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Datasheet for the decision of 17 December 2019

Case Number: T 1050/16 - 3.2.06

Application Number: 05722177.2

Publication Number: 1877017

IPC: A61F13/15, A61F5/44

Language of the proceedings: EN

Title of invention:
A PANT-TYPE ABSORBENT ARTICLE

Patent Proprietor:
SCA Hygiene Products AB

Opponents:
Laboratorios Indas, S.A.U.
The Procter & Gamble Company
Paul Hartmann AG

Headword:

Relevant legal provisions:
EPC Art. 111(1), 113(1), 84, 123(2), 83

Keyword:
Remittal to the department of first instance as main request - (no) - special reasons for not remitting the case
Amendments - auxiliary requests 1, 3 and 10 - extension beyond the content of the application as filed (yes)
Sufficiency of disclosure - auxiliary requests 2 and 4 (no) - undue burden (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 1050/16 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 17 December 2019

Appellant: (Patent Proprietor)	SCA Hygiene Products AB 405 03 Göteborg (SE)
Representative:	Valea AB Box 1098 405 23 Göteborg (SE)
Respondent: (Opponent 1)	Laboratorios Indas, S.A.U. Camino Cerro de los Gamos n° 1 Edificio 3, Pta.3ª (Parque Empresarial Cerro de los Gamos) 28224 Pozuelo De Alarcon (Madrid) (ES)
Representative:	Carpintero Lopez, Francisco Herrero & Asociados, S.L. Cedaceros 1 28014 Madrid (ES)
Respondent: (Opponent 2)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnatti, Ohio 45202 (US)
Representative:	Jump, Timothy John Simon Venner Shipley LLP 200 Aldersgate London EC1A 4HD (GB)
Respondent: (Opponent 3)	Paul Hartmann AG Paul-Hartmann-Strasse 12 89522 Heidenheim (DE)
Representative:	DREISS Patentanwälte PartG mbB Friedrichstraße 6 70174 Stuttgart (DE)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 11 March 2016 revoking European patent No. 1877017 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: P. Cipriano
J. Hoppe

Summary of Facts and Submissions

I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division revoking European Patent No. 1 877 017.

II. With its grounds of appeal, the appellant requested, as a main request, that the decision under appeal be set aside and the case be remitted to the opposition division with an order for further prosecution of auxiliary request 5, or, as an auxiliary measure, that the patent be maintained in amended form based on the claims of one of auxiliary requests 1 to 10 filed with the grounds of appeal.

The appellant further requested reimbursement of the appeal fee.

III. The respondent II (opponent 2) requested that the appeal be dismissed and that an apportionment of costs in its favour be made in the event that the appellant's main request or one of auxiliary requests 3 to 9 would be allowed.

IV. The respondent III (opponent 3) requested that the appeal be dismissed.

V. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the Board was not inclined to grant the main request for remittal, that the subject-matter of claim 2 of auxiliary requests 1 and 3 as well as that of claim 1 of auxiliary request 10 did not seem to fulfill the requirement of Article 123(2) EPC, and that the skilled

person could not carry out the invention of claim 2 of auxiliary request 2 and claim 1 of auxiliary request 4 over the whole range claimed.

VI. Oral proceedings were held before the Board on 17 December 2019, during which the appellant withdrew auxiliary requests 5 to 9 as well as its request for reimbursement of the appeal fee. Respondent II withdrew its request for apportionment of costs.

The final requests of the appellant (patent proprietor) were
that the decision under appeal be set aside
and the case be remitted to the opposition division as a main request with the order for further prosecution of auxiliary request 5 (main request)
or as an auxiliary measure,
that the patent be maintained in amended form based on the claims of one of auxiliary requests 1 to 4 or 10, filed with the grounds of appeal.

The final request of both respondents II and III (opponent 2 and 3)
was that the appeal be dismissed.

Respondent I did not attend the oral proceedings and made no written submissions in the appeal.

VII. Claim 1 of auxiliary requests 1 and 2 reads as follows:
"1. A pant-type absorbent article (1) such as a pant diaper, a sanitary pant or incontinence pant, said article having an absorbent assembly (3) comprising an absorbent core (2) and a chassis (4), said chassis (4) comprising a front portion (5) and a back portion (6), wherein the front and back portions (5;6) are joined to each other along two opposite longitudinal side edges

to define a waist-opening and a pair of leg-openings, at least one of the front and back portions (5;6) comprises anelastic web material (10), wherein said elastic web material is a laminate (10) composed of first and second layers of fibrous material (11,12) and an elastic film layer (13) located between said first and second fibrous layers, said article (4) further comprising a crotch portion (7) located between the front portion (5) and the back portion (6) in the longitudinal direction of the article, said front portion (5) having a length (b1) in the longitudinal direction, said back portion (6) having a length (b3) in the longitudinal direction, and said crotch portion (7) having a length (b2) in the longitudinal direction, said absorbent assembly (3) lying at least in said crotch portion (7) and overlapping a certain distance with both the front and back portions (5; 6), said article having a front half (14) defined by the edges of the article and a transverse centre line (16) of the article, and a rear half (15) defined by the edges of the article and a transverse centre line (16) of the article, said article having a longitudinal (y) and a transverse direction (x),
characterized in
that the surface area of the front half (14) is between 80% and 90% of the surface area of the rear half (15), as measured in an extended state of the article."

Claim 2 of auxiliary requests 1 and 3 reads as follows:
"2. A pant-type absorbent article (1) according to claim 1,characterized in
that the absorbent assembly (3) overlaps no more than 20%, preferably no more than 10%, of the surface area of each of the front and back portions, as measured in an extended state of the article."

Claim 2 of auxiliary request 2 reads as follows:
"2. A pant-type absorbent article (1) according to claim 1,characterized in
that the length (b2) of the crotch portion (7) is between 10-40%, preferably between 20-40%, most preferably between 25-35% of the entire length of the article (b) as measured in an extended state of the article."

Claim 1 of auxiliary request 4 differs from claim 1 of auxiliary request 1 in that the following features have been added:
"both of the front and back portions (5) and (6) comprise said elastic laminate (10) and that the crotch portion (7) is substantially free from said elastic laminate (10) and that the length (b2) of the crotch portion (7) is substantially equal to the distance between panels of the elastic laminate (10) in the front and back portion (5) and (6)."

Claim 1 of auxiliary request 10 reads as follows:
"1. A pant-type absorbent article (1) such as a pant diaper, a sanitary pant or incontinence pant, said article having a longitudinal (y) and a transverse direction (x), said article having an absorbent assembly (3) comprising an absorbent core (2) and a chassis (4), said chassis (4) comprising a front portion (5) and a back portion (6), wherein the front and back portions (5;6) are joined to each other along two opposite longitudinal side edges to define a waist-opening and a pair of leg openings, said leg openings having leg opening edges with a defined point at the front portion (5) and a defined point at the back portion (6) where there is an abrupt change of the angle of the leg opening edges with respect to the transverse direction (x) of the article, at least one

of the front and back portions (5;6) comprises an elastic web material (10), wherein said elastic web material is a laminate (10) composed of first and second layers of fibrous material (11,12) and an elastic film layer (13) located between said first and second fibrous layers, said article (4) further comprising a crotch portion (7) located between the front portion (5) and the back portion (6) in the longitudinal direction of the article, wherein said crotch portion (7) is defined in the longitudinal direction (y) of the article by a transverse line located at said defined point at the front portion (5) where there is an abrupt change of the angle of the edge of the leg opening and a transverse line located at said defined point at the back portion (6) where there is an abrupt change of the angle of the edge of the leg opening, said front portion (5) having a length (b1) in the longitudinal direction, said back portion (6) having a length (b3) in the longitudinal direction, and said crotch portion (7) having a length (b2) in the longitudinal direction, said absorbent assembly (3) lying at least in said crotch portion (7) and overlapping a certain distance with both the front and back portions (5; 6), said article having a front half (14) defined by the edges of the article and a transverse centre line (16) of the article, and a rear half (15) defined by the edges of the article and a transverse centre line (16) of the article,, characterized in
that the surface area of the front half (14) is between 80% and 90% of the surface area of the rear half (15), as measured in an extended state of the article."

VIII. The arguments of the appellant may be summarised as follows:

Main request - remittal

The decision under appeal should be set aside and the case should be remitted to the opposition division with the order for further prosecution on the basis of auxiliary request 5, because the opposition division had not allowed the filing of further requests although it had raised objections under Article 123(2) EPC against the subject-matter of claim 1 of the former auxiliary request 9 that corresponded to former auxiliary request 1 of 26 September 2014 for the first time during the oral proceedings.

The decision of the opposition division was thus incomplete and had made it difficult for the appellant to structure its requests and form its complete defence on appeal. Had it been provided with a complete decision, the appellant might not even have had to appeal. The actions of the opposition division could even lead to the need of appealing twice with the consequent accrual of costs and time delay.

Auxiliary requests 1 and 3 - Article 123(2) EPC

The subject-matter of claim 2 of auxiliary requests 1 and 3 did not extend beyond the content of the application as originally filed.

The passage on page 11, lines 31-36, of the published application provided a basis for the subject-matter of claim 2. The references in the description to "invention" were different from the ones referring to "embodiment", and the skilled person recognized that these references to the invention would be generally combined with each other.

Further, the passage on page 2, lines 10-22 of the published application taught the skilled person the need to have correct elastic materials and dimensions so as to obtain the advantages of the invention whereby the skilled person derived directly and unambiguously therefrom that the features of independent claims 1 and 2 as originally filed could be combined.

Auxiliary request 2 - Article 83 EPC

The invention of claim 2 of auxiliary request 2 could be carried out.

The claim was limited to articles where the dimensions of the crotch portion could be defined, such as the embodiment of Figure 2, noting that paragraph [0054] explained how to define and measure the crotch portion.

Auxiliary request 4 - Article 83 EPC

The invention of claim 1 of auxiliary request 4 could be carried out.

The skilled person would understand that the distance between panels was the closest distance between the two closest panels in each portion and that this distance defined the crotch portion.

There were no examples of real life embodiments with more than one panel in the front and back portion or with offset panels. The skilled person with a mind willing to understand thus realized that such products fell outside the scope of the claim and was able to determine the distance in all the workable embodiments.

Auxiliary request 10 - Article 123(2) EPC

Page 11, lines 16-29 and Figure 2 provided a basis for the combination of features of claim 1 of auxiliary request 10. There was no difference between the expressions "changes most abruptly" and "abrupt change".

IX. The arguments of the respondents II and III may be summarised as follows:

Main request - remittal

It was neither economically nor procedurally efficient to remit the case before having considered auxiliary requests 1 to 4.

It was already foreseeable before the oral proceedings during opposition that an objection under Articles 84 and 123(2) EPC could have arisen in the oral proceedings, as this possibility had been mentioned on page 3 of the letter of opponent 3 dated 18 January 2016.

Auxiliary requests 1 and 3 - Article 123(2) EPC

There was no basis in the whole disclosure as originally filed to combine the features of independent claim 2 as originally filed with the features of the characterizing portion of claim 1 as originally filed.

The skilled person would not consider that the references to the "invention" and "embodiment" related to subject-matter that could be generally combined, since they belonged to different disclosures of the invention.

The passage on page 2, lines 10-22, was only a general reference to the importance of the diaper dimensions and of the placement of the elastics in the invention that did not direct the skilled person towards combining any specific set of features, such as the features of claims 1 and 2 as originally filed.

Auxiliary request 2 - Article 83 EPC

It was not possible to establish the crotch portion and its length for any other shape than the specific one of Figure 2 of the patent.

Auxiliary request 4 - Article 83 EPC

The skilled person did not know what the panels were or whether they were only located in the front and back portion.

It was only possible for the skilled person to establish the distance between the panels of elastic laminate for very specific embodiments, such as the one of Figure 2. The whole disclosure did not teach the skilled person how to establish this distance for most of the other cases encompassed in claim 1, such as when there were several panels in each portion.

Auxiliary request 10 - Article 123(2) EPC

The expression "abrupt change" did not correspond to "changes most abruptly", since the latter made a distinction between different levels of "abruptness".

Only in the specific shape of Figure 2 was it even possible for the skilled person to recognize the abrupt

changes. Since there were only two abrupt changes, these were presumably also the ones that changed most abruptly.

Reasons for the Decision

1. Main request - remittal

1.1 The appellant requested as a main request that the decision under appeal be set aside and the case be remitted to the opposition division with the order for further prosecution of auxiliary request 5.

1.2 Under Article 111(1) EPC, second sentence, the Board of Appeal may either decide on the appeal or remit the case to the department which was responsible for the decision appealed. The appropriateness of a remittal is decided by the Board on the merits of the particular case. There is no absolute right to have every issue decided upon by two instances. Further, the criteria which *inter alia* can be taken into account when deciding on possible remittal may include for example the parties' requests, the general interest that proceedings are brought to a close within an appropriate period of time and whether or not there has been a comprehensive assessment of the case during the proceedings.

1.3 In the proceedings leading to the decision under appeal, the opposition division denied the appellant the possibility of filing a request during the oral proceedings after announcing that the subject-matter of claim 1 of auxiliary request 9 (which had the same wording as claim 1 of auxiliary request 1 filed on

26 September 2014) did not fulfil the requirements of Articles 84 and 123(2) EPC.

1.3.1 The preliminary opinion of the opposition division regarding this claim (i.e. claim 1 of the (then) auxiliary request 1 of 26 September 2014), which was sent to the parties with the communication dated 6 July 2015, was that such a claim met the requirements of Article 123(2) EPC and Article 83 EPC, notably without mentioning any further objections or points for discussion (see point 7.2 of the preliminary opinion). No other objections regarding this claim had been put forward at that time (albeit objections were however raised against different claims).

1.3.2 Further, no specific objections regarding this particular claim were put forward by the opponents in reply to the preliminary opinion, nor at any other time before the oral proceedings either. With its letter dated 18 January 2016, the opponent 3 stated only in general that there were concerns ("Bedenken") regarding the amendments made to auxiliary request 1 of 26 September 2014 under Article 84 EPC, without specifying what these might be. The sentence immediately before this, in its letter regarding the maintenance ("aufrechterhalten") of the objections under Articles 100(b) and 100(c) EPC, evidently relates to the main request, as no objections had been put forward by any of the parties regarding any possible extension of subject-matter or sufficiency of disclosure objections to auxiliary request 1 at that date. The other opponents did not bring forward any specific objection before the oral proceedings on that request either.

1.3.3 The Board finds that whilst objections might arise at every stage of the proceedings, it cannot be expected

from the appellant (in a case such as this) that it should anticipate the substance of any possible objections and then file (in advance) precautionary requests, in particular if in the preliminary opinion of the opposition division it is clearly stated that the requirements of the EPC are met. By denying the appellant the possibility of reacting to the objections put forward for the first time during the oral proceedings by filing another request, the opposition division denied the appellant its right to be heard under Article 113(1) EPC. A party being denied its right to be heard amounts to a substantial procedural violation.

1.4 The appellant argued that the decision of the opposition division was not complete and had made it difficult for the appellant to structure its defence, possibly even leading to a need of appealing twice and to an accrual of costs; it might also have avoided appealing at all. Whether or not the appellant is correct on these points in the case in question can be left undecided, since the appellant anyway made the deliberate and conscious choice of maintaining higher ranking auxiliary requests 1 to 4 each comprising sets of claims upon which the decision from the opposition division was based.

The Board thus finds that, regardless of whether the opposition division should have admitted a further auxiliary request or not, it would serve no useful purpose and that it is not procedurally economical to remit the case for further prosecution at this stage without having dealt with the higher ranking requests (i.e. in terms of the sets of claims filed as auxiliary requests 1 to 4) and at least with the admittance of

auxiliary request 5 which forms the basis of the remittal request.

1.5 For these reasons, the Board decided, in the exercise of its discretion conferred by Article 111(1) EPC, not to remit the case to the opposition division for further prosecution of the opposition at that particular stage reached during the oral proceedings before the Board. The main request for remittal was thus rejected.

1.6 The Board notes that auxiliary request 5, on which basis the "main request" for remittal was originally based, was withdrawn at a later stage of the oral proceedings, such that no further discussion of its merits is required here.

2. Auxiliary requests 1 and 3 - Article 123(2) EPC

2.1 Claim 2 of auxiliary request 1 is a combination of the features of independent claim 2 as originally filed with the specific features of the characterizing portion of independent claim 1 as originally filed.

2.2 Independent claims 1 and 2 as originally filed however correspond to two different embodiments of the application. There is however no disclosure in the application of an article comprising the features of both.

2.3 The appellant argued that page 11, lines 31-36 (of the published application) provided a basis for the subject-matter of claim 2 and that the references in the description to "invention" were different from the ones to referring to "embodiment". According to its argument, the skilled person would recognize that these

references to the invention (such as the one on page 11) could generally be combined with all the disclosures. The Board, however, does not concur.

The passage on page 11, lines 31-36 of the published application does not provide a basis for the subject-matter of claim 2. The skilled person reading the description would understand that this passage relates "to the invention" which is being explicitly described (i.e. the first invention described at that juncture).

Following the passage on page 11, there is (on page 12, lines 8-13) a further passage where the features of the characterizing portion of independent claim 1 of this request (corresponding to the characterising portion of independent claim 2 as originally filed) are disclosed as belonging to "another embodiment of the invention". Without a previous literal reference to an "embodiment according to the invention" on pages 11 and 12 concerning a pant diaper, the skilled person reading the application understands that the passage on page 12 belongs to another (i.e. a different) embodiment as distinct from the one described immediately before on page 11 (simply referring to "invention") having the overlapping ranges. A direct and unambiguous disclosure of the combination of the referred features of pages 11 and 12 is thus not present.

2.4 The appellant also argued that the passage on page 2, lines 10-22 of the published application taught the skilled person the need to have correct elastic materials and dimensions to obtain the advantages of the invention and thus that the skilled person would directly and unambiguously derive therefrom that the features of claims 1 and 2 as originally filed could be

combined. The Board does not find this argument persuasive either.

This passage teaches the skilled person generally that it is important for articles to have appropriate dimensions to the size of the wearer and to place elastics only in the appropriate regions of the article but it does not provide a direct and unambiguous disclosure for an article according to the specific features of the invention as now claimed. The whole application discloses a pant diaper comprising not only the features of the claim but also further specific features relating to its dimensions and the elastics (e.g. the ratio between the maximum width c and length b or other details concerning the position of the elastic web material) such that it would be impossible for the skilled person to derive from this passage alone the specific combination of features of claim 1.

2.5 Thus there is no basis in the whole disclosure as originally filed to combine the features of independent claim 2 as originally filed with the specific features of the characterizing portion of independent claim 1 as originally filed. The subject-matter of claim 2 of auxiliary request 1 does not fulfil the requirement of Article 123(2) EPC and auxiliary request 1 is therefore not allowable.

2.6 The issue of possible exclusion of auxiliary request 3 into proceedings (Article 12(4) RPBA 2007) need not be addressed, since the request is anyway not allowable for the same reasons as explained for auxiliary request 1.

2.7 Claim 2 of auxiliary request 3 comprises the combination of the features of independent claim 2 as

originally filed with the specific features of the characterizing portion of independent claim 1 as originally filed discussed above and with the further features of dependent claims 4 and 5 as originally filed. The addition of the further features from dependent claims 4 and 5 does not change the reasoning regarding extension of subject-matter discussed above nor has any of the parties argued that it would.

2.8 The subject-matter of claim 2 of auxiliary request 3 therefore does not fulfill the requirement of Article 123(2) EPC. Thus auxiliary request 3 is not allowable.

3. Auxiliary request 2 - Article 83 EPC

3.1 Claim 2 of auxiliary request 2 defines *inter alia* that the length of the crotch potion is between 10% and 40% of the entire length of the article as measured in an extended state of the article.

3.2 However, it is not possible for the skilled person to establish the length of the crotch person as required by the features of claim 2 for any other shape than the specific shape shown in Figure 2 of the patent, since the patent does not teach the skilled person how to establish any boundaries of the crotch portion of the absorbent article in general.

3.3 Contrary to the argument of the appellant, the claim is not limited to articles where the dimensions of the crotch portion can be defined. The claim simply defines that the length of the crotch portion is between 10% and 40% of the entire length of the article as measured in an extended state of the article and that the crotch portion is located between the front portion and the back portion. Without a teaching in the patent of how

to establish the crotch portion and its boundaries, any limits then established by a skilled person would be nothing but entirely arbitrary when defining a crotch portion of the article and its length as required in claim 2 of auxiliary request 2. The skilled person is thus faced with an impossible burden.

3.4 Paragraph [0054] belongs to the specific embodiment of Figure 2 where two points at which each leg opening changes most abruptly might be identified. This disclosure of a single embodiment however does not teach the skilled person how to establish what are the points where the angle of the edge of the leg opening changes "most abruptly" and where, for example, they might be located for other shapes of leg opening. It is thus impossible for the skilled person taking into consideration paragraph [0054] to define the boundaries and establish the length of the crotch portion for the other shapes encompassed by the wording of claim 2, i.e. over the whole range claimed.

3.5 The invention according to claim 2 of auxiliary request 2 therefore does not fulfil the requirements of Article 83 EPC. Auxiliary request 2 is thus not allowable.

4. Auxiliary request 4 - Article 83 EPC

4.1 The Board exercised its discretion not to exclude auxiliary request 4 from the proceedings under Article 12(4) RPBA 2007. The reasons therefor are however not important for the decision, since as explained below the requirements of Article 83 EPC are not met.

4.2 Claim 1 of auxiliary request 4 defines *inter alia* that the front and back portions comprise an elastic laminate and that the length b2 of the crotch portion

is substantially equal to the distance between the panels of the elastic laminate in the front and back portion.

4.3 Regardless of the question of whether it is clear what these panels of elastic laminate are, the disclosure as a whole does not specify the number, size and shape of these panels nor their possible positions in the front and back portions of the absorbent article.

It is thus only possible for the skilled person to establish the distance between panels of the elastic laminate as defined in claim 1 for very specific embodiments (such as the one of Figure 2, when there is a single panel in each of the front and back portion and their shape and size match the shape and size of the portions).

The whole disclosure does not provide information to a skilled person on how to establish this distance for most of the other encompassed cases in claim 1, such as when there are several panels in each of the portions with each of the panels having possibly a different shape with concave or convex contours.

4.4 The appellant argued that the skilled person recognized that the distance between panels was the closest distance between the two closest panels in each portion and that this distance defined the crotch portion. The Board is however not persuaded by this argument. Paragraphs [0060], [0062] and [0065] disclose the possibility of the elastic web material (and thus the panels) not coinciding with the limits of the front and back portion, of being also present in the crotch portion or being arranged only in parts of the front and back portion. The skilled person therefore does not

derive from the disclosure as a whole that the closest distance between the panels is a general criteria to establish the boundaries of the crotch portion that can be applied throughout the invention.

4.5 Even if the skilled person would try to apply this criteria, it would still be impossible for them to carry out the invention over the whole scope claimed. For example, in some embodiments where the panels would be present in the side portions to replace the elasticized side portions (as hinted in paragraph [0065]), it is not clear whether the distance between the panels should be measured in a straight line and possibly over areas outside the absorbent article or only between points whose distance is obtainable without surpassing the boundaries of the article. The patent is simply silent on how such a distance should be established.

4.6 The appellant also argued that there were no "real life" embodiments with more than one panel in the front and back portion or with offset panels and that thus the skilled person with a mind willing to understand would realize that such products fall outside the scope of the claim and would thus be able to determine the distance in all reasonably workable embodiments. The Board however does not agree with this argument, not least since paragraph [0065] discloses possible cases “where the elastic web material 10 is arranged only in parts of the front and/or back portions”. It is thus specifically disclosed as a possibility in the disclosure for elastic web material to be arranged in multiple parts of one of the front or back portions, thus more than one panel can be present in each of the front and back portions.

4.7 At least for the reasons stated above, the skilled person would not be able to perform the invention over the whole scope of claim 1 of auxiliary request 4 such that the requirements of Article 83 EPC are not fulfilled. Thus, auxiliary request 4 is not allowable.

5. Auxiliary request 10 - Article 123(2) EPC

5.1 Claim 1 of auxiliary request 10 differs from claim 1 of auxiliary request 1 *inter alia* in the specific added feature:

"said crotch portion (7) is defined in the longitudinal direction (y) of the article by a transverse line located at said defined point at the front portion (5) where there is an abrupt change of the angle of the edge of the leg opening and a transverse line located at said defined point at the back portion (6) where there is an abrupt change of the angle of the edge of the leg opening"

5.2 The appellant argued that page 11, lines 16-29 and Figure 2 provided a basis for the combination of features of claim 1 of auxiliary request 10.

The Board does not agree. The features added to claim 1 referred to above do not correspond to the ones in the referred passage on page 11. For example, the point at which the angle of the edge of the leg opening changes most abruptly (as described on page 11, lines 19-21 and 23-25) is more specific than a defined point at the front/back portion where there is an abrupt change (as defined in claim 1).

5.3 Contrary to the argument of the appellant, the skilled person would identify a clear difference between

"changes most abruptly" and "abrupt change". The latter expression does not differentiate, for instance, between levels of abruptness in cases where there are several abrupt changes (i.e. all of them are encompassed), whereas the expression "changes most abruptly" only encompasses the points at which this rate of change is the highest.

5.4 In addition, the description of the way of establishing the crotch portion on page 11, lines 16-29, belongs to a specific embodiment of a pant diaper of Figure 2 with a leg opening shape comprising (possibly only) two abrupt changes, which necessarily are also the ones that change most abruptly. However, claim 1 is not limited to this specific embodiment of Figure 2 and its specific leg contour shape (i.e. no such limiting features have been included in the claim). It encompasses instead leg opening shapes with a higher number of abrupt changes some of them being more abrupt than others. The passage on page 11 does therefore not provide a basis for the specific combination of the features of claim 1.

5.5 The subject-matter of claim 1 extends beyond the content of the application as originally filed contrary to Article 123(2) EPC. Auxiliary request 10 is thus not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar: The Chairman:

M. H. A. Patin M. Harrison

Decision electronically authenticated