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**Datasheet for the decision
of 16 December 2024**

Case Number: R 0017/24

Appeal Number: T 1673/22 - 3.2.01

Application Number: 17195872.1

Publication Number: 3453368

IPC: A61F13/532, A61F13/539,
A61F13/15

Language of the proceedings: EN

Title of invention:

ABSORBENT ARTICLE WITH CHANNELS AND METHOD FOR MANUFACTURING
THEREOF

Patent Proprietor:

Drylock Technologies NV

Opponents:

Ontex BV
Fippi SpA

Headword:

Petition for review

Relevant legal provisions:

EPC Art. 112a(1), 112a(2)(c), 113(1), 114(2), 123(2)

EPC R. 106, 107, 109(2)(a)

RPEBA Art. 13, 14(2)

RPBA 2020 Art. 13(2), 15(1)

Keyword:

Petition for review - clearly unallowable

Fundamental violation of Article 113(1) EPC - no

Decisions cited:

R 0007/21, R 0008/17, R 0006/17, R 0016/13, R 0008/13,

R 0015/12, R 0019/11, R 0017/11, R 0010/11, R 0010/09,

R 0001/08



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Case Number: R 0017/24

D E C I S I O N
of the Enlarged Board of Appeal
of 16 December 2024

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Decision under review: **Decision T 1673/22 of Technical Board of
Appeal 3.2.01 of the European Patent Office
of 13 May 2024**

Composition of the Board:

Chairman I. Beckedorf
Members: M. Blasi
 R. Bekkering

Summary of Facts and Submissions

- I. The petition for review concerns decision T 1673/22 of Technical Board of Appeal 3.2.01 ("Board") dated 13 May 2024. With this decision, the Board set aside the decision under appeal and revoked the patent.
- II. The appellant-patent proprietor ("petitioner") duly filed a petition for review of decision T 1673/22 ("decision under review"). The petition is based on Article 112a(2)(c) EPC in conjunction with Article 113(1) EPC. It is submitted that the petitioner's right to be heard has been violated by the Board by not admitting auxiliary requests 8 to 24 into the proceedings.
- III. The appeal proceedings had been initiated by all three parties to the opposition proceedings, i.e. the petitioner and opponents 1 and 2, against the opposition division's decision relating to European patent 3 453 368. The opposition division had found, *inter alia*, that
- the subject-matter of claim 1 of the patent as granted lacked novelty over the disclosure of document D1,
 - claim 1 of auxiliary requests 1, 2 and 3, into which the feature "*along a plurality of longitudinal, substantially parallel stripes*", with or without a preceding "*only*", had been introduced, contravened Article 123(2) EPC,
 - the subject-matter of claim 1 of auxiliary request 4, which differed from claim 1 as granted on account of the addition of a further feature, likewise lacked novelty over document D1,

- auxiliary request 5, and the invention to which it related, complied with the requirements of the EPC.

IV. On appeal, the petitioner had maintained the patent as granted as the main request and auxiliary requests 1 to 5 as considered in the contested decision, and had additionally submitted sets of claims of

- new auxiliary requests I to IV, together with the statement of grounds of appeal,
- new auxiliary requests 6 and 7, together with the reply to the other parties' appeals, and
- new auxiliary requests 8 to 24, together with a further letter on 2 May 2024, i.e. after the Board had issued its communication pursuant to Article 15(1) RPBA on 4 December 2023.

Oral proceedings before the Board took place on 13 May 2024, during which, amongst other things, the issue of admittance of the auxiliary requests first filed on appeal was discussed. According to the minutes of the oral proceedings before the Board, the parties referred to their written submissions regarding the admittance of auxiliary requests 8 to 13.

The parties' written submissions on the admittance of auxiliary requests 8 to 13 were as follows:

- (a) In its letter dated 2 May 2024, together with which the sets of claims of auxiliary requests 8 to 13 were filed, the petitioner stated that these requests were "*submitted in reaction to the annotated figure which was first presented in section 4.5 of the submissions of opponent-appellant 01 dated 26 March 2024 in the context of an attack in view of alleged extension of subject-matter. New auxiliary requests 8-13 correspond with*

auxiliary requests 1, 2, 3, 5, 6 and 7 respectively, wherein the wording 'along a plurality of longitudinal, substantially parallel stripes' has been amended to 'as a plurality of longitudinal, substantially parallel stripes'. Although the proprietor-appellant believes there is basis for the wording 'along' as acknowledged in section 5.1.2 of the preliminary opinion of the Board, the wording 'along' has been amended to 'as' to more closely reflect the wording on page 16, lines 19-20 of the application as filed. The respective amendment is not complex as it only concerns the amendment of one word and therefore the impact to procedural efficiency should remain small." (see page 10 of the letter dated 2 May 2024).

- (b) In the reply letter dated 9 May 2024, appellant-opponent 1 requested, *inter alia*, that auxiliary requests 8 to 13 not be admitted by submitting the following: "The appellant-proprietor argued that auxiliary requests 8-13 were filed in response to the annotated figure presented in paragraph 4.5 of our letter of 26 March 2024. However, as set out in paragraph 4.4 of our letter of 26 March 2024, the argument illustrated with the annotated figure was made in paragraph 6.26 of our letter dated 20 April 2023; it was not a new argument. Accordingly, the inclusion of the annotated figure is not an exceptional circumstance justified with a cogent reason in the sense of Article 13(2) RPBA for the filing of auxiliary requests 8-13 less than two weeks before oral proceedings." (see point 1.11 of the letter dated 9 May 2024).

In its decision, the Board held that the subject-matter of claim 1 of each of the main request and auxiliary requests 1 to 5 lacked novelty over the disclosure of document D1 and decided not to admit any of the further auxiliary requests into the appeal proceedings, including auxiliary requests 8 to 24. As a consequence, the patent was revoked.

V. The petitioner requested
that decision T 1673/22 be set aside and
that the proceedings before the Board be re-opened.

VI. The Enlarged Board, in its composition pursuant to Rule 109(2) (a) EPC, summoned the petitioner to oral proceedings as requested, and issued a communication pursuant to Article 13 and Article 14(2) RPEBA.

VII. At the oral proceedings before the Enlarged Board, which took place on 16 December 2024, the petitioner presented its point of view as regards the Board not admitting auxiliary requests 8 to 13 and relied on its written submissions as regards auxiliary requests 14 to 24. At the end of the oral proceedings, the present decision was announced.

VIII. The petitioner's case is summarised as follows.

In sections 5 and 6 of the decision under review it was stated that auxiliary requests 8 to 13 and auxiliary requests 14 to 24, respectively, were not admitted in the proceedings pursuant to Article 13(2) RPBA as no exceptional circumstances had been justified with cogent reasons by the petitioner; however, the Board's decision was incorrect, and not admitting these auxiliary requests therefore violated the petitioner's right to be heard.

As regards auxiliary requests 8 to 13, the Board erroneously concluded in its written reasoned decision that the newly annotated figure which was first presented in point 4.5 of the submissions of appellant-opponent 1 did not represent exceptional circumstances. Moreover, the Board relied upon new facts on which the petitioner had not been given any opportunity to present comments.

Reasons for the Decision

Admissibility of the petition for review

1. The petition for review is not clearly inadmissible.
2. It meets the requirements of Article 112a(1) and (4) EPC in conjunction with Rule 107 EPC.
3. As regards the obligation under Rule 106 EPC to raise an objection in respect of the procedural defect, the petitioner submitted that it had only become aware of the procedural defect when taking notice of the written decision. The Enlarged Board accepts that an objection could not have been raised during the appeal proceedings before the Board, and therefore the exception provided for in Rule 106 EPC can be considered to apply in the circumstances of the present case.

Allowability of the petition for review

4. However, the petition is clearly unallowable.
5. Contrary to the petitioner's position, the Enlarged Board cannot establish that the petitioner's right to be heard had been violated due to auxiliary requests 8 to 24 not being admitted into the proceedings, let alone that this represented a fundamental violation of Article 113(1) EPC within the meaning of Article 112a(2) (c) EPC.
6. Pursuant to Article 113(1) EPC, decisions of the European Patent Office, including the boards of appeal, may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. A party has to have an opportunity to comment on the decisive aspects of the case.

On the other hand, the deciding board must be able to draw its own conclusions from the discussion of the grounds put forward. Therefore, the right to be heard does not go so far as to impose a legal obligation on a board to disclose in advance to the parties how and why, on the basis of the decisive issues under discussion, or at least those foreseeable as the core of the discussion, it will come to its conclusion. This is part of the reasoning given in the written decision (see also R 8/17, points 15 and 16 of the Reasons; R 16/13, point 3.3 of the Reasons; R 8/13 of 15 September 2015, point 2.2 of the Reasons; R 15/12, point 5 of the Reasons; R 1/08, point 3.1 of the Reasons).

7. The petitioner's complaint about the Board's decision on the admittance of auxiliary requests 8 to 24 concerns the question of whether the Board correctly applied Article 13(2) RPBA, i.e. the procedural provision on which the Board's decision not to admit these auxiliary requests was based, more specifically how the Board exercised its discretionary power in the circumstances of the case leading to the decision under review.
8. However, as derivable from the wording of Article 112a(2) EPC, a petition for review can only be based on fundamental procedural defects or on a criminal act having occurred in the proceedings before a board, i.e. issues which are intolerable for the legal system and override the principle that, in the interest of legal certainty, proceedings which have led to a final decision should not be re-opened. Accordingly, review proceedings cannot be based on an incorrect application of the law, including provisions of procedural law, by a board, or on procedural defects which are not of a fundamental nature. It follows that the Enlarged Board has no competence under Article 112a EPC to examine the merits of a board's decision and to go into the substance of a case, not even indirectly (see also Case Law of the Boards of Appeal, 10th edition, July 2022, V.B.3.1 and V.B.3.4.3, and the decisions cited in it, e.g. R 1/08, and R 19/11, point 2.2 of the Reasons).
9. The specific way in which the Board actually exercised its discretion on these procedural matters falls outside the Enlarged Board's competence, since this would need a review of all the facts and circumstances of the case, which would necessarily mean going into the merits of substantive issues (see also R 10/09,

point 2.2 of the Reasons; R 7/21, point 1 of the Reasons with further references).

10. The discretionary power provided for in Article 114(2) EPC, as well as in the relevant provisions in the Rules of Procedure of the Boards of Appeal, in this case Article 13(2) RPBA, is as such not subject to review by the Enlarged Board unless, under Article 112a(2)(c) EPC, a fundamental violation of Article 113 EPC occurred in the exercise of this discretionary power (see also R 17/11, point 10 of the Reasons with further references).
11. The exercise of discretion by a board is subject only to a limited review by the Enlarged Board, i.e. it is confined to a review of whether the Board's exercise of discretion was arbitrary or manifestly illegal (see also R 10/11, point 5.2 of the Reasons; R 6/17, point 3.5 of the Reasons; R 7/21, point 2 of the Reasons), thereby involving a fundamental violation of the right to be heard.

Admittance of auxiliary requests 8 to 13

12. The Board did not admit auxiliary requests 8 to 13 into the proceedings pursuant to Article 13(2) RPBA as it found that no exceptional circumstances had been justified with cogent reasons by the petitioner (see decision under review, point 5 of the Reasons). The Board considered that "*[t]he figures in paragraph 4.5 of the letter of 26 March 2024 [NB: to be read as 20 March 2024 since there is no letter bearing that date] illustrate the argument already submitted in the reply to the grounds of appeal of appellant 1 (opponent 1) under point 6.26, that the binder being arranged 'along substantially parallel stripes' allows*

the binder to take other forms so long as it is arranged along substantially parallel lines" and that "[t]herefore the annotated figure submitted by the appellant 1 (opponent 1) in the letter of 26 March 2024 does not provide exceptional circumstances for submitting auxiliary requests 8-13 at such a late stage in the proceedings" (see decision under review, point 5.3 of the Reasons).

13. In points 5.1 and 5.2 of the Reasons for the decision under review, the Board summarised the parties' arguments on the issue of admittance of auxiliary requests 8 to 13, essentially reproducing the parties' submissions verbatim as contained in the letters dated 2 May 2024 and 9 May 2024 (see section IV above).
14. In the petition for review, the petitioner submitted that the Board "*erroneously concluded in section 5.3 that this newly annotated figure does not provide exceptional circumstances ... because the annotated figure submitted on 26 March 2024 would correspond to an argument that was already submitted in the reply to the grounds of appeal of appellant 1 (opponent 1) under point 6.26*". The Board's reasoning was "*flawed as the newly submitted annotated figure does add matter to the argument that was already presented. If the annotated figure merely represented the argument already on file, then why would the appellant 1 (opponent 1) submit the annotated figure at such late stage rather than relying on the earlier presented argument*" (see petition, page 3, first and second paragraphs).
15. At the oral proceedings before the Enlarged Board, the petitioner further submitted that the annotated figure in point 4.5 of appellant-opponent 1's letter dated 20 March 2024 was a new fact which had been submitted

late in the appeal proceedings. Moreover, appellant-opponent 1's argument was actually not the same, but was different, which was immediately apparent without going into the merits of the appeal case; in point 6.26 of appellant-opponent 1's reply of 20 April 2023 to the petitioner's appeal, reference was made to page 42, lines 12 to 14 of the application as filed, while in the figure contained in the letter dated 20 March 2024, reference was made to page 16, lines 19 to 20 of the application as filed.

16. The Enlarged Board notes that the issue of whether or not the argument associated with the annotated figure had already been made at an earlier stage in the appeal proceedings, or should be considered to represent exceptional circumstances suitable for justifying the late submission of auxiliary requests 8 to 13, had been a point of dispute between the parties in appeal proceedings. The submissions made by the parties on this issue were considered by the Board when it decided on the admittance of auxiliary requests 8 to 13. As can be derived from the decision under review (see also point 12 above), the Board ultimately agreed with appellant-opponent 1's position.

17. The issue of whether or not the argument had indeed already been made by appellant-opponent 1 earlier than in the letter of 20 March 2024 is a matter which falls outside the competence of the Enlarged Board. Assessing whether the Board was correct in considering that what was presented with the "annotated figure" was an illustration of an argument that had already been made earlier in the appeal proceedings would amount to a review of the substance of the case on its merits. As set out in points 8 and 9 above, this is, however, a matter in relation to which the Enlarged Board has no

competence, as this would necessarily mean going into the merits of substantive issues. For the case in hand, this means that the Enlarged Board is not allowed to review whether or not the Board's conclusions were correct.

18. In relation to the petitioner's submissions, made at the oral proceedings before Enlarged Board, to the effect that the Board's exercise of discretion was incorrect as the argument associated with the annotated figure was obviously not the same in the relevant sections of appellant-opponent 1's letters dated 20 March 2024 and 20 April 2023, respectively, since different passages of the application as filed, hence new facts, were referred to, the Enlarged Board notes the following:
19. At the oral proceedings before the Board, the issue of admittance of auxiliary requests 8 to 13, *inter alia*, into the appeal proceedings was addressed. Therefore, the parties had the opportunity to present their comments on this issue before the Board decided on it (see also page 2 of the minutes of the oral proceedings before the Board). This was not disputed by the petitioner.
20. At this stage of the proceedings before the Board, submissions on the issue of admittance of auxiliary requests 8 to 13 had been made in writing by the parties:
 - first, and in support of the presence of exceptional circumstances within the meaning of Article 13(2) RPBA, the petitioner submitted, *inter alia*, in its letter dated 2 May 2024, together with which these auxiliary requests 8 to 13 had been filed, that these requests were submitted in

response to the annotated figure first presented in point 4.5 of appellant-opponent 1's letter of 20 March 2024 (NB: in point 4.5, reference was made to page 16, lines 19 to 20 of the application as filed above a drawing which was referred to as Figure 10A in the preceding point 4.4);

- subsequently, denying the presence of exceptional circumstances, in its letter dated 9 May 2024 appellant-opponent 1 argued, *inter alia*, that the argument illustrated with the annotated figure was not a new argument as it had already been made in point 6.26 of its letter dated 20 April 2023 (NB: in point 6.26, reference was made to page 42, lines 12 to 14 and Figure 10A of the application as filed).

21. While the issue of the admittance of auxiliary requests 8 to 13 had been addressed at the oral proceedings before the Board, the parties, the petitioner included, merely referred to their written submissions (see page 2 of the minutes of the oral proceedings before the Board). These submissions were considered by the Board when it decided on the admittance of auxiliary requests 8 to 13, as reflected in the decision under review.
22. The Enlarged Board therefore cannot see that the Board's reasoning for not admitting auxiliary requests 8 to 13 was based on grounds on which the petitioner had had no opportunity to present comments.
23. The fact that the petitioner considers the references to different passages of the application as filed, contained in the relevant sections of appellant-opponent 1's letters dated 20 March 2024 and 20 April 2023, to mean that the argument was actually

not the same amounts to a counter-argument which the petitioner had had the opportunity to make during the appeal proceedings, in particular at the oral proceedings before the Board when the issue of the admittance of auxiliary requests 8 to 13 was debated. The petitioner must have been aware of appellant-opponent 1's position, which was submitted in writing before the oral proceedings.

24. Moreover, as can be derived from the decision under review, it was relevant to the Board that the objection under Article 123(2) EPC which the submission of auxiliary requests 8 to 13 was supposed to address had already been raised in point 6.26 of appellant-opponent 1's letter dated 20 April 2023. In that section, appellant-opponent 1 had argued that, while the application as filed (page 42, lines 12 to 14 or Figure 10A) disclosed that "*the binder takes the form of substantially parallel stripes*", claim 1 of the request objected to (in which the binder was defined as being arranged "*along substantially parallel stripes*") was not limited in this way, but allowed the binder to take other forms (as long as it was arranged along substantially parallel lines). Claim 1 of auxiliary requests 8 to 13 likewise defined the arrangement of the binder by amending the wording "*along a plurality of longitudinal, substantially parallel stripes*" to read "*as a plurality of longitudinal, substantially parallel stripes*" (see section IV. above). This led the Board to conclude that the annotated figure contained in the letter dated 20 March 2024 did not represent exceptional circumstances.
25. Accordingly, the Enlarged Board does not consider there to be any manifest incorrectness in the Board's decision relating to the non-admittance of auxiliary

requests 8 to 13 or any violation of the petitioner's right to be heard.

Admittance of auxiliary requests 14 to 24

26. Based on Article 13(2) RPBA, the Board likewise did not admit auxiliary requests 14 to 24, the sets of claims of which had also been filed by the petitioner with the letter dated 2 May 2024. In these auxiliary requests, all the product claims and the apparatus claims had been deleted, and they only comprised the method claims.
27. The Board was of the view that *"no exceptional circumstances justified with cogent reasons were presented by the appellant (proprietor) that would justify the admission of auxiliary requests 14-24"* (see decision under review, point 6.3.4 of the Reasons).
- 27.1 In its reasoning for why it decided not to admit auxiliary requests 14 to 24, the Board set out, *inter alia*, that the petitioner, *"[i]n this letter [dated 2 May 2024] and throughout the appeal proceedings ... however failed to specifically identify the effect of the differences between the subject-matter of the method claims and the prior art and their contribution to inventive step"* while *"appellant 1 (opponent 1) specifically raised novelty and inventive step objections against the method claims (see ... the grounds of appeal of appellant 1 (opponent 1)"* (see decision under review, point 6.3.1, second and third paragraphs, of the Reasons).

- 27.2 The Board considered that "*[s]ubmitting for the first time in appeal two weeks before the oral proceedings auxiliary requests based on the method claims only, changes the focus of the appellant's (proprietor's) appeal case in an unforeseeable manner*" and that, if the auxiliary requests were admitted, "*specific arguments of the appellant (proprietor) on inventive step in reply to the above-mentioned appellants' (opponents') objections would have to be discussed for the first time during the oral proceedings ... Accordingly, admitting the requests would be tantamount to allowing the appellant (proprietor) to make a fresh case on novelty and inventive step for the method claims during the oral proceedings.*" (see decision under review, point 6.3.1, last paragraph, of the Reasons).
- 27.3 Furthermore, "*the newly identified distinguishing feature of claim 1 over D1 as put forward ... less than two weeks before the oral proceedings, cannot justify the filing of auxiliary requests 14-24.*". The Board also noted that in its communication under Article 15(1) RPBA, the "*at a distance*" feature was not addressed as "*[t]his feature was not disputed and did not require for the Board to address it*" (see decision under review, point 6.3.2 of the Reasons).
- 27.4 Moreover, the Board considered that its preliminary opinion contained in the communication under Article 15(1) RPBA, in which the Board had disagreed with the appellants-opponents and preliminarily had held that the subject-matter of (method) claim 9 was not anticipated by D1, was "*not an invitation to file new auxiliary requests*" (see decision under review, point 6.3.3 of the Reasons).

28. The petitioner submitted that the Board "*has wrongfully decided not to admit auxiliary requests 14-24, and therefore has led to a violation of Article 113(1) EPC*" (see petition, page 7, first paragraph). According to the petitioner, the Board should have admitted these auxiliary requests essentially for the following reasons:

- These auxiliary requests were submitted in response to the Board's preliminary opinion.
- The method claims were already known to all the parties, were found allowable by the opposition division, did not negatively impact procedural economy, did not alter the factual and legal scope of the appeal proceedings, and merely reduced the complexity. The Board's assessment that the "*at a distance*" feature had not been addressed by the parties was wrong since the petitioner had made relevant submissions in its statement of grounds of appeal.
- The Board's consideration that submitting auxiliary requests based only on the method claims would change the focus of the petitioner's appeal case in an unforeseeable manner was not correct.
- The Board's statement that admitting the auxiliary requests would be tantamount to allowing the petitioner to make a fresh case on novelty and inventive step for the method claims during the oral proceedings was contradictory at the very least.
- The Board's statement that the petitioner had acknowledged at the oral proceedings that the novelty and inventive step in respect of the method claims were substantiated in writing with reference to the arguments submitted only for the product claims was erroneous.

29. Again in relation to these auxiliary requests, what the petitioner wishes to obtain is a review by the Enlarged Board of whether the Board correctly assessed and evaluated the specific aspects taken into consideration when exercising its discretion over whether or not to admit auxiliary requests 14 to 24.
30. As already set out above, however, the Enlarged Board has no competence under Article 112a EPC for such a review. Re-assessing and re-evaluating would require going into the merits of the appeal case and examining its substance.
31. With regard to the Board's considerations on the issue of admittance of auxiliary requests 8 to 24, as set out in the decision under review, the Enlarged Board cannot see anything which would suggest that the Board exercised its discretion in an arbitrary or manifestly illegal manner.
32. Therefore, the Enlarged Board can only conclude that no fundamental violation of Article 113(1) EPC has occurred.
33. In sum, the petitioner's complaints in the petition for review are not associated with any violation of Article 113(1) EPC, let alone a fundamental violation within the meaning of Article 112a(2) (c) EPC.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as being clearly unallowable.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated