

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 26 May 2025**

Case Number: T 0920/23 - 3.2.04

Application Number: 14725379.3

Publication Number: 2991511

IPC: A24B13/02, A24B15/167

Language of the proceedings: EN

Title of invention:

VAPORISABLE MATERIAL AND CAPSULE

Patent Proprietor:

JT International SA

Opponent:

Philip Morris Products S.A.

Headword:

Relevant legal provisions:

EPC Art. 100(a)

RPBA 2020 Art. 12(4), 12(5), 12(6)

Keyword:

Grounds for opposition - lack of patentability (no)
Discretion not to admit submission - requirements of Art.
12(3) RPBA 2020 met (no)
Late-filed facts - admitted (no)
Late-filed evidence - admitted in first-instance proceedings
(no) - admitted (no)
Request for staying the proceedings in view of a pending
referral to the Enlarged Board of Appeal - answer required for
the Board's decision (no)

Decisions cited:

T 0198/15

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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

Case Number: T 0920/23 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 26 May 2025

Appellant: Philip Morris Products S.A.
(Opponent) Quai Jeanrenaud 3
2000 Neuchâtel (CH)

Representative: Grünecker Patent- und Rechtsanwälte
PartG mbB
Leopoldstraße 4
80802 München (DE)

Respondent: JT International SA
(Patent Proprietor) 8 rue Kazem Radjavi
1202 Geneva (CH)

Representative: Gill Jennings & Every LLP
The Broadgate Tower
20 Primrose Street
London EC2A 2ES (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 2 March 2023
rejecting the opposition filed against European
patent No. 2991511 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Pieracci
Members: G. Martin Gonzalez
T. Bokor

Summary of Facts and Submissions

- I. The appeal was filed by the appellant opponent against the decision of the opposition division to reject their opposition.
- II. The division held that granted claim 1 was new over D1, D4, D8 and D13 and involved an inventive step considering D2, D3, D5, D6 or D7 as closest prior art, while it did not admit late-filed documents D14-D19.
- III. In preparation for oral proceedings the Board issued a communication setting out its provisional opinion on the relevant issues.

Oral proceedings were held by videoconference before the Board on 26 May 2025.

- IV. The appellant opponent requests that the decision under appeal be set aside and that the patent be revoked in its entirety.

The respondent proprietor requests dismissal of the appeal, or auxiliarily that the decision under appeal be set aside and the patent be maintained according to one of auxiliary requests 1-18 filed with the reply of 21 November 2023, where auxiliary requests 1-17 correspond to the same numbered requests before the opposition division.

V. Claim 1 of the main request (as granted) reads as follows:

"A method for producing a vaporisable material comprising tobacco fibres for use in a vapour generating device which generates a vapour by heating rather than burning the vaporisable material, the method comprising drying the tobacco fibres to a moisture content of 5 wt% or less reducing the particle size of the tobacco fibres to less than 1.5 mm and mixing tobacco fibres of at least two ranges of particle size."

VI. In the present decision, reference is made to the following documents:

(D1) EP 0 520 231 A2
(D2) WO 2009/079641 A2
(D3) EP 0 352 107 A2
(D4) US 2011/0048434 A1
(D5) EP 2 512 271 B1
(D6) US 2012/0037175 A1
(D7) US 2012/0138073 A1
(D8) US 2008/0092912 A1
(D10) US 5,099,864 A
(D12) KR 10-2013-002109
(D12a) English translation of D12
(D13) EP 2 526 787 A1

VII. The parties' arguments relevant to the decision are discussed in detail in the Reasons for the Decision.

Reasons for the Decision

1. The appeal is admissible as regards time limits and appeal fee. It is also sufficiently substantiated.
- 1.1 The respondent argued that an overwhelming portion of the appellant's arguments are merely word for word repetitions of its arguments submitted before the opposition division. According to the respondent, such arguments are essentially inadmissible, as found by decision **T 0198/15**, also cited in CLBA V.A.2.6.3.h.
- 1.2 In the reading of the Board, decision **T 0198/15** did not state that word for word repetitions as parts of the arguments in a party's grounds of appeal are inadmissible as a question of principle. It stated that mere repetitions cannot be seen as arguments why the decision under appeal is to be set aside because they were drafted before the decision of the opposition division was issued (Reasons 2.5). The present Board does not disagree with this statement. However, in view of the requirements of Article 12(2) RPBA, according to which "a party's appeal case shall be directed to the ... facts, objections, arguments and evidence on which the decision under appeal was based", repetition of matter is practically unavoidable, as also conceded by the respondent in the oral proceedings.
- 1.3 The present Board sees no reason why repetitions could not consist of word-for-word repetition, depending on the structure of the arguments and the party's main reasons for overturning the decision. The relevant question is whether the appellant's case as a whole makes it clear why the impugned decision should be set aside and replaced with a different substantive

decision. This question must be answered on a case-by-case basis. If the question can be answered in the affirmative, the appeal must be seen as reasoned and fulfilling the requirements of Rule 99(2) EPC.

- 1.4 This is so in the present case. In its grounds of appeal, the appellant drew attention to its earlier arguments, which they claimed had been ignored by the division. The appellant submitted that the contested decision merely reproduced the division's preliminary opinion (see grounds of appeal, page 6, first paragraph of point 3, 'Novelty'). Repeating earlier arguments word for word may be justified in these circumstances. In this situation, an appellant is under no obligation to present a significantly different argument, either in substance or on procedure. For example, they need not rely on a substantial procedural violation through the violation of the right to be heard and need not insist on a remittal of the case. Simply requesting that the Board decide the disputed issue by reviewing the earlier arguments that were ignored may be justified and as such also sufficient.

Thus also in the present case, the Board is satisfied that the grounds of appeal contain sufficient indication of those salient points of the impugned decision that the appellant considers as crucial and also contains sufficient reason why, in the appellant's view, the opposition division's decision is wrong. Whether those reasons are also found convincing by the Board is another matter.

- 1.5 Accordingly, in view of the totality of the grounds of appeal and the circumstances of the present case, the Board sees no reason to disregard any part of the appellant's submissions solely because they are word-

for-word repetitions of earlier submissions before the opposition division, notwithstanding other admittance issues, which are discussed further below. In any case, these submissions do not convince the Board, irrespective of their admittance.

2. Background

The invention concerns a method of producing a vaporisable material, specifically tobacco fibres, for use in vapour-generating devices, see patent specification para 0001. The method involves drying the tobacco fibres to a moisture content of 5% or less, reducing their particle size to less than 1.5 mm, and mixing fibres of at least two different particle size ranges, see granted claim 1. The goal is to create a consistent and high-quality vapour without burning the material, thus preserving its aroma and providing a better user experience, see paras 0003. Mixing two different particle size ranges enhances or preserves flavour by providing a blend of high impact/fast release particles with low impact/longer release particles, resulting in improved taste and flavour delivery, see para 0009.

3. Main request - Claim interpretation - Stay of proceedings

3.1 The interpretation of feature E, "mixing tobacco fibres of at least two ranges of particle size", is in dispute between the parties. The appellant opponent requests a stay of the appeal proceedings, citing the pending referral **G 1/24** to the Enlarged Board of Appeal.

- 3.2 The opponent argues that claim 1 should be interpreted solely on its wording. Terms such as "different" or "groups" are not present in the claim and cannot be read in from the description. In their view, "mixing" can include merely stirring a homogeneous mass, which is technically sensible here. Indeed, the step prior to mixing already reduces particle size to below 1.5 mm, and the stirring of such material would inherently involve several ranges of particle sizes (since particle sizes between 0 and 1.5 mm inherently encompass numerous definable sub-ranges), satisfying the mixing requirement. On this interpretation, the claim would lack novelty over the cited prior art.

The proprietor's interpretation - that "mixing" implies combining previously separate and also different elements - is, according to the opponent, a limitation derived from the description rather than from the wording of the claim itself.

The pending referral **G 1/24** is expected to answer the question whether the description and figures may be consulted when interpreting the claims to assess patentability. As this issue underlies both the opposition and the Board's preliminary opinion, the appellant opponent argues that a stay is justified, because it would prevent a decision based on an approach that may later be overturned.

- 3.3 The appellant argues that the claim should be interpreted on its own merits rather than with the help of the description. The Board generally agrees with the appellant opponent in this respect. However, in the present case, the Board considers that even when the claim is interpreted on its own terms, it arrives at the same conclusion as the opposition division. A stay

of the proceedings is therefore not necessary, as the Board does not expect that the outcome of referral **G 1/24** would affect the Board's findings in this appeal, as set out below.

- 3.4 Claim interpretation must be approached with a mind willing to understand, with synthetical propensity - that is, seeking to build a coherent technical meaning from the claim as a whole, rather than tearing down and dissecting its language in isolation or reducing its features to mere formalities, see in this respect Case Law of the Boards of Appeal, 10th edition 2022 (CLB), II.A.6.1.

In the present case, the Board holds that the interpretation of "mixing" in the context of the claim is clear. For the skilled person aiming to make technical sense of the language, the term "mixing" is to be understood together with its object, "of tobacco fibres of at least two ranges of particle size". This phrasing indicates a process in which two distinct particle size ranges are brought together. It therefore presupposes an initial state in which the two ranges are not together, i.e. separated, and excludes the mere stirring of an already homogeneously mixed mass.

By contrast, the opponent's interpretation - that stirring any mass of particles under 1.5 mm satisfies the requirement by invoking arbitrary sub-ranges - divorces the term from its technical context. It would deprive the expression "of at least two ranges of particle size" of any meaningful limitation. On that view, the expression would serve no purpose in the claim; it would add nothing to the technical teaching and the claim wording would be reduced to empty verbiage. Such an interpretation cannot be accepted.

4. Main request - Novelty

4.1 The appellant opponent challenges the opposition division's conclusion that claim 1 is novel over D4 and D13.

4.2 D4 and D13 describe a tobacco composition for use as an additive (D4) and a treated tobacco homogenate (D13) not specifically for use in heated products, but for use in both combustible, heated and also smokeless products (see D4 paras 0012, 0026 and 0073; and D13 para 0068).

4.3 The appellant opponent submits that paras 0032 of D4 and 0043 of D13 disclose sizing "fine-cut" tobacco particles to pass through a screen of about 18 Tyler mesh. An 18 Tyler mesh has openings of about 0.9 mm, so particles passing through it range from 0 to 0.9 mm. Reducing particle size below this threshold naturally results in multiple size ranges. Paras 0032 of D4 and 0043 of D13 further disclose mixing differently sized tobacco pieces of tobacco homogenates. Therefore, the mixing of more than one size range, as claimed in claim 1, is known from D4 and D13.

4.4 However, paras 0032 of D4 and 0043 of D13 describe various forms and sizes of tobacco, such as shredded, ground, and granulated, but does not specify which is suitable for a heated vapour device, lack details on reducing particle size to below 1.5 mm while mixing two size ranges, and do not link these characteristics to be suitable for a heat-not-burn vaporisable material. While D4 and D13 recite that differently sized pieces of granulated tobacco or differently sized tobacco homogenates may be mixed together if desired, there is

no explicit disclosure of mixing two ranges of particle sizes, while staying within the particular size range of below 1.5 mm (see decision sections 3.4 and 3.6).

- 4.5 In this respect, the appellant opponent refers during the oral proceedings to a sentence in para 0032 of D4 stating that air classification equipment may be used to collect small tobacco particles of the desired sizes or range of sizes. They argue this implies a separation step after sieving below 18 Tyler mesh, producing distinct sub-ranges, and that the subsequent reference to mixing differently sized pieces covers the mixing of those sub-ranges.

In the Board's view, the appellant's argument fails, as it is not directly and unambiguously derivable that the cited sentence implies further separation of the sieved particles. The reference to "sizes" or "range of sizes" more plausibly reflects the natural variation within a single particle sieved size range (e.g. 0-0.9 mm or 0.25-0.9 mm), rather than implying separation. The air classifier may merely remove fibrous or lightweight dust to allow clean collection within that range. That the air classifier allows to collect small sized tobacco particles does not imply the claimed mixing step of at least two ranges of particle sizes. It therefore cannot be directly and unambiguously concluded, based on this sentence, that the optional mixing described in para 0032 of D4, of differently sized pieces of granulated tobacco particles, refers to sizes exclusively below the 18 Tyler mesh threshold, i.e. to particle sizes below 1.5 mm. as claimed.

Otherwise the appellant opponent reiterated during the oral proceedings their argument that the stirring of a homogeneous mass meets the claimed "mixing" feature. As

explained above, this interpretation is excluded from the claim scope.

The appellant opponent argued in a similar way with respect to D13, para [0043].

- 4.6 The Board is therefore not convinced by the appellant opponent arguments. It thus confirms the conclusion of the opposition division that neither D4 nor D13 discloses all features of method claim 1 in combination and that therefore claim 1 is new over the cited prior art, Articles 100(a) and 54(2) EPC.

5. Main request - Inventive step

- 5.1 The appellant challenges the opposition division's conclusion that claim 1 involves an inventive step over the prior art (see section 5 of the decision).

They maintain the objection of the lack of inventive step, starting from D2, D3, D4, D5, D6, D7, or D13.

- 5.2 **Starting from D2 or D3**, these documents, like the present invention, concern vaporisable materials for vapour-generating devices that heat rather than burn the material, making them suitable starting points for assessing inventive step.

- 5.3 It is undisputed that D2 does not disclose feature E, the method step of mixing tobacco fibres of at least two particle size ranges (see opponent's grounds, p. 16, third paragraph).

Document D3 also fails to disclose feature E, contrary to the opponent's arguments. D3 describes comminuting tobacco material to a size range between 20 mesh

(0.85 mm) and 400 mesh (0.037 mm) before adding glycerine (see p. 3, col. 4, line 44), but there is no disclosure that this involves mixing two distinct particle size ranges.

- 5.4 Thus, claim 1 differs from D2 and D3, at least in feature E, which requires the step of mixing tobacco fibres of at least two particle size ranges. As explained in para 0009 of the patent specification, blending particles of different sizes allows high-impact, fast-delivery particles to be combined with low-impact, slower-release particles. This contributes to enhanced richness and smoothness of flavour as perceived by the user, as well as improved duration of flavour delivery.

Importantly, para 0009 presents this technical effect in general terms, not limited to any specific embodiment. Contrary to the appellant opponent's argument during the oral proceedings before the Board, this teaching is associated with the claimed features - particularly the mixing step - since the paragraph explicitly refers to the two sets of particles as the ones "to be mixed".

Tables 2 and 3 (paras 0019 and 0020) provide specific examples of such mixtures, evaluated by regular tobacco users, and further underpin the technical effect that is already plausibly established in general terms by the technical explanations in para 0009. Thus, contrary to the opponent's arguments in section 4.1.2 of their grounds, the skilled person would view Tables 1, 2, and 3 as illustrative examples, understanding that the effect can be achieved with other combinations.

5.5 Accordingly, the technical problem may be formulated as providing a method for designing a vaporisable material with adjustable taste intensity and duration (para 0004 of the opposed patent).

5.6 In one line of argument, the appellant formulates the technical problem as simply providing an alternative (see grounds p. 16, para 6). However, this is incorrect for the reasons set out above and the inventive step argument fails on this basis alone.

5.7 Alternatively, the appellant argues that para 0011 of D4 clearly indicates an intention to alter the sensory character - such as taste, aroma, or flavour - for the user (see also para 0025 of D4). They further note that para 0032 of D4 discloses the same particle size as D2. On this basis, the appellant contends that D4 serves the same purpose as the opposed patent and that the implementation of mixing differently sized pieces of granulated tobacco, as mentioned in para 0032 of D4, into the method of D2 would be an obvious measure to solve the problem posed.

However, D4 is primarily directed to thermal treatment processes for tobacco material, and any sensory effects are linked to chemical changes induced by heat, often in combination with an additive (para 0011), or more generally to the impact of thermal processing on flavour, aroma, and chemistry (para 0025). Mixing tobacco fibres of two particle size ranges is not suggested in those passages. While para 0032 does mention the possibility of mixing differently sized tobacco particles, it does not explain the technical effect of such mixing - let alone any suggestion that such mixing might be relevant to solving the technical

problem posed by the opposed patent, namely adjusting taste intensity and duration - nor does it teach any association of this step with use in a heated, non-combustible smoking article. Accordingly, the skilled person would have no reason, based on the teachings of D4, to modify the method of D2 by introducing the step of mixing differently sized tobacco particles, as there is no suggestion that this would contribute to solving the problem posed.

The same conclusion applies to the various other combination documents cited by the appellant opponent, which contain the same or very similar teachings as those in para 0032 of D4 - some even reproducing the cited passages verbatim. These include D13 para 0043, D5 paras 0016, D7 para 0027, and D10, col. 4, lines 21-28. D12 para 0030, also cited by the appellant, refers to grinding tobacco to 80 mesh, which yields a single particle size range and contains no suggestion of mixing two different size ranges. The same applies to D6, for which the appellant opponent refers to para 0001 and 0024. D1 and D8 are cited only in connection with other claim features, but not with respect to the mixing step in feature E, which is the differentiating feature under discussion.

- 5.8 Regarding the inventive step objections starting from other documents, including admittance of documents D14-D19 and related inventive step objections, the parties referred to their written submissions. The Board set out its preliminary opinion in respect of these objections in its written communication under Article 15(1) RPBA dated 11 November 2024 as follows:

*"6.11 The appellant opponent also submits objections **starting from D4 or D13** (section 4,4 of the grounds),*

arguing for feature E - mixing tobacco fibres of at least two ranges of particle size - only that this feature is rendered obvious for the reasons mentioned in their Item 4.3 of the grounds (the combinations starting with D2 or D3). However, these documents are different starting points with distinct features and the Board does not find the reasoning for D2 and D3 straightforwardly applicable to D4 or D13. These objections are therefore presently considered as not substantiated and thus not admissible, Articles 12(3) and 12(5) RPBA. Moreover, the combinations in section 4.3 of the appellants grounds do not seem convincing, see the above observations starting from D2 or D3.

6.12 In section 4.5 of the grounds, the appellant argues that **D5, D6, and D7** can also be considered as **starting points** for assessing inventive step. However, as noted by the proprietor (see reply, section 4.5), these documents concern smokeless tobacco products for oral consumption, not vaporisable material intended or suitable for use in a vapour-generating device that heats rather than burns the material (D5 para 0008, D6 para 0004, D7 para 0004). Thus, any obvious further development of such a product or its manufacturing method would typically yield a product for oral consumption, not a vaporisable material.

The passages cited by the appellant - paragraph 0005 of D5, paragraph 0002 of D6, and paragraph 0002 of D7 - only reference aerosol-generating articles as known tobacco products in the general background section. They contain no indication or teaching to use the products disclosed in D5, D6, or D7 to generate aerosol.

7 Documents D14-D19 - Admittance

7.1 These late filed documents were not admitted by the opposition division, see section 4 of the appealed decision.

7.2 Regarding document D14, the division appears to have exercised its discretion reasonably, according to the correct principles, including prima-facie relevance and, after hearing the parties, see section 4.5 of the decision. The Board therefore does not intend to admit it under Article 12(6) RPBA first paragraph.

7.3 For documents D15-D19, the division merely stated that they were less relevant than D14 without providing reasons for this assessment, thereby failing to substantively justify their non-admission and so erring in their use of discretion. The Board must therefore exercise its own discretion, under Article 12(4) RPBA. As argued by the respondent proprietor in section 5 of their reply, they appear to lack prima facie relevance, for the following reasons:

D15 relates to filtering smoke in smoking articles to remove smoke constituents (see abstract). It does not concern the improvement of flavour and taste in a heat-not-burn device. It is neither in the same field of the contested patent nor addresses the same problem as claim 1. Thus prima facie it does not offer a promising starting point for inventive step.

D16 discusses aerosol production without significant thermal degradation or combustion by-products (page 3, lines 5-12). It does not focus on enhancing taste in a

heat-not-burn device, making it irrelevant for inventive step analysis of claim 1.

Unlike the invention of claim 1, which seeks to improve flavour in a heat-not-burn device, D17 deals solely with blended fillers for combustible cigarettes. Therefore, D17 is neither in the same field nor addresses the same problem as claim 1.

D18 (and D18a) concerns cutting tobacco for cigarettes to increase bulkiness and reduce raw material costs without affecting smoking taste (abstract). D18, focused on burning cigarettes, does not relate to heating without burning, nor does it address enhancing taste in a heat-not-burn device.

7.4 Therefore the Board is minded not to admit documents D15-D19 into the proceedings, Article 12(4) RPBA."

- 5.9 After reviewing its preliminary opinion, and in the absence of any further submissions from the parties, the Board sees no reason to depart from its provisional assessment on these issues. It therefore concludes that the inventive step objections starting from D4 or D13 are not admissible under Articles 12(3) and 12(5) RPBA. In any event, and irrespective of their admittance, those objections - as well as those starting from D5, D6, or D7 - are not found to be convincing. The Board also decides not to admit documents D14 to D19 for those reasons as set out in its communication.

5.10 In sum, the appellant opponent's arguments against the opposition division's findings on inventive step are either not taken into account or not convincing. The Board therefore sees no reason to overturn the division's conclusion that granted claim 1 involves an inventive step, Article 100(a) EPC in combination with Article 56 EPC.

6. Since all objections raised by the appellant opponent are unsuccessful, the Board upholds the findings of the opposition division.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. Pieracci

Decision electronically authenticated