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**Datasheet for the decision  
of 18 May 2020**

**Case Number:** T 2202/19 - 3.2.07

**Application Number:** 12808853.1

**Publication Number:** 2868598

**IPC:** B65D85/816

**Language of the proceedings:** EN

**Title of invention:**

CAPSULE FOR THE PREPARATION OF BEVERAGES

**Patent Proprietor:**

CUP OUT OF THE BOX S.L.

**Former Opponent:**

Bacon, Brian

**Headword:**

**Relevant legal provisions:**

EPC Art. 14(2) sentence 2, 54, 56, 83, 113, 116, 123(2)  
RPBA 2020 Art. 11, 12(8)

**Keyword:**

Decision in written proceedings without holding oral proceedings

Remittal to the department of first instance (no) - special reasons for remitting the case (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 2202/19 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 18 May 2020**

**Appellant:** CUP OUT OF THE BOX S.L.  
(Patent Proprietor) Av. Tren Expreso, Block C,  
Pol. Ind. Venta de Baños  
34200 Venta de Baños Palencia (ES)

**Representative:** Curell Suñol S.L.P.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted on 27 May 2019  
revoking European patent No. 2868598 pursuant to  
Article 101(3) (b) EPC.

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** S. Watson  
A. Pieracci

## **Summary of Facts and Submissions**

- I. The patent proprietor (appellant) filed an appeal in the prescribed form and within the prescribed period against the decision of the opposition division to revoke European patent EP 2 868 598.  
The then main request was found to contain subject-matter that extended beyond the content of the application as filed (Article 100(c) EPC), the amendments made to the claims in the first and second auxiliary requests were found to extend the protection the patent confers, contrary to the requirements of Article 123(3) EPC.
- II. The opponent withdrew its opposition on 4 April 2019, therefore the appellant is the sole party to the appeal proceedings.
- III. At the outset of the appeal proceedings the appellant sought the maintenance of the patent, respectively, as granted (notice of appeal) and in amended form according to a main request and seven auxiliary requests (statement setting out the grounds of appeal).
- IV. In a communication pursuant to Rule 100(2) EPC, the Board gave its preliminary opinion that the subject-matter of claim 1 according to the main request satisfied the requirements of the EPC. The appellant was invited to adapt the description to the claimed subject-matter according to the main request and correct contradictions in the dependencies of claims.
- V. With its reply to the communication pursuant to Article 100(2) EPC the appellant filed, with letter dated 17 April 2020, adapted description pages 1 to 14

and set of claims 1 to 12 with amended dependencies in claims 6 and 10.

VI. The appellant essentially requested

that the decision under appeal be set aside and that the patent be maintained in amended form based on the set of claims and the adapted description of the main request as filed on 17 April 2020.

VII. The present decision refers to the following documents which were considered in the decision under appeal:

E1: WO 2010/137946 A1;  
E11: US 2011/297005 A1;  
E12: EP 2681126 B1.

VIII. The appellant's arguments contesting the decision of the opposition division are dealt with in detail in the reasons for the decision.

IX. Independent claim 1 of the main request reads:

"A capsule for preparing infusions from a product contained in a closed inner chamber (2), by forcing liquid to flow under pressure through said chamber (2), said capsule comprising a frustoconical main body (4) having a smaller base (10) and a larger base (8) and a peripheral flange (6) extending outwardly from the larger base (8) of said main body (4), said capsule further comprising an annular hermetic closing member (12) provided on the region of said capsule (1) comprised between the surface of said flange (6) facing the smaller base (10) of said main body (4) and the smaller base (10) of said main body (4), characterized

in that said closing member (12) comprises a plurality of point-like blind openings (14) penetrating in said closing member (12), said closing member (12) is made from the same material as said capsule (1) and is integral with said capsule (1) and in that said closing member (12) is made from a plastics material having a Vicat softening temperature comprised between 70 and 140°C, such that said closing member (12) is deformable under pressure during the preparation of said infusion."

## **Reasons for the Decision**

### *Procedural aspects*

1. The present decision is taken in written proceedings without holding oral proceedings in accordance with Article 12(8) RPBA 2020. The party's rights under Articles 113 and 116 EPC are observed. The appellant's request for oral proceedings is auxiliary to its main request that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the main request. Thus, since the appellant's main request is followed by the Board, the aforementioned auxiliary request remains inactive.

### *Substantive aspects in respect of the main request*

2. Independent claim 1 corresponds to the main request on which the contested decision was based, with the addition of the following correction:

In the feature "discrete blind openings", the word "discrete" has been replaced by the word "point-like"

and, following on from this correction, the feature "said blind openings not being concentric grooves" has been deleted.

3. Article 14(2) EPC correction

The patent was originally filed as a PCT application in the Spanish language (WO 2014/001584). According to Article 14(2), second sentence, EPC, the translation may be brought into conformity with the application as filed throughout the proceedings before the European Patent Office. This is understood to include appeal proceedings (see Case Law of the Boards of Appeal, 9th edition 2019, III.F.5, sixth paragraph).

The correction requested by the appellant, the replacement of the word "discrete" with "point-like", is regarded as being allowable as it is a correct translation of the feature as originally filed: "hendiduras ciegas y **puntuales**".

4. Article 123 (2) EPC

Claim 1 corresponds to a combination of the originally filed claims 1, 2, 4 and 5. In the contested decision (Reasons, point 15.2), the opposition division found that the feature "said blind openings not being concentric grooves" extended the subject-matter beyond the originally filed application. This feature has however now been deleted and the Board sees no further extension of subject-matter. Claim 5 was originally dependent on claim 4, which was itself dependent on any one of claims 1 to 3 and claim 2 was dependent on claim 1.

Claims 2 to 12 correspond to claims 3 and 6 to 15 as filed.

Therefore the requirements of Article 123(2) EPC are fulfilled.

5. Article 123(3) EPC

Claim 1 corresponds to granted claims 1, 2, 4 and 5 with the deletion of the feature "said blind openings not being concentric grooves".

In the contested decision, the opposition division objected to the deletion of this feature (Reasons, point 16.4) as it extended the scope of protection of the amended claim. However, this objection was based on the claim being directed to "discrete blind openings" rather than the corrected feature of "point-like blind openings".

The Board finds that the deletion of this feature does not extend the scope of protection of the patent as granted. The granted patent claimed all discrete blind openings which were not concentric grooves. The corrected claim 1 claims point-like blind openings. A groove is understood as being a long, narrow opening and as such cannot be a point-like opening. Therefore, regardless of the exact scope of the formerly disclaimed subject-matter, i.e. whether concentric is only in relation to the capsule axis, or whether the grooves can be discontinuous, the corrected claim now excludes all forms of long, narrow openings and is therefore narrower in scope than the granted claim which included non-concentric grooves.

Therefore the requirements of Article 123(3) EPC are fulfilled.



6. Further grounds of opposition raised during the opposition proceedings

In the present case, whilst the contested decision was based only on Article 123 EPC objections, the appellant, in the statement setting out the grounds of appeal, has convincingly argued why the claimed subject-matter overcomes the other grounds of opposition (Article 100(a) and (b) EPC) which were raised during the opposition proceedings.

As the current main request is directed to a combination of granted claims, the Board considers that it can be expected that all objections to the granted subject-matter should and would have been raised during the opposition proceedings.

7. No remittal of the case to the opposition division

According to Article 11 RPBA 2020, the Board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so.

The Board finds in the current appeal case, having recourse to the arguments made by the former opponent and the opposition division during opposition proceedings and also those of the appellant made in the statement setting out the grounds of appeal, that the Board is in a position to decide on whether the patent may be maintained in amended form without remitting the case to the opposition division. The Board finds that no special reasons are present.

7.1 Article 83 EPC

The Board agrees with the preliminary opinion of the opposition division, as set out in the annex to the

summons to oral proceedings, regarding the objections of the former opponent that the patent is not sufficiently disclosed.

It is established jurisprudence of the Boards of Appeal (Case Law of the Boards of Appeal, *supra*, II.C.9) that a finding of lack of sufficient disclosure should be based on serious doubts, substantiated by verifiable facts.

In the present case the former opponent has argued essentially that the skilled person is unable to carry out the invention over the whole area claimed in granted claim 1 as it is not clear how the closing member can be positioned on the sidewall of the capsule (rather than at the flange or at the smaller base). The Board concurs with the opinion of the opposition division given in the annex to the summons to oral proceedings (point 7.1.3.1), that the figures of the contested patent clearly show the closing member located at the region comprising the surface of the flange and also the smaller base and the skilled person using their common general knowledge is able without any undue burden to carry out the invention over the whole range of the claim by moving the sealing member to a position along the sidewall.

The Board also concurs with the reasoning of the opposition division given in its preliminary opinion in the annex to the summons to oral proceedings (points 7.1.3.2 and 7.1.3.3), that the skilled person is able to carry out the invention as claimed in granted dependent claims 7 and 13.

The requirements of Article 83 EPC are fulfilled.

## 7.2 Novelty (Article 54 EPC)

In the notice of opposition (sections 6.1 and 6.2) the former opponent argued that the claimed subject-matter lacked novelty over the disclosure of each of documents E1 and E12.

The current main request is a combination of granted claims 1, 2, 4 and 5. The former opponent argued that granted claim 2 lacked novelty over the disclosure of E12 and claims 4 and 5 lacked novelty in view of the disclosure of E1 (notice of opposition, points 7.1.1, 7.3.1, 7.4.1). Therefore the former opponent did not make a novelty objection to the combination of granted claims 1, 2, 4 and 5.

The Board finds that the appellant has convincingly shown, in its statement setting out the grounds of appeal, that the subject-matter of the claims is novel (see points 5.5.1 to 5.5.4).

## 7.3 Inventive Step (Article 56 EPC)

In the notice of opposition (see sections 7.1.2, 7.3.1, 7.4.1) the former opponent argued that the subject-matter of claims 2, 4 and 5 was not inventive over E1 alone or in combination with the common general knowledge of the skilled person or in combination with E11.

The Board essentially agrees with the arguments of the appellant with respect to the inventive step objections made by the former opponent (see statement setting out the grounds of appeal, 6.1.1 and 6.1.3).

The embodiment disclosed in figure 5 of document E1, chosen as closest prior art, shows a capsule for preparing infusions from a product contained in a closed inner chamber, by forcing a liquid to flow under pressure through said chamber that comprises a frustoconical main body (102a) and a peripheral flange extending outwardly from the larger base of said main body (104), whereby it further comprises an annular hermetic closing member provided on the region of said capsule comprised between the surface of said flange facing the smaller base of said main body and the smaller base of said main body, said closing member comprising point-like blind openings (137) penetrating in said closing member, such that said closing member is deformable under pressure during the preparation of said infusion (page 18, lines 20-23).

The subject-matter of claim 1 differs from this known capsule in that said closing member is made from the same material as said capsule and is integral with said capsule, and in that said closing member is made from a plastics material having a Vicat softening temperature comprised between 70 and 140°C.

The problem to be solved is regarded as to provide a capsule with improved sealing abilities which is economical to manufacture (see patent specification, paragraphs [0012], [0014] and [0015]).

The former opponent has argued that it would be apparent to the skilled person to form the structure of E1 (figure 5) containing the openings (137) integrally with the capsule and also of the same material, particularly in light of the fact that other embodiments of E1 show integrally formed closing members and capsules. The former opponent cites

passages in E1 on page 14, lines 28-30 and page 17, lines 8-10.

However, in view of the fact that the embodiments described on these pages (which correspond to figures 1 and 3 of E1) have been explicitly described as being integrally formed, whereas the embodiments of other figures (2, 4 and 5) have not been disclosed as being integrally formed and form more complicated structures, the skilled person would understand these embodiments as comprising separate components and would have no reason to attempt to form them integrally. Even if these embodiments were to be combined, the closing member and capsule would not be formed from a plastics material having a Vicat softening temperature comprised between 70 and 140°C.

The former opponent argued further that it would be obvious for the skilled person to select a plastics material having a Vicat softening temperature comprised between 70 and 140°C. They reasoned that the skilled person is aware that a better seal is made with a hard element against a soft element; that plastics soften when heated; and that the temperature of water being forced through the capsule would determine when the material will soften. As the water being used will be at a temperature falling within the region between 70 and 140°C, the skilled person would obviously select a plastics material having a Vicat softening temperature in the range between 70 and 140°C in order to achieve an effective seal.

The Board finds that the skilled person, without knowledge of the invention, would not be motivated from the teaching of E1 alone or with their common general knowledge to use a plastics material having Vicat

softening temperature comprised between 70 and 140°C for the capsule and closing member. E1 mentions generally the use of deformable plastics and the specific choice of a plastics material having a Vicat softening temperature comprised between 70 and 140°C cannot be seen as an obvious choice from the available alternatives.

Document E11 contains the teaching that the capsule should be formed from a material which softens in contact with a liquid of which the temperature is greater than ambient temperature (see E11, claim 7). However, this teaching would not lead the skilled person specifically to the feature that the material is a plastic material having a Vicat softening temperature between 70 and 140°C, merely to a material which softens when contacted with a liquid having a temperature greater than the ambient temperature.

8. The appellant has convincingly argued that the main request overcomes both the objections in the contested decision and those raised by the former opponent.

## 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 as amended in the following version:

### Description

Pages 1 to 14                      filed with letter of 17 April 2020.

### Claims

No. 1 to 12                        filed with letter of 17 April 2020.

### Drawings

Sheets 1/6 to 6/6    of the patent specification.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated