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**Datasheet for the decision
of 25 June 2025**

Case Number: T 1265/23 - 3.2.04

Application Number: 13821803.7

Publication Number: 2879533

IPC: A24F47/00

Language of the proceedings: EN

Title of invention:

HEATED AEROSOL-GENERATING DEVICE AND METHOD FOR GENERATING
AEROSOL WITH CONSISTENT PROPERTIES

Patent Proprietor:

Philip Morris Products S.A.

Opponent:

British American Tobacco (Investments) Ltd

Headword:

Relevant legal provisions:

EPC 1973 Art. 123(2)

Keyword:

Amendments of application

Decisions cited:

G 0002/10

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1265/23 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 25 June 2025

Appellant: Philip Morris Products S.A.
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Appellant: British American Tobacco (Investments) Ltd
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Representative: Dehns
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
19 May 2023 concerning maintenance of the
European Patent No. 2879533 in amended form.

Composition of the Board:

Chairman A. Pieracci
Members: S. Oechsner de Coninck
C. Heath

Summary of Facts and Submissions

- I. The proprietor appeals against the decision of the Opposition Division of the European Patent Office concerning maintenance of the European Patent No. 2879533 in amended form.
- II. The present patent was the subject of appeal **T0354/20**, filed against the decision of the opposition division to reject the opposition. The then deciding Board considered sufficiency and novelty and held that the subject-matter of claim 1 as granted was anticipated by D7 as well as D3, state of the art documents according to Art. 54(3) EPC. The case was remitted to the opposition division for further prosecution.
- III. In its decision following remittal, the opposition division decided that the claim 1 according to an amended main request as well as auxiliary requests 1,2 and 6 contained added subject-matter, and decided that auxiliary request 3 met the requirements of the EPC.
- IV. In a communication in preparation for oral proceedings, the Board gave a provisional opinion on the relevant issues.
- V. Oral proceedings were held per videoconference on 25 June 2025. At the oral proceedings, the opponent withdrew their appeal.
- VI. The appellant-proprietor's final request is that the decision be set aside and the patent be maintained on the basis of a main request, alternatively on the basis of one of the auxiliary requests 1 to 16, wherein

auxiliary request 3 is the request considered allowable by the opposition division.

VII. The independent claim 1 according to the main request and auxiliary requests 1 and 2 reads as follows:

"A method of controlling aerosol production in an aerosol-generating device, the device comprising: a heater comprising at least one heating element (14) configured to heat an aerosol forming substrate (12), the aerosol-forming substrate comprising an aerosol former; and a power source (16) for providing power to the heating element; characterised by the steps of:

controlling the power provided to the heating element such that in a first phase power is provided such that the temperature of the heating element increases from an initial temperature to a first temperature, in a second phase power is provided such that the temperature of the heating element drops below the first temperature but not below the volatilization temperature of the aerosol former and in a third phase power is provided such that the temperature of the heating element increases again."

VIII. The relevant arguments of the parties are addressed in the following reasons for the decision.

Reasons for the Decision

1. Main request - added subject-matter

1.1 In relation to this question the Board has expressed its preliminary opinion under point 3 of its communication pursuant to article 15(1) RPBA as follows:

"This question concerns the addition in claim 1 of the amended main request that in the second phase the temperature of the heating element drops below the first temperature but not below the volatilization temperature of the aerosol former.

The decision found no direct and unambiguous disclosure of the further specification submitted to be found in page 3, lines 11 to 19 of the application as filed.

The appellant-proprietor considers that the skilled person would have understood that the "minimum allowable temperature" expressed in the last sentence of the paragraph corresponds to the volatilization temperature of the aerosol former provided in the substrate.

In the Board's view, however, the expressed minimum allowable temperature is unspecific, and lacks any identifiable relationship with any particular temperature "preferably" determined based on a range of temperatures that correspond to the volatilization temperature. Indeed, the general and unspecific expression used in the second sentence do not establish any clear relationship with particular values, minimum or maximum, of the range of volatilisation temperatures. This sentence does not allow to establish a direct and unambiguous link between these undefined temperatures values that allow volatilisation of the aerosol former and the minimum "allowable" temperature.

The further passage relied upon by the appellant-proprietor on page 14, lines 6 to 23 does not support the added feature because they merely add further condition on volatilisation temperatures of undefined

desired or undesired volatile compounds, again without clear relationship between any such temperatures and the volatilisation temperature above which the temperature should be kept in the second phase, as added in claim 1.

Therefore, the opposition division appears to have correctly assessed the question of added subject-matter for claim 1 of the main request."

- 1.2 At the oral proceedings before the Board, the appellant focussed on the question whether the skilled person would be presented with new information and submitted that reading the whole context of page 3, lines 11 to 19 of the published application as filed, the skilled person would have generalised the disclosure to other aerosol formers beyond the specific example of glycerine used therein and would have identified the minimum allowable temperature as the volatilisation temperature, as only technically sensible interpretation.
- 1.3 The Board remains unconvinced that the skilled person would have made such generalisation and derive that the minimum allowable temperature below which the temperatures should not fall is in fact the volatilisation temperature of an aerosol former, as the cited paragraph does not directly and unambiguously present such a teaching. This argument remains thus unsubstantiated and is not convincing.
- 1.4 The second sentence of the third paragraph on page 3 uses non limiting terms such as "preferably", "based on" and "that correspond". These however fail to establish a clear relationship between the volatilization temperature and a particular one of the

first, second or third temperatures previously mentioned. The last sentence of this paragraph on which the appellant base their reasoning introduces a possible "minimum allowable temperature" with no antecedent and again without explicit relationship between any of the first, second or third temperatures or volatilization temperature as previously mentioned in the same paragraph. In this context, whether or not the skilled reader may have inferred some relationship between this minimum allowable temperature and other temperatures such as the boiling point of glycerine, or a volatilization temperature of some unspecific aerosol former present in the substrate fails to represent the required direct and unambiguous disclosure as required by the gold standard (see G2/10).

- 1.5 The Board thus confirms the finding of the opposition division in the decision under appeal that the subject-matter of claim 1 according to the main request extends beyond the content of the application as filed under Article 123(2) EPC.
2. Auxiliary requests 1 and 2
- 2.1 Claim 1 according to both of these requests also comprises the same limitation "but not below the volatilization temperature of the aerosol former" as claim 1 of the main request. For the same reasons as above, the opposition division correctly concluded that these requests are not allowable under Art. 123(2) EPC, either.
3. It follows from the above that the opposition division correctly assessed the main request and auxiliary requests 1 and 2 which form the basis of the present

appeal from the proprietor. As auxiliary request 3 is the sole remaining request that has been upheld, the proprietor's appeal thus fails.

Order

For these reasons it is decided that:

The proprietor's appeal is dismissed.

The Registrar:

The Chairman:



A. Chavinier-Tomsic

A. Pieracci

Decision electronically authenticated