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**Datasheet for the decision  
of 12 September 2023**

**Case Number:** T 3088/19 - 3.2.06

**Application Number:** 12882709.4

**Publication Number:** 2883522

**IPC:** A61F13/49, A61F13/514

**Language of the proceedings:** EN

**Title of invention:**  
UNDERWEAR-TYPE WORN ARTICLE

**Patent Proprietor:**  
Unicharm Corporation

**Opponent:**  
THE PROCTER & GAMBLE COMPANY

**Headword:**

**Relevant legal provisions:**  
EPC Art. 84, 100(c), 123(2)  
RPBA 2020 Art. 12(6)

**Keyword:**

Grounds for opposition - added subject-matter - main request -  
(yes)

Amendments - added subject-matter - auxiliary request 1 -  
(yes)

Late-filed auxiliary requests 2 to 6 - admitted (no)

Claims - clarity - auxiliary requests 7 to 14 - (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

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**Case Number: T 3088/19 - 3.2.06**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 12 September 2023**

**Appellant:** Unicharm Corporation  
(Patent Proprietor) 182 Shimobun  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 2 October 2019  
revoking European patent No. 2883522 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** M. Hannam  
W. Ungler

## **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. 2 883 522.
- II. With its grounds of appeal, the appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or as an auxiliary measure that the patent be maintained according to one of auxiliary requests 1 to 14 as filed with the statement of grounds of appeal. Furthermore it requested that the case be remitted to the opposition division if the ground for opposition under Article 100(c) EPC or the objections under Article 123(2) EPC were considered to be overcome.
- III. The respondent (opponent) requested that the appeal be dismissed. Furthermore it requested that the case be remitted to the opposition division if there was a need to consider the issues of insufficiency of disclosure, novelty or inventive step.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the ground for opposition under Article 100(c) EPC seemed to prejudice maintenance of the patent as granted. It further indicated that the subject-matter of claim 1 of auxiliary request 1 seemed not to meet the requirement of Article 123(2) EPC, and that auxiliary requests 2 to 6 might not be admitted. It further indicated that auxiliary requests 7 to 14 appeared not to be allowable.

V. Oral proceedings were held before the Board on 12 September 2023, at the end of which the parties' requests were as indicated under points II and III above.

VI. Claim 1 of the main request reads as follows:

"A pants-type wearing article (10) having a longitudinal direction and a transverse direction being orthogonal to the longitudinal direction, comprising:  
a skin-facing surface;  
a non-skin-facing surface;  
a front waist region (11);  
a rear waist region (12);  
a crotch region (13) extending between the front and rear waist regions (11, 12) and having concave lateral edges;  
a chassis (14) defining the front and rear waist regions (11, 12) and the crotch region (13); and  
a liquid-absorbent structure (15) affixed to the skin-facing surface of the chassis (14) and extending in the longitudinal direction at least in the crotch region (13), wherein:  
the chassis (14) includes a base sheet (25) extending through the front and rear waist regions (11, 12) and the crotch region (13), a front waist sheet (26) layered with the base sheet (25) in the front waist region (11) and defining together with the base sheet (25) the front waist region (11) and a portion of the crotch region (13), and a rear waist sheet (27) layered with the base sheet (25) in the rear waist region (12) and defining together with the base sheet (25) the rear waist region (12) and a portion of the crotch region (13), wherein the front waist sheet (26) and the rear waist sheet (27) are spaced apart from each other in the longitudinal direction in the crotch region (13);

wherein the chassis (14) has a multilayer zone in the crotch region (13) composed of the base sheet (25) and the front waist sheet (26) and rear waist sheet (27) layered with each other, a monolayer zone formed of the base sheet (25) alone lying between a first boundary (40) defined by an intermediate inner end of the front waist sheet (26) and a second boundary (41) defined by an intermediate inner end of the rear waist sheet (27), wherein the first boundary (40) and the second boundary (41) extend in the transverse direction; and in the portion of the crotch region (13) close to the front waist region (11), the multilayer zone includes corners (73) each surrounded by the first boundary (40), an inner end in the longitudinal direction of the front waist region (11), a joint region (60) extending in the longitudinal direction in which the liquid-absorbent structure (15) is bonded to the chassis (14) and the concave lateral edge of the crotch region (13), wherein the first boundary (40) extends across the joint region."

Claim 1 of auxiliary request 1 reads:

"A pants-type wearing article (10) having a longitudinal direction and a transverse direction being orthogonal to the longitudinal direction, comprising:  
a skin-facing surface;  
a non-skin-facing surface;  
a front waist region (11);  
a rear waist region (12);  
a crotch region (13) extending between the front and rear waist regions (11, 12) and having concave lateral edges;  
a chassis (14) defining the front and rear waist regions (11, 12) and the crotch region (13); and  
a liquid-absorbent structure (15) affixed to the skin-

facing surface of the chassis (14) and extending in the longitudinal direction at least in the crotch region (13), wherein:

the chassis (14) includes a base sheet (25) extending through and defining the front and rear waist regions (11, 12) and the crotch region (13), a front waist sheet (26) layered with the base sheet (25) in the front waist region (11) and defining together with the base sheet (25) the front waist region (11) and a portion of the crotch region (13), and a rear waist sheet (27) layered with the base sheet (25) in the rear waist region (12) and defining together with the base sheet (25) the rear waist region (12) and a portion of the crotch region (13), wherein the front waist sheet (26) and the rear waist sheet (27) are spaced apart from each other in the longitudinal direction in the crotch region (13);

wherein the chassis (14) has a multilayer zone in the crotch region (13) composed of the base sheet (25) and the front waist sheet (26) and rear waist sheet (27) layered with each other, a monolayer zone formed of the base sheet (25) alone lying between a first boundary (40) defined by an intermediate inner end of the front waist sheet (26) and a second boundary (41) defined by an intermediate inner end of the rear waist sheet (27), wherein the first boundary (40) and the second boundary (41) extend in the transverse direction; and

in the portion of the crotch region (13) close to the front waist region (11), the multilayer zone includes corners (73) each surrounded by the first boundary (40), an inner end in the longitudinal direction of the front waist region (11), a joint region (60) extending in the longitudinal direction in which the liquid-absorbent structure (15) is bonded to the chassis (14) and the concave lateral edge of the crotch region (13), wherein the first boundary (40) and the second boundary

(41) extend across the joint region."

The wording of claim 1 of each of auxiliary requests 2 to 6 is not relevant for the present decision.

The wording of claim 1 of auxiliary request 7 reads as for claim 1 of auxiliary request 1 with the following features appended:

"and wherein between a main part (29) of the front waist sheet (26) and the base sheet (25), a plurality of first waist elastics (31) extending in the transverse direction (X) between the lateral edges (26c, 26d) of the front waist sheet (26) are contractibly attached under tension, wherein between a main part (34) of the rear waist sheet (27) and the base sheet (25), a plurality of second waist elastics (32) extending in the transverse direction (X) are contractibly attached under tension."

For the present decision the relevant part of claim 1 of each of auxiliary requests 8 to 14 includes the appended features as indicated above in auxiliary request 7.

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

Main request

The subject-matter of claim 1 did not add subject-matter. The 'extending through' wording of claim 1 was based on para. [0014] of the application as filed, in which the base sheet was indicated to 'define the front and rear waist regions and the crotch region in a continuous fashion'. The term 'defining' determined the exact extent or shape of the base sheet in the front



and rear waist regions but did not exclude other shapes or extensions. Additionally, any solution where the base sheet 'extends through' the front and rear waist regions automatically defined the front and rear waist regions. The phrase 'extending through' therefore did not claim anything broader than 'defining'.

Alternatively, 'extending through' was an additional limitation or specification of the extent of the base sheet going beyond that achieved by the use of the word 'defining', since it was a physical definition of the base sheet in the front and rear waist regions.

#### Auxiliary request 1

The addition of 'and the second boundary' at the end of claim 1 found basis in both claim 3 and paragraph [0042] as filed. All functionally and structurally linked features to the second boundary disclosed in paragraph [0042] had been included in claim 1.

#### Auxiliary requests 2 to 6

These should be admitted.

#### Auxiliary requests 7 to 14

Claim 1 of each of these requests meets the requirement of Article 84 EPC.

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

#### Main request

The ground for opposition under Article 100(c) EPC was prejudicial to the subject-matter of claim 1 as granted. There was no explicit disclosure of the 'extending through' wording in the application as filed. The extent of the 'front and rear waist regions' could be interpreted very broadly as the expressions

lacked any inherent boundary. In claim 1 as filed, 'defining' indicated that the base sheet determined the extent of these regions. If 'extending through' was more limited or even simply different than 'defining', no basis could be seen for the former.

#### Auxiliary request 1

The subject-matter of claim 1 contravened Article 123(2) EPC. Claim 3 as filed disclosed further features relating to the joint region which had not been taken up into claim 1. As for the disclosure in paragraph [0042], this formed part of a disclosure of a single embodiment at least including components having a certain shape and composition (see paragraphs [0015], [0016] and [0018]), an arrangement of elastics (see paragraphs [0017 and [0019]), a particular liquid absorbent structure (see paragraph [0032]) and a special arrangement for the joint regions (see paragraph [0043]). Omission of these features resulted in the claimed subject-matter being an unallowable intermediate generalisation of the content of the application as filed.

#### Auxiliary requests 7 to 14

The expressions 'main part of the front waist sheet' and 'main part of the rear waist sheet' lacked clarity as it was unclear what was being referred to by the 'main part' in these features. The expressions appeared in claim 1 of each request such that these all failed to meet the clarity requirement of Article 84 EPC.

## **Reasons for the Decision**

### *1. Main request*

#### *Article 100(c) EPC*

- 1.1 The ground for opposition under Article 100(c) EPC is prejudicial to maintenance of the patent as granted.
- 1.2 As originally filed, claim 1 defined the chassis as including 'a base sheet defining the front and rear waist regions and the crotch region'. In the context used in claim 1, the term 'defining' is found to determine the margins (i.e. the extent) of the front, rear and crotch regions. As also argued by the respondent, the adjectives 'front waist', 'rear waist' and 'crotch' relating to the various regions of the chassis failed to define a boundary of the regions i.e. the physical extent of these regions was not clear from the adjectives used to describe them. The further qualification in claim 1 that the base sheet defined the regions was thus that which allowed the boundaries of the regions to be determined i.e. that the regions were limited by the extent of the base sheet. In claim 1 as granted, the word 'defining' of original claim 1 is replaced with 'extending through' such that the chassis includes 'a base sheet extending through the front and rear waist regions and the crotch region'. The expression 'extending through' lacks an explicit basis in the application as filed. In contrast to 'defining', 'extending through' is seen to prescribe that the base sheet is not only present in the regions, but it may e.g. also extend beyond the regions i.e. the base sheet can be more extensive than at least one of the extremities (e.g. laterally or longitudinally) of the regions.

Consequently, the 'extending through' wording as granted is broader than the 'defining' wording as originally filed. It is therefore not equal or equivalent to the wording in claim 1 as filed.

- 1.3 The appellant's argument that the 'extending through' wording of claim 1 had its basis in paragraph [0014] of the application as filed, in which the base sheet was indicated to 'define the front and rear waist regions and the crotch region in a continuous fashion' is not persuasive. Paragraph [0014] solely uses the expression 'defining' to describe the presence of the base sheet in the various regions of the article and, in failing to disclose the expression 'extending through', fails to link the two expressions. That the various regions are defined by the base sheet 'in a continuous fashion' also fails to provide even a suggestion that the base sheet could be seen as 'extending through' the front waist, rear waist and crotch regions.
- 1.4 The Board concurs with the appellant's argument that the term 'defining' determines the exact extent or shape of the base sheet in the front and rear waist regions but disagrees that this includes other shapes or extensions (which however the terminology 'extending through' does). The term 'defining', at least in the context of a sheet defining a region, means that the sheet determines the extent of the region. It thus limits the sheet to not extending beyond the physical extremities of the region. Conversely, if a sheet 'extends through' a region, the sheet is not limited to the shape or extent of the region and may be physically more extensive than its extremities.

1.5 At oral proceedings the appellant argued on an alternative basis that 'extending through' was an additional specification of the extent of the base sheet going beyond that achieved by the use of the word 'defining'. This argument also fails to provide any basis for the replacement of 'defining' with 'extending through'. 'Extending through' is explicitly disclosed nowhere in the application as filed and, if the expression has a different meaning to the word 'defining' (as argued at oral proceedings by the appellant), a simple replacement of one with the other does not define the same subject-matter.

1.6 It thus follows that the subject-matter of claim 1 lacks basis in the application as filed such that the ground for opposition under Article 100(c) EPC prejudices maintenance of the patent as granted.

2. *Auxiliary request 1*

*Article 123(2) EPC*

2.1 The subject-matter of claim 1 fails to meet the requirement of Article 123(2) EPC.

2.2 Claim 1 of auxiliary request 1 *inter alia* includes an amendment relative to claim 1 as granted in that not only the first boundary, but also the second boundary is defined to extend across the joint region. The appellant argued that claim 3 and paragraph [0042] of the application as filed provided basis for the amended subject-matter.

2.3 Regarding the combination of claims 1 and 3, this does not provide a direct and unambiguous basis for the claimed subject-matter. Claim 3 as filed discloses

further features relating to the joint region (e.g. the joint region includes a central joint region and a pair of second lateral joint regions), the omission of which from the claim means that claims 1 and 3 fail to provide the required direct and unambiguous basis therefor.

2.4 Paragraph [0042] also fails to provide the requisite basis for the subject-matter of claim 1. Paragraph [0042] forms just a small part of the total disclosure of an embodiment of the invention. As also identified by the respondent, this embodiment includes components having a certain shape and composition (see paragraphs [0015], [0016] and [0018]), an arrangement of elastics (see paragraphs [0017 and [0019]), a particular liquid absorbent structure (see paragraph [0032]) and a special arrangement for the joint regions (see paragraph [0043]). Omission from claim 1 of features in these further paragraphs which, in the application as filed, are disclosed as part of a single embodiment, result in the claimed subject-matter being an unallowable intermediate generalisation of the application as filed.

2.5 The subject-matter of claim 1 of auxiliary request 1 thus fails to meet the requirement of Article 123(2) EPC. Auxiliary request 1 is hence not allowable.

### 3. *Auxiliary requests 2 to 6*

#### *Admissibility*

3.1 Article 12(6) RPBA 2020, second sentence, states that the Board shall not admit requests .... which should have been submitted .... in the proceedings leading to the decision under appeal. Auxiliary requests 2 to 6

were filed for the first time with the grounds of appeal i.e. on 30 January 2020. The question to be answered is whether these requests could reasonably have been filed by the appellant already before the opposition division.

- 3.2 In the preliminary opinion of the opposition division issued prior to oral proceedings before it, the added subject-matter objections to claim 1 of the patent as granted, which were raised under point 3 of the notice of opposition, were found to be unpersuasive. At the oral proceedings, that preliminary opinion was overturned and the opposition division found the ground for opposition under Article 100(c) EPC to be prejudicial to maintenance of the patent as granted. In reaction, the patentee requested a break of 45 minutes to consider its requests (see page 2 of the minutes of the oral proceedings before the opposition division) and, on oral proceedings being resumed, filed replacement auxiliary requests 1 to 3.
- 3.3 Having requested a 45 minute interruption in oral proceedings, this having been granted and thereupon having filed replacement auxiliary requests, it seems that the proprietor had sufficient opportunity to fully consider its requests in reaction to the change of opinion of the opposition division. The Board thus sees this to have been the time when auxiliary requests 2 to 6, first filed on appeal, could and should have been filed. In this context, it should also be noted that parties must be prepared for the possibility that the Opposition Division may deviate from its preliminary opinion during the oral proceedings.
- 3.4 To this opinion given at oral proceedings before the Board, and to the indication in the communication under

Article 15(1) RPBA 2020 that auxiliary requests 2 to 6 may be held inadmissible, the appellant submitted no counter-arguments, neither in writing nor orally.

3.5 The Board thus decided not to admit auxiliary requests 2 to 6 (Article 12(6) RPBA 2020).

4. *Auxiliary requests 7 to 14*

*Article 84 EPC*

4.1 Claim 1 of each of auxiliary requests 7 to 14 includes reference to a 'main part of the front waist sheet' and a 'main part of the rear waist sheet'. In its reply to the grounds of appeal, the respondent submitted that it was unclear what was being referred to by the 'main part' of these sheets and that the respective claim 1 of each request thus lacked clarity. The Board concurs with the respondent in this regard since the 'main part' is not specified earlier in the claim and has no implicit extent or location. The appellant submitted no counter-arguments to this objection, neither in writing nor orally.

4.2 The Board thus finds that claim 1 of each of auxiliary requests 7 to 14 lacks clarity contrary to the clarity requirement of Article 84 EPC. Auxiliary requests 7 to 14 are thus not allowable.

5. In the absence of an allowable request, the appellant's appeal must be dismissed.



## Order

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated