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**Datasheet for the decision
of 8 July 2022**

Case Number: T 0608/20 - 3.2.06

Application Number: 11706485.7

Publication Number: 2539493

IPC: D03D15/04, D03D15/08,
D03D27/04, D03D17/00

Language of the proceedings: EN

Title of invention:

WOVEN FABRIC THAT LOOKS AND PERFORMS LIKE A KNITTED FABRIC AND
METHOD OF MAKING THEREOF

Patent Proprietor:

Sanko Tekstil Isletmeleri San. Ve Tic. A.S.

Opponents:

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Ticaret Anonim Şirketi
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Headword:

Relevant legal provisions:

EPC Art. 100(b)

EPC R. 124(1)

RPBA 2020 Art. 12(3), 12(6), 13(1)

Keyword:

Grounds for opposition - insufficiency of disclosure (yes)

Amendment to appeal case - auxiliary requests - admitted (no)

Minutes of oral proceedings - request to correct the minutes
(refused)

Decisions cited:

R 0007/17, T 0468/99, T 1721/07, T 0888/17, T 0494/18,

T 1891/20

Catchword:



Beschwerdekammern

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Case Number: T 0608/20 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 8 July 2022

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 21 January 2020
revoking European patent No. 2539493 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appellant (proprietor) filed an appeal against the decision of the opposition division revoking the patent in suit (hereinafter "the patent").

- II. According to the impugned decision, the opposition division considered the grounds for opposition under Articles 100(c) and 100(b) EPC not to prejudice maintenance of the patent. The patent was however revoked for lack of novelty of the granted independent product and methods claims 1 and 19 (main request) and lack of inventive step of the amended independent product and method claims according to auxiliary requests 1 to 6. In the reasons for the decision, no separate consideration was given to the two independent claims in respect of sufficiency of disclosure, novelty or inventive step.

- III. The following facts from the opposition proceedings are also of relevance for the present decision.

In its letter of reply dated 6 December 2016 to the oppositions and interventions by the (now) respondents (opponents 1 to 7), the appellant submitted three auxiliary requests (auxiliary requests 1 to 3). After a further intervention and opposition by the (now) respondent (opponent 8) and further exchanges of written arguments, the appellant replaced all previously filed auxiliary requests with new auxiliary requests 1 to 7 as submitted with its letter of 2 March 2018.

In the annex to the summons to oral proceedings before

the opposition division, the parties were informed of the division's preliminary opinion. The opposition division gave a positive opinion on *inter alia* the ground for opposition of sufficiency of disclosure in regard to the granted claims and a negative opinion on *inter alia* novelty of the granted claims and of those of the then pending auxiliary request 1 to 7.

With its letter dated 18 September 2019 in reply to the opposition division's opinion, the appellant submitted auxiliary requests 0a, 0b, 1, 1a, 1b, 2, 2a, 2b to 7, 7a and 7b, replacing the previously filed requests.

During the oral proceedings which took place on 18 to 20 November 2019, the appellant was then afforded several opportunities to further amend its auxiliary requests, including the opportunity to submit new auxiliary requests (see the minutes of the oral proceedings, points 123-123, 179, 194, 203 to 205, 246 to 253). On the last day of the oral proceedings, the appellant submitted a written statement identifying the requests to be considered in the oral proceedings (point 251 of the minutes; unamended main request and six auxiliary requests, of which auxiliary requests 1, 2 and 4 to 6 corresponded to requests submitted on 18 September 2019 and auxiliary request 3 to a request submitted during the oral proceedings). According to point 253 of the minutes, the appellant stated that these "were indeed all the requests they were going to make and that all other auxiliary requests were withdrawn". After further discussion and the announcement of the opposition division's negative preliminary opinion on all requests, the appellant asked for a further opportunity to submit another auxiliary request (point 268 of the minutes). According to point 269 of the minutes, the chairman of the

division stated that "in view of their [i.e. the proprietor's] previous declaration with respect to the sequence of auxiliary requests during the oral proceedings it was now too late to file a further auxiliary request." (comment in square brackets added by the Board).

The content of the minutes was not contested by the appellant.

- IV. In all auxiliary requests submitted during the opposition proceedings, the corresponding sets of claims always comprised an independent product claim and an independent method claim.
- V. With its statement of grounds of appeal, the appellant submitted auxiliary requests 0, 0+ and 1 to 7, which comprised certain new requests not previously submitted. All requests again included independent product and method claims.
- VI. The respondent (opponent 08) requested acceleration of the proceedings in its letter dated 12 October 2020 and submitted reasons and evidence for this request in compliance with Article 10(3) of the Rules of Procedure of the Boards of Appeal (RPBA 2020, EPO OJ 7/2019, A63). By way of its communication dated 23 November 2020, the Board granted this request and informed the parties of its intention to hold oral proceedings in April 2021.
- VII. Following a request for postponement of one respondent (opponent 5) due to conflicting summons in other proceedings, the Board, on 2 February 2021, summoned the parties to oral proceedings before the Board to be

held on 11 to 13 January 2022.

- VIII. With its letter dated 22 September 2021 the appellant submitted new auxiliary requests 7 to 15 in reply to the respondents' written submissions (new auxiliary request 7 replacing the earlier version). In auxiliary requests 8 to 15 all product claims were deleted and only the method claims kept.
- IX. The Board issued a communication pursuant to Rule 100(2) EPC, inviting the appellant to comment on the respondents' (opponents 3, 4 and 8) objections *inter alia* pursuant to the opposition ground under Article 100(b) EPC, on which the appellant had not replied until then and which, according to the Board's preliminary view, might however be of relevance for the decision to be taken.
- X. The appellant replied to the Board's communication in its submission of 29 November 2021.
- XI. In a subsequent communication pursuant to Article 15(1) RPBA 2020, dated 7 December 2021, the parties were informed of the Board's preliminary opinion. This stated that the grounds for opposition under Article 100(b) EPC and under Articles 100(a) in combination with Article 54 EPC appeared to be prejudicial to maintenance of the patent according to the main request. In regard to auxiliary requests 0, 0+, the Board opined that irrespective of the objections raised against their admissibility, they would not have the potential of overcoming the objections made under the grounds for opposition pursuant to Articles 100(a) and (b) EPC, and that the requirement of Article 56 EPC would seemingly not be met by any of the amended versions of claim 1 (or 19) according to auxiliary

requests 1 to 4. Auxiliary requests 5 and 6 appeared not to be allowable, due at least to a lack of compliance with Article 123(2) EPC. In regard to auxiliary request 7, the Board tended towards not admitting it into the proceedings pursuant to the criteria for admittance set out in Article 12(4) RPBA 2020. Concerning auxiliary requests 8 to 15 the Board identified two particular issues of relevance in view of their possible admittance into the proceedings:

- (a) whether these requests should have been submitted before the opposition division (Article 12(6), second alternative, RPBA 2020)
- (b) whether these auxiliary requests constituted an amendment to the appellant's appeal case within the meaning of Article 13 RPBA 2020, and if so, whether the criteria in Article 13(1) and 13(2) RPBA 2020 were met for the Board to admit an amendment to the appellant's appeal case at this stage.

The Board also noted that irrespective of whether the admittance of auxiliary requests 8 to 15 was considered under Article 12(6), 13(1) and/or (2) RPBA 2020, it was also incumbent on the appellant to provide reasons why all outstanding objections were overcome. The Board identified several issues making it questionable whether the appellant had satisfied this requirement. The Board concluded by stating that it tended towards not admitting auxiliary requests 8 to 15.

- XII. Following a request for postponement due to applicable travel restrictions under the continuing coronavirus (COVID-19) pandemic, submitted on 20 December 2021 by the appellant, the oral proceedings were again re-scheduled to July 2022.

XIII. With its letter dated 31 May 2022 the appellant submitted additional written exhibits accompanied by further arguments. The appellant also withdrew auxiliary request 7.

XIV. Oral proceedings before the Board were held on 7 and 8 July 2022 in the course of which the appellant withdrew auxiliary requests 0+ and 1 to 6.

The appellant requested that the decision under appeal be set aside and the patent be maintained as granted, auxiliarily that the patent be maintained in amended form on the basis of one of auxiliary requests 8 to 15 filed with letter of 22 September 2021, or on the basis of the claims of the main request in combination with auxiliary request "0".

The respondents (opponents) requested that the appeal be dismissed.

XV. With letter dated 22 August 2022 the appellant requested correction of the minutes of the oral proceedings held on 7 and 8 July 2022.

With its subsequent letter dated 16 September 2022, the respondent opponent 4 submitted comments in regard to this request.

XVI. The following evidence submitted by the parties is referred to in the present decision:

P69 : expert opinion by Prof. Dr.-Ing Heinrich Planck
Exhibit 17 : brochure "Uster Tensorapid 4"
Exhibit 26 : page 94 of "Textile - Terms and Definitions", 4th Ed., 1960

XVII. Claim 1 of the patent as granted (main request) reads as follows (feature numbering in square brackets added by the Board):

"[f1] A woven fabric (101) that has a front side and a back side, said fabric having warp yarns (104) and weft yarns (105, 106),

[f2] the weft yarns extending over selected warp yarns (104) to provide over portions (108) on said front side and extending on the back side of the fabric between two adjacent over portions to define under portions (107) of the weft yarns,

[f3] wherein the weft yarns comprise a plurality of first, hard, weft yarns (106) that have a first shrinkage ratio and a plurality of second, elastomeric, weft yarns (105) that have a second shrinkage ratio,

[f4] wherein the second weft yarns (105) have a shrinkage ratio greater than the shrinkage ratio of the first weft yarns (106);

[f5] the hard yarns form alternately arranged under portions (107) and over portions (108) with respect to said warp yarns (104), said under portions (107) being formed when said hard yarns pass along the back side of the warp yarns (104) and [f6] defining loop portions (107a), and

[f7] said over portions being formed when said hard yarns pass along the front side of the warp yarns and defining connection portions (108a),

[f8] said loops (107a) being provided on said back side of the fabric;

[f9] wherein said first and second weft yarns [sic!] are alternated to provide a fabric (101) [sic!] pattern;

[f10] and the loop portions (107a) of adjacent hard yarns (106) and the connection portions (108a), formed by the over portions of the first weft yarns (106), of adjacent hard yarns form a pattern extending in a

diagonal direction with respect to the warp yarns (104) and to the weft yarns to provide a diagonal pattern, [f11] wherein the fabric stretches in a diagonal direction with respect to the warp and the weft yarns, characterized in that:

[f12] the under portions (107) of said plurality of first weft yarns (106) form loops (107a) that extend to cover at least 6 warp yarns and

[f13] in that the under portions (109) of said second weft yarns (105) extend for an amount of warp yarns (104) that is less than 6 to provide a tighter weave of the second weft yarns (105);

[f14] the number of warp yarns (104) passed by the loop portion (107a) formed by the under portions of the first weft yarns is at least 6 times the number of warp yarns passed by the connection portions (108a) formed by the over portions of the first weft yarns (106);

[f15] the number of warp yarns (104) passed by the loop portion (107a) is within the range of 6 to 24."

Claim 19 of the patent reads as follows:

"A method for producing a woven fabric having a front side and a back side, the method comprising providing warp yarns (104), providing first, hard, weft yarns (106);

providing second, elastomeric, weft yarn [sic!] (105), the elastomeric weft yarns having a greater shrinkage ratio than the shrinkage ratio of the hard weft yarns (105);, [sic!]

selecting a weave pattern wherein at least one hard yarn (106) is alternately arranged with at least one elastomeric yarn (105), the hard yarns pass alternately along the back side of the warp yarns a predetermined number of warp yarns for each pass to form a series of hard under portions (107) defining loop portions

(107a), and along the front side of the warp yarns a predetermined number of warp yarns for each pass to form hard over portions (108) defining connection portions (108a), and for each hard yarn, an average number of warp yarns (104) passed by each under portion is at least 6, and the elastomeric yarns (105) pass alternately along the back side of the warp yarns a predetermined number of warp yarns for each pass to form a series of elastomeric under portions, and along the front side of the warp yarns a predetermined number of warp yarns for each pass to form a series of elastomeric over portions, whereby said first and second weft yarns are alternated to provide a fabric (101) pattern; whereby the number of warp yarns (104) passed by the said loop portion (107a) formed by the under portions of the first weft yarns is at least 6 times the number of warp yarns passed by the connection portions (108a) formed by the over portions of the first weft yarns (106); the number of warp yarns (104) passed by the loop portion (107a) is within the range of 6 to 24, said loops (107a) are provided on said back side of the fabric and whereby the loop portions (107a) of adjacent hard yarns (106) and the connection portions (108a), formed by the over portions of the first weft yarns (106), of adjacent hard yarns form a pattern extending in a diagonal direction with respect to the warp yarns (104) and the weft yarns to provide a diagonal pattern, wherein the fabric stretches in a diagonal direction with respect to the warp and the weft yarns, weaving the fabric according to the selected pattern; shrinking the woven fabric wherein the elastomeric weft yarns shrink more than the hard weft yarns causing said hard under portions (107) of the hard weft yarns to form said loop portions (107a) on said back face of the fabric."

In auxiliary requests 8 to 15, all product claims have been deleted. Independent method claim 1 of auxiliary request 8 is identical to independent method claim 19 of the patent as granted. In auxiliary requests 9 to 15 the respective independent method claims are further amended by the introduction of additional features. However, the substance of these amendments is not relevant for the decision to be taken by the Board so that the amended claim wording of these requests is therefore not reproduced here.

The amendments requested with auxiliary request 0 only relate to the description. The addition "not according to the invention" was inserted in four instances in paragraphs 35 and 55 of the description.

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

Main request - Article 100(b) EPC

As also acknowledged by the opposition division, the feature "shrinkage ratio" had a well known meaning for the person skilled in the art. The patent additionally indicated in paragraph 15 how to measure such ratios and contained a number of examples teaching the skilled person how to carry out the invention. Moreover, it was clear from the entire disclosure of the patent that the two types of weft yarns with different shrinkage ratio led to the creation of loop portions. These loop portions were presented in the patent as essential for achieving the object of the invention, namely to provide a woven fabric having a look and feel like a knitted fabric. A woven fabric's loop portions, resulting from the greater shrinkage of the elastomeric weft yarns compared to less shrunk hard weft yarns,

presented a clear indication of the presence of yarns of different shrinkage ratio. If there were loops in the woven product, the invention had been carried out. The term "loop" had its common meaning, implying a noticeable curvature, excluding straight, tightly woven segments. This common meaning was supported by the description, notably by paragraphs 35 to 38, and emphasised by the wording of claim 19, in which despite a previous definition of loop portions, it was stated at the end of the claim that the loop portions were formed as a result of a shrinkage step.

Moreover, the manufacturing method according to claim 19 could anyway be carried out, thereby leading necessarily to the product according to claim 1. All parameters to be controlled in its individual process steps were well known and were within the knowledge of the skilled person. The shrinkage ratio was initially chosen for each yarn by its draft ratio and the tension applied for weaving. The resulting initial length before shrinkage of the yarn on the loom was known. The following process steps then resulted in a controlled change of length during all steps involving shrinkage.

In national proceedings in the US, Japan and China the claims comprising the wording "shrinkage ratio" were held to be sufficiently disclosed.

Auxiliary requests 8 to 15 - Admittance

The requests did not constitute an amendment of the appellant's appeal case. The subject-matter of the method claims had been present throughout the entire proceedings before the opposition division and before the Board. It could not have come as a surprise to the respondents and the Board. It did not change the

factual and legal framework of the appeal because the product and method claims had always been objected to and defended by the same or similar arguments. The deletion of the product claims was therefore a step narrowing down the issues to be discussed.

During the oral proceedings before the opposition division, the appellant was denied the right to file further requests, even though the appellant had made no statement from which it could be concluded that it had indeed filed its final requests beforehand. Moreover they constituted an appropriate reaction to new objections raised by the respondents in their replies to the appeal grounds. They could not have been filed earlier. The ground for opposition of sufficiency of disclosure, to which these requests replied, was decided in favour of the appellant by the opposition division. There was thus no necessity to submit new requests responding to this ground for opposition with the statement of grounds of appeal. The requests were thus filed in due time, after the respondent raised the new inventive step objections and the issue of insufficiency of disclosure again in their replies to the grounds of appeal, so at the earliest possible moment and two months before the date of the oral proceedings initially appointed. Finally they also had to be considered adequate in view of the Board's indication at the oral proceedings during the discussions of sufficiency of disclosure that the method claims could possibly have been considered to be sufficiently disclosed.

XIX. The respondents' arguments as far as relevant to the present decision may be summarised as follows.

Main request - Article 100(b) EPC

Neither the meaning of the feature "shrinkage ratio" nor how it could be determined were disclosed in the patent. The apparatus mentioned in paragraph 15 only allowed measuring of the tensile strength of yarns, rather than any shrinkage ratio. It was not clear how such tests could be carried out on a fabric. No conditions, such as temperature, duration of treatment, stretch condition, condition of the yarn during measurement, whether in a woven or non-woven state, were disclosed under which a shrinkage ratio of yarns had to be determined. Even the assumption of the opposition division that a shrinkage ratio was based on the numerical relationship of change of length due to shrinkage divided by initial length before shrinkage had no basis in the patent nor in any other source. Since the person skilled in the art did not know how to determine the shrinkage ratio for a weft yarn in order to compare it with another weft yarn it was impossible to distinguish between the hard and elastomeric weft yarns.

Claim 1 did not comprise any definition requiring the loop portions to present a certain amount of droopiness. Loop portions were defined in the preamble of claim 1 and were not defined as resulting from the difference in shrinkage ratios or from a shrinkage step. The "droopiness" of loops was only a preferred embodiment.

Claim 19 also did not indicate how to determine a shrinkage ratio. Although the appellant had argued that

the fabric of claim 1 would be obtained by carrying out the steps in claim 19, its subject-matter was not linked to claim 1. Claim 1 anyway referred only to a shrinkage ratio of yarns whereas the last step of claim 19 referred to the shrinkage of the woven fabric, without being clear how this was linked to or governed by the yarns' shrinkage ratios.

The entire argument based on the considerations of claim 19 as disclosing a way to carry out the invention had been submitted for the first time throughout the entire opposition-appeal procedure only during the oral proceedings before the Board. No evidence was presented that the different explanations given in regard to the meaning of the expression "shrinkage ratio" belonged to common general knowledge.

Auxiliary requests 8 to 15 - Admittance

The deletion of the product claims constituted an amendment to the appellant's case and should not be admitted into the proceedings, see also T 482/19. The appellant had submitted 47 auxiliary requests before the opposition division and had even submitted its final requests in writing, and confirmed this orally, during the third day of the oral proceedings before the opposition division.

No reason was given why the auxiliary requests were filed only at that stage of the appeal procedure.

There had never been any difference in regard to the objections and arguments submitted against claims 1 and 19, nor any individual defence of the method claims. No new issues had been raised by the respondent or the Board. When submitting auxiliary requests 8 to 15 the

appellant had only replied to the objections on inventive step raised by the respondents, ignoring those concerning insufficiency of disclosure. Nowhere was it stated that the method claims were intended to reply to the opposition ground pursuant to Article 100(b) EPC. The appellant had not raised this possibility in reply to the Board's specific invitation to comment on this ground for opposition which had been maintained by the respondents in their responses to the appeal grounds. The respondents could not have been prepared for the arguments of the proprietor implying that the method had to be considered differently in regard to the issue of sufficiency of disclosure. The appellant's argument that paragraph 54 had always been taken into account when considering claims 1 and 19 was not persuasive since this paragraph had only been referred to in view of novelty and inventive step, rather than as a source for supporting sufficiency of disclosure.

Reasons for the Decision

Main request - Article 100(b) EPC

1. The ground for opposition of Article 100(b) EPC is prejudicial to maintenance of the patent because the skilled person has insufficiently clear and complete information to perform the invention of claim 1.
2. Claim 1 is a product claim. It is directed to a "woven fabric". The claim defines *inter alia* that the woven fabric comprises two types of weft yarns, a plurality of first, hard weft yarns and a plurality of second, elastomeric weft yarns. According to features f3 and f4

of claim 1, these two types of weft yarns are distinguished by their "shrinkage ratio". The elastomeric weft yarns shall have a shrinkage ratio greater than the shrinkage ratio of the hard weft yarns.

Claim 19 is directed to a method for producing a woven fabric. It comprises *inter alia* the steps of providing first hard and second elastomeric weft yarns. Similarly to claim 1, the two types of yarns differ from each other by the relative shrinkage ratio.

Except for the respective definitions of the relative shrinkage ratios for the two types of yarns, both independent claims make no further reference to the shrinkage ratio. It is also noted that claim 19 is not linked to claim 1 by any back reference, nor does claim 1 refer to the method of production or to individual steps thereof.

3. At the outset it is to be noted that the shrinkage ratio is considered in the patent to be a physical property of a yarn which is distinguished from its elasticity. Paragraph 51 lists both these properties as separately selectable parameters for the weft yarns. Also, it is not excluded that the hard weft yarns with their claimed relatively lower shrinkage ratio are elastomeric (see paragraph 13 of the patent). So both weft yarns may be of elastomeric material but present different shrinkage ratios.
4. Despite features f3 and f4 relying only on a relative definition, the requirement that one type of weft yarn is an elastomeric yarn while the other type is a hard yarn, depending on their relative "shrinkage ratios", must therefore be able to be determined in a woven

fabric according to claim 1. It must therefore be possible to tell the difference of both types of yarns, which may both be of an elastomeric material, based on their relatively different shrinkage ratio.

The Board does not accept that this issue relates to just the clarity of the claim, as argued by the appellant. It is not a question of not knowing where the border lies between a woven fabric falling within the scope of the claim and a fabric outside that scope. In the present case, for example in fabrics where both yarns could be elastic, it is a question of whether there is sufficient information to carry out such woven fabric comprising two types of weft yarns which are different in that they present a different "shrinkage ratio". Without knowing what this difference in the parameter "shrinkage ratio" means or implies in terms of structural limitation, the invention cannot be said to be reproducible.

Although it is conceivable that other features of the claimed invention may serve, in certain cases, as an indicator that the two types of weft yarns present necessarily different shrinkage ratios, so that the shrinkage ratios would not be required to be "measurable" *per se*, not even in relative terms, for each yarn type, there is no such corresponding linking feature defined in claim 1 (and claim 19), see also below point 7.

Consequently, the invention defined in claim 1 may only be considered to be sufficiently disclosed if the skilled person, taking into account common general knowledge and the disclosure of the patent, is enabled to make this distinction between the two yarns based on their shrinkage ratio. The (relative) shrinkage ratio

of the yarns in the woven fabric must therefore be able to be determined if the invention is to be carried out by a skilled person.

This is not the case for the reasons given in the following.

5. Neither the claims nor the description comprise a definition of the feature "shrinkage ratio", nor an explanation of how to determine the shrinkage ratio of the two types of weft yarns, let alone how to determine such ratios in yarns of a final woven fabric (noting here that claim 1 defines a "woven" fabric). Furthermore, no evidence has been provided that the parameter "shrinkage ratio" and its determination on yarns, in particular when woven into a fabric, belongs to the common general knowledge of the skilled person.
6. Based on the disclosure of paragraph 54 of the patent, the appellant and the opposition division however considered the shrinkage ratio to be the ratio of the change in length due to shrinkage and the length before shrinkage.

The Board finds this argument unconvincing for the following reasons.

- 6.1 Paragraph 54 of the patent referred to by the appellant as explanatory for the shrinkage ratio, in fact does not mention the shrinkage ratio at all, let alone give a proper definition of it as envisaged by the appellant and the opposition division. It merely refers to shrinking of the yarns and that certain yarns will shrink more when shrinking the fabric after weaving.

6.2 Assuming for the sake of argument that this relationship considered by the appellant were the only possible ratio the skilled person would have understood to be meant by the expression "shrinkage ratio" in claim 1, the patent would still lack a disclosure in regard to the question of which conditions must prevail when the length variation due to shrinkage and the initial length before shrinkage had to be determined.

6.2.1 For example, the initial length before shrinkage may be a length under a particular amount of pre-stretch applied, or the yarn could have to undergo a certain number (e.g. 20 or 50) of successive stretching steps before measuring an initial or final length, possibly at different loadings and/or temperatures or humidity levels; the initial or final length could depend on certain treatment steps being performed before establishing the lengths, involving, for example, a certain amount of wash-operations at defined temperatures (see also claims 7 or 9).

6.2.2 It is unclear whether the shrinkage ratio of a yarn in a woven fabric refers to some still inherent potential for further shrinkage or whether it is directed to a shrinkage which already incurred in the past. Such diverging interpretations are technically reasonable as is apparent for example from P69, page 11, item IV.b.

Regarding the first option, it would be necessary to know the conditions underlying the potential further shrinkage. For example, should such shrinkage result from further processing, such as heating, wetting or washing the fabric? Or is it for example related to the residual tension of part of the (elastomeric) weft yarns of the woven fabric which when released by, for example, separating individual weft yarns from the

fabric, would result in a shrinkage of the yarn so as to take their natural, untensioned length?

The second option, a ratio of shrinkage of the yarns incurred in the past, makes the determination of the shrinkage ratio of yarns in a woven fabric impossible, see also P69, page 4, end of second full paragraph. It would rely on the knowledge of the history of the woven fabric, which can generally not be deduced from the woven fabric itself.

- 6.2.3 Claim 1 moreover defines that the shrinkage ratio is a parameter of pluralities of weft yarns and not just a single yarn. It is hence not to be established for an individual yarn, rather it relates to a property of plural weft yarns. Which criteria would govern the selection of such plurality of yarns, e.g. how many, under which conditions, is, again, entirely unknown.
- 6.2.4 The patent itself is entirely silent in regard to all these aspects.
- 6.3 The only reference to the determination of the shrinkage ratio in the patent is in paragraph 15. It mentions that suitable apparatus for measuring the shrinkage ratio would be known in the art, e.g. an Uster Tensorapid tester. Taking into account also the content of the brochure filed by the appellant as exhibit 17 for this type of tester, there is still no indication of how to determine shrinkage ratios for weft yarns on a woven fabric. Besides the description of establishing stress-strain curves of yarns, exhibit 17 contains neither information on shrinkage ratios nor on the determination of such features on woven fabrics, let alone conditions underlying their determination. The appellant's argument that a skilled person would

understand the reference in the patent to mean that some specific loading and stretching conditions would be used to establish relative values however misses the point, since it fails to address the issue of specifically what conditions or what tests would be required to establish any such values and indeed how, having arrived at any particular result due to stretching under load, the stretching ratio itself would then ultimately be determined. In as far as the appellant alluded to the idea that relative elasticity could be understood to underlie shrinkage ratio, it is noted that in the patent, paragraph 51 includes shrinkage ratio and elasticity as distinct items in a list of different characteristics of the yarns (see above point 3.). Thus, there is no reason for a skilled person to subsume shrinkage ratio under elasticity or vice versa.

7. In an alternative line of argument, the appellant stated that the skilled person would understand from the patent as a whole that the mere presence of shrinkable yarns and droopy or loose loops, i.e. (hard) yarns with reduced tension and a noticeable curvature, in the woven fabric indicated the presence of two types of weft yarns with different shrinkage ratios, making the determination of the relative shrinkage ratios of the two types of yarns superfluous.

The Board is not convinced by the arguments submitted in this context for the following reasons.

- 7.1 At the outset it is noted that claim 1 comprises a broad definition of the feature "loop portions". Features f5 and f6 of claim 1 define loop portions to result from under portions of the hard weft yarns passing along the back side of the fabric's warp yarns.

According to feature f12 these under portions form loops that extend to cover at least 6 warp yarns. A similar definition is found at the beginning in claim 19 and for example in paragraph 12 of the patent. The presence of loop portions according to claim 1 is thus in no way specified to be related to a (lower) shrinkage ratio of the hard weft yarns compared to the elastomeric yarns or to any process step involving different shrinkage of the two yarn types.

Furthermore, the definition in claim 1 of the "loop portions" does not necessarily imply any amount of curvature to be present in the respective hard yarn segments constituting or forming (feature f12) the loop portions or loops, such as suggested Figures 1 and 3 of the patent. Any loop portion according to the literal definition in claim 1 which is extending straight in a final woven fabric, laid flat and without constraint on a plane surface, has however the potential to bend and thereby to take a shape of a curved or even "droopy" loop portion when the fabric is bent. Or in other words, since such loop portions of the hard weft yarns extend over a certain number of warp yarns, there is a certain amount of their length which can be displaced from the fabric's back side (by bending the fabric or by tearing on such segments), which could also form curved segments.

There is thus no technical reason to exclude essentially straight yarn segments from being considered as "loop portions" in the woven fabric.

7.2 On the assumption that the description should be used in order to give the claim a narrow interpretation, which the Board does not accept, paragraph 54 referred to by the appellant anyway does not support the

appellant's contention. The paragraph relates to a process step during the manufacture of a woven fabric, rather than to properties of yarns in a woven fabric. It mentions indeed that during shrinking elastomeric yarns will shrink more than hard yarns causing the under portions of hard weft yarns on one (back) side of the woven fabric to become loop portions. However, describing just one step of the entire method of manufacture, it does not relate to different shrinkage ratios of two types of weft yarns of the (final) woven fabric according to claim 1 to the creation of loop portions. This passage does not contain any statement indicating that the presence of loop portions in a woven fabric represents a necessary consequence of two types of hard and elastomeric weft yarns which are distinguished by their relative shrinkage ratios. For similar reasons, also the corresponding statement in claim 19 does not support a limited interpretation considered by the appellant.

7.3 Nor do the other passages of the patent referred to by the appellant, including inter alia paragraphs 26, 35-37, support a limited meaning of the expression "loop portion".

7.3.1 Paragraph 26, despite mentioning again that elastomeric weft yarns shrink more after the completed fabric's removal from the loom than hard yarns, providing loop portions in the hard yarns, does not necessarily imply the formation of loose loops in the woven fabric either. It is not disclosed to which degree the elastomeric yarn has to shrink so as to form loose loops. The shrinkage of the elastomeric yarns may thus be low, or may be lost compared to the hard yarns upon some subsequent treatment steps (washing etc). Moreover, paragraph 26 follows on from a preceding

broad definition of loop portions in paragraph 12, similar to that in claim 1.

- 7.3.2 Loose or droopy loop portions are disclosed merely as preferable embodiments of a woven fabric. The corresponding passages in the patent even encompass the possibility that loop portions may also be in equilibrium (see for example paragraph 35), hence somewhat straighter rather than "droopy". Even if this paragraph were not present, according to the following paragraph 36, loop portions help to add to the knit-like appearance (emphasis added by the Board) and merely "can" hang loosely. The presence of any particular loop portion shape, let alone droopy segments, is thus not a necessary requirement for achieving such knit-like appearance because loop portions, irrespective of their tension or shape, just add to this appearance. The aim of a certain knit-like appearance is also not defined in the claims, let alone linked to the existence of the loop portions or the different shrinkage ratios. Although it is indeed not required to define such results to be achieved in a claim, such purpose mentioned in the description could not serve on the other hand to limit the subject-matter of a broad claim. Paragraph 36 then discloses only as an example that loose or droopy loops can hang loosely at the back (emphasis added). Again, this paragraph does not disclose a general necessary requirement of some degree of droopiness, rather it discloses droopiness as a preferable feature. Also paragraphs 37 and 38 do not contradict the broad interpretation encompassing loop portions extending somewhat straight.
- 7.3.3 The content of exhibit 26, relating to the definition of the term "loop", does not help the appellant's view of a more limited interpretation either. Even a

straight yarn segment of a woven fabric presents a curved shape, at least in those portions turning over warp yarns. The curved shape depicted in exhibit 26, and described literally as yarn "kinking", is not supported by the patent either. At least the loop portions illustrated in Figures 1 and 3 of the patent are closer to straight loop portions than to the kinked version disclosed in exhibit 26.

7.3.4 The broad interpretation of the expression "loop portion" is thus based on the language of the patent, without any attempt to intentionally "misunderstand" what is meant. Notably it is based on claim 1 (and claim 19): "defining loop portions" by a hard yarn's under portions extending over (a number of) warp yarns.

7.4 In summary, the mere presence of the feature "loop portions", given the broadest technically reasonable meaning in accordance with the patent, does not allow the conclusion to be reached that the presence of such loop portions in a woven fabric, accompanied by the presence of elastomeric yarns, is in any way an unequivocal indicator of two types of weft yarns with necessarily different shrinkage ratio.

There is moreover no evidence on file proving that woven fabrics with loop portions necessarily have two types of weft yarns distinguished by their shrinkage ratios.

7.5 So the appellant's line of argument "if there are loops, you have carried out the invention of claim 1" must fail.

8. The alternative line of argument, presented by the appellant for the first time during the oral

proceedings before the Board and based on the contention that method claim 19 disclosed to the skilled person how to obtain a woven fabric according to claim 1, is also not persuasive. In the following, the Board has left aside the issue raised by the respondents of whether this entirely new line of argument raised for the first time during oral proceedings before the Board should even be taken into account under Article 13(2) RPBA 2020 when assessing claim 1. The Board has instead simply considered it.

As already stated above, there is no explicit link between these two claims. Claim 1 is much broader in certain respects than claim 19 in that it does not require, for example, any form of shrinkage step to have taken place. Also, as pointed out by the respondents, claim 19 anyway requires in an initial step, the provision of first and second yarns which already have to have relatively different shrinkage ratios before weaving, without, again, defining what the shrinkage ratio is. Thus, even if the argument of the appellant were followed, the method defined in claim 19 cannot be considered a disclosure which teaches the skilled person how to carry out the invention defined in claim 1, let alone over its entire scope.

Moreover, during the oral proceedings the appellant relied on different interpretations of the shrinkage ratio in the context of the required initial selection of the two types of weft yarns in such method of manufacture. The shrinkage ratio was for example identified with the draft ratio of the respective (elastic) yarns on their bobbins, an issue which was not only newly raised in the oral proceedings, but also contested by the respondents who argued it could just

as well be e.g. the natural length or even another length. In the alternative, the shrinkage ratio was considered to be able to be determined because the initial yarn length and the change of length due to shrinkage were known. The initial yarn length was for example to be measured on the loom and the resulting change of length derivable from the expected effects of the individual manufacturing method steps (weaving, release from loom, wetting, washing etc. of the fabric) on the shrinkage of the fabric and its yarns. However, none of these assumptions is reflected in the patent and no evidence has been submitted in support thereof. All this thus remains in the sphere of speculation, as also argued by the respondents.

9. As already noted in the Board's preliminary opinion, the ten examples given in Table 1 of the patent also do not support the appellant's case (at least not for the whole scope of claim 1). In fact, the examples are distinguished essentially by the weave pattern (see paragraph 57 of the patent), whereas the weft yarn type is only varied in three examples, namely 7, 9 and 10. A shrinkage ratio is not mentioned in any of the examples. The appellant did not comment on the Board's preliminary opinion in this regard, so the Board sees no reason to come to a different evaluation of the examples' significance to the question of sufficiency of disclosure of the feature "shrinkage ratio".

10. As to the appellant's arguments in its letter of 31 May 2022 (see items 94 to 96), the appellant's reference to the fact that patents had been granted in USA and China does not alter the Board's findings. No indication is present that any particular significance of sufficiency of disclosure arose in those cases, nor that particular arguments were made on this issue that

were found convincing. Indeed, even the EPO granted the patent in suit, but the issue of sufficiency of disclosure first became of particular importance due to the objections of the opponents. The fact that the opposition division's decision on sufficiency was then challenged on appeal is indeed simply one of the possibilities open in the appeal. The appellant's argument that only opponents 3 & 4 and 5 had maintained the sufficiency of disclosure objections in the responses is of no relevance - even if only one party maintains an objection, the Board must still consider that objection. Indeed, the other parties might not have taken up the objection for any number of reasons, such as for example that they were convinced that their objections on novelty or inventive step were already enough to have the appeal dismissed. None of the reasons given by the appellant therefore leads the Board to a different conclusion.

11. To summarise, the Board concludes that the patent does not disclose the invention defined in claim 1 in a manner sufficiently clear and complete to be carried out by the person skilled in the art. The patent can thus not be maintained in the form as granted.

Auxiliary request 0

12. In its preliminary opinion, the Board had already indicated that the amendments carried out only in the description of the patent, according to auxiliary request 0, did not limit the subject-matter defined in the claims and would not have the potential of overcoming the objections made under the ground for opposition pursuant to *inter alia* Article 100(b) EPC. The appellant did not contest this view. In this request, which was to be considered with the claims of

the main request, the additions "not according to the invention", in paragraphs 35 and 55 of the description, themselves do not provide definitions of what loop portions must actually be nor what must be excluded in the claims, but simply relate to the description of certain embodiments which the appellant wished to be excluded therefrom. Hence, they are not found to be limiting for the claims. Also, the Board's essential reasoning as to why the claimed invention cannot be carried out is not reliant on the disclosures in these paragraphs. Even the mention of paragraph 35 in item 7.3.2 above is merely exemplary. Also during the oral proceedings, the appellant did not provide any arguments in relation to this request. The Board therefore has no reason to change its preliminary opinion which is hereby confirmed. Auxiliary request 0 is thus not allowable.

Auxiliary requests 8 to 15 - Admittance

13. Auxiliary request 8 was filed after the appellant had submitted its grounds of appeal. Compared to the claims constituting the main request all product claims have been deleted and only the method claims are maintained. The wording of claim 1 of auxiliary request 8 is identical to the wording of claim 19 as granted.

The Board considers auxiliary request 8 to constitute an amendment of the appellant's case within the meaning of Article 13 RPBA 2020 and exercised its discretion according to Article 13(1) RPBA 2020 not to admit the request into the proceedings for the reasons given in the following.

14. Article 12(3) RPBA 2020 stipulates *inter alia* that the statement of grounds of appeal shall contain a party's

complete appeal case. Accordingly, they shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the requests, facts, objections, arguments and evidence relied on.

Article 13(1) RPBA 2020 provides:

"Any amendment to a party's appeal case after it has filed its grounds of appeal or reply is subject to the party's justification for its amendment and may be admitted only at the discretion of the Board.

Article 12, paragraphs 4 to 6, shall apply mutatis mutandis.

The party shall provide reasons for submitting the amendment at this stage of the appeal proceedings.

The Board shall exercise its discretion in view of, inter alia, the current state of the proceedings, the suitability of the amendment to resolve the issues which were admissibly raised by another party in the appeal proceedings or which were raised by the Board, whether the amendment is detrimental to procedural economy, and, in the case of an amendment to a patent application or patent, whether the party has demonstrated that any such amendment, prima facie, overcomes the issues raised by another party in the appeal proceedings or by the Board and does not give rise to new objections."

Article 13(1) RPBA 2020 implies two general questions to be decided in regard to the consideration of auxiliary request 8 in the appeal proceedings. First, whether auxiliary request 8 indeed is to be considered

an amendment to the appellant's appeal case, secondly and only if the first question is answered in the affirmative, whether the Board should exercise its discretion according to the other criteria set out in that Article, so as to admit or not that request.

15. Irrespective of the question of whether the deletion of claims *per se* amounts to an amendment of a party's appeal case (see for example T 494/18, Reasons 1.1 to 1.4), in the present case the deletion of the product claims clearly involves a change of the appellant's appeal case for the following reasons.

- 15.1 In the appellant's statement setting out the grounds of appeal, which essentially concern only the prejudicial opposition grounds under Article 100(a) in combination with Articles 54 and 56 EPC, all considerations and conclusions on the product claims of the main request and of the subsequently withdrawn auxiliary requests 1 to 7 were consistently applied by analogy to the method claims (see for example point 238 of the appeal grounds). More particularly, and in as far as the two independent claims are explicitly referred to at all in the grounds of appeal - the appellant also repeatedly refers to an entire request, without making explicit reference to a particular claim (see for example at the top of page 8 points c.-g., or points 180, 186, 197, 198, 215, 246, 250, 251, 256 etc.) - the appellant's argumentation is consistently based on the identification of perceived distinguishing features of the product claim 1, i.e. a woven fabric, over the respective prior art. The resulting conclusions on novelty (or inventive step) are then simply extended to the corresponding independent method claim. There is however no distinct consideration given to the features of the respective independent method claim of any of

the main or auxiliary requests 1 to 7 submitted with the appeal grounds, and their potential effects on the assessment of novelty and/or inventive step, in particular in regard to any potential difference between the conclusions to be reached for the product and method claims.

15.2 The subsequent deletion of the product claims and the resulting limitation to the method claims according to the auxiliary request 8 submitted with the letter of 22 September 2021, can only be seen to be based on the conjecture that the assessment of the outstanding objections in view of the grounds for opposition under Article 100(a) EPC in regard to the method claims could be different from that of the product claims. This would mean that some difference should have been shown to exist in regard to the method of manufacture according to the independent method claim with respect to the deleted corresponding independent product claim. Compared to the appeal case made with its grounds of appeal - which according to Article 12(3) RPBA 2020 shall be complete and should specify expressly *inter alia* all the requests, facts and arguments, and which did not comprise any such argument - this would involve at least new fact finding as to the possible distinguishing (method) features and their effects. New fact finding can in no way be regarded as narrowing down the issues to be discussed to a subset of the issues to be discussed originally. Rather it clearly changes at least the factual framework of the appeal.

15.3 The fact that the method claims were always present throughout the entire proceedings, does not alter the Board's conclusion. Since there was no separate consideration given to their subject-matter, a different consideration would nevertheless have been

required for the first time in the appeal proceedings, after the appellant had submitted its supposedly complete appeal case with the grounds of appeal.

That all respondents and the opposition division had relied on arguments applied by analogy to both types of claims could not preclude the appellant from having pointed to the potential differences in the assessment of the grounds for opposition for the two kinds of claims if they were of the opinion that such differences existed and were of relevance for the maintenance of the patent.

16. The following considerations led the Board to exercise its discretion not to admit that amendment of the appellant's case, i.e. auxiliary request 8.
 - 16.1 It is first noted that no reason at all was given in the letter of 22 September 2021 why auxiliary request 8 was filed only at that stage of the appeal proceedings, which is already contrary to the third sentence of Article 13(1) RPBA 2020.
 - 16.2 Moreover, the Board considers that the request could and should have been submitted in the first instance proceedings, or at the very latest together with the appeal grounds had the proprietor wished to limit its patent to the method claims in the proceedings before the opposition division, as it had stated. The Board does not consider that the circumstances in the appeal proceedings justify its admittance (see Article 12(6) RPBA 2020, also applicable according to Article 13(1), second sentence, RPBA 2020).
 - 16.2.1 The appellant argued that the opposition division had refused the submission of a further request during the

oral proceedings and that this justified the late filing. In view of the summary of the opposition procedure given in point III. above, the Board cannot see that the opposition division unduly restricted the right of the appellant to amend the patent. The appellant clearly had several opportunities to amend the patent. Even during those oral proceedings, which lasted three days, the appellant was given the possibility to file new auxiliary requests and to reformulate its requests. On the last day of those proceedings, the appellant submitted in writing a list of the auxiliary requests maintained and to be dealt with during the oral proceedings (see the annex to the minutes). The appellant confirmed orally that these "were indeed all the requests they were going to make" (point 253 of the minutes). Moreover, the Board cannot accept that these or other statements recorded in the minutes of the oral proceedings would be incorrect or only incompletely reproduced, as suggested by the appellant during the oral proceedings before the Board. If this had been the case the appellant should have requested a correction of the minutes. Such a request is not on file. The Board therefore can only base its considerations on the premise that the content of the minutes correctly reflects the events and parties' declarations during the oral proceedings. It may also be added that neither the statement of grounds of appeal nor any of the appellant's subsequent letters mentioned any potential defect in the minutes. It is therefore entirely unclear to the Board how the cited written and oral statements recorded in the minutes could be understood by the opposition division as being anything else than the appellant's "final" requests. The appellant's argument that it had meant that those requests were all the requests it wanted to make only at that stage of the oral proceedings, and that it had

not excluded making further requests later in the oral proceedings, is simply not borne out given the course of proceedings, the minutes and the appellant's oral statements.

Taking into account the entire circumstances in the opposition proceedings, the refusal to grant a further possibility to submit an amended request in the afternoon of the third day of oral proceedings, after the opposition division had given its preliminary opinion in regard to all auxiliary requests submitted in accordance with the written list previously established and signed by the representative, cannot justify the admittance of further auxiliary requests at a later stage in the appeal proceedings.

And, if the appellant had indeed wanted to submit the method claims before the opposition division in the oral proceedings, despite there being no trace in the minutes (or in the decision) of the appellant's intention to prosecute the patent on the basis of only the method claims, then it remains entirely unclear why these method claims were not submitted at the latest with its appeal grounds.

- 16.2.2 It is also not apparent that the impugned decision or the replies of the respondents to the grounds of appeal raised issues which were new or surprising for the appellant and which could have justified a reaction in the form of a limitation to only the method claims. From the reasoning in points 6.4.6, 6.4.7 and 6.12.6 in the accompanying letter of 22 September 2021, to which the appellant referred during the oral proceedings before the Board in this context, it cannot be construed that the submission of auxiliary request 8 could have been motivated or was intended to

particularly refute new objections of inventive step allegedly raised by respondents for the first time in their replies to the grounds of appeal. To the contrary, auxiliary request 8 was filed to also overcome the outstanding objections which clearly were part of the impugned decision (see points 6.12.1-6.12.5 of the September 2021-letter). So it could and should have been submitted with the appeal grounds.

- 16.2.3 Moreover, when submitting auxiliary request 8 as a reaction to the respondents' allegedly new objections on inventive step in their replies to the grounds of appeal, the appellant also failed to substantiate this amendment of its appeal case in view of the other outstanding objections, contrary to the further requirement of Article 13(1) fourth sentence, RPBA 2020. In the accompanying letter of 22 September 2021 none of the arguments points to a possibility of the method claims escaping from the ground for opposition pursuant to Article 100(b) EPC.

The appellant's reply, dated 29 November 2021, to the Board's specific invitation to comment on the respondents' objections on insufficiency of disclosure is again silent in this respect. Specifically, nothing was mentioned about the method claims at all, let alone any argument stating why the requirement of sufficiency of disclosure might be fulfilled by any of auxiliary requests 8 to 15. And, the appellant's letter dated 31 May 2022, in reply to the Board's preliminary opinion, mentions for the first time that *inter alia* auxiliary request 8 mainly addressed the insufficiency objections based on shrinkage ratio, without however any explanation in this regard, let alone any reference to any submissions made in previous letters that could possibly be understood to relate to the issue of

sufficiency of disclosure as regards the method claims, when those requests were filed. Indeed, as argued by the respondents and not refuted by the appellant, no such mention is present at all. Points 93-96 on page 12 of the 31 May 2022 letter include four sentences of comments on the shrinkage ratio, again without any mention of the suitability of the method claims to overcome that part of the outstanding objections. Thus, the Board was presented with no arguments in relation to the issue of sufficiency of disclosure as regards the method claims, either when filing the auxiliary requests 8 to 15 nor indeed thereafter, the first time the method claims were brought up being during the oral proceedings before the Board when the appellant argued how the invention defined in claim 1 could be carried out.

- 16.2.4 The Board also does not accept the appellant's contention that insufficiency of disclosure was a ground which was "not an object of the decision under appeal" (as argued for example in point 90 of its letter dated 31 May 2022). The impugned decision is indeed based on this ground for opposition, albeit with a positive outcome for the appellant on this issue. That the appellant did not address this point when filing its grounds of appeal is of course not in any way problematic in the present case, but likewise nothing precludes the respondents who are not negatively affected by the opposition division's decision to revoke the patent and who therefore could not have filed an appeal, from maintaining their objections in subsequent appeal proceedings where the reasoning given by the opposition division is unconvincing to them. According to Article 12(3) RPBA 2020, the appellant's complete appeal case is made up of *inter alia* its statement of grounds of appeal;

similarly, the respondents' appeal case is made up from *inter alia* their reply to the grounds of appeal. The replies contained the objections pursuant to Article 100(b) EPC, as already raised before the opposition division and dealt with in the impugned decision.

- 16.2.5 Admittance of auxiliary request 8 can also not be justified by the circumstances which arose only later, after its submission, in the appeal proceedings. In particular, a statement made by the Board in the oral proceedings in regard to the expression "shrinkage ratio" after its conclusion on the objection under Article 100(b) EPC against product claim 1, mentioning that the considerations in view of the method claim 19 would not necessarily have to be the same, cannot be considered a circumstance prevailing at the submission of the request. Moreover, the Board's remark could in no way be considered to indicate a positive outcome for the appellant on those claims, but simply that the Board did not need to decide on those claims because the invention defined in claim 1 was already defective due to insufficient disclosure, even if different considerations might well apply (due, not least, to its different wording - see item 8 above). If anything, it rather underlines the presence of a change of case in order to address in detail the significance of the insufficiently disclosed parameter "shrinkage ratio" in the granted method claim 19 and that the appellant had failed before to identify such potential differences in reply to the outstanding objection. It also emphasises that it would have been necessary to address (for the first time during the entire opposition-appeal-proceedings) in the oral proceedings before the Board, a new line of argument (i.e. why such considerations could be different and in which respect) for which neither the respondents nor the Board could have been

expected to be prepared. The appellant did not even present during the long and extensive discussion of sufficiency of disclosure of claim 1 during the two days of the oral proceedings before the Board the slightest suggestion of some difference in this regard, but finally limited its argument on admittance to pointing to the Board's previous open statement.

16.2.6 Irrespective of the fact that auxiliary request 8 is anyway considered an amendment to the appellant's case, it bears no significance whether its submission ten months after the last reply of the respondents to the grounds of appeal and two months before the first date of oral proceedings which subsequently had to be postponed for more than half a year, could be at all considered a timely response to the respondent's objections. The appellant missed too many opportunities (the letters of 22 September 2021, 30 November 2021 and of 31 May 2022) to substantiate this amendment of its appeal case, in particular in regard to the crucial question of sufficiency of disclosure throughout the entire proceedings.

16.3 In summary, taking into account all circumstances of the case, the Board considered the submission of auxiliary request 8 (and any arguments substantiating that in regard to Article 83 EPC) as being far too late and consequently detrimental, not least, to procedural economy. For these reasons, the Board exercised its discretion as stated above.

17. The same applies in regard to the auxiliary requests 9 to 15 which had been submitted together with auxiliary request 8. Considering that these requests are also limited to the method claims only, the same considerations as set out above apply. The appellant

chose not to submit any specific argument in this regard.

18. Absent any request which meets the requirements of the EPC, the appeal cannot be allowed.
19. *Request for correction of the Minutes*
 - 19.1 The Board first notes that, if a request for correction of the minutes is made before issuing the written decision terminating the appeal proceedings, the request is considered in that written decision (cf. T 888/17, Reasons 2; T 1721/07, Reasons 15 to 19; T 1891/20, Reasons 1.1). Furthermore it is noted that the Board is responsible for deciding upon what is necessary to be recorded in the minutes, not the parties (T 468/99, Reasons 1.5; T 1721/07, Reasons 15; R7/17, Reasons 23).
 - 19.2 Pursuant to Rule 124(1) EPC, minutes of oral proceedings shall be drawn up, containing the essentials of the oral proceedings and the relevant statements made by the parties.
 - 19.3 With letter dated 22 August 2022 the appellant requested that the minutes of the oral proceedings held on 7 and 8 July 2022 be supplemented by an alleged statement of respondent opponent 4 as regards the statement of the Board on the issue of sufficiency of disclosure with respect to the method claims of the patent as granted (claims 19 to 23 as granted).
 - 19.4 In that regard, the Board would point out that the Chairman, after having informed the parties of the Board's conclusion on the issue of sufficiency of disclosure as regards the invention in claim 1 of the

patent as granted, noted that the Board's view on the issue of sufficiency of disclosure of the method claims (i.e. granted claims 19 to 23) might involve different considerations and could thus be different.

- 19.5 Even under the assumption that respondent opponent 4 had expressed its surprise on that open statement of the Board, that the respondent in its letter dated 16 September 2022 anyway denied any memory of having made, the expression of such surprise, which might be due to subjective expectations of the party concerned about the success or lack of success of any of its objections, is neither part of the essentials of the oral proceedings nor a relevant statement within the meaning of Rule 124(1) EPC.
- 19.6 Therefore, the request for correction of the minutes of oral proceedings is refused.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated