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**Datasheet for the decision
of 29 March 2022**

Case Number: T 2763/18 - 3.2.06

Application Number: 04713700.5

Publication Number: 1603502

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:

PANT-SHAPED GARMENT WITH IMPROVED FIT

Patent Proprietor:

SCA Hygiene Products AB

Opponents:

Kimberly-Clark Worldwide, Inc.
THE PROCTER & GAMBLE COMPANY

Headword:

Relevant legal provisions:

EPC Art. 54, 56

RPBA 2020 Art. 13(2)

RPBA Art. 12(4)

Keyword:

Late-filed argument - admitted (yes)

Novelty - (yes)

Inventive step - Main request, auxiliary requests 3 and 4 -
(no), auxiliary request 5 - (yes)

Late-filed auxiliary requests 1 and 2 - admitted (no)

Decisions cited:

T 0607/10

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 2763/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 29 March 2022

Appellant: Kimberly-Clark Worldwide, Inc.
(Opponent 1) 2300 Winchester Road
Neenah WI 54956 (US)

Representative: Dehns
St. Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Respondent: SCA Hygiene Products AB
(Patent Proprietor) 405 03 Göteborg (SE)

Representative: Valea AB
Box 1098
405 23 Göteborg (SE)

Party as of right: THE PROCTER & GAMBLE COMPANY
(Opponent 2) One Procter & Gamble Plaza
Cincinnati, Ohio 45202 (US)

Representative: P&G Patent Germany
Procter & Gamble Service GmbH
Sulzbacher Straße 40
65824 Schwalbach am Taunus (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 September 2018 concerning maintenance of the
European Patent No. 1603502 in amended form.**

Composition of the Board:

Chairman T. Rosenblatt
Members: M. Hannam
 W. Ungler

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent 1) against the interlocutory decision of the opposition division in which it found that European patent No. 1 603 502 in an amended form met the requirements of the EPC.
- II. The appellant requested that the decision under appeal be set aside and the patent be revoked in its entirety.
- III. The respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained according to one of auxiliary requests 1 to 6.
- IV. The following documents are relevant to the present decision:

D1	US-B-4 355 425
D2	US-B-4 906 243
D4	US-B-4 938 757
D8	WO-A-99/14044
D15	US-B-3 038 474
- 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 subject-matter of the respective claim 1 of the main request and of auxiliary requests 1 to 5 appeared to lack an inventive step.
- VI. With letter dated 16 March 2022 the appellant filed further arguments in support of its objections to the

main request and to the auxiliary requests.

VII. Oral proceedings were held before the Board on 29 March 2022. The party as of right (opponent 2) did not attend the oral proceedings, as announced in its letter dated 16 February 2022. At the close of the proceedings the requests of the parties were as follows:

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

The respondent requested that the appeal be dismissed (main request), auxiliarily that the patent be maintained according to one of auxiliary requests 1 to 6 filed with letter of 21 May 2019.

VIII. Claim 1 according to the main request reads as follows:

"A pant shaped garment comprising an outer panty (2) having a length direction (L) and a transverse direction (T) and which exhibits a rear portion (4) intended to be arranged over the buttocks of a user during use, a front portion (3) intended to be arranged over the belly of a user during use, a crotch portion (5) intended to be arranged in the user's crotch during use and, further, a waist opening (14) with a waist edge (13) extending in the transverse direction (T) and two leg openings (16) each being bordered by a leg edge (15) having a front part of the leg edge (15) being located generally on the front portion (3) and a rear part of the leg edge being located generally on the rear portion (4) and on the crotch portion (5) and wherein the rear portion (4) and the front portion (3) are mutually connected in two side joins (12) which run in the length direction (L) from the waist opening (14)

to each leg opening (16), characterized in that the front portion (3) and the rear portion (4) of the outer panty (2) consist substantially of an elastically extensible material and in that the rear part of each leg edge (15) is curve-shaped and exhibits a concave curved segment (A) located mainly on the crotch portion (5) and a convex curved segment (B) located mainly on the rear portion (4), and in that the crotch portion (5) of the outer panty (2) consists of a substantially non-elastic material which is joined to the elastic front portion in a front join (S_1) and to the elastic rear portion (4) in a rear join (S_2), wherein both joins (S_1 , S_2) are arranged in the transverse direction (T)."

The respective claim 1 of auxiliary requests 1 to 5 are appended to the present decision. The wording of claim 1 of auxiliary request 6 is not relevant to the present decision and is consequently not appended.

IX. The appellant's arguments relevant to the present decision may be summarised as follows:

The submissions in the letter of 16 March 2022 should be admitted as these were simply developments of existing arguments with respect to the main request.

Main request

The subject-matter of claim 1 lacked novelty. The claimed crotch portion consisting of a substantially non-elastic material was known from a combination of the panty blank 10 and the backsheet portion 25 of the absorbent crotch element of D1. Column 8, lines 23 to 48 disclosed the backsheet being a sheet of polyethylene which was an inelastic material. The

claimed crotch portion was not limited to a single material such that a laminate of the panty blank and the backsheet portion 25 of D1 met the claimed 'consists of a non-elastic material' wording. The panty blank and backsheet were bonded together as described from line 40 of column 10, the panty blank 10 and the crotch element 20 being lapped over one another before being bonded together. This was in addition to the bonding of the perimeter of the crotch portion as disclosed in column 10, lines 65 to 68. Consequently a laminate of the backsheet 25 and the panty blank 10 was formed in the crotch region which was inelastic. The inelastic crotch portion material defined at least by the backsheet 25 was joined to the front and rear portions 18, 19 despite the common elastic panty blank layer extending from the front portion via the crotch to the rear portion.

The subject-matter of claim 1 also lacked an inventive step starting from D15 and combining with the technical teaching of *inter alia* D2. D15 disclosed all features of claim 1 save for the rear part of each leg edge having a convex curved segment located mainly on the rear portion. The crotch portion seen as a whole was concave shaped. Based on the sole characterising feature, the objective technical problem to be solved was how to provide a suitable fit of the article in the buttocks region. D2 provided the solution to this problem through convex side edges of the intermediate section 10b of the pants (see Fig. 1 and column 2, lines 51 to 53), a snug fit around the wearer's legs thus being achieved (see column 3, lines 45 to 46). The type of absorbent article disclosed in D2 was of no relevance to the curvature disclosed in the rear part of the article's leg edges.

Auxiliary requests 1 and 2

These should be found inadmissible. The novelty objection based on D1 to which these auxiliary requests respond was filed already in items 18 to 20 of the notice of opposition. The requests thus could and should have been filed already before the opposition division.

Auxiliary request 3

The subject-matter of claim 1 lacked an inventive step when starting from D15 and combining with the technical teaching of D8 (see first paragraph of page 1; claims 1 and 16). The elastic film known from D8 was breathable (see page 2, Summary of the invention) which corresponded to the nature of the perforated film disclosed in paragraph [0015] of the patent. No difference between micro-pores and perforations could be seen, and no evidence thereof had been provided.

Auxiliary request 4

The feature added to claim 1 relative to claim 1 of auxiliary request 3 failed to solve a technical problem. The positioning of the curve maximum of the convexly curved part of the leg edge seemed arbitrary as regards the alleged technical effect of improving buttock coverage. The subject-matter of claim 1 thus lacked an inventive step for the same reasons as those given for auxiliary request 3.

Auxiliary request 5

The subject-matter of claim 1 did not involve an inventive step. The newly added features to claim 1

relative to claim 1 of auxiliary request 4 had a technical effect separate to that of the convex curvature of the rear leg edge. The formulation of partial objective technical problems was thus again appropriate. The partial problem for the newly added features was thus to provide a suitable fit at the front of the user. Both D1 and D4 disclosed concave leg edges on the front portion which would guide the skilled person to the required modification of D15 without their becoming inventively active.

- X. The respondent's arguments relevant to the present decision may be summarised as follows:

The appellant's letter of 16 March 2022 was filed late and should not be admitted into the proceedings.

Main request

The subject-matter of claim 1 was novel. The claimed outer panty could only be anticipated by the panty blank 10 of D1 since all other physical features of the pant shaped garment of D1 were internal to the panty blank and could not be considered part of the 'outer' panty. The outer panty should thus be interpreted as a chassis supporting the internal elements of the article. If the internal components were considered part of the outer panty, the crotch portion would not consist of a substantially non-elastic material since the panty blank in the crotch portion was elastic. In addition, the crotch portion as a whole could then not be considered to be joined to the front and the rear portions 18, 19 because the elastic layer of the crotch portion was integral with the front and rear portions. The subject-matter of claim 1 also involved an inventive step. In addition to D15 not disclosing the

convex curved rear leg edges, the crotch portion disclosed perfectly straight side edges and so also failed to disclose the rear part of each leg edge exhibiting a concave curved segment located mainly on the crotch portion. The objective technical problem was thus to provide a suitable fit. D2 did not relate to a pants-type diaper and so would not be considered by the skilled person for combination with D15. Even though the intermediate portion 10b edge was convex, when in use this would be located at the front of the wearer, and thus not mainly on the rear portion as required by claim 1.

Auxiliary requests 1 and 2

These should be admitted to the proceedings. D15 was filed shortly before the oral proceedings before the opposition division such that insufficient opportunity was available to formulate auxiliary requests to overcome the objections based thereon. The first opportunity to file these requests was thus with the respondent's reply to the grounds of appeal, at which juncture they were indeed filed.

Auxiliary request 3

The subject-matter of claim 1 involved an inventive step. The newly added features in claim 1 had a synergistic effect with those differentiating claim 1 of the main request from D15, a single objective technical problem thus being appropriate. This would then read 'how to provide a suitable fit of the article'. D15 disclosed a washable, non-disposable article which the skilled person would be dissuaded from modifying with disposable nonwovens and plastic films. Should the skilled person nonetheless modify D15

with the laminate disclosed in D8, the laminate of D8 disclosed micro-pores which were different to the claimed 'perforations'.

Auxiliary request 4

The feature added to claim 1 relative to claim 1 of auxiliary request 3 ensured that the curve maximum was in the elastic portion of the outer panty which improved the ability of the article to adapt its fit to the wearer. This technical effect was achieved over the entire scope of claim 1. The subject-matter of claim 1 thus involved an inventive step.

Auxiliary request 5

The subject-matter of claim 1 involved an inventive step. When starting from D15, this failed to disclose the newly added feature of the front part of the leg edge exhibiting a concave curved segment. From paragraphs [0009 - 0011] it was evident that a single technical effect relating to a good fit of the article to the wearers legs was achieved. The cited documents did not provide an obvious hint as to how to modify D15 in order to reach the claimed subject-matter: Even if D1 could be considered to unambiguously disclose concave curvature of the leg edge on the front portion, D1 did not suggest the edge curvature to be relevant for improvement of fit; D2 lacked leg shaping on the front portion of the article; D4 disclosed solely straight leg edges in the plan view relevant for disclosure of the leg curvature; and D15 itself solely disclosed concave curvature on the crotch portion of the article, not on the front panel.

Reasons for the Decision

1. *Admittance of late filed submission*
 - 1.1 With letter of 16 March 2022, the appellant filed *inter alia* further arguments in support of its novelty objection to the subject-matter of claim 1 of the main request. The respondent requested that the letter not be admitted into the proceedings.
 - 1.2 According to Article 13(2) RPBA, any amendment to a party's appeal case ... after notification of a summons to oral proceedings shall, in principle, not be taken into account. In the present case, the question to be answered was whether the content of the appellant's submission of 16 March 2022 constituted an amendment to its appeal case.
 - 1.3 It is established case law of the Boards of appeal (see e.g. T 607/10, Reasons 4.1.3) that new arguments may be admitted at every stage of opposition appeal proceedings, provided that such arguments are just a development of the original arguments filed with the grounds of appeal i.e. that the new arguments do not constitute an amendment to the party's appeal case.
 - 1.4 In the present case, the grounds of appeal had contested novelty of the subject-matter of claim 1 based on D1, detailed reference and argument being made to both D1 and to the opposition division's decision on this objection. With respect to claim 1 in its submission of 16 March 2022, the appellant referred to several paragraphs of the patent in suit in order to interpret the expression 'consists of' in claim 1 and further cited a passage in D1 in order to argue the presence of a particular bonding of the crotch

assembly. These references and citation follow the line of objection based on D1 submitted with the grounds of appeal and are consequently seen merely as a development of the arguments already on file.

1.5 In view of the above, the Board finds the appellant's submission with respect to the main request in its letter of 16 March 2022 not to amend its appeal case. This submission is thus not excluded from the proceedings.

2. *Main request*

2.1 *Novelty (Article 54 EPC)*

2.1.1 Both parties were in agreement that the following features of claim 1 are known from D1 (the reference signs in parentheses referring to D1):

A pant shaped garment comprising an outer panty (10) having a length direction and a transverse direction (see Fig. 1) and which exhibits a rear portion (18) intended to be arranged over the buttocks of a user during use, a front portion (19) intended to be arranged over the belly of a user during use, a crotch portion (see Fig. 1) intended to be arranged in the user's crotch during use and, further, a waist opening (as depicted in Fig. 6) with a waist edge extending in the transverse direction and two leg openings (see Fig. 6) each being bordered by a leg edge having a front part of the leg edge being located generally on the front portion (19) and a rear part of the leg edge being located generally on the rear portion (18) and on the crotch portion (See Fig. 6) and wherein the rear portion (18) and the front portion (19) are mutually connected in two side joins (see Fig. 6) which run in

the length direction from the waist opening to each leg opening, the front portion (19) and the rear portion (18) of the outer panty (10) consist substantially of an elastically extensible material (see column 2, lines 18 to 22; "panty blank is formed from elastic fabric"), the rear part of each leg edge (portion formed by rear panel 18; see Fig. 1) is curve-shaped and exhibits a concave curved segment located mainly on the crotch portion and a convex curved segment located mainly on the rear portion.

- 2.1.2 The sole contentious features are thus that:
- the crotch portion of the outer panty consists of a substantially non-elastic material
 - which is joined to the elastic front portion in a front join and to the elastic rear portion in a rear join, wherein both joins are arranged in the transverse direction.
- 2.1.3 The respondent's argument that solely the panty blank 10 of D1 could be seen as the claimed outer panty is not accepted. The outer panty is claimed very broadly, essentially defined in respect of a rear portion, a front portion, a crotch portion, a particular shape of the rear part of each leg edge and the elastic / inelastic quality of the claimed portions. The claimed outer panty thus has within its scope many more physical elements of a typical pant-shaped garment (albeit unclaimed) such as elastic elements at the waist and leg openings or an absorbent component in the crotch as typically found in a diaper. Consequently, the outer panty is not seen to be limited to just the panty blank 10 of D1, but can reasonably be interpreted to include further features, such as at least the absorbent crotch element 20. The respondent's reference, in this regard, to several portions of the

description of the patent in order to support its interpretation of claim 1 is not an accepted reason for the claimed outer panty to be given an unduly limited interpretation.

2.1.4 The Board agrees with the appellant that a combination of the panty blank 10 and the backsheet portion 25 of the absorbent crotch element of D1 could reasonably be considered an outer panty as defined in claim 1 (see also point 2.1.3 above). However, the appellant's contention that this arrangement of panty blank and backsheet portion would anticipate the claimed crotch portion consisting of a substantially non-elastic material is not accepted. In patent claims before the EPO, the wording 'consists of' is usually interpreted to mean that no further features are present apart from those specifically mentioned. For the claimed crotch portion defined to 'consist[s] of a substantially non-elastic material', this implies that solely a non-elastic material is present therein. However, the appellant's contention with respect to D1 requires both a non-elastic material (the backsheet portion 25) and an elastic material (the part of the panty blank 10 in the crotch region) to anticipate the claimed 'crotch portion', which clearly fails to meet the requirement for the crotch portion to 'consist of' a substantially non-elastic material.

2.1.5 With this unequivocal understanding of the crotch portion consisting of solely a non-elastic material, the presence of elastic elements 18 around the leg openings on the crotch portion (see para [0032] of the patent) does not contradict this. The elastic elements, which may be sandwiched between two layers of a laminate, do not render the non-elastic material of the crotch portion elastic, rather the elements would

create gathers of crotch material around the leg openings in order to improve fit. This would have no effect on the material of the crotch portion itself which would continue to "consist of a substantially non-elastic material" as defined in claim 1.

2.1.6 The appellant's argument that the panty blank 10 and backsheet 25 of D1 formed a laminate and that the material of this laminate was non-elastic is not accepted. The Board finds D1 not to disclose the panty blank 10 and backsheet 25 forming a laminate since, in the common understanding of a laminate, this would have at least two layers bonded over the majority of their contacting surfaces. D1 does not disclose such a bonding between the panty blank 10 and the backsheet 25, rather the bonding is solely around the periphery of the backsheet 25. The bonding of the lapped surfaces disclosed in column 10, lines 59 to 68 of D1 is in relation to the crotch portion 20, the panty blank 10 and additionally the elastic member 11, where the bonding zones "are congruent with respect to the elastic member" (see also column 10, lines 25 to 26). As depicted in Figs. 1 and 3 of D1, the elastic member 11 solely bonds the periphery of the absorbent crotch member 20 (and hence solely the periphery of the backsheet 25) to the crotch region of the panty blank 10. A bonding of the remaining portion of the backsheet 25 to the panty blank is not directly and unambiguously derivable from D1. Consequently, the panty blank 10 and backsheet 25 cannot be considered to be combined into what is the common understanding of a laminate. The corollary of this is that the panty blank 10 and backsheet 25 are present as separate layers of material in the crotch portion of D1 such that, as it cannot be viewed as a single feature, the crotch portion cannot be seen to consist of a substantially non-elastic

material.

2.1.7 As regards the claimed joins between the inelastic crotch portion and the front and rear portions, these are also not known from D1. The appellant argues that the claimed crotch portion is anticipated by a combination of the panty blank 10 in the crotch region and the backsheet 25 of the absorbent crotch element 20. For the crotch portion of D1 to thus anticipate the claimed joins, both the panty blank in the crotch region and the backsheet of D1 would in combination have to be joined to the front portion and the rear portion. However, solely the backsheet 25 of the absorbent crotch element 20 is joined via bonding around its periphery to the panty blank 10. The panty blank in the crotch region is integral with the panty blank of the front and rear panels 18,19. Consequently, the panty blank in the crotch region and the backsheet of D1, seen in combination as a single feature anticipating the claimed crotch portion, lacks both a front join to the front portion and a rear join to the rear portion.

2.1.8 The appellant's argument that the claimed front and rear joins were anticipated by the joins between the front / rear portions 18, 19 and a combination of the topsheet 23, backsheet 25 and the outer elastic layer in the crotch portion of D1 is not accepted. The claimed crotch portion cannot be anticipated by the laminate comprising the outer elastic layer, topsheet and backsheet of D1 (see point 2.1.6 above). Consequently, the crotch portion of D1 is not joined to the front and rear portions 18 according to the feature in the characterising portion of claim 1 since these three portions are a single, continuous piece of

material absent any join connecting them together.

2.1.9 In summary therefore, D1 fails to disclose both the features of claim 1 identified in point 2.1.2 above.

2.1.10 In the absence of any further novelty objections, the Board finds the subject-matter of claim 1 to be novel (Article 54 EPC).

2.2 *Inventive step (Article 56 EPC)*

The subject-matter of claim 1 lacks an inventive step when starting from D15 and combining with the technical teaching of D2

2.2.1 Both parties accepted that, starting from D15, this failed to disclose that the rear part of each leg edge had a convex curved segment located mainly on the rear portion. In addition, the respondent alleged that the crotch portion of D15 disclosed perfectly straight side edges and so also failed to disclose the rear part of each leg edge exhibiting a concave curved segment located mainly on the crotch portion.

2.2.2 This latter alleged differentiating feature is not found to differentiate claim 1 over D15. Claim 1 defines the concave curved segment of the rear part of each leg edge being located mainly on the crotch portion. With reference to Fig. 9 of D15 it is clear that the section of the crotch portion 41 in the vicinity of seam 44 has an essentially concave edge. It is not denied that a significant length of the central section of the crotch portion 41 has straight side edges but the side edges between the straight edges and the seam 44 are without doubt concavely curved. Furthermore, and as also argued by the appellant, the

claim does not require the crotch portion to present a constant curvature and thus does not exclude straight segments on the overall concave crotch portion 41.

2.2.3 The sole differentiating feature of claim 1 over D15 is thus that the rear part of each leg edge has a convex curved segment located mainly on the rear portion. Paragraph [0009] of the patent discloses that 'the leg cut in accordance with the invention has a very good fit and provides good shaping of the panty around the legs of the user'. The technical problem posed by the respondent of 'how to provide a suitable fit of the article in the rear portion' can thus be accepted as objective. The appellant's posed problem of 'to provide a better fit in the buttocks region' cannot be seen as objective, as a better fit around the buttocks would be subject to the particular anatomy of the wearer e.g. buttock size or shape. It can thus not be generalised that a convexly curved leg edge would improve fit in the buttocks region relative to the article known from D15.

2.2.4 In trying to solve the objective problem, the skilled person would refer to D2 which discloses convex side edges of the intermediate section 10b of the pants (see Fig. 1 and column 2, lines 51 to 53). This arrangement is disclosed to achieve a snug fit around the wearer's legs (see column 3, lines 45 to 46), thus guiding the skilled person obviously to the solution of the objective technical problem.

2.2.5 The respondent's argument that the open diaper absorbent article disclosed in D2 was different to the pants type diaper of D15 such that the skilled person would not combine the teachings of the two documents is not accepted. As also held by the appellant, the type

of diaper is of no relevance to the specific curvature disclosed in the rear part of the article's leg edges, this curvature being an independent teaching from the diaper type and being transferable between the two types without the skilled person thereby having to become inventively active.

2.2.6 The respondent further argued that, even though the intermediate portion 10b edge of D2 was convex, when in use this would be located at the front of the wearer, and thus not mainly on the rear portion as required by claim 1. This argument is not persuasive. Claim 1 defines physical features of the pant shaped garment *inter alia* the concave curved segment (A) and the convex curved segment (B) of the rear part of each of its leg edges. Irrespective of whether 'laid-flat' or being worn, these physical features of the garment will be present and cannot shift from that very rear part of the leg edge to the garment's front portion when worn. Moreover, claim 1 does not relate to the location of a convex curved segment of a leg edge's rear part in a worn state relative to a wearer's front. A convex curved segment on the intermediate part 10b of the leg edge which corresponds to leg edge's rear part is however clearly depicted in Figure 1 of D2 and described consistently with this drawing in the passages referred to above in point 2.2.4.

2.2.7 In summary, therefore, starting from D15 and motivated by the posed objective technical problem, the skilled person would modify the rear leg edge curvature of D15 to provide a convex curved segment on the rear portion as disclosed in D2, thus solving the posed problem and reaching the claimed subject-matter without exercising an inventive step.

2.2.8 The subject-matter of claim 1 thus lacks an inventive step (Article 56 EPC). The main request is not allowable.

3. *Admittance of auxiliary requests 1 and 2*

3.1 Article 12(4) RPBA 2007 outlines a Board's power to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first instance proceedings. Auxiliary requests 1 and 2 were filed for the first time with the respondent's reply to the grounds of appeal. In order to appropriately exercise its discretion it was necessary for the Board to establish whether these requests could reasonably have been filed before the opposition division.

3.2 In its letter of reply to the grounds of appeal, the respondent failed to provide any reasons why auxiliary requests 1 and 2 were being filed for the first time at that juncture, rather than previously before the opposition division. At oral proceedings before the Board, the respondent argued that the auxiliary requests were respondent to the filing of D15 shortly prior to oral proceedings before the opposition division, the first opportunity to file them thus being in the appeal proceedings.

3.3 The respondent's justification for filing auxiliary requests 1 and 2 for the first time on appeal is not persuasive for admitting them. Claim 1 of each auxiliary request defines an absorbent package (in auxiliary request 1) or an absorbent unit (in auxiliary request 2) as a separate structural feature to the outer panty. These amendments appear responsive to the appellant's argument based on D1 that the panty blank

10 and the absorbent crotch element 20 in combination corresponded to the claimed outer panty rather than, as alleged by the respondent, overcoming an objection based on D15, for which discussions did not concern the presence or the structure of an absorbent package or unit in the crotch region but the geometrical configuration of the leg edge. Indeed, the novelty objection based on D1 and the interpretation of the claimed outer panty was, as argued by the appellant, raised already with the opponent's notice for opposition (see items 18 to 20).

3.4 In view of the above, it is evident that the respondent was faced with the objection which has precipitated the filing of auxiliary requests 1 and 2 already at the start of the opposition procedure. The auxiliary requests thus could and should have already been presented before the opposition division, rather than for the first time in the appeal proceedings.

3.5 Consequently the Board exercised its discretion to hold auxiliary requests 1 and 2 inadmissible under Article 12(4) RPBA 2007.

4. *Auxiliary request 3*

4.1 *Inventive step (Article 56 EPC)*

The subject matter of claim 1 lacks an inventive step.

4.2 The features added to claim 1 of the present request with respect to claim 1 of the main request specify the front and rear portion of the outer panty to 'consist of an elastic laminate comprising two nonwoven layers and an elastic, perforated plastic film arranged between the nonwoven layers'. These features are

accepted by both parties as not being known from D15.

4.3 The features of this addition to claim 1 have no synergy with those found to differentiate claim 1 of the main request over D15. Therefore the formulation of partial objective technical problems is appropriate when considering if the subject-matter of claim 1 involves an inventive step. The respondent's allegation that both sets of differentiating features address a common problem is not accepted. The differentiating features in claim 1 of the main request relate to the shape of the leg edge and are thus seen to be directed to article fit improvements. The newly added differentiating features of the present request relate to a laminate material which in this generality does not necessarily present a technically recognisable influence over article fit. The respondent did at least not indicate any passage in the patent which would support this contention. Partial objective technical problems are thus appropriate.

4.4 As regards the partial objective technical problem with respect to the differentiating features of claim 1 of the main request over D15, reference is made to item 2.2.3 above. As regards the partial objective technical problem based on the newly added features of claim 1 of the present request, this can be seen as 'to select a suitable alternative material for the front and rear portions of the outer panty'.

4.5 As found in item 2.2 above, the claimed solution to the first objective technical problem does not involve an inventive step. When trying to solve the second partial objective technical problem, the skilled person would refer to D8 which (see first paragraph on page 1; claims 1 and 16) discloses a laminate suitable for

disposable diapers comprising a breathable elastomeric film sandwiched between two nonwoven web layers. When starting from D15 and wishing to solve the posed partial objective technical problem, the skilled person would adopt the teaching from D8 in order to modify D15, thus reaching the claimed subject-matter without exercising an inventive step.

4.6 The respondent argued that, starting from D15 which disclosed a washable, non-disposable article, the skilled person would be dissuaded from modifying such an article with disposable nonwovens and plastic films. The Board is not persuaded by this argument. Whilst D15 indeed discloses a crotch portion of the garment to be preferably of a washable material (see column 7, lines 25 to 26), there is no general teaching in D15 which would limit the application of the disclosed sanitary napkin to necessarily be re-usable rather than disposable. The Board does not see the washability of the crotch portion of D15 as dissuading the skilled person, at the priority date of the opposed patent (i.e. 2003), from modifying the front and rear portions of the garment of D15 with materials usually unsuited to washing.

4.7 The respondent's argument, raised for the first time in the oral proceedings before the Board, that the laminate of D8 disclosed micro-pores which were different in terms of their size, structure and the process by which they were created to the claimed 'perforations' is not accepted. Details of the perforations of the elastic, perforated plastic film according to claim 1 are not disclosed in the patent. The only purpose attributed to the perforated plastic film of the elastic laminate in its use as a particularly suitable material for the front and rear

portions is to assure breathability (see paragraph [0015] of the patent), as also argued by the appellant in reply to the respondent's contention. This same purpose is attributed to the breathable elastomeric film provided with micro-pores according to D8 (*ibid.*). Despite alleging a difference between a perforation and a micro-pore, and the allegation having been made for the first time at oral proceedings, the respondent failed to provide any evidence in support of its view. Consequently, the Board cannot see a difference between the perforated film according to claim 1 and the film provided with micro-pores according to D8.

4.8 In summary therefore, the claimed solution for each partial objective technical problem is found not to involve an inventive step.

4.9 Therefore the subject-matter of claim 1 lacks an inventive step (Article 56 EPC). Consequently auxiliary request 3 is not allowable.

5. *Auxiliary request 4*

5.1 *Inventive step (Article 56 EPC)*

The subject-matter of claim 1 lacks an inventive step.

5.2 Relative to claim 1 of auxiliary request 3, claim 1 of auxiliary request 4 has the following features appended:

"and in that the join between the non-elastic material in the crotch portion and the elastic material in the rear portion is located at a level with or in front of the curve maximum of the convexly curved part of the leg edge".

- 5.3 The respondent explained with reference to paragraph [0030] of the patent how this feature resulted in the curve maximum being in the elastic rear portion of the outer panty, thereby improving the ability of the article to adapt its fit to the wearer.
- 5.4 The Board does not accept in such generality that positioning the curve maximum in the elastic rear portion of the outer panty necessarily improves the garment fit. Firstly it is not technically understandable how the physical presence of a curve maximum on the convexly curved part of the leg edge can affect the ability of the article to adapt to the user's body. The curve maximum as defined simply reflects a maximum curvature in a particular position on the contour of the leg edge and so, in itself, has no influence on the ability of the outer panty to adapt its shape to the user. As regards the positioning of the curve maximum in the elastic rear portion of the outer panty, this can also not be seen to affect the fit of the outer panty, nor could the respondent provide any explanation going beyond the disclosure in paragraph [0030]. In this regard, if the join between the crotch and rear portions were located behind the curve maximum, i.e. just outside the claimed position, it cannot be seen how this would adversely affect the article's ability to adapt to the wearer. Consequently, as also argued by the appellant, the feature added to claim 1 of the present request is merely arbitrary as it is completely unrelated to the issue of article fit.
- 5.5 In the absence of a plausible technical effect achieved by the features, identified in item 5.2 above, added to claim 1 of the present request, the subject-matter of claim 1 lacks an inventive step for the same reasons as those given with respect to the subject-matter of claim

1 of auxiliary request 3. Auxiliary request 4 is thus also not allowable.

6. *Auxiliary request 5*

6.1 *Inventive step (Article 56 EPC)*

The subject-matter of claim 1 involves an inventive step.

6.2 Relative to claim 1 of auxiliary request 4, claim 1 of auxiliary request 5 has the following feature appended: "the front part of the leg edge which is located on the front portion exhibits a concave curved shape". The appellant's contention with reference to column 6, lines 45 to 50 that this feature is known from D15 is not accepted. There is no unambiguous disclosure in D15 of how the outward flare at the front section 49 of the crotch portion 41 continues along the edge of the front section of the body portion 40; that this continues in a concave curved shape is mere speculation. This appended feature is thus not known from D15.

6.3 The features of this addition to claim 1 have no synergy with those found to differentiate claim 1 of the auxiliary request 4 over D15. As also argued by the appellant, partial objective technical problems are thus appropriate, the first being as found in item 2.2.3 above, the second in relation to the features added to claim 1 in the present request being 'to provide a suitable article fit at the front of the user'.

6.4 As found in item 2.2 above, the claimed solution to the first objective technical problem does not involve an inventive step. However, as regards the solution to the

second partial objective technical problem, the arguments of the appellant based on the documents presented for combination with D15 as the starting point for the inventive step attack are not persuasive.

- 6.4.1 With respect to D1, whilst this does indeed show a concave curved leg edge on the front portion of the garment (see Fig. 1), there is no technical relevance for this edge shape disclosed in D1. As also indicated by the respondent, column 7, lines 48 to 54 of D1 discloses a better fit to be achieved in the disclosed garment by increasing the width of the legband back portions 28. There is nothing in D1 guiding the skilled person to particularly consider the concave leg edge as being relevant for solving the problem of better fit.
- 6.4.2 As regards D2, the garment disclosed therein fails to disclose the claimed concave shaped leg edge on its front portion. Fig. 1 shows the front section 10c as having essentially straight side edges such that D2 cannot be seen to provide any technically meaningful teaching to the skilled person to provide concave shaped leg edges on the front portion of the garment.
- 6.4.3 Considering the disclosure of D4, similarly to D2, this also fails to disclose anything but essentially straight leg edges in the plan view of the garment in Fig. 5 and 5A. D4 would thus not be able to provide any hint to the skilled person to modify the leg edges of the article of D15 to have concave curved leg edges on its front part.
- 6.4.4 With respect to D15 itself (see in particular Figs. 7 to 9, this indeed discloses a convex leg edge on the crotch portion 41 yet discloses an essentially straight edge on the front portion of the garment. Again, the

skilled person would thus find no hint in D15 to modify the leg edge of the front portion to have a concave shape.

6.5 In summary, therefore, starting from D15 and wishing to solve the second partial objective technical problem, no teaching in any of D1, D2, D4 or even D15 itself would guide the skilled person to the solution of claim 1 without their exercising an inventive step.

6.6 Despite no inventive step argument when starting from D1 as closest prior art being presented at oral proceedings, in its grounds of appeal the appellant did object to the presence of an inventive step in the subject-matter of each of claims 1 to 9 of the main request when starting from D1 (see last paragraph on page 3 and the whole of page 5 of the grounds of appeal). Claim 1 of auxiliary request 5 is based on a combination of claims 1, 2, 4, 5 and 7 as filed such that an implicit inventive step objection when starting from D1 is on file against the subject-matter of the present claim 1.

Even so, the appellant's arguments (see last paragraph on page 3 of its grounds of appeal) when starting from D1 sees this as failing to disclose solely that the crotch portion of the outer panty consists of a substantially non-elastic material. With the Board having found a further feature not to be known from D1 (see item 2.1.2 above), there is no argument on file which reasons how the skilled person would, starting from D1, reach the claimed subject-matter without the exercise of an inventive step. Thus, when starting from D1 and based on the arguments of the appellant on file, the subject-matter of claim 1 is found to involve an inventive step.

6.7 In summary therefore, considering all the objections raised, the subject-matter of claim 1 of auxiliary request 5 involves an inventive step (Article 56 EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent in amended form on the basis of claims 1 to 6 of auxiliary request 5 filed with letter dated 21 May 2019 and a description to be adapted thereto.

The Registrar:

The Chairman:



D. Grundner

T. Rosenblatt

Decision electronically authenticated

CLAIMS (AUXILIARY REQUEST 1)

1. A pant shaped garment comprising an outer panty (2) having a length direction (L) and a transverse direction (T) and which exhibits a rear portion (4) intended to be arranged over the buttocks of a user during use, a front portion (3) intended to be arranged over the belly of a user during use, a crotch portion (5) intended to be arranged in the user's crotch during use and, further, a waist opening (14) with a waist edge (13) extending in the transverse direction (T) and two leg openings (16) each being bordered by a leg edge (15) having a front part of the leg edge (15) being located generally on the front portion (3) and a rear part of the leg edge being located generally on the rear portion (4) and on the crotch portion (5) and wherein the rear portion (4) and the front portion (3) are mutually connected in two side joins (12) which run in the length direction (L) from the waist opening (14) to each leg opening (16), characterized in that the garment comprises an absorbent package (21), wherein the absorbent package (21) comprises an absorption core (23) enclosed between a liquid permeable inner layer (24) and a liquid impermeable barrier layer (22) and is arranged at least in the crotch portion (5) of the outer panty (2), the front portion (3) and the rear portion (4) of the outer panty (2) consist substantially of an elastically extensible material and in that the rear part of each leg edge (15) is curve-shaped and exhibits a concave curved segment (A) located mainly on the crotch portion (5) and a convex curved segment (B) located mainly on the rear portion (4), and in that the crotch portion (5) of the outer panty (2) consists of a substantially non-elastic material which is joined to the elastic front portion in a front join (S₁) and to the elastic rear portion (4) in a rear join (S₂), wherein both joins (S₁, S₂) are arranged in the transverse direction (T).

CLAIMS (AUXILIARY REQUEST 2)

1. A pant shaped garment comprising an outer panty (2) having a length direction (L) and a transverse direction (T) and which exhibits a rear portion (4) intended to be arranged over the buttocks of a user during use, a front portion (3) intended to be arranged over the belly of a user during use, a crotch portion (5) intended to be arranged in the user's crotch during use and, further, a waist opening (14) with a waist edge (13) extending in the transverse direction (T) and two leg openings (16) each being bordered by a leg edge (15) having a front part of the leg edge (15) being located generally on the front portion (3) and a rear part of the leg edge being located generally on the rear portion (4) and on the crotch portion (5) and wherein the rear portion (4) and the front portion (3) are mutually connected in two side joins (12) which run in the length direction (L) from the waist opening (14) to each leg opening (16), characterized in that the front portion (3) and the rear portion (4) of the outer panty (2) consist substantially of an elastically extensible material and in that the rear part of each leg edge (15) is curve-shaped and exhibits a concave curved segment (A) located mainly on the crotch portion (5) and a convex curved segment (B) located mainly on the rear portion (4), and in that the crotch portion (5) of the outer panty (2) consists of a substantially non-elastic material which is joined to the elastic front portion in a front join (S₁) and to the elastic rear portion (4) in a rear join (S₂), wherein both joins (S₁, S₂) are arranged in the transverse direction (T), the non-elastic material in the crotch portion (5) providing support for attaching an absorbent unit in the crotch portion (5).

CLAIMS (AUXILIARY REQUEST 3)

1. A pant shaped garment comprising an outer panty (2) having a length direction (L) and a transverse direction (T) and which exhibits a rear portion (4) intended to be arranged over the buttocks of a user during use, a front portion (3) intended to be arranged over the belly of a user during use, a crotch portion (5) intended to be arranged in the user's crotch during use and, further, a waist opening (14) with a waist edge (13) extending in the transverse direction (T) and two leg openings (16) each being bordered by a leg edge (15) having a front part of the leg edge (15) being located generally on the front portion (3) and a rear part of the leg edge being located generally on the rear portion (4) and on the crotch portion (5) and wherein the rear portion (4) and the front portion (3) are mutually connected in two side joins (12) which run in the length direction (L) from the waist opening (14) to each leg opening (16), characterized in that the front portion (3) and the rear portion (4) of the outer panty (2) consist of an elastic laminate comprising two nonwoven layers and an elastic, perforated plastic film arranged between the nonwoven layers and in that the rear part of each leg edge (15) is curve-shaped and exhibits a concave curved segment (A) located mainly on the crotch portion (5) and a convex curved segment (B) located mainly on the rear portion (4), and in that the crotch portion (5) of the outer panty (2) consists of a substantially non-elastic material which is joined to the elastic front portion in a front join (S₁) and to the elastic rear portion (4) in a rear join (S₂), wherein both joins (S₁, S₂) are arranged in the transverse direction (T).

CLAIMS (AUXILIARY REQUEST 4)

1. A pant shaped garment comprising an outer panty (2) having a length direction (L) and a transverse direction (T) and which exhibits a rear portion (4) intended to be arranged over the buttocks of a user during use, a front portion (3) intended to be arranged over the belly of a user during use, a crotch portion (5) intended to be arranged in the user's crotch during use and, further, a waist opening (14) with a waist edge (13) extending in the transverse direction (T) and two leg openings (16) each being bordered by a leg edge (15) having a front part of the leg edge (15) being located generally on the front portion (3) and a rear part of the leg edge being located generally on the rear portion (4) and on the crotch portion (5) and wherein the rear portion (4) and the front portion (3) are mutually connected in two side joins (12) which run in the length direction (L) from the waist opening (14) to each leg opening (16), c h a r a c t e r i z e d in that the front portion (3) and the rear portion (4) of the outer panty (2) consist of an elastic laminate comprising two nonwoven layers and an elastic, perforated plastic film arranged between the nonwoven layers and in that the rear part of each leg edge (15) is curve-shaped and exhibits a concave curved segment (A) located mainly on the crotch portion (5) and a convex curved segment (B) located mainly on the rear portion (4), and in that the crotch portion (5) of the outer panty (2) consists of a substantially non-elastic material which is joined to the elastic front portion in a front join (S_1) and to the elastic rear portion (4) in a rear join (S_2), wherein both joins (S_1 , S_2) are arranged in the transverse direction (T) and in that the join (S_2) between the non-elastic material in the crotch portion (5) and the elastic material in the rear portion (4) is located at a level with or in front of the curve maximum (P_2) of the convexly curved part (B) of the leg edge (15).

CLAIMS (AUXILIARY REQUEST 5)

1. A pant shaped garment comprising an outer panty (2) having a length direction (L) and a transverse direction (T) and which exhibits a rear portion (4) intended to be arranged over the buttocks of a user during use, a front portion (3) intended to be arranged over the belly of a user during use, a crotch portion (5) intended to be arranged in the user's crotch during use and, further, a waist opening (14) with a waist edge (13) extending in the transverse direction (T) and two leg openings (16) each being bordered by a leg edge (15) having a front part of the leg edge (15) being located generally on the front portion (3) and a rear part of the leg edge being located generally on the rear portion (4) and on the crotch portion (5) and wherein the rear portion (4) and the front portion (3) are mutually connected in two side joins (12) which run in the length direction (L) from the waist opening (14) to each leg opening (16), characterized in that the front portion (3) and the rear portion (4) of the outer panty (2) consist of an elastic laminate comprising two nonwoven layers and an elastic, perforated plastic film arranged between the nonwoven layers and in that the rear part of each leg edge (15) is curve-shaped and exhibits a concave curved segment (A) located mainly on the crotch portion (5) and a convex curved segment (B) located mainly on the rear portion (4), in that the front part (C) of the leg edge (15) which is located on the front portion (3) exhibits a concave curved shape, in that the crotch portion (5) of the outer panty (2) consists of a substantially non-elastic material which is joined to the elastic front portion in a front join (S₁) and to the elastic rear portion (4) in a rear join (S₂), wherein both joins (S₁, S₂) are arranged in the transverse direction (T), and in that the join (S₂) between the non-elastic material in the crotch portion (5) and the elastic material in the rear portion (4) is located at a level with or in front of the curve maximum (P₂) of the convexly curved part (B) of the leg edge (15).