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**Datasheet for the decision  
of 15 May 2024**

**Case Number:** T 1614/21 - 3.2.03

**Application Number:** 14799001.4

**Publication Number:** 3058282

**IPC:** F24C15/00, F24C15/04,  
F24C15/20, F24C15/32

**Language of the proceedings:** EN

**Title of invention:**  
HOUSEHOLD COOKING APPLIANCE

**Patent Proprietor:**  
Whirlpool EMEA S.r.l.

**Opponent:**  
Electrolux Rothenburg GmbH Factory and Development

**Relevant legal provisions:**  
EPC Art. 52(1), 56, 84, 123(2), 111(1)  
EPC R. 116(1), 80  
RPBA 2020 Art. 12(6), 12(4), 13(1), 11

**Keyword:**

Inventive step - main request (no) - auxiliary request 1 (no)  
- auxiliary request 2 (no)

New objection under Rule 80 EPC against auxiliary requests 2  
and 2\* - admitted (no)

Auxiliary request 2A - requirement for conditional filing not  
met

Auxiliary request 2\* - admitted (yes) - added subject-matter  
(no) - claims - clarity (yes) - inventive step (yes)

Adaptation of the description - claims supported in the  
description (no) - remittal (yes)

**Decisions cited:**

G 0003/14



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Case Number: T 1614/21 - 3.2.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.03**  
**of 15 May 2024**

**Appellant:** Electrolux Rothenburg GmbH Factory and  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
7 July 2021 concerning maintenance of the  
European Patent No. 3058282 in amended form.**

**Composition of the Board:**

**Chairman** C. Herberhold  
**Members:** M. Olapinski  
N. Obrovski

## **Summary of Facts and Submissions**

- I. The appeal was filed by the opponent (appellant) against the interlocutory decision of the opposition division finding that, on the basis of auxiliary request 1 (then on file), the patent in suit (the patent) met the requirements of the EPC.
- II. Oral proceedings before the Board were held in the absence of the respondent, which had announced it would not attend the oral proceeding in its letter of 6 May 2024.
- III. At the end of the oral proceedings before the Board, the requests were as follows.

The appellant requested that the decision under appeal be set aside and that the patent be revoked. The appellant requested, as an auxiliary measure, that the case be remitted to the opposition division for further adaptation of the description to the claims of auxiliary request 2\*.

The respondent had requested in writing that the appeal be dismissed and that the patent be maintained in the version found allowable by the opposition division (main request). Alternatively, the respondent had requested that the patent be maintained in the version found allowable by the opposition division but with paragraph [0020] of the description amended (auxiliary request 1). Further alternatively, the appellant had requested that the patent be maintained on the basis of one of the following auxiliary requests in the following order:

2 - 2A - 2\* - 2\*A - 3 - 3A - 3B - 3C - 3\* - 3\*A - 3\*B -  
3\*C - 4 - 4A - 4\* - 4\*A - 4\*B - 4\*C

Auxiliary requests with the addition "A" had been filed on 12 December 2023 in reaction to fresh objections under Rule 80 EPC submitted with the appellant's letter of 4 April 2023 and under the condition that these objections were admitted, contrary to the respondent's request.

By letter of 6 May 2024, the respondent had further submitted an amended description for auxiliary request 2\* in two versions, Option A and Option B, and had requested that maintenance of the patent of auxiliary request 2\* according to the requested sequence be based on Option A or on Option B of the amended description, or, should these versions not be found allowable, that the case be remitted to the opposition division for the adaptation of the description.

IV. The following documents are referred to:

E1: EP 1 050 718 A2  
E3: DE 199 49 724 A1  
E4: EP 1 972 855 A1  
E7: EP 0 952 404 A2  
E8: EP 1 686 322 A2  
E11: WO 2012/117378 A1

E11 was filed by the appellant with the letter of 13 September 2023.

V. The claims under consideration in the present decision are the following.

Claim 1 of the main request (corresponding to auxiliary request 1 found allowable by the opposition division) reads (with feature denominations in square brackets):

"[M1] A household cooking appliance, in particular an oven,

[M2] comprising a cooking chamber (6) defined by a muffle (5) [M3] having a flue [M4] with a fume outlet (7) at an upper wall (5a) of the muffle (5), [M5] and a front door (4), for opening and closing the cooking chamber (6), the appliance (1) also comprising:

[M6] a delivery channel (30), defined by a duct body (10) that extends above the upper wall (5a) of the muffle (5), [M7] the duct body (10) having an outlet (30a) of the delivery channel (30) that is substantially at a front region of the appliance (1), above an upper portion of the door (4), [M8] and having a fume inlet (10d) in a lower wall (10a) of the duct body (10), which is in fluid communication with the fume outlet (7) of the muffle (5) and with the delivery channel (30);

[M9] a ventilation assembly (20), operatively associated to the duct body (10) so as to draw in fumes from the fume outlet (7) of the muffle (5) and expel them from the outlet (30a) of the delivery channel (30), [M10] the ventilation assembly (20) being in a rear end region of the duct body (10) that is generally opposite to the outlet (30a) of the delivery channel (30);

[M11] wherein the flue has at least one portion which is made integrally with one between the upper wall (5a) of the muffle (5) and the lower wall (10a) of the duct

body (10) and comprises a drawn part (8, 9) of said wall (5a; 10a);

*the appliance (1) being characterized in that:*

[M12] - the ventilation assembly (20) comprises a radial fan (21) with a centrifugal impeller (22) thereof within the duct body (10), [M13] the centrifugal impeller (22) being positioned above the fume inlet (10d) of the duct body (10) substantially coaxial thereto and to the fume outlet (7) of the muffle (5) [M14] in such a way that at least the fumes are drawn in from the fume outlet (7) substantially in the direction of the axis (X) of the impeller (22) and forced in a radial direction into the delivery channel (30) for being expelled from the corresponding outlet (30a) and

[M15] - the door (4) comprises at least one outer door panel (4b), one inner door panel (4e), and one intermediate door panel (4c, 4d), [M16] the door panels (4b-4e) defining between them a plurality of gaps (40a, 40b, 40c), [M17] amongst which at least an external gap (40a) and an internal gap (40b), each having a lower inlet and an upper outlet, at a lower portion and an upper portion of the door (4), respectively, for passage of a respective flow of cooling air and

[M18] - the at least one portion of the flue (8, 9) comprises a drawn part (8) of the upper wall (5a) of the muffle (5) that generally projects towards the lower wall (10a) of the duct body (10) and has an upper end portion, where the fume outlet (7) of the muffle (5) is defined."

Claim 1 of auxiliary request 1 is identical to claim 1 of the main request. Auxiliary request 1 merely differs from the main request by amended paragraph [0020] of the description.

Claim 1 of auxiliary request 2 differs from claim 1 of the main request by further specifying:

"[M18a] - the at least one portion of the flue (8, 9) comprises a drawn part (9) of the lower wall (10a) of the duct body (10) that generally projects towards the upper wall (5a) of the muffle (5) and has a lower end portion, where the fume inlet (10d) of the duct body (10) is defined".

Auxiliary request 2A differs from auxiliary request 2 in that claims 7 to 10 as granted are not deleted.

Claim 1 of auxiliary request 2\* differs from claim 1 of auxiliary request 2 by the following additional feature:

"[M19] - said lower end portion and said upper end portion have respective substantially plane parts that bear upon one another and that have respective holes for elements for mutual fixing."

VI. The appellant's arguments can be summarised as follows.

*Main request - inventive step*

Claim 1 of the main request did not involve an inventive step at least starting from E1 in combination with E3 and E4.

*Auxiliary request 1 - inventive step*



Claim 1 of auxiliary request 1 was identical to claim 1 of the main request and thus also not inventive.

*Auxiliary requests 2 and 2\* - Rule 80 EPC*

The deletion of dependent claims 7 to 10 in auxiliary requests 2 and 2\* was not occasioned by a ground of appeal and thus not in line with Rule 80 EPC.

*Auxiliary request 2 - inventive step*

The additional feature of claim 1 of auxiliary request 2 was already known from E1 and E3, so claim 1 of auxiliary request 2 did not involve an inventive step for the same reasons as the main request.

*Auxiliary request 2A*

Regarding auxiliary request 2A, the appellant referred to its written submissions.

*Auxiliary request 2\**

Auxiliary request 2\* was found inadmissible by the opposition division and should thus not be admitted under Article 12(6) RPBA.

Claim 1 was based on an inadmissible intermediate generalisation from the application as filed because the passage from which Feature M19 was taken further disclosed the end portions as "facing each other" and that a "substantial portion of the flue" was "integral with" the duct body.

The subject-matter of claim 1 was unclear because of the term "substantially" and because it was not clear whether "mutual fixing" referred to the mutual fixing of the elements with each other or to the mutual fixing of the plates with each other.

The subject-matter of claim 1 did not involve an inventive step because at least the documents E7 (Figures 2 and 3) and E8 (Figures 4 and 5a to 5d) disclosed Feature M19. It did not involve an inventive step in view of E1 in combination with E11 either.

*Adaptation of the description*

Paragraphs [0019] and [0021] of the adapted description of 6 May 2024 were still not in line with the claims of auxiliary request 2\*.

VII. The respondent's arguments can be summarised as follows.

*Main request - inventive step*

The skilled person would not have arrived at the subject-matter of claim 1 in an obvious manner starting from E1 in combination with E3 and E4.

*Auxiliary request 1 - inventive step*

Claim 1 of auxiliary request 1 was identical to claim 1 of the main request and thus also inventive.

*Auxiliary requests 2 and 2\* - Rule 80 EPC*

The appellant's fresh objection under Rule 80 EPC against the deletion of dependent claims 7 to 10 in

auxiliary requests 2 and 2\* was *prima facie* unfounded and should not be admitted.

*Auxiliary request 2 - inventive step*

E1 and E3 did not disclose the additional feature of claim 1 of auxiliary request 2. Hence, also for this reason, claim 1 of auxiliary request 2 involved an inventive step.

*Auxiliary request 2A*

Auxiliary request 2A differed from auxiliary request 2 only by the reinsertion of granted claims 7 to 10. It was filed to overcome the objection under Rule 80 EPC against auxiliary request 2 in case the fresh objection was admitted.

*Auxiliary request 2\**

The statement in the decision under appeal that auxiliary requests 2\*, 3\* and 4\* were "considered as not admissible" (sheet 11, last paragraph) had to be disregarded as it was not reasoned and had not been discussed with the parties so that the respondent's right to be heard was not observed. Auxiliary request 2\* was thus part of the respondent's appeal case pursuant to Article 12(2) RPBA.

The additional Feature M19 of claim 1 of auxiliary request 2\* was literally disclosed in the paragraph bridging pages 17 and 18 of the A-publication and did not extend beyond the content of the application as originally filed.

The terms "substantially" and "mutual fixing" in claim 1 were clearly understandable and did not give rise to an objection under Article 84 EPC.

Feature M19 was not disclosed by E7 and E8, and it also did not derive from the fictitious "illustration" of a combination from documents E1 and E11, as submitted by the appellant. Hence, the subject-matter of claim 1 involved an inventive step.

#### *Adaptation of the description*

The description submitted on 6 May 2024 overcame all previously raised issues and was fully adapted to the claims of auxiliary request 2\* and thus in line with the requirements of Article 84 EPC.

### **Reasons for the Decision**

1. Neither the appellant nor the respondent submitted new arguments regarding the Board's preliminary opinion set out in its communication under Article 15(1) RPBA. The appellant, apart from addressing the adaptation of the description, merely referred to its written submissions. The respondent submitted, by letter of 6 May 2024, that it maintained its previous request, filed amended description pages for auxiliary request 2\* and announced that it would not attend the oral proceedings. The Board, hence, saw no reason to deviate from its preliminary opinion.
2. Main request - inventive step
  - 2.1 It was common ground that E1 is a suitable closest prior art for the assessment of inventive step of claim 1 of the main request.

E1 undisputedly discloses Features M1 to M14 (Figure 1) and a door comprising an outer door panel and an inner door panel defining a gap between them, the gap having a lower inlet and an upper outlet, at a lower portion and an upper portion of the door, for passage of a flow of cooling air (part of Features M15 to M17; Figure 4, paragraph [0057]).

## 2.2 Distinguishing features

The parties agreed that the subject-matter of claim 1 differs from the appliance of E1 by the following distinguishing features.

a) The door further comprises at least one intermediate door panel, the door panels defining between them a further gap having a lower inlet and an upper outlet, at a lower portion and an upper portion of the door, for passage of a flow of cooling air (remaining part of Features M15 to M17).

b) The at least one portion of the flue comprises a drawn part of the upper wall of the muffle that generally projects towards the lower wall of the duct body and has an upper end portion, where the fume outlet of the muffle is defined (Feature M18).

## 2.3 Effects and objective technical problems to be solved

It was common ground that the distinguishing features under a) and b) solve different partial problems.

### 2.3.1 As to a), the parties and the Board agree that the problem is how to improve cooling of the appliance door.

2.3.2 Regarding b), the appellant submitted that whether the flue was formed by a drawn part of the lower wall of the duct body (as in E1) or by a drawn part of the upper wall of the muffler (as required by Feature M18) was presented in the impugned patent as equivalent alternatives without specific advantages or technical effects of one over the other (paragraphs [0018], [0019] of the impugned patent; "similar considerations [...] with all the advantages", paragraph [0022]). Hence, the objective technical problem of b) in view of E1 was "to find an alternative solution for connecting the upper wall of the muffler with the lower wall of the duct body in which" the advantages that "these components can be coupled in a simple way" are preserved (grounds, page 10, second-last paragraph).

The respondent submitted that the distinguishing features under b) generally "allow to make the [...] manufacture of the flue [...] easier and faster" (reply, page 5, second paragraph) but did not explain why these effects were not achieved by the alternative of a drawn part of the duct body in E1.

The Board agrees with the appellant that the advantages of ease and rapidity of manufacture are set out for all alternatives according to paragraph [0022] of the impugned patent and thus already achieved in E1. Hence, the objective technical problem solved by the distinguishing features under b) resides in finding an alternative solution as specified by the appellant.

2.4 Obviousness of distinguishing features under a) in view of E4

The respondent submitted that - contrary to the reasoning in the decision under appeal - paragraphs [0055] and [0057] in E1 did not provide a motivation for considering the objective technical problem of improving the cooling of the door. Hence, there was no reason for the skilled person to "look at E4" for solving it. The respondent further argued that the provisions in E1 for cooling the handle (paragraph [0057], Figure 4) were not reconcilable with providing an intermediate door panel between the inner and outer door panels, meaning that the skilled person would not have adopted the solution of E4.

The Board is not convinced by these arguments.

According to the problem-solution approach, the skilled person strives to solve the identified partial objective technical problem (which is derived in an objective way from the differentiating features and their associated technical effects). It is thus not necessary that the skilled person find a specific motivation for solving this problem in the closest prior art E1. Rather, the skilled person would have looked for solutions to improve the cooling of the door regardless of whether E1 suggests that further improvements are necessary.

Document E4 is concerned with exactly the same problem as formulated above (paragraphs [0007] and [0009]) vis-à-vis a prior art oven with a door with two panels and one gap as in E1 (paragraph [0002]). Hence, the skilled person would have considered the solution in E4.

E4 teaches (Figures 5 and 6; paragraph [0025]) a door with two additional intermediate door panels 43 and three respective gaps between the panels, among them at

least an external gap (51) and an internal gap (52), each having a lower inlet and an upper outlet, at a lower portion (Figure 6) and an upper portion (Figure 5), respectively, for passage of a flow of cooling air. Fresh air is sucked through the two innermost gaps 52 into the suction duct 6 of the blower (paragraph [0040]), while a flow of fresh air is drawn through the external gap 51 due to a Venturi effect by the air expelled from the blower (paragraph [0048]). Accordingly, E4 discloses the solution of Features M15 to M17.

It is true that E4 does not disclose the same provisions for cooling the handle of the door as in E1, and the respective construction of E1 cannot be easily implemented in the door of E4. However, the skilled person would have understood that cooling of the handle is no longer needed with the improved door construction of E4. Hence, the door of E4 solves the partial objective technical problem under a) and supersedes the need to cool the handle as well. Accordingly, the skilled person would have implemented the door of E4 in the appliance of E1 and would thus have arrived at Features M15 to M17 in an obvious manner.

2.5 Obviousness of distinguishing features under b) in view of E3

E3 discloses a drawn part of the upper wall of the muffle ("kragenförmige Begrenzung" 180, Figure 3; column 8, lines 12 to 18) as an inner guidance ("innenliegende Führung") for the annular condensate collection region (42) formed by the lower wall of the duct body (column 5, lines 40 to 50) and to allow - via a gasket 48 between the drawn part 180 and the collar 41 - a very good sealing.



- 2.5.1 The appellant argued that it would have been obvious for the skilled person to adopt the drawn muffle part of E3 (Figure 3) to improve the connection between the muffle and duct body in E1 in terms of relative positioning and sealing.
- 2.5.2 The respondent submitted that the drawn part of the muffle as shown in Figure 3 of E3 did not fulfil the claimed requirement that it "generally projects towards the lower wall of the duct body" because the lowest part of the duct body was lying on the flat part of the muffle and the drawn part of the muffle pointed away from this wall. This requirement applied to the entire drawn part including the "upper end portion where the fume outlet of the muffle is defined".

In addition, the respondent argued that the appliance door of E3, like that of E1, was not compatible with the door construction of E4.

- 2.5.3 The Board agrees with the respondent that according to the wording of Feature M18, the claimed "drawn part" must contain the "upper end portion" where the fume outlet is formed. Hence, the appellant's arguments according to which only the part of the curved portions of part 180 in E3 positioned below the wall 40 and projecting in a direction toward the lower wall of the duct body is considered the "drawn part of the upper wall of the muffle" is not convincing.

However, the Board considers that the requirement that the drawn part "generally projects towards" the lower wall of the duct body in M18 is to be understood more broadly, namely such that it only defines the general direction of the projection but does not exclude that

the drawn part extends further in this direction beyond the lower wall of the duct body. This is in accordance with the understanding in the patent itself. The patent discloses that the duct body 10 is made from two half shells 11, 12, where the lower half shell defines the lower wall 10a of the duct body (paragraph [0051]). Hence, the "lower wall" is the entire underside of the duct body, not only the lowest portion where it contacts the muffle. Moreover, Figure 5 and paragraph [0049] disclose that the drawn part 8 of the upper wall 5a of the muffle "generally projects upwards" (from the upper wall 5a). However, it also has a central recess (housing 8a) in which a filtering element 14 can be deposited (paragraph [0049]). The fume outlet 7 is in the centre of this recess. Hence, the term "upper end portion" is not restricted to the uppermost part of the drawn part. While the central part of this drawn part including the fume outlet projects inwardly with respect to the muffle, the overall drawn part as a whole can be considered to "generally" project towards the lower wall of the duct body. Furthermore, paragraph [0049] discloses that the drawn part generally projects "upwards", not "towards the lower wall of the duct body". Likewise, paragraph [0054] and Figures 9 and 10 disclose that the drawn part 9 of the lower wall 10a of the duct body "generally projects downwards, i.e., towards the upper wall of the muffle 5" (this drawn part also contains a central recess projecting in the opposite direction). Accordingly, the expression "generally projects towards" as meant in the patent is understood as defining a general upward/downward projection direction, i.e. away from the component on which the respective drawn part is formed and towards the neighbouring component.

In E3, the lower wall of the duct body ("Gebläsekammer 3") carries the reference sign 34 ("Gehäuseboden") and has openings 36 (column 8, lines 39 to 68). The "Wrasenkanal" 4 does not necessarily form part of the duct body, although the lower wall 34 and the channel 4 can optionally be formed from a common metal sheet, in which case the channel 4 is considered "practically a part" of the blower chamber 3 (column 9, lines 44 to 49).

In view of the above, the drawn part 180 in E3 fulfils the requirements of Feature M18. Firstly, the drawn part 180 projects towards the lower wall 34 of the duct body 3 in a literal sense. And secondly, it "generally" projects upwards and thus "towards" the duct body as a whole, i.e. it "generally projects towards" the lower wall of the duct body as meant in the patent. Accordingly, E3 discloses Feature M18.

2.5.4 The obviousness for the skilled person to implement the drawn part 180 from E3 in the appliance of E1 in view of the advantages of improved positioning and sealing has not been contested by the respondent.

2.5.5 As set out above, the Board does not share the respondent's concerns regarding the compatibility of the door of E4 with that of E1. This is not changed when considering, in addition, the teaching of E3 regarding the cooling of the door (Figure 5).

2.6 Accordingly, the subject-matter of claim 1 of the main request does not involve an inventive step starting from E1 in combination with E4 and E3. Therefore, the main request is not allowable.

3. Auxiliary request 1 - inventive step

Claim 1 of auxiliary request 1 is identical to claim 1 of the main request and thus does not involve an inventive step for the same reasons as set out for the main request. Auxiliary request 1 is thus not allowable either.

4. Auxiliary request 2 and 2\* - Rule 80 EPC

4.1 By letter of 4 April 2023, the appellant submitted for the first time an objection under Rule 80 EPC against auxiliary requests 2 and 2\* because it considered that the deletion of dependent claims 7 to 10 was not occasioned by a ground for opposition. The respondent requested that these objections not be admitted under Article 13(1) RPBA.

4.2 The objections under Rule 80 EPC against the deletion of dependent claims in auxiliary requests 2 and 2\* are *prima facie* without merit for the following reasons.

Auxiliary requests 2 and 2\* have been amended by including in claim 1 the additional features of claims 2 and 3 as granted. This amendment is, in view of the objections of lack of inventive step against the main request, occasioned by a ground for opposition under Article 100 EPC as required by Rule 80 EPC.

According to the respondent, in the course of this amendment, claims 7 to 10 as granted were deleted "to avoid to claim fictitious embodiments not supported by the patent application as originally filed".

The Board is thus of the opinion that the deletion of the dependent claims, in combination with the amendment

occasioned by a ground for opposition, does not violate the requirements of Rule 80 EPC.

Accordingly, the objections set out by the appellant under Rule 80 EPC are *prima facie* unfounded.

4.3 For this reason, the Board thus decided to exercise its discretion under Article 13(1) RPBA not to admit the objections under Rule 80 EPC.

5. Auxiliary request 2 - inventive step

5.1 Claim 1 of auxiliary request 2 further specifies Feature M18a, according to which "the at least one portion of the flue comprises a drawn part of the lower wall of the duct body that generally projects towards the upper wall of the muffle and has a lower end portion, where the fume inlet of the duct body is defined". That is, claim 1 of auxiliary request 2 requires that the flue is formed with drawn parts of both the muffle (Feature M18) and the duct body (Feature M18a).

5.2 According to the respondent, neither E1 nor E3 disclosed a drawn part of the lower wall of the duct body according to Feature M18a because the fume inlet was not formed at the lower end of the drawn part (which formed the condensate collection region) but at a part (41) projecting upwards and, hence, projecting away from (instead of towards) the upper wall of the muffle.

5.3 For similar reasons as set out above under point 2.5.3, the Board does not agree with the respondent's line of argument.

E1 and E3 disclose a drawn part of the lower wall of the duct body that "generally" projects downward and towards the upper wall of the muffle as in the patent. Furthermore, according to Feature M18a, the fume inlet is not required to be "at the lower end" or "in the lowest part" but in "a lower portion" of the drawn part. Likewise, Figure 7 in the patent discloses that the fume inlet 10d is provided in a recessed portion projecting upwards from the lowest part of the drawn part.

Hence, both E1 and E3 disclose the additional Feature M18a of claim 1 of auxiliary request 2.

5.4 Accordingly, the subject-matter of claim 1 of auxiliary request 2 differs from E1 by the same distinguishing features as claim 1 of the main request, which solve the same (partial) objective technical problem(s).

5.5 The subject-matter of claim 1 of auxiliary request 2 thus does not involve an inventive step for the same reasons as set out for claim 1 of the main request, *mutatis mutandis*. For these reasons, auxiliary request 2 is not allowable either.

6. Auxiliary request 2A

As set out under point 4. above, the objections under Rule 80 EPC against auxiliary request 2 are not admitted. Hence, the prerequisite for the conditional filing of auxiliary request 2A is not given. It is thus not necessary to consider auxiliary request 2A.

The Board further notes that claim 1 of auxiliary request 2A is identical to claim 1 of auxiliary request 2, the subject-matter of which does not involve an inventive step as set out above. Accordingly, auxiliary request 2A is, for the same reasons, *mutatis mutandis*, not allowable either.

7. Auxiliary request 2\*

7.1 Admittance

Auxiliary request 2\* was filed on 20 April 2021, the day before the oral proceedings in the opposition proceedings, that is, after the final date for making written submissions according to Rule 116(1) EPC.

The Board agrees with the respondent that the statement at the end of sheet 11 of the grounds for the decision under appeal, i.e. the passage in which auxiliary requests 2\*, 3\* and 4\* are referred to as "late-filed" and "considered as not admissible", is an *obiter dictum* (auxiliary request 1 having been considered allowable by the opposition division). Regarding the right to be heard, this statement is problematic as the admittance of these requests was "not discussed" with the parties "during the oral proceedings" (decision under appeal, sheet 11) or in writing.

Hence, the Board does not consider that these auxiliary requests were, for the purposes of Article 12(6) RPBA, "not admitted in the proceedings leading to the decision under appeal", at least not without violating the right to be heard in the exercise of discretion. This does not, however, mean that they are "admissibly raised" within the meaning of Article 12(4) RPBA, either. Hence, admittance of auxiliary request 2\* is at

the Board's discretion.

Having said this, in view of the fact that the amendment has been thoroughly discussed by the parties in the written appeal proceedings and *prima facie* overcomes all outstanding issues, the Board decided to exercise its discretion under Article 12(4) RPBA to admit auxiliary request 2\* into the appeal proceedings and to deal with the appellant's objections against this claim request in full.

## 7.2 Article 123(2) EPC

Claim 1 of auxiliary request 2\* is further specified by Feature M19 requiring that "said lower end portion and said upper end portion have respective substantially plane parts that bear upon one another and that have respective holes for elements for mutual fixing". This feature is literally taken from page 17, line 33 to page 18, line 2 of the description as originally filed.

The appellant submitted that this passage referred to "the aforesaid end portions" defined in the preceding paragraph as the "upper end portion" and the "lower end portion" of the drawn parts of the muffle and the duct body defined in Features M18 and M18a. This paragraph further disclosed the end portions as "facing each other" and that a "substantial portion of the flue is integral with" the duct body, restrictions which were omitted in claim 1 by means of an inadmissible intermediate generalisation.

The Board does not agree for the following reasons. Page 17, lines 23 to 25 states that "at least a substantial portion of the flue can be defined integrally by [...] the duct body" as an optional



feature ("can"), which can be omitted without infringing the requirements of Article 123(2) EPC. The feature of the "end portions facing each other" from page 17, line 23 is already represented in the more specific Feature M19 of claim 1 requiring that the plane parts "bear upon one another". Hence, the Board does not see an unallowable intermediate generalisation in Feature M19 as submitted by the appellant.

Claim 1 of auxiliary request 2\* thus complies with the requirements of Article 123(2) EPC.

### 7.3 Article 84 EPC

The appellant submitted that Feature M19 was unclear because of the term "substantially" and because it was not clear whether "mutual fixing" referred to the mutual fixing of the elements with each other or to the mutual fixing of the plates with each other.

In the Board's view, the term "substantially" is to be understood to refer to minor deviations from the exact planar geometry due to usual manufacturing and/or measurement tolerances. Such deviations are inevitable and are also encompassed in the common reading of the technical features by a skilled person without the term "substantially". Hence, the presence of this term does not broaden the claim definition beyond its normal understanding and does not lead to a lack of clarity.

The expression "for mutual fixing" defines a suitability of the "elements". It is true that "mutual fixing" could relate to the mutual fixing of the elements or of the plates. However, the subject-matter of claim 1 is not limited by the elements themselves but only by the general suitability of the holes for

any such elements. Hence, the clarity of the subject-matter of the claim is not affected by the ambiguity of whether the elements are suitable for mutual fixing of the plates to each other or for mutual fixing to each other.

Accordingly, the subject-matter of claim 1 of auxiliary request 2\* is clear.

#### 7.4 Inventive step

##### 7.4.1 In view of E7 or E8

By letter of 4 April 2023, the appellant submitted that the subject-matter of claim 1 of auxiliary request 2\* was not inventive because "at least the documents E7, Fig. 2 and Fig. 3 and E8, Fig. 4 and Fig. 5a to 5d show plane parts having holes for mutual fixing".

The Board notes that this objection is not substantiated as it does not specify the starting point, the effects and problem to be solved by the distinguishing features, nor a detailed analysis of where the distinguishing features are found in E7 or E8.

Moreover, E7 does not disclose a drawn part of the muffler. Figures 2 and 3 show a separate filter housing, which is fixed to a drawn part of the duct body. Likewise, Figures 5a to 5d in E8 do not show a drawn part of the muffler but relate to a separation unit 20 for placement within the duct body (Figure 4).

Hence, the objection of lack of inventive step is not only unsubstantiated, it is also not apparent how E7 or

E8 could have led the skilled person to the subject-matter of Feature M19.

#### 7.4.2 Starting from E1 in combination with E11

By letter of 13 September 2023, the appellant filed document E11 and submitted an objection of lack of inventive step of claim 1 of auxiliary request 2\* starting from E1 in combination with E11. E11 allegedly disclosed Feature M18 in part 3A in Figures 1 and 2 and was thus highly relevant as a combination document for inventive step.

The filing of E11 and the objection of lack of inventive step based on E11 represent an amendment of the appellant's appeal case under Article 13(1) RPBA.

Part 3A in E11 is described as an "aperture" of the muffle without further details on its structure. Even if it was considered a protrusion in the upper wall of the muffle as apparent from Figure 1 or 2, it could well be a separate part attached to the upper wall of the muffle, not necessarily a drawn part. Hence, E11 neither explicitly nor implicitly discloses that part 3A is a drawn part of the upper wall of the muffle according to Feature M18. Hence, E11 lacks the alleged *prima facie* relevance submitted by the appellant.

Furthermore, as to Feature M19, the Board notes that E11 does not disclose that the "aperture" 3A has a substantially plane part with fixing holes either. Instead, the connection between the aperture 3A and the duct body in E11 is made with a tubular element 27. Hence, the "illustration" submitted by the appellant (on page 7 of its letter of 13 September 2023) is not based on the disclosure of E11 but seems to be drawn

using hindsight knowledge of the claimed invention. Finally, according to the "illustration", the holes would have to be placed at the bottom of the condensate collection region 42, and this would have been counter-intuitive. Hence, E11 is *prima facie* not particularly relevant for auxiliary request 2\* either.

Moreover, the appellant submitted that E11 was not found in earlier searches and thus could not have been filed earlier. The Board, however, considers that the document could and should have been found and filed earlier, i.e. during the opposition proceedings (Article 12(6) RPBA).

Hence, the Board decided to exercise its discretion under Article 13(1) RPBA not to admit E11.

7.4.3 Therefore, the subject-matter of claim 1 of auxiliary request 2\* involves an inventive step.

## 8. Adaptation of the description

8.1 In its communication under Article 15(1) RPBA, in view of its preliminary opinion, the Board requested the respondent to submit an adapted description for auxiliary request 2\* ahead of the oral proceedings.

8.2 By letter of 6 May 2024, the respondent submitted two versions, Options A and B, of an adapted description and requested that the patent be maintained on the basis of auxiliary request 2\* with either of these versions of the description, or the case be otherwise remitted to the opposition division for the further adaptation of the description. Option B differs from Option A only in that the wrong reference number 8 in

paragraph [0064] is not replaced by the correct reference number 9.

8.3 The appellant and the Board were satisfied with the correction of the reference sign in paragraph [0064] of Option A and with the adaptation of paragraph [0020].

8.4 The appellant raised objections regarding paragraphs [0019] and [0021] of this adapted description. It stated that it did not have further objections against Option A of the adapted description and requested that the case be remitted to the opposition division for further adaptation of the description.

8.5 More specifically, the appellant submitted the following.

a) The statement "in particular if it is considered that the entire flue may possibly be obtained from the aforesaid lower drawn part" in the first sentence of paragraph [0019] was in conflict with claim 1 of auxiliary request 2\*, which required that the flue has at least one portion (Feature M11) comprising a drawn part of the upper muffle wall (Feature M18) and a drawn part of the lower duct body wall (Feature M18a). According to claim 1, the "entire" flue could thus not be obtained from a "lower drawn part" alone.

b) As Feature M19 defined that the end portions of the drawn parts "bear upon one another", the "presence of the drawn part in question" could not function "as a spacer element between the upper wall of the muffle and the lower wall of the duct body" as expressed in the second sentence of paragraph [0019].

c) Paragraph [0021] was not in line with claim 1 because it only conditionally ("when") referred to situation that "the flue includes drawn parts of the duct body and of the muffle", which was, however, mandatory according to claim 1, and it defined that the end portions "preferably face each other" as an optional feature, whereas this was an implicit requirement in claim 1 according to which the end portions of the drawn parts "have respective substantially plane parts that bear upon one another" (Feature M19).

8.6 The Board agrees with objections a) and c) submitted by the appellant. Hence, the adapted description (both options) submitted by the respondent on 6 May 2024 is not in line with the invention according to claim 1 of auxiliary request 2\* and thus does not fulfil the requirements of Article 84 EPC.

8.7 As to objection b), the Board considers that - apart from the reference to "the drawn part in question" of objection a) in the second sentence of paragraph [0019] - the submitted contradiction that a drawn part of a wall cannot be a spacer element between this wall and another wall was already present in the granted patent and is thus not open to an objection according to G 3/14. Moreover, the second sentence of paragraph [0019] merely refers to the function as, not the structure of, "a spacer element" and clearly expresses, from the skilled person's viewpoint, that the drawn part provides a distance between the remaining parts of the walls not belonging to the drawn part. Hence, the Board does not share the appellant's objection under b) above.

8.8 In view of the outstanding issues, the Board decided, in line with both parties' requests, to remit the case to the opposition division for further adaptation of the description pursuant to Article 111(1) EPC and Article 11 RPBA.

9. Conclusion

For the reasons set out above, with a suitably adapted description, auxiliary request 2\* is allowable.

## 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 with the following claims and a description to be adapted thereto:
  - claims 1 to 7 according to auxiliary request 2\* filed with the reply to the statement of grounds of appeal

The Registrar:

The Chairman:



C. Spira

C. Herberhold

Decision electronically authenticated