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**Datasheet for the decision  
of 23 September 2024**

**Case Number:** T 0658/22 - 3.2.06

**Application Number:** 17202006.7

**Publication Number:** 3403632

**IPC:** A61F13/475, A61F13/49,  
A61F13/511, A61F13/534

**Language of the proceedings:** EN

**Title of invention:**

ABSORBENT ARTICLE WITH CHANNELS AND METHOD FOR MANUFACTURING  
THEREOF

**Patent Proprietor:**

Drylock Technologies NV

**Opponents:**

Ontex BV  
von Westernhagen, Tilo

**Headword:**

**Relevant legal provisions:**

EPC Art. 54, 100(a), 84, 123(2)  
RPBA 2020 Art. 12(3), 12(5), 13(1), 13(2), 12(4), 12(6)

**Keyword:**

Novelty - (no)

Amendment to appeal case - justification by party (no)

Amendment after notification of Art. 15(1) RPBA communication  
- taken into account (no)

Late-filed request - circumstances of appeal case justify  
admittance (no)

Claims - clarity - auxiliary request (no)

Amