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**Datasheet for the decision
of 19 June 2019**

Case Number: T 0791/15 - 3.2.07

Application Number: 10166034.8

Publication Number: 2289820

IPC: B65D85/804, A47J31/36

Language of the proceedings: EN

Title of invention:

Capsule with relief-shaped sealing member

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponents:

Koninklijke Douwe Egberts BV
Migros-Genossenschafts-Bund
MacLean, Martin Robert
CURELL SUÑOL S.L.P.

Headword:

Relevant legal provisions:

EPC Art. 100(c), 76(1), 123(2), 83, 84, 52(1), 56
RPBA Art. 12(4), 13(1), 13(3)

Keyword:

Grounds for opposition - subject-matter extends beyond content of earlier application (yes)

Amendments - auxiliary requests I, II, II', III, III', IV to VIII, VIII'' - allowable (no) - auxiliary request VIII''' - allowable (yes)

Late-filed auxiliary request VIII' - admitted (no)

Late-filed auxiliary request VIII''' - admitted (yes)

Late-filed document - admitted (yes)

Sufficiency of disclosure - auxiliary request VIII''' (yes)

Clarity - auxiliary request VIII''' (yes)

Inventive step - auxiliary request VIII''' (yes)

Decisions cited:

Catchword:



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Case Number: T 0791/15 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 19 June 2019

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
6 March 2015 concerning maintenance of the
European Patent No. 2289820 in amended form.**

Composition of the Board:

Chairman I. Beckedorf
Members: K. Poalas
G. Patton

Summary of Facts and Submissions

- I. The patent proprietor (appellant I) and opponent 04 (appellant II) lodged each an appeal in the prescribed form and time limit against the interlocutory decision of the opposition division maintaining European patent No. 2 289 820 in amended form.
- II. Four oppositions had been filed against the patent as a whole based on Articles 100(a) EPC (lack of novelty and inventive step) and 100(c) EPC (unallowable amendments).
- III. The opposition division found that the subject-matter of the independent claim 1 of the then auxiliary request II meets the requirements of the EPC.
- IV. Opponents 01, 02 and 03 withdrew their oppositions with their corresponding letters dated 27 November 2014, 30 January 2015 and 2 September 2015. Hence, they ceased their status as parties to the present appeal proceedings.
- V. The Board issued a communication pursuant to Article 15(1) RPBA with its preliminary opinion on the appeal case. According to the Board's review of the decision under appeal and its assessment of the parties' written submissions during the appeal proceedings, the patent could be maintained in amended form of the basis of auxiliary request IX filed with the statement setting out the grounds of appeal.
- VI. Oral proceedings before the Board took place on 19 June 2019.

The patent proprietor finally 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 in amended form on
the basis of one of the sets of claims filed as
auxiliary requests I, II, II', III, III' and IV to
VIII with the statement setting out the grounds of
appeal dated 6 July 2015,
VIII', VIII'', VIII''', new X filed during the
oral proceedings,
XI to XIV filed with the statement setting out the
grounds of appeal dated 6 July 2015, and
new auxiliary request XV filed during the oral
proceedings.

Opponent 04 finally requested

that the decision under appeal be set aside
and

that the European patent 2 289 820 be revoked.

For further details from the oral proceedings, in
particular the matters discussed with the parties and
the parties' statements on procedural matters,
reference is made to the minutes thereof.

The decision was given at the end of the oral
proceedings.

VII. The following documents are referred to in the present
decision:

A2 : Parent application EP 09010132.0;

A4 : Originally filed application EP10166034.8;
D16: WO 2007/113100 A;
D21: US 4 775 048 A;
D30: DE 20 2004 009 954 U1.

VIII. **Feature analysis of claim 1 of the main request**, i.e according to the patent as granted (see impugned decision, under point II.1.1):

"a) A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device,
b) the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8),
c) said sealing member having, in a radial cross sectional view, at least one protrusion
d) the at least one protrusion being oriented perpendicularly relative to the flange-like rim portion (2) or slightly inclined at an angle lower than 45 degrees,
e) the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall
f) so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device,
g) the sealing member (8) being distanced from the outer edge of the rim portion (2),
h) wherein the height (h1) of the sealing member (8) is within the range of 0.8 to 2mm."

Claim 1 of auxiliary request I reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device, the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8) having, in a radial cross sectional view, at least one protrusion which is oriented perpendicularly relative to the flange-like rim portion (2) or slightly inclined at an angle lower than 45 degrees **with respect to a rotational axis (Z) of the capsule**, the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device, the sealing member (8) being distanced from the outer edge of the rim portion (2), **wherein the sealing member (8) is designed to be compressed from a first height (h1) to a second height (h2)**, and wherein the height (h1) of the sealing member (8) is within the range of 0.8 to 2 mm".

Claim 1 of auxiliary request II reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device, the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8) having, in a radial cross sectional view, at least one protrusion which is oriented perpendicularly relative to the flange-like rim portion (2) or slightly inclined at an angle lower than 45 degrees, the sealing member (8)

being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device, the sealing member (8) being distanced from the outer edge of the rim portion (2), **wherein the sealing member (8) is designed to be compressed from a first hight (h1) to a second height (h2)**, wherein the height (h1) of the sealing member (8) is within the range of 0.8 to 2 mm, **and wherein the sealing member comprises at least two concentrically arranged lips distanced radially to one another**".

Claim 1 of auxiliary request II' reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device, the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8) having, in a radial cross sectional view, at least one protrusion which is oriented perpendicularly relative to the flange-like rim portion (2) or slightly inclined at an angle lower than 45 degrees **with respect to a rotational axis (Z) of the capsule**, the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device, the sealing member (8) being distanced from the outer edge of the rim portion (2), **wherein the sealing member (8) is designed to be compressed from a first hight (h1) to a second height**

(h2), wherein the height (h1) of the sealing member (8) is within the range of 0.8 to 2 mm, **and wherein the sealing member comprises at least two concentrically arranged lips distanced radially to one another**".

Claim 1 of auxiliary request III reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device, the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8) having, in a radial cross sectional view, at least one protrusion which is oriented perpendicularly relative to the flange-like rim portion (2) or slightly inclined at an angle lower than 45 degrees, the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device, the sealing member (8) being distanced from the outer edge of the rim portion (2), **wherein the sealing member (8) is designed to be compressed from a first height (h1) to a second height (h2)**, wherein the height (h1) of the sealing member (8) is within the range of 0.8 to 2 mm, **and wherein the sealing member comprises a multitude of concentrically arranged lips distanced radially to one another**".

Claim 1 of auxiliary request III' reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device, the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8) having, in a radial cross sectional view, at least one protrusion which is oriented perpendicularly relative to the flange-like rim portion (2) or slightly inclined at an angle lower than 45 degrees **with respect to a rotational axis (Z) of the capsule**, the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device, the sealing member (8) being distanced from the outer edge of the rim portion (2), **wherein the sealing member (8) is designed to be compressed from a first height (h1) to a second height (h2)**, wherein the height (h1) of the sealing member (8) is within the range of 0.8 to 2 mm, **and wherein the sealing member comprises a multitude of concentrically arranged lips distanced radially to one another**".

Claim 1 of auxiliary request IV reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device, the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8) having, in a radial cross sectional view, at least one protrusion which is oriented perpendicularly relative to the

flange-like rim portion (2) ~~or slightly inclined at an angle lower than 45 degrees~~, the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device, the sealing member (8) being distanced from the outer edge of the rim portion (2), **wherein the sealing member (8) is designed to be compressed from a first hight (h1) to a second height (h2)**, and wherein the height (h1) of the sealing member (8) is within the range of 0.8 to 2 mm".

Claim 1 of auxiliary request V reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device, the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8) having, in a radial cross sectional view, at least one protrusion which is oriented perpendicularly relative to the flange-like rim portion (2) ~~or slightly inclined at an angle lower than 45 degrees~~, the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device, the sealing member (8) being distanced from the outer edge of the rim portion (2), **wherein the sealing member (8) is designed to be compressed from a first hight (h1) to a second height (h2)**, wherein the height (h1) of the sealing member (8)

is within the range of 0.8 to 2 mm, **and wherein the sealing member comprises at least two lips distanced radially to one another**".

Claim 1 of auxiliary request VI reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device, the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8) having, in a radial cross sectional view, at least one protrusion which is oriented perpendicularly relative to the flange-like rim portion (2) ~~or slightly inclined at an angle lower than 45 degrees~~, the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device, the sealing member (8) being distanced from the outer edge of the rim portion (2), **wherein the sealing member (8) is designed to be compressed from a first hight (h1) to a second height (h2)**, wherein the height (h1) of the sealing member (8) is within the range of 0.8 to 2 mm, **and wherein the sealing member comprises at least two concentrically arranged lips distanced radially to one another**".

Claim 1 of auxiliary request VII reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device, the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8) having, in a radial cross sectional view, at least one protrusion which is oriented perpendicularly relative to the flange-like rim portion (2) ~~or slightly inclined at an angle lower than 45 degrees~~, the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device, the sealing member (8) being distanced from the outer edge of the rim portion (2), **wherein the sealing member (8) is designed to be compressed from a first height (h1) to a second height (h2)**, wherein the height (h1) of the sealing member (8) is within the range of 0.8 to 2 mm, **and wherein the sealing member comprises a multitude of concentrically arranged lips distanced radially to one another**".

Feature analysis of claim 1 of auxiliary request VIII corresponding to the feature analysis of claim 1 of the main request (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

- "a) A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device,
- b) the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8),
- c) said sealing member having, in a radial cross

sectional view, at least one protrusion

d) the at least one protrusion being oriented perpendicularly relative to the flange-like rim portion (2) or slightly inclined at an angle lower than 45 degrees **with respect to a rotational axis (Z) of the capsule,**

e) the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall

f) so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device,

g) the sealing member (8) being distanced from the outer edge of the rim portion (2),

g1) **wherein the sealing member (8) comprises at least two concentrically arranged lips (8a) distanced radially to one another, whereby the lips (8a) are protruding from an upper surface (2a) of the rim portion (2) of the capsule (10) to a height (h1),**

h) wherein the height (h1) **of the sealing lips (8a)** of the sealing member (8) is within the range of 0.8 to 2 mm,

h1) **and wherein the sealing lips (8a) are arranged at a sealing area (A) which is circumferentially arranged to a sidewall (9) of the capsule body portion (1) at a distance (d)".**

Feature analysis of claim 1 of auxiliary request VIII' corresponding to the feature analysis of claim 1 of the main request (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

"a) A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage

production device,

b) the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a sealing member (8),

c) the sealing member having, in a radial cross sectional view, ~~at least one protrusion which is at~~ **least two concentrically arranged sealing lips (8a)**

d) said lips being **distanced radially to one another and** oriented perpendicularly **or slightly inclined at an angle lower than 45 degrees** relative to the flange-like rim portion (2) ~~or slightly inclined at an angle lower than 45 degrees,~~

e) the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall

f) so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device,

g) the sealing member (8) being distanced from the outer edge of the rim portion (2),

g1) **whereby the lips (8a) are protruding from upper surface (2a) of the rim portion (2) of the capsule (10) to a height (h1),**

h) wherein the height (h1) of the sealing lips (8a) of the sealing member (8) is within the range of 0.8 to 2 mm, **and**

h1) **wherein the sealing lips (8a) are arranged at a sealing area (A) which is circumferentially arranged to a sidewall (9) of the capsule body portion (1) at a distance (d)".**

Claim 11 of auxiliary request VIII' reads as follows

(in bold the features introduced and in strike-through the features deleted with respect to claim 11 of the main request, emphasis added by the Board):

"A beverage production system, comprising a capsule according to any of the preceding claims, and a beverage production device for providing ~~heater~~**heated** and pressurized liquid to the interior of the capsule and being designed for accommodating the capsule in a brewing chamber and, wherein the protrusion is deformed when the capsule is put in sealing engagement with an enclosing member (23) of the beverage production device."

Claim 11 of auxiliary request VIII'' corresponding to claim 11 of the main request, i.e. of the patent as granted, reads as follows:

"A beverage production system, comprising a capsule according to any of the preceding claims, and a beverage production device for providing heater and pressurized liquid to the interior of the capsule and being designed for accommodating the capsule in a brewing chamber and, wherein the protrusion is deformed when the capsule is put in sealing engagement with an enclosing member (23) of the beverage production device."

Feature analysis of the single independent claim 1 of auxiliary request VIII'' corresponding to the feature analysis of claim 1 of the main request (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request, emphasis added by the Board):

- "a) A capsule (10) for containing beverage ingredients, the capsule being designed for insertion in a beverage production device,
- b) the capsule comprising a cup-like body portion (1), a flange-like rim portion (2), a delivery wall and a

sealing member (8),
c) the sealing member having, in a radial cross sectional view, ~~at least one protrusion which is at~~ **least two concentrically arranged sealing lips (8a)**
d) said lips being **distanced radially to one another and** oriented perpendicularly relative to the flange-like rim portion (2),
e) the sealing member (8) being arranged at the rim portion (2) oriented on the side opposite to the side of the delivery wall
f) so that it is deformed when the capsule is put in sealing engagement with an enclosing member of the beverage production device,
g) the sealing member (8) being distanced from the outer edge of the rim portion (2),
g1) **whereby the sealing lips (8a) are protruding from upper surface (2a) of the rim portion (2) of the capsule (10) to a height (h1),**
h) wherein the height (h1) of the sealing lips (8a) of the sealing member (8) is within the range of 0.8 to 2 mm, **and**
h1) **wherein the sealing lips (8a) are arranged at a sealing area (A) which is circumferentially arranged to a sidewall (9) of the capsule body portion (1) at a distance (d)".**

IX. The patent proprietor's essential lines of arguments in the appeal proceedings, as far as they are relevant for this decision, can be summarised as follows and are dealt with in detail in the Reasons for the Decision:

The figures of A2 do not disclose the information that feature g) of claim 1 of the main request is inextricably connected to the features that the sealing member in the form of a plurality of concentrically arranged sealing lips, said lips being distanced from

the sidewall of the capsule body portion and having a rectangular cross section.

Therefore, claims 1 of the main request and of the auxiliary requests I, II, II', III, III' and IV to VII do not violate the requirements of Article 76(1) EPC.

In view of the information disclosed in the first paragraph on page 5 and the second paragraph on page 12 of A4, the skilled person based on its general technical knowledge would immediately understand that the second alternative of feature d) of claim 1 of auxiliary request VIII meets the requirements of Article 123(2) EPC.

Auxiliary request VIII' although being filed late during the oral proceedings before the Board, should be admitted into the proceedings since the filing of said request was the patent proprietor's reaction to the discussion of the case during the oral proceedings and claim 1 of said request is *prima facie* allowable.

Given that claim 1 of auxiliary request VIII'' is *prima facie* allowable and claim 11 of said auxiliary request comprising an obvious error does not violate the requirements of Article 76(1) EPC, auxiliary request VIII'', although being filed late during the oral proceedings before the Board, should be admitted into the proceedings since the filing of said request was the patent proprietor's reaction to the discussion of the case during the oral proceedings.

Given that claim 1, the sole independent claim of auxiliary request VIII''', is identical with claim 1 of the set of claims upheld by the opposition division, said auxiliary request, although being filed late during the oral proceedings before the Board, should be

admitted into the appeal proceedings. The appeal of opponent 04 was directed against said claim. Therefore, an auxiliary request disclosing as sole independent claim claim 1 of the request upheld by the opposition division cannot take by surprise neither opponent 04 nor the Board. It further does not raise issues which the Board or opponent 04 cannot deal with without adjournment of the oral proceedings.

D30 filed for the first time during the appeal proceedings should not be admitted into the proceedings.

Claim 1 of auxiliary request VIII''' meets the requirements of Articles 123(2), 83, 84, 52(1) and 56 EPC.

- X. The opponent's essential lines of arguments in the appeal proceedings, as far as they are relevant for this decision, can be summarised as follows and are dealt with in detail in the Reasons for the Decision:

The figures of A2 disclose the information that feature g) of claim 1 of the main request is inextricably connected to the features that the sealing member in the form of a plurality of concentrically arranged sealing lips, said lips being distanced from the sidewall of the capsule body portion and having a rectangular cross section.

Therefore, claims 1 of the main request and of the auxiliary requests I, II, II', III, III' and IV to VII violate the requirements of Article 76(1) EPC.

There is no basis to be found in A4 for the second alternative of feature d) of claim 1 of auxiliary request VIII, contrary to the requirements of Article 123(2) EPC.

Auxiliary request VIII', not being *prima facie* allowable and being filed late during the oral proceedings before the Board, should not be admitted into the proceedings.

Given that claim 11 of auxiliary request VIII'' is not *prima facie* allowable and that auxiliary request VIII'' was filed late during the oral proceedings before the Board, said request should not be admitted into the proceedings.

Given auxiliary request VIII''' was filed late during the oral proceedings before the Board, said request should not be admitted into the appeal proceedings. D30 being a relevant document filed with the opponent's 04 statement setting out the grounds of appeal should be admitted into the proceedings.

Claim 1 of auxiliary request VIII'''' does not meet the requirements of Articles 123(2), 83, 84, 52(1) and 56 EPC.

Reasons for the Decision

1. *Claim 1 of the main request - unallowable amendments, Articles 100(c) and 76(1) EPC*
- 1.1 It is undisputed that no literal basis is to be found in A2 for feature g) of claim 1.
- 1.2 It is therefore common ground that only figures 1a to 3 of A2 may provide support for this feature introduced in claim 1 of the patent as granted.

- 1.3 It is further undisputed that also other structural features are depicted in said figures.
- 1.4 The question at stake is therefore, whether the singling out of feature g) from the other structural features of the capsule depicted in said figures generates an unallowable intermediate generalisation.
- 1.5 The Board agrees with the arguments of opponent 04 that the sealing member depicted in said figures is in the form of a plurality of sealing lips (**seven** in the embodiment of figure 1b, **four** in the embodiment of figure 2 and **eight** in the embodiment of figure 3). In addition to that, in said figures 1a to 3 the sealing member is depicted distanced not only from the outer edge of the rim portion but also from the sidewall of the capsule body portion.
- 1.6 However, the patent proprietor did not introduce the above-mentioned features into claim 1 and isolated the feature regarding the position of the sealing member relative to the outer edge of the rim portion from said features. This generates an unallowable intermediate generalisation which contravenes the requirements of Article 76(1) EPC.
- 1.7 The patent proprietor argues that A2 discloses on page 11, lines 21 - 23 that the sealing member 8 according to the present invention comprises at least one protrusion. This would be enough to solve the overall problem defined in page 3 of A2 to improve sealing. Therefore, A2 clearly reveals that the sealing member 8 as shown in figures 1a and 1b may as well comprise at least one protrusion. There is no hint in A2 that feature g) is inextricably linked to the feature according to which the sealing member comprises a

plurality of sealing lips. It argues further, that the sealing member being distanced from the sidewall of the capsule is not inextricably linked to the added feature g) and that such limitation appears to be already present in claim 1 as it relates to a protrusion that is oriented perpendicular or slightly inclined to the flange-like rim. As per definition, a protrusion has to be always distanced from the sidewall of the capsule.

1.8 The Board does not agree. Notwithstanding that on page 11, lines 21 - 23 of A2 is disclosed that the sealing member 8 **according to the present invention** comprises at least one protrusion, fact is that the sealing member is **depicted in figures 1a and 1b as well as in figures 2 and 3**, which are intended to be the base for feature g), as being distanced from both the outer edge of the rim portion and the sidewall of the capsule body portion and having a plurality of concentrically arranged lips (see hereto also page 12, lines 5 to 6). Accordingly, for the sealing member depicted in said figures as being distanced from the outer edge of the rim portion it is further mandatory, that said sealing member is in the form of a plurality of concentrically arranged lips and it cannot be in the form of a single ("at least one") protrusion, as argued by the patent proprietor.

1.9 Furthermore, contrary to the patent proprietor's argument, that as *per definitionem*, a protrusion has to be always distanced from the sidewall of the capsule, the Board considers that for example by a conical side wall of the capsule a rectangular or conical protrusion may very well have at the level of the rim portion contact to the corresponding edge of the side wall of the capsule having thereby no distance to the side wall

of the capsule.

1.10 Moreover, given that said figures show the sealing member in the form of a plurality of concentrically arranged sealing lips and being distanced from both the outer edge of the rim portion (feature g)) and the side wall of the capsule the Board considers said features as being inextricably connected to each other in order to obtain the effect of sealing. The singling out of the feature g) from these other structural features depicted in said figures leads to the new teaching that this feature from the disclosed embodiments on its own would enable to provide the sealing function, i.e. there would exist a reason for its selection. The reason provided by the patent proprietor that only feature g) would appear to be necessary in view of figures 2 and 3 in order to provide suitable engagement with the beverage preparation device so as to improve sealing, is not convincing since this engagement depends *inter alia* on the shape of the circumferential wall 24 of the enclosing member 23 of the beverage preparation device. Hence, the arbitrary selection of feature g) alone from the figures of A2 generates an unallowable intermediate generalisation.

1.11 As far as it concerns the opponent's 04 argument that the figures of A2 show that the sealing lips have a rectangular cross section the Board cannot see how such a rectangular shape for the lips can be derived from said figures, since the scale used in figures 1a, 1b and 2 does not allow to recognise the precise cross-section of the lips and the plurality of the lips depicted in figure 3 are at a compressed stage, not allowing thereby the skilled person to recognise the precise cross-section of said lips at a compressed or,

furthermore, at an uncompressed stage.

1.12 For the reasons mentioned under points 1.1 to 1.10 above the requirements of Article 76(1) EPC are not met and the ground for opposition according to Article 100(c) EPC holds against the patent as granted.

2. *Claims 1 of auxiliary requests I, II, II', III, III' and IV to VII - unallowable amendments, Article 76(1) EPC*

2.1 Given that none of the claims 1 of the auxiliary requests I, II, II', III, III' and IV to VII discloses the sealing member in the form of a plurality of concentrically arranged sealing lips, said lips being distanced from both the outer edge of the rim portion and the sidewall of the capsule body portion (see point 1.10 above), said claims are also not allowable in view of the requirements of Article 76(1) EPC.

3. *Claim 1 of auxiliary request VIII - unallowable amendments, Article 123(2) EPC*

3.1 It is undisputed that no literal basis is to be found in A4 for the second alternative of feature d) ("at least one protrusion which is oriented ... slightly inclined at an angle lower than 45 degrees **with respect to a rotational axis (Z) of the capsule**") introduced into claim 1.

3.2 The only reference to an **inclination angle range** having an **upper limit of 45 degrees** for a sealing member in form of **a** (at least one) **protrusion** is to be found in the first paragraph on page 5 of A4. This inclination angle range is given relative to the **flange-like rim**

portion.

- 3.3 According to the second paragraph of page 12 of A4 a sealing member in form of a multitude of concentrically arranged lips is inclined at different angles with respect to the rotational axis Z of the capsule. This means, that this paragraph discloses **any possible inclination** from 0 to 180° of the **multitude of concentrically arranged lips** relative to the **rotational axis Z** of the capsule. Said paragraph on the one hand does not refer to an **inclination** angle range of the **multitude of concentrically arranged lips** relative to the flange-like rim portion and on the other hand it does not exclude that the **multitude of concentrically arranged lips** may be inclined at an angle lower than 45 degrees relative to the flange-like rim portion.
- 3.4 Accordingly, no discrepancy exists between the information disclosed in the first paragraph on page 5 and in the second paragraph on page 12 of A4, so that the skilled person would have to assess the information of the one paragraph against the information of the other paragraph, as argued by the patent proprietor.
- 3.5 Even if, for the sake of argument, accepting the patent proprietor's argument that from the overall content of A4, taking into account the description and the figures, the skilled person would immediately recognize that the "sealing lips" is merely an example for the "at least one protrusion" of the sealing member, there is no basis to be found in A4 for an **inclination angle range** having an **upper limit of 45 degrees** for a sealing member in the form of either **a** (at least one) **protrusion** or in the form of a **multitude of concentrically arranged lips** relative to the **rotational**

axis (Z) of the capsule.

- 3.6 The Board cannot follow the patent proprietor's argument that the skilled person would also rule out the obviously wrong understanding of the disclosure of the first paragraph on page 5 of A4 requiring the sealing member in the form of an at least one protrusion to almost "lay down" on the flange-like rim portion, since it allegedly would make technically no sense.
- 3.7 The Board notes in this respect, that the claimed inclination angle range does not define a lower limit and it does not require that the protrusion should be laying down on the flange-like rim portion. Furthermore, even an allegedly obviously wrong understanding of the disclosure of the first paragraph on page 5 of A4 referring to the flange-like rim portion cannot serve as the basis for an inclination angle range relative to the rotational axis (Z) of the capsule.
- 3.8 The Board concurs with the patent proprietor that the first paragraph on page 5 and the second paragraph on page 12 of A4 are not so "clear in themselves". This means actually that no clear teaching is derivable from said paragraphs and that therefore no clear teaching is derivable from said paragraphs concerning the above-mentioned second alternative of feature d). Accordingly, said paragraphs cannot serve as basis for the second alternative of featured d) claiming an inclination range with respect to the rotational axis (Z) of the capsule.
- 3.9 For the above-mentioned reasons, the Board concludes that claim 1 of auxiliary request VIII does not meet

the requirements of Article 123(2) EPC.

4. *Admittance of auxiliary request VIII' into the proceedings*

4.1 The patent proprietor filed auxiliary request VIII' during the oral proceedings before the Board. It argued that said request being *prima facie* allowable, i.e. overcoming all the opponent's 04 objections, should be admitted into the proceedings, irrespective of its late filling.

4.2 According to Article 13(1) RPBA it is in the Board's discretion to admit and consider any amendment to a party's case after it has filed its grounds of appeal or reply. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. Furthermore, according to Article 13(3) RPBA amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings.

4.3 It is further established case law that, at this stage of the proceedings, claims which are clearly not allowable will not normally be admitted. Thus, the general principle is that in order to be admissible, amended claims belatedly filed in oral proceedings must be clearly allowable by virtue of a clearly permissible amendment. It must be immediately apparent to the Board, with little or no investigative effort on its part, that amendments successfully address the issues raised without giving rise to new ones (see Case Law of

the Boards of Appeal, 8th edition 2016, IV.E.4.2.6.a).

- 4.4 In the present case the second alternative of feature d) of claim 1 of the auxiliary request VIII' differs from the one present in claim 1 of the auxiliary request VIII in that the at least one protrusion has been replaced through at least two concentrically arranged sealing lips (8a) being distanced radially to one another and slightly inclined at an angle lower than 45 degrees relative to the flange-like rim portion and in that the reference to the rotational axis of the capsule has been deleted. Claim 11 of auxiliary request VIII' has been amended over claim 11 of auxiliary request VIII, said last corresponding to claim 11 of the main request, i.e. of the patent as granted, in that the word "heater" has been replaced by the word "heated".
- 4.5 The Board following the corresponding opponent's 04 arguments considers that the introduction of the feature concerning at least two concentrically arranged sealing lips being distanced radially to one another and slightly inclined at an angle lower than 45 degrees relative to the flange-like rim portion into claim 1, in view of the fact that no literal basis is to be found in A4 for said feature, does not *prima facie* overcome all the objections based on Article 123(2) EPC. Furthermore, the replacement in claim 11 of the word "heater" by the word "heated" raises the question of the admissibility of said amendment/correction in view of the decision G1/10 (OJ EPO 2013, 194).
- 4.6 Dealing with this request at a very late stage of the appeal proceedings would go against the need for procedural economy, namely the need to conclude proceedings swiftly and so create legal certainty,

which plays an increasingly dominant role as appeal proceedings progress towards their end.

4.7 In view of the above, the Board exercised its discretion according to Articles 13(1) and (3) RPBA and did not admit auxiliary request VIII' into the proceedings.

5. *Claim 11 of auxiliary request VIII'' - unallowable amendments, Article 76(1) EPC*

5.1 It is undisputed that no basis is to be found in A2 for a beverage production device providing a **heater** to the interior of the capsule as claimed in claim 11 of the auxiliary request VIII''.

5.2 The patent proprietor argues that the skilled person in view of the information present on page 9, lines 18 to 21 of A2 the skilled person would readily understand the above-mentioned feature of claim 11 as being an obvious error and would immediately and directly derive that said feature is to be read as referring to a beverage production device providing **a heated and pressurized liquid** to the interior of the capsule.

5.3 The Board following the arguments of opponent 04 considers that the provision of (a) heater to the interior of the capsule is not recognised by the skilled person as a feature which technically makes no sense let alone as an obvious error.

5.4 Furthermore, claim 11 refers to a beverage production device providing the interior of the capsule **with at least two elements**, namely with [a] heater and with [a] pressurized liquid. According to the passage on page 9, lines 18 to 21 of A2 the beverage production device

provides the interior of the capsule **with only one element**, namely with a heated and pressurized liquid. Accordingly, an implicit correction by the person skilled in the art of the wording of claim 11 concerning the combination of [a] heater and [a] pressurized liquid in the sense that it is immediately evident that nothing else would have been intended than what is offered by the patent proprietor as the correction, namely a single heated and pressurized liquid, is not considered by the Board as being obvious.

5.5 For the above-mentioned reasons, claim 11 of auxiliary request VIII'' does not meet the requirements of Article 76(1) EPC and auxiliary request VIII'' is thus not allowable. In view of said finding the Board saw no need for addressing the issue of admittance into the proceedings of said request anymore.

6. *Admittance of auxiliary request VIII''' into the proceedings*

6.1 Claim 1, the sole independent claim of auxiliary request VIII''', is identical with claim 1 of the set of claims upheld by the opposition division. The appeal of opponent 04 was directed against said claim. Therefore, an auxiliary request disclosing as sole independent claim said claim 1 upheld by the opposition division cannot take by surprise opponent 04, as also argued by the patent proprietor. It further does not raise issues which the Board or opponent 04 cannot deal with without adjournment of the oral proceedings.

6.2 In view of the above, the Board exercises its discretion according to Articles 13(1) and (3) RPBA in the sense of admitting auxiliary request VIII''' into

the proceedings.

7. *Claim 1 of auxiliary request VIII''' - unallowable amendments, Article 123(2) EPC*

7.1 Opponent 04 argues that due to the presence of the terms "thereby", "however" and "thereby" in the passage on page 13, lines 14 to 21 of A4 the specific range of 0.8 to 2 mm mentioned therein refers specifically to sealing members having lips of different heights and not to sealing members with lips of constant height. For this reason, according to opponent 04, the feature h) ("the sealing lips (8a) are protruding from upper surface (2a) of the rim portion (2) of the capsule (10) to a height (h1), wherein the height (h1) of the sealing lips (8a) of the sealing member (8) is within the range of 0.8 to 2 mm") of claim 1, covering both kinds of sealing members does not meet the requirements of Article 123(2) EPC.

7.2 The Board disagrees. It considers that although each of the second and the third sentence of said passage refers to different sealing members, namely to one with lips of constant height and one with lips of different heights, the last sentence disclosing the range of 0.8 to 2 mm refers to all three previous sentences of said passage and builds therefore the basis for feature h) of claim 1.

7.3 For the above-mentioned reasons, claim 1 of auxiliary request VIII''' meets the requirements of Article 123(2) EPC.

8. *Claim 1 of auxiliary request VIII''' - clarity, Article 84 EPC*

8.1 Opponent 04 argues that the feature of claim 1 that the sealing lips are arranged at a sealing area which is circumferentially arranged to a sidewall of the capsule body portion at a distance (d) renders the subject-matter of claim 1 unclear, since there exists no information for the person skilled in the art as to where to measure the distance d. This especially due to the fact that the claim does not limit the lips to ones having a rectangular cross-section.

8.2 The Board is not convinced. Firstly, since no specific distance is claimed in claim 1, claim 1 requires only that the sealing area is not in direct contact with the sidewall of the capsule and does not start directly at the sidewall of the capsule. The Board considers, that whether said conditions are fulfilled is very easy to be evaluated by the person skilled in the art. Secondly, the skilled person knows how to measure the distance between two different objects, here the sidewall of the capsule and the sealing area, independently from their shape, namely by measuring the shortest path/distance between the outer boundaries of said objects.

8.3 The subject-matter of claim 1 is therefore clear and claim 1 meets the requirements of Article 84 EPC.

9. *Claim 1 of auxiliary request VIII''' - sufficiency of disclosure, Article 83 EPC*

9.1 Opponent 04 argues that for the same reason presented in respect with the lack of clarity objection the

claimed invention is insufficiently disclosed.

9.2 For the same reason presented under point 8.2 above the Board considers that the present invention is sufficiently disclosed and that the requirements of Article 83 EPC are met.

10. *Admittance of D30 into the proceedings*

10.1 Document D30 referring to sealing lips was filed at the earliest possible stage of the present appeal proceedings, namely together with the statement setting out the grounds of appeal of opponent 04. The filing of D30 together with the statement setting out the grounds of appeal was the first possible reaction of opponent 04 to the filing the set of claims which were considered by the opposition division as being allowable, for the first time during the oral proceedings before the opposition division, whereby claim 1 disclosed no reference to protrusion(s) but only to sealing lips. As far as it concerns the relevance of D30 the Board notes that opponent 04 presented an arguable lack of inventive step attack based on the combination of the teachings of D16 and D30 with its statement setting out the grounds of appeal (see point 9.3 of the statement of grounds of appeal of opponent 04).

10.2 Taking into consideration the above-mentioned procedural and factual situation the Board sees no reason for excluding D30 from consideration in the appeal proceedings, since especially according to Article 12(4) RPBA everything presented by a party with its statement of grounds of appeal shall be taken into consideration by the Board.

10.3 For the above-mentioned reasons D30 is admitted into the proceedings.

11. *Claim 1 of auxiliary request VIII''' - inventive step, Article 56 EPC*

At the oral proceedings before the Board opponent 04, when asked for identifying all its objections to inventive step of the claimed subject-matter according to auxiliary request VIII''', relied for its objection of lack of inventive step only on D16 as closest prior art against the subject-matter of claim 1 of auxiliary request VIII''' and presented orally its complete case on lack of inventive step as discussed below.

D16 alone

11.1 It is common ground that the sealing member of the example according to figure 16 of D16 in the form of a single O-ring is not to be considered as sealing lips in the sense of claim 1 of auxiliary request VIII'''.

11.2 Accordingly, the subject-matter of claim 1 differs therefore from the capsule depicted in figure 16 of D16 at least in that the sealing member has in a radial cross sectional view at least two concentrically arranged sealing lips distanced radially to one another which are oriented perpendicularly relative to the flange-like rim portion.

11.3 The obtained technical effect is the provision of an effective sealing member with reduced sealing material and which requires less sealing force within a beverage preparation machine.

- 11.4 The technical problem to be solved may therefore be formulated as providing alternative sealing means enabling an effective sealing of the capsule within a beverage preparation device at reduced closing forces (see paragraphs 8 to 11 of the patent in suit).
- 11.5 Nothing in D16 teaches or suggests the replacement of the O-ring of figure 16 with at least two concentrically arranged sealing lips oriented perpendicularly relative to the flange-like rim portion. D16 rather focuses on the provision of a sealing material in the form of a ring such as e.g. shown in figure 16, which is not arranged perpendicular to the flange-like rim portion, but rather arranged essentially parallel to the rim in direct contact with the side wall of the capsule. Hence, D16 aims at a completely different sealing approach from which the skilled person derives no hint or incentive to modify the capsule to comprise a sealing member as asked for by claim 1. Also the passage on page 24, lines 11 to 13 of D16 referred to by opponent 04 and stating that the sealing material 8 can be attached to the outer surface of the capsule by gluing, welding or also mechanically (press-fitting, crimping, etc.) does not contain any hint or pointer towards the above-mentioned differentiating features. The O-ring of figure 16 would still not amount to two concentrically arranged sealing lips distanced radially to one another and oriented perpendicularly relative to the flange-like rim portion as claimed.

D16 in combination with D21

- 11.6 Opponent 04 argues that D21 refers to a capsule for preparing beverages, that D21 discloses (see column 3, lines 43 to 60) two annular, concentric and

perpendicularly protruding lips 332 acting as a sealing element and that the skilled person starting from D16 and faced with the problem of obtaining enhanced sealing properties would replace the O-ring of D16 by the two radially distanced concentric elements 332 of D21 thus arriving at the claimed invention without exercising any inventive activity.

11.7 The Board disagrees. D21 discloses two types of containers, namely a small size container with annular elements 232 and a large size container with annular elements 332. In use of the small size container, hot water flows from the port 41 into the container. Further, in use of the large size container, hot water flows through port 41 and cold water flows through the port 41 into the container, wherein the two flows will mix due to bending of the inner annular element 332 (see column 4, lines 1 - 14). D21 does not teach that the second sealing lip 332 would improve the sealing within the beverage preparation machine. To the contrary, D21 teaches at least for the large size container that the inner annular element 332 will bend in order to allow the mixing of the hot and cold water, thereby providing a valve function. Therefore, the skilled person would not take into consideration the teaching of D21 when trying to enhance the sealing functions of D16. But even when taking into consideration the teaching of D21, the skilled person derives nothing else from D21 than that the second protrusion at the rim may be used for providing a valve function at the rim portion of the capsule. Nothing in D21 thus teaches or suggests that the provision of a second protrusion at the flange of the capsule would improve the sealing properties of the capsule.

11.8 It follows that even when referring to D21, the skilled person would not derive any hint or incentive which would actually prompt the skilled person to modify the sealing member of D16 in the sense of claim 1.

D16 in combination with D30

11.9 Opponent 04 argues that D30 refers to a sealing element having sealing lips 5, 6 and that the skilled person starting from D16 and faced with the problem of obtaining enhanced sealing properties would replace the O-ring of D16 by the two distanced sealing lips 5, 6 of D30 thus arriving at the claimed invention without exercising any inventive activity.

11.10 The Board disagrees again. D30 belongs to a different technical field, namely to a sealing gasket for use in an annular recess to a corrugated pipe (see paragraph 1). Furthermore, D30 discloses axial sealing lips ("Axialdichtlippen") 5, 6, 8 and 9 (see paragraph 34 and figures 2, 4) and not concentrically arranged sealing lips distanced radially to one another and oriented perpendicularly relative to the flange-like rim portion.

11.11 For the above-mentioned reasons, the skilled person seeking to improve the sealing of the capsule known from D16 used with a beverage preparation machine would not take into consideration the teaching of D30 in which the sealing gasket serves a different purpose and is provided with sealing lips of a completely different art and orientation as claimed in claim 1.

11.12 But even if, for the sake of argument, the skilled person would contemplate to take into consideration the teaching of D30, it would not arrive at the subject-

matter of claim 1 since the differentiating features mentioned under point 11.2 above are not derivable from D30.

11.13 For the above-mentioned reasons, the subject-matter of claim 1 involves an inventive step.

Order

For these reasons it is decided that:

- 1. The decision under appeal is set aside**
- 2. The case is remitted to the opposition division with the order to maintain the patent in amended form with claims 1 to 10 according to auxiliary request VIII''' filed during the oral proceedings of 19 June 2019 (annex D of the minutes) and a description to be adapted thereto.**

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated