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**Datasheet for the decision
of 22 November 2012**

Case Number: T 1020/10 - 3.2.06

Application Number: 00305450.9

Publication Number: 1064895

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:

Disposable diaper

Patentee:

UNI-CHARM CORPORATION

Opponent:

KIMBERLY-CLARK WORLDWIDE, INC.

Relevant legal provisions:

EPC Art. 84, 123(2)

RPBA Art. 13(1)

Keyword:

Main request - not allowable

Auxiliary requests - not admissible



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Boards of Appeal
Chambres de recours**

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Case Number: T 1020/10 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 22 November 2012

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted 1
March 2010 concerning maintenance of the
European Patent No. 1064895 in amended form.**

Composition of the Board:

Chairman: M. Harrison
Members: G. de Crignis
K. Garnett

Summary of Facts and Submissions

- I. By way of its interlocutory decision, the opposition division found that European Patent No. 1 064 895 according to an amended main request met the requirements of the European Patent Convention (EPC).
- II. The appellant (opponent) filed an appeal against this decision and in its statement setting out the grounds of appeal requested that the patent be revoked. It referred to amended claims 1 and 3 as contravening Article 123(2) EPC. Moreover, objections concerning clarity and sufficiency were raised. Additionally, the subject-matter of claims 1 and 3 was considered to lack an inventive step in view of each of documents
D1 US-A-4 534 769
D2 US-A-4 166 464 and
D3 US-A-5 470 639.
- III. The respondent (patent proprietor) replied and submitted a main request and five auxiliary requests.
- IV. In a communication annexed to the summons to oral proceedings, the Board indicated *inter alia* that, with regard to all the requests, the requirement of Article 123(2) EPC appeared not to be met.
- V. In reply, the respondent filed an amended main request, amended auxiliary requests 1 to 8 and requested as a ninth auxiliary request to maintain the patent based on the claims found allowable by the opposition division.
- VI. Oral proceedings were held before the Board on 22 November 2012.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed, alternatively that the decision under appeal be set aside and the patent be maintained in accordance with one of the first to fourth auxiliary requests as filed during the oral proceedings.

Claim 1 of the main request (form found allowable by the opposition division) reads:

"A disposable diaper (1) comprising a topsheet (2, 22) intended to come in contact with the wearer's skin, a backsheet (3, 23) intended to come in contact with the wearer's garment and an absorbent core (4) disposed between the topsheet and the backsheet wherein, said diaper has a front waist region (6), a rear waist region (7) and a crotch region (8) extending between the waist regions, wherein transversely opposite side edges (9, 9) of the crotch region are partially cut away to form curved edges (10, 10) to fit around and surround the wearer's legs, characterised in that: the topsheet comprises a first topsheet (2) and second topsheets (22); the backsheet comprises a first backsheet (3) and second backsheets (23), said first topsheet (2) and the first backsheet (3) in the front and rear waist regions are elastically stretchable in a transverse direction of the diaper, the first topsheet (2) and first backsheet (3) are partially cut away at the transversely opposite side edges (9, 9) of the crotch region (8) and each is replaced by a second topsheet (22) and a second backsheet (23) respectively; and the second topsheets (22) and second backsheets (23) are formed from a non-woven fabric or an elastomer having a bi-axial stretchability and are bonded to the

first topsheet and the first backsheet at the transversely opposite side edges (9, 9) of the crotch region (8) such that said second topsheets and said second backsheets (23) of said transversely opposite side edges (9, 9) are elastically stretchable in a longitudinal direction of the diaper and in said transverse direction, said first topsheet (2) and said first backsheet (3) in the remaining regions being elastically stretchable at least in said transverse direction."

Independent claim 3 of the main request reads:

"A disposable diaper (1) comprising a topsheet (2) intended to come in contact with the wearer's skin, a backsheet (3) intended to come in contact with the wearer's garment and an absorbent core (4) disposed between the topsheet and the backsheet wherein, said diaper has a front waist region (6), a rear waist region (7) and a crotch region (8) extending between the waist regions so that transversely opposite side edges (9, 9) of the crotch region surround the wearer's legs, wherein said topsheet (2) and the backsheet (3) in the front and rear waist regions are elastically stretchable in a transverse direction of the diaper, characterised in that said topsheet (2) and the backsheet (3) in the entire range of said crotch region (8) including the transversely opposite side edges (9, 9) of the crotch region (8) are formed from a non-woven fabric or an elastomer having a bi-axial stretchability such that the topsheet (2) and the backsheet (3) of said transversely opposite side edges (9, 9) are elastically stretchable in a longitudinal direction of the diaper and in said transverse direction, said topsheet (2) and the backsheet (3) in the remaining regions being elastically stretchable at least in said

transverse direction, wherein: the topsheet is divided into a topsheet sections (2A, 2B) for the front and rear waist regions (6, 7) and a topsheet section (2C) for the crotch region (8); the backsheet is divided into backsheet sections (3A, 3B) for the front and rear waist regions (6, 7) and a backsheet section (3C) for the crotch region (8); the backsheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively; and the topsheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively."

Claim 1 of the first auxiliary request differs in the characterising portion from claim 1 of the main request, and reads as follows:

"the topsheet consists of a first topsheet (2) and two separate second topsheets (22); the backsheet consists of a first backsheet (3) and two separate second backsheets (23), said first topsheet (2) and the first backsheet (3) in the front and rear waist regions are of a nonwoven fabric or an elastomer film having a monoaxial stretchability and are elastically stretchable in a transverse direction of the diaper; and the second topsheets (22) and second backsheets (23) are formed from a non-woven fabric or an elastomer having a bi-axial stretchability and are bonded to the respective inner surfaces of the first topsheet and the first backsheet such that the crotch region is provided along each of its transversely opposite side edges 9 with a second topsheet and a second backsheet and such that said second topsheets and said second backsheets (23) of said transversely opposite side edges (9, 9)

are elastically stretchable in a longitudinal direction of the diaper and in said transverse direction, said first topsheet (2) and said first backsheet (3) in the remaining region of the crotch being elastically stretchable in said transverse direction; the first topsheet and the first backsheet (2, 3) are placed upon and joined to each other by means of hot melt adhesive (12) along their portions extending outward beyond a peripheral edge of the absorbent core (4); the second topsheets and second backsheets associated with the leg-openings are placed upon and joined to each other by means of hot melt adhesive (13) applied thereon in a pattern of sine curves or small dots; and no gathers are formed in said front and rear waist regions and said crotch region."

Independent claim 2 of the first auxiliary request differs from claim 3 of the main request in that the features "said topsheet (2) and the backsheet (3) in the remaining regions being elastically stretchable at least in said transverse direction" and "the backsheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively; and the topsheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively." are deleted and the following features are added:

"the topsheet sections (2A, 2B) for the front and rear waist regions as well as the backsheet sections (3A, 3B) for the front and rear waist regions are elastically stretchable transversely of the diaper (1); the topsheet section (2C) and the backsheet section (3C) for the crotch region are elastically stretchable

longitudinally as well as transversely of the diaper (1); and the topsheet sections (2A, 2B, 2C) and the backsheet sections (3A, 3B, 3C) are bonded one to another along their overlapping zones by means of hot melt adhesive (12, 13) applied thereto in a pattern of sine curves or small dots; and no gathers are formed in said front and rear waist regions and said crotch region."

Claim 1 of the second auxiliary request differs from claim 1 of the first auxiliary request in that the characterising portion reads as follows:

"the topsheet consists of a first topsheet (2) and two separate second topsheets (22); the backsheet consists of a first backsheet (3) and two separate second backsheets (23), said first topsheet (2) and the first backsheet (3) in the front and rear waist regions are of a nonwoven fabric or an elastomer film having a monoaxial stretchability and are elastically stretchable in a transverse direction of the diaper, the first topsheet (2) and first backsheet (3) are partially cut away at the transversely opposite side edges (9, 9) of the crotch region (8) and each is replaced by one of the second topsheets (22) and one of the second backsheets (23) respectively; and the second topsheets (22) and second backsheets (23) are formed from a non-woven fabric or an elastomer having a bi-axial stretchability and are bonded to the respective inner surfaces of the first topsheet and the first backsheet such that the crotch region is provided along each of its transversely opposite side edges 9 with a second topsheet and a second backsheet and such that said second topsheets and said second backsheets (23) of said transversely opposite side edges (9, 9) are

elastically stretchable in a longitudinal direction of the diaper and in said transverse direction, said first topsheet (2) and said first backsheet (3) in the remaining region of the crotch being elastically stretchable in said transverse direction; the first topsheet and the first backsheet (2, 3) are placed upon and joined to each other by means of hot melt adhesive (12) along their portions extending outward beyond a peripheral edge of the absorbent core (4); the second topsheets and second backsheets associated with the leg-openings are placed upon and joined to each other by means of hot melt adhesive (13) applied thereon in a pattern of sine curves or small dots; and no gathers are formed in said front and rear waist regions and said crotch region."

Independent claim 2 of the second auxiliary request differs from claim 2 of the first auxiliary request in that the feature "the backsheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively; the topsheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively." is re-inserted.

The third auxiliary request includes a single independent claim, which reads as follows:

"A disposable diaper (1) comprising a topsheet (2) intended to come in contact with the wearer's skin, a backsheet (3) intended to come in contact with the wearer's garment and an absorbent core (4) disposed between the topsheet and the backsheet wherein, said

diaper has a front waist region (6), a rear waist region (7) and a crotch region (8) extending between the waist regions so that transversely opposite side edges (9, 9) of the crotch region surround the wearer's legs, wherein said topsheet (2) and the backsheet (3) in the front and rear waist regions are of a nonwoven fabric or an elastomer film having a monoaxial stretchability and are elastically stretchable in a transverse direction of the diaper, characterised in that said topsheet (2) and the backsheet (3) in the entire range of said crotch region (8) including the transversely opposite side edges (9, 9) of the crotch region (8) are formed from a non-woven fabric or an elastomer having a bi-axial stretchability such that the topsheet (2) and the backsheet (3) of said transversely opposite side edges (9, 9) are elastically stretchable in a longitudinal direction of the diaper and in said transverse direction, wherein: the topsheet is divided into topsheet sections (2A, 2B) for the front and rear waist regions (6, 7) and a topsheet section (2C) for the crotch region (8); the backsheet is divided into backsheet sections (3A, 3B) for the front and rear waist regions (6, 7) and a backsheet section (3C) for the crotch region (8); the topsheet sections (2A, 2B) for the front and rear waist regions as well as the backsheet sections (3A, 3B) for the front and rear waist regions are elastically stretchable transversely of the diaper (1); the topsheet section (2C) and the backsheet section (3C) for the crotch region are elastically stretchable longitudinally as well as transversely of the diaper (1); and the topsheet sections (2A, 2B, 2C) and the backsheet sections (3A, 3B, 3C) are bonded one to another along their overlapping zones by means of hot melt adhesive (12, 13) applied thereto in a pattern of sine curves or

small dots; and no gathers are formed in said front and rear waist regions and said crotch region."

Claim 1 of the fourth auxiliary request differs from claim 1 of the third auxiliary request in that the following features are re-inserted in the claim, between the features "... and a backsheet section (3C) for the crotch region (8);" and "the topsheet sections (2A, 2B) for the front and rear regions...":

"...the backsheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively; the top sheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively; ...".

VII. The appellant argued essentially that:

Claim 1 of the main request referred to a diaper - but included method features ("...side edges (9, 9) ... are partially cut away to form curved edges..." and "the first topsheet (2) and the first backsheet (3) are partially cut away ... and each is replaced by ..."). It was not clear how to identify such features on the finished article (Article 84 EPC). Also the feature "the second topsheets (22) and second backsheets (23) are ... bonded to the first topsheet and the first backsheet at the transversely opposite side edges" lacked clarity (Article 84 EPC) because these side edges were formed by the second topsheets and backsheets themselves.

Claims 1 and 3 were limited to the two embodiments shown in Figures 1/2 and 4/5 respectively, but there

was no disclosure of such embodiments including "remaining regions" as referred to in these claims (Article 123(2) EPC) which features accordingly also resulted in a lack of clarity (Article 84 EPC).

The "overlapping zones" were not disclosed as claimed in claim 3, contrary to Article 123(2) EPC.

Claim 1 of auxiliary requests 1 and 2 included the above cited method features concerning "cutting". In particular when considering the link to the feature that the "second topsheets (22) and second backsheets (23) are ... bonded to the respective inner surfaces of the first top sheet and the first backsheet such that the crotch region is provided along each of its transversely opposite side edges 9 with a second topsheet and a second backsheet...", it was not clear how the transversely opposite side edges (9, 9) could be cut away and at the same time be provided, since the second top- and backsheets constituted the side edges themselves. Additionally, there was no original disclosure concerning any other second top- and backsheets than the ones which were already defined in the claim (Article 123(2) EPC and Article 84 EPC).

Claim 1 of each of auxiliary requests 3 and 4 related to the second embodiment shown in Figures 4 and 5. Figure 4 represented a sketch of this embodiment and illustrated the defined extension of the crotch region with respect to the waist regions. Due to the definition of the sections in the claim, the extension of the sections and regions became ambiguous. Claim 1 included additionally the feature that no gathers were formed in the front, rear and crotch region. However, there was no explanation as regards under which condition no gathers would be formed. All in all, such

features lacked clarity (Article 84 EPC) to an extent that even an objection with regard to lack of sufficient disclosure (Article 83 EPC) was justified.

Additionally all the auxiliary requests should not be admitted into the proceedings in that they were filed during the oral proceedings and were not *prima facie* allowable.

VIII. The respondent (patent proprietor) argued essentially as follows:

Concerning claim 1 of the main request, the skilled person would understand which features were meant by the curved edges 10, the side edges 9 and the waist and crotch regions such as defined in claim 1 on the basis of the first embodiment shown in Figures 1 and 2. Moreover, the "remaining regions" of the top- and back sheets were defined as being only stretchable in the transverse direction and hence it was clear that they could only concern the region in the crotch area between the side edges formed by the second top- and back sheets. In view of the sketch shown in Figure 1, the skilled person would recognize that the transversely opposite side edges had to be cut away from the first top- and backsheets and had to be replaced by second top- and backsheets. Thus it was also clear where the second top- and backsheets were bonded to the first top- and backsheets.

Concerning the subject-matter of claim 3, there was no discrepancy between the claimed subject-matter, the description and the embodiment shown in Figure 4, because the skilled person would identify without doubt that the margins of the regions were shown erroneously in the Figure and that the area of the top- and back

sheets in the front and rear waist region should be congruent with the corresponding sections. Therefore, the requirements of Article 84 EPC and of Article 123(2) EPC were met.

The subject-matter of claim 1 of the first and second auxiliary requests was limited to the embodiment shown in Figures 1 and 2. The skilled person had no problem to recognize that the wording of the claim was limited to two kinds of top- and backsheets arranged in the way shown in these Figures, in that the claim now defined the crotch region as being "provided along each of its transversely opposite side edges 9 with a second topsheet and a second backsheet". Such wording was clear. The construction of the side edges 9, 9 was also clear in view of the Figures 1 and 2 and the skilled person understood that the remaining regions concerned the region constituted by the second top- and backsheets in the area of the leg openings in the crotch region.

The subject-matter of claim 2 of the first and second auxiliary requests included *inter alia* the feature that no gathers were formed. Accordingly, the claims were further restricted.

