the second auxiliary request) that claim 1 lacks clarity, so the first auxiliary request must fail.

5. Second auxiliary request

5.1 Power of the Board to fully examine the second auxiliary request

As already explained (see section 1.2.2), the Board takes the view that the original opposition was explicitly directed to all the claims of the granted patent.

Therefore, the situation in the present case is different from that referred to in G9/91, section 11 in which opposition was explicitly directed only to an independent claim and patentability to be examined if, *prima facie*, validity of dependent claims was in doubt.

Although in the present case the decision under appeal considers novelty only briefly, it is dealt with. Furthermore, the decision gives detailed reasoning on the issue of inventive step. On the basis of their analysis of these issues the Opposition Division decided to maintain the patent in amended form. Thus, rather than this reasoning constituting an *obiter dictum* it is the basis for the interlocutory decision and sets out the legal and factual framework of the impugned decision in respect of this request. Lastly, nothing in the decision suggests that the Opposition Division reached their conclusions based merely on a *prima facie* analysis.

In the light of the above and since the main purpose of the appeal proceedings is to give the losing party a possibility to challenge the decision of the opposition division on its merits (see G 9/91, point 18), the Board concludes that it is competent to examine this request and review the decision of the Opposition Division, as challenged in appeal, within the above legal and factual framework.

5.2 Claim 1, novelty vis-à-vis D8

5.2.1 D8 as Art 54(3) prior art is relevant for novelty only. The Board first notes that D8 can only take away the novelty of claim 1 if it discloses, inter alia, that the capsule has a plurality of ridges and that "a ridge of the plurality of ridges has a tapered...cross section". Regarding the latter feature, the meaning of "tapered" plays a decisive role.

5.2.2 In accordance with established jurisprudence, terms used in patent documents should be given their normal meaning in the relevant art, unless the description gives them a special meaning (see CLBA, II.A.6.3.3).

5.2.3 The normal meaning of the word "tapered" is: "diminishing gradually in breadth or thickness towards one extremity (originally, upward); becoming continuously narrower or more slender in one direction; tapering" (cf. Oxford English Dictionary on line). In the Board's opinion, the description (cf. published specification, paragraph [0014]) does not give a different or additional special meaning to the word tapered as the appellant-opponent has argued.

Paragraph [0014] opens with the words "In an embodiment, a ridge of the plurality of ridges has a

tapered, e.g. a substantially triangular, cross section". The paragraph continues by explaining that this can apply to all ridges and states an advantage of this shape. The paragraph ends with the sentence "Other cross sections, such as a semicircular cross section or a beam-shaped cross section, possibly with rounded corners, are conceivable too".

In the Board's view, the wording "other cross sections..." makes clear that the ridges of the last sentence are "other" than, that is different from, the tapered ridges of the first two sentences of the paragraph. Therefore, although the author of this paragraph sees the variously shaped ridges as relating to one general embodiment (cf. the first sentence), different and distinctly shaped ridges are described in paragraph [0014] as alternatives falling within this embodiment. Therefore, the paragraph does not define that "tapered ridges" has, for the purpose of the patent, the additional special meaning of semicircular, beam shaped or a shape having rounded corners, as the appellant-opponent has argued. On the contrary, the paragraph makes clear that the latter shapes are not tapered. Therefore, the Board interprets the word "tapered" in claim 1 giving it its normal meaning (see above).

- 5.2.4 Bearing in mind this normal meaning of "tapered", the Board considers that D8 does not directly and unambiguously disclose a capsule as claimed. In particular, figure 26 shows two ridges each with parallel sides. Therefore the ridges do not gradually diminishing in thickness towards one extremity, so they are not tapered.



5.2.5 By the same token, the ridges on the flange as shown in figure 27, and the outermost ridges on the flange of figure 28 have the same parallel sided shape as those of figure 26, so these are also not tapered. With regard to figure 28, a small intermediate ridge is also shown. In the Board's opinion, this is also not tapered. If anything this intermediate ridge has a semi-circular cross section, which, as the patent confirms (see specification, paragraph [0014]), is not tapered. The sides of this round profiled ridge rise steeply near the base before flattening off at the top. Thus, with its flattened top, the ridge has no extremity towards which its sides can narrow. Nor do the sides of the ridge, following as they do the arc of a circle, become continuously narrower. Thus none of the ridges of figure 28 are tapered.

5.2.6 Finally, the Board is of the opinion that figure 20, in conjunction with the general description of the invention of D8 (see page 3, lines 28 to 32), does not directly and unambiguously disclose more than one ridge, whereby one is tapered. Figure 20 shows a single tapered ridge. In the Board's view, the information in the general description that one or more ridges on the flange can be used for other purposes, such as facilitating the centring of the capsule is not a direct and unambiguous disclosure that the skilled person should interpret the capsule of figure 20 as having two ridges, rather than the one shown.

In this regard the Board sees no reason as to why the skilled person should interpret this generic statement as directly and without ambiguity applying to figure 20 of the 38 figures. All the more so, since (see last two lines of page 5) D8 informs the skilled person that figures 19 to 32 represent various embodiments of inter

alia thickenings (ridges) on the flange, not incomplete embodiments which may not look as shown.

5.2.7 The Board concludes that D8 does not directly and unambiguously disclose a capsule having a plurality of ridges, one of which being tapered, as the claim requires. Therefore it cannot take away the novelty of claim 1.

5.3 Admissibility of document D14

5.3.1 Document D14 was filed with the grounds of appeal, so outside the opposition period. It is thus late filed and its admittance subject to the discretion afforded by Article 114(2) EPC and Article 12(4) RPBA. In exercising their discretion the Boards consider, among other factors, whether or not late filing is justified by developments in proceedings, and relevance (cf. CLBA, IV.C.1.3.7 and IV.C.1.3.14).

5.3.2 In the present case the second auxiliary request was filed on 12 September 2014, so the appellant-opponent was made aware of this request one month prior to the oral proceedings. Furthermore, since claim 1 is based solely on a combination of granted claims, the appellant-opponent was, or at least should have been, aware that this subject matter represented a potential fall-back position for the patent proprietor at the time the opposition was filed. Thus, in the Board's view, the appellant-opponent could, and indeed should have timely filed document D14 during the course of the opposition proceedings. Therefore, there is no justification for filing D14 for the first time in appeal proceedings.

5.3.3 Furthermore, the Board sees no reason why, *prima facie*, D14 would be more relevant than documents already on file. The appellant-opponent has argued that its particular relevance lies in its disclosing a coffee capsule with a tapered sealing ridge (see D14, page 7, lines 4 to 12 and figures 5 and 7). However, document D9 already discloses these features (see for example abstract and column 3, lines 49 to 53 "annular, cuspidal, raised, concentric elements 332" with figures 10 to 12). Therefore, the Board concludes that D14 is not more relevant than documents already on file.

5.3.4 For all these reasons the Board decided to exercise their discretion under Article 114(2) EPC with Rule 12(4) RPBA to not admit document D14 into the proceedings.

5.4 Claim 1, inventive step starting from D11

5.4.1 D11 (see abstract, page 3, lines 5 to 30, page 7, line 35 to page 8, line 33 and figures 1 to 3) discloses a capsule (portion packaging 1) having, inter alia, a cup with a circumferential wall 13, bottom 12, a flange like rim extending outwardly of the circumferential wall and a lid 5 connected in use to the flange like rim. D11 therefore discloses all features of the preamble of claim 1. It also discloses a sealing element 3, in the form of a ridge made by the rolled over edge of the flange, thus of the same material as the flange and integral therewith. However, there is only one ridge, so D11 does not disclose plural ridges arranged on the flange like rim.

5.4.2 Moreover, contrary to the appellant-opponent's view, the Board holds that the ridge of D11 does not have a tapered cross section as claimed. Rather, it has an

elliptical or oval cross section (see page 3, lines 14 to 15, page 7, lines 36 to 39 with figure 1). Recalling the normal meaning of tapered (diminishing gradually in breadth or thickness towards one extremity), oval or elliptical shapes are different. The latter rise steeply at first, then flatten off at the top, so their widths do not diminish gradually towards one extremity (similar to a semicircular cross section, cf. patent paragraph [0014] again). Therefore the ridge of D11 is not tapered.

Thus the subject matter of claim 1 differs from D11 in that the capsule has a plurality of ridges and in that at least one of them has a tapered cross section.

- 5.4.3 According to the patent, the technical effect of, in particular, having a ridge of tapered cross section is that the ridge forms a seal that easily follows contours of irregularities on the enclosing member, which can be due to wear, degradation or fouling as the brewing device ages (cf. published patent specification, column 1, lines 25 to 30 and column 3, lines 24 to 28).

Therefore, in the Board's view, the objective technical problem can be expressed as how to improve a capsule, such as that of D11, so that it better seals against irregularities on an enclosing member.

- 5.4.4 In the Board's opinion, the skilled person, a mechanical engineer specialised in packaging, particularly capsules for beverages, would not look to a solution to this problem in D5 because it lies in a different technical field. D5 discloses a bottle closure, for carbonated drinks (see D5, paragraph [0001]). Although beverage capsules and drinks

containers are both packages, they perform very different functions. The one contains dry material, and is designed to be pierced in a beverage making machine, the other seals in liquid with a cap removable by a user.

In more detail, the beverage capsule 1 of D11 must seal (see page 9, lines 6 to 20 with figures 1 and 2 for example) to an enclosing member 2 of a beverage making machine, which is pushed axially onto the capsule (page 10, lines 1 to 7). In contrast thereto the closure member of D5 (see paragraphs [0001] and [0005], [0038] and figures 2 to 5) is a bottle cap having a sealing plug 8 which fits into the neck of the bottle and is guided by a screw threaded outer cap 4, so seals to the bottle neck as the cap rotates. Thus, in view of the disparity of these two devices and how they seal, the Board holds that the skilled person would not seek a solution to a problem related to a capsule (such as that of D11) in a document related to a bottle cap (as in D5).

This is all the more true in the present case, as the objective technical problem relates to sealing when there are irregularities on the enclosing member. D5 offers no solution to sealing a surface having irregularities, even in the field of bottle caps. In particular, although D5 (see paragraph [0011] with figure 1, right hand side of the drawing) discloses tapered sealing ridges (outlying relative to the sealing plug 8), they are specifically arranged to seal around the curved lip of the bottle neck, with its essentially smooth surface. The ridges splay and slide either side of the top of the wall as the bottle cap is precisely guided over the neck by the sealing plug 8

inside the bottle neck and screw threaded outer part 4 (cf. figures 2 to 5).

5.4.5 Similar arguments apply to the combination of D11 with D6. D6, see figures, similarly discloses a screw top with tapering thread 4,5 to provide seal between lid 2 and container 1.

5.4.6 Therefore, when tasked with the above objective technical problem, the skilled person would not, as a matter of obviousness, modify the ridge of the capsule of D11 by making it tapered, in the light of D5 or D6.

5.4.7 The Board reaches an analogous conclusion when considering D11 with D9 or D7.

D9 discloses (see abstract and column 3, lines 43 to 53 with figures 3 to 6 and 12) containers 230 and 330, for use with a beverage machine. The containers have covers 231, 331 respectively. As shown in figures 10 to 12, the lid 331 for example is provided with cuspidal, in other words tapered, elements 332.

5.4.8 However, nothing in D9 suggests these are for sealing to a surface having irregularities. Rather, they fit to a water supply head 40 for separately supplying hot and cold water to the container (see column 3, lines 49 to 53) or completely prevent cold water from entering the container 230, cf. column 4, lines 1 to 5). Therefore D9 offers no solution to the objective technical problem, so the skilled person would not, as a matter of obviousness, combine the teachings of D11 and D9.

5.4.9 In D7 similarly, there is no indication that the bellow shape wall 9c of coffee container 1, which provides a vertical seal within holder 8, would serve to avoid

irregularities. In any case such a bellow shape constitutes a rather different sealing mechanism to that of the claimed tapered ridges on a flange like rim.

5.4.10 In the light of the foregoing, the Board holds that the skilled person would not, as a matter of obviousness, modify the capsule of D11 to arrive at the feature of a seal with a tapered cross section, whether or not it might be obvious for the skilled person to modify D11 to provide a plurality of seals from their common general knowledge or from D5, D6, D7 or D9, as the appellant-opponent has argued.

5.5 Claim 1, inventive step starting from D2

5.5.1 It is not in dispute that D2 (see abstract and figures 3 and 4) discloses a capsule according to the preamble of claim 1. A sealing ring 13 is provided on the side of the flange facing away from the capsule's lid 16.

5.5.2 However, in the Board's view, this ridge is not tapered. D2 describes (page 9, lines 27 to 29) the seal 13 as a "sealing edge". In the Board's view "edge" as used here, simply identifies the relevant part as a "boundary" of the capsule (cf. Oxford English Dictionary, OED on line), just as D2 identifies the outer rim 12 as an edge (page 8, line 29 with figure 3, reference 12). Thus the sealing edge is the boundary of the capsule along which it is sealed. It may be that the edge of a cutting blade, such as a knife is tapered, but there is no indication in D2 whatsoever that the edge 13 is such an edge. In this regard edge 12 is clearly shown to be of rectangular cross-section.

5.5.3 Nor, in the Board's opinion, is it directly and unambiguously disclosed in figures 3 and 4 that the element 13 is tapered. The element 13 is a narrow protrusion on the underside of the flange 12. Its inner side recedes behind the wall 11 on both sides of the cup, so it is a circumferential ridge. The small size of the ridge 13 in figures 3 and 4 (in the drawings its width appears to be less than 1 mm), and the quality of the drawings, make it impossible for the skilled person to unambiguously identify its cross sectional shape. In the Board's view, its curved sides could be concentric and the lower side flat, in other words its cross section rectangular, or rounded giving a semi-circular cross-section. Either interpretation would be consistent with figure 4, which shows the underside of the capsule and depicts the ridge 13 as two concentric circles. The resolution of figure 3 is furthermore so poor, that even upon magnification it would not conclusively show the edge to be tapered.

Therefore, D2 does not (directly and unambiguously) disclose that the sealing ridge 13 has a tapered cross section.

5.5.4 Starting from D2, whether or not the capsule of D2 contains an extractable product, the differing claim features vis-à-vis D2 are at least the same as those identified above vis-à-vis D11 (plurality of ridges whereby at least one is tapered). Therefore, the objective technical problem associated with these differences is the same as for D11 (improve a capsule, so that it better seals against irregularities on an enclosing member).

5.5.5 In the Board's view, tasked with this objective technical problem, D2 combined with, D5, D9, common



general knowledge, D6 or D7 would not take away inventive step of claim 1 for the same reasons as apply when starting from D11 in combination with the same documents (see section 5.4).

6. From the above, the arguments of neither appellant have convinced the Board that the impugned decision was wrong in maintaining the patent in amended form according to the present second auxiliary request. For these reasons, both appeals must fail and the appellant-proprietor's lower ranking requests need not be considered.

**Order**

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

The appeals are dismissed.

The Registrar:

The Chairman:



D. Hampe

A. de Vries

Decision electronically authenticated