Auxiliary requests 3 and 4 included a single independent claim which was based upon claim 3 of the main request and hence concerned the embodiment shown in Figures 4 and 5. Therefore, the feature concerning the "remaining region" could be omitted since no such region was present in this embodiment. Figure 4 showed that the topsheet sections and the backsheet sections were bonded to one another along their overlapping zones as claimed. The sections and regions were defined in the claim and there remained no lack of clarity in

this respect. Concerning the feature that no gathers were formed in the different regions, such feature was the subject-matter of originally filed and granted claim 4 and hence no clarity issue could be raised in this respect. Auxiliary request 4 differed from claim 1 of auxiliary request 3 in that the bonding of the top- and backsheet sections was more clearly specified. The requests should be admitted.

Reasons for the Decision

1. *Main Request*

1.1 Amendments

The claims are limited to the two embodiments disclosed in the Figures. Claim 1 refers to the embodiment shown in Figures 1 and 2 while claim 3 refers to the embodiment shown in Figures 4 and 5.

1.2 Claim 1

1.2.1 In the wording of claim 1 the final feature of granted claim 1:

"said first topsheet (2) and said first backsheet (3) in the remaining regions being elastically stretchable at least in said transverse direction"
has been maintained.

The further amendments concern the addition of features related to the embodiment shown in Figures 1 and 2.

1.2.2 With respect to the disclosure of the added features, the respondent referred to Figures 1 and 2 and to the

description on page 3, lines 9/10, to page 4, lines 7 to 12, to page 4, lines 1 to 14 and argued that the "remaining regions" in such embodiment would correspond to the single region which lies between the side edges (9, 9) in the crotch region of the article.

1.2.3 However, the region between the side edges is already defined in the wording of the claim as being the crotch region and is referred to as such in the description. Therefore, it is not clear which further "remaining regions" would be consistent with the claimed embodiment, contrary to the requirement of clarity in Article 84 EPC.

1.2.4 Moreover, there is no disclosure from which a skilled person would unambiguously derive that the claimed embodiment of the diaper required a further "remaining region". To the contrary, all the regions are defined: the crotch region is defined as extending between the two waist regions, the front and rear waist regions are shown in Figure 1 to extend from the crotch region to the respective end edges of the diaper. Accordingly, there is no original disclosure of such an embodiment having "remaining regions" (Article 123(2) EPC).

1.3 Accordingly, the main request is not allowable, at least because there is no clear and unambiguous disclosure of the combination of features claimed in claim 1 (Article 123(2) EPC). This objection applies as well to the subject-matter of claim 3, which also includes a feature concerning the "remaining regions", even though it has been limited to the embodiment shown in Figures 4/5. In that embodiment there is also no disclosure whatsoever which includes the possibility of having any remaining region. Since the main request is not allowable for this reason, it is not necessary to

comment on the further objections made in regard to this request.

2. *First to fourth auxiliary requests - procedural considerations*

These requests were filed during the oral proceedings, hence, after receipt of the Board's communication annexed to the summons to oral proceedings. According to Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA), it lies within the discretion of the Board to admit any amendment to a party's case after it has filed its grounds of appeal or reply and states that "the discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy". For the reasons explained *infra*, none of the requests was in the event admitted into the proceedings.

3. *Auxiliary requests 1 and 2*

3.1 Claim 1 of both requests is amended with respect to claim 1 of the main request in that it includes additionally *inter alia* the feature that "the second top- and backsheets ... are bonded to the respective inner surfaces of the first topsheet and the first backsheet such that the crotch region is provided along each of its transversely opposite side edges 9 with a second topsheet and a second backsheet".

3.2 This feature is partly originally disclosed on page 5, lines 8/9 of the originally filed application ("top- and backsheets 22, 23 are bonded to the respective inner surfaces of the top- and backsheet 2, 3"). For the remaining wording of this feature ("such that the

crotch region is provided along each of its transversely opposite side edges 9 with a second topsheet and a second backsheet") the respondent referred to the overall disclosure and to Figure 1.

- 3.3 Figure 1 shows that the transversely opposite side edges (9, 9) in the crotch region form an area constituted by the second top- and backsheets. The curved side end-edges of the leg openings themselves are designated with the reference numeral 10. The side end-edges of the first top- and backsheets are not designated with a reference numeral.
- 3.4 The information given in claim 1 as well as in the description with respect to the side edges (9, 9) reads: "in the vicinity of the side edges 9, 9 of the crotch region 8, the top- and backsheets 2, 3 are partially cut away and these portions of the sheets 2, 3 thus cut away are replaced by separate top- and backsheets 22, 23 both associated with the leg openings" (page 4, line 20 to page 2, line 2). When reading this passage and having in mind the previous disclosure on page 4, line 9 to 12, "The crotch region 8 has its transversely opposite side edges (9, 9) partially cut away to form curved edges (10, 10) adapted to fit around the wearer's legs", it is clear - consistent with what is illustrated in Figure 1 - that the transversely opposite side edges are themselves constituted by the second top- and backsheets.
- 3.5 Accordingly, it is not clear how to "provide" the crotch region "along each of its transversely opposite side edges" with a second top- and backsheet, since these already constitute the side edges.

3.6 Moreover, the reference in the added wording to "a" second top- and "a" second backsheet does not clearly limit such top- and backsheets to the second top- and backsheets (22, 23) which are specified earlier in the claim. Thus it remains undefined whether further second top- and backsheets are to be considered, something which not only results in a lack of clarity contrary to Article 84 EPC but also would amount to a lack of disclosure in the application as originally filed, contrary to Article 123(2) EPC.

3.7 The subject-matter of claim 1 of both requests therefore does not meet at least the clarity requirement of Article 84 EPC. Since the claimed subject-matter is therefore not *prima facie* allowable, the Board exercised its discretion not to admit the first and the second auxiliary requests into the proceedings having regard to Article 13(1) RPBA.

4. *Auxiliary requests 3 and 4*

4.1 These requests are amended with respect to the previous requests in that they include a sole independent claim 1, which is based upon claim 3 as found allowable by the opposition division, and which claim is based on the second embodiment shown in Figures 4 and 5 and the corresponding passages of the originally filed description on page 6, lines 11 to page 7, line 11.

4.2 This embodiment differs mainly from the first embodiment shown in Figures 1 and 2 - and hence from the embodiment claimed in the previous requests - in that no portions of the crotch region which are partially cut away are defined.

4.3 Instead, in the wording of claim 1 of each request "sections" are defined as well as "regions" of the top- and backsheet.

4.4 Claim 1 of each request includes the following definitions concerning regions and sections (emphasis added, basis in the originally filed application in brackets):

"said topsheet (2) and the backsheet (3) in the **front and rear waist regions** are of a nonwoven fabric or an elastomer film having a monoaxial stretchability and are elastically stretchable in a **transverse** direction of the diaper"; (page 6, l. 21 and page 7, l. 12 to 15);

"said topsheet (2) and the backsheet (3) in the entire range of said **crotch region** (8) including the transversely opposite side edges (9, 9) of the crotch region (8) are formed from a non-woven fabric or an elastomer having a bi-axial stretchability"; (page 6, l. 22 and page 7, l. 18 - 20);

"the topsheet is divided into topsheet **sections** (2A, 2B) for the front and rear waist regions (6, 7) and a topsheet **section** (2C) for the crotch region; the backsheet is divided into backsheet **sections** (3A, 3B) for the front and rear waist regions (6, 7) and a backsheet **section** (3C) for the crotch region (8)"; (page 6, l. 13 to 18);

"the topsheet **sections** (2A, 2B) for the front and rear waist regions as well as the backsheet **sections** (3A, 3B) for the front and rear waist regions are elastically stretchable **transversely** of the diaper (1);

the topsheet **section** (2C) and the backsheet **section** (3C) for the crotch region are elastically stretchable longitudinally as well as transversely of the diaper (1);" (page 6, l. 18 to page 7, l. 1).

4.5 However, the disclosure on pages 6 and 7 of the originally filed application refers to the embodiment shown in Figures 4 and 5, whereby Figure 4 illustrates that the respective regions and sections are not congruent: Figure 4 shows in this respect that the front and rear **regions** (6, 7) of the diaper extend from the transverse end edges until the beginning of the leg openings, whereas the front and rear waist **sections** (2A, 2B) of the top- and backsheet end within such regions. Hence, it is neither clear from the wording of the claim nor from the description of the corresponding embodiment how to distinguish the front and rear sections from the front and rear regions (Article 84 EPC).

4.6 Although the appellant argued that the embodiment shown in Figure 4 was simply erroneous with regard to the borderlines indicated for the regions, and that the regions and sections should be congruent, the Board finds this argument unconvincing since the description refers *expressis verbis* to "sections" separately from "regions" and hence distinguishes between the areas to be considered. Thus no clearly erroneous illustration in Figure 4 can be acknowledged, let alone which correction of it would be appropriate. Additionally, the claimed combination of regions and sections is a matter which cannot simply be ignored. Hence, the subject-matter of claim 1 is not clear, as required by Article 84 EPC.

4.7 Such lack of clarity is present in the originally filed application and also leads to no clear and unambiguous disclosure being present for the claimed combination of features (Article 123(2) EPC).

4.7.1 Claim 1 includes the wording
"the topsheet sections (2A, 2B, 2C) and the backsheet sections (3A, 3B, 3C) are bonded one to another along their overlapping zones by means of hot melt adhesive (12, 13) applied thereto in a pattern of sine curves or small dots;".

Hence, the position of the bonding of the top- and backsheet sections is specified in claim 1 as being "along overlapping zones".

4.7.2 However, with regard to the diaper also being claimed as having
"a front waist region (6), a rear waist region (7) and a crotch region (7) extending between the waist regions"
and the topsheet and the backsheet in the front and rear waist regions being claimed to be elastically stretchable - mono-axially - in a transverse direction of the diaper and the entire range of the crotch region being formed of a bi-axial stretchable material, it remains unclear how sections not being congruent with these regions can exist since the change of material can only be provided at the overlapping zones and thus at the borderlines of the regions.

4.7.3 As set out above (point 4.5), Figure 4 illustrates that the regions and sections are not congruent. Thus the insertion of features relating only to the Figure 4/5 embodiment into the wording of the claim leads to a mixture of features of the first and the second

embodiments whereas the wording of a claim has to be based upon a clear and unambiguous disclosure (Article 123(2) EPC). This requirement not being met, claim 1 of the third auxiliary request is *prima facie* not allowable.

- 4.8 Claim 1 of the fourth auxiliary request differs from claim 1 of the third auxiliary request in that the following feature is included/re-inserted into the claim:

"...the backsheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively; the top sheet sections are bonded together at overlapping zones between the front waist region (6) and crotch region (8) and rear waist region (7) and crotch region (8) respectively; ..."

- 4.9 The above objection concerning the regions and sections also applies to claim 1 of auxiliary request 4. Moreover, in such claim 1 there are front- and backsheet sections defined as being bonded together at overlapping zones "between" the front- and the rear waist region and the crotch region respectively. According to Figure 4, however, the overlapping zones are within the front waist region and within the rear waist region respectively. Hence, it is not clear how overlapping zones are formed "between" the above cited regions. To the extent that this claim should reflect the situation given in Figure 4, no disclosure is present for overlapping zones between the specified regions, contrary to Article 123(2) EPC.

4.10 Therefore, claim 1 of auxiliary requests 3 and 4 is not clear as required by Article 84 EPC, and also its subject-matter contravenes Article 123(2) EPC.

Accordingly, the sole independent claim of auxiliary requests 3 and 4 is not *prima facie* allowable and thus the Board exercised its discretion under Article 13(1) RPBA not to admit auxiliary requests 3 and 4 into the proceedings.

5. Since the respondent's main request is not allowable and the first to fourth auxiliary requests were not admitted into the proceedings, there was no request in the proceedings on the basis of which the Board could order maintenance of the patent, with the result that the patent must be revoked.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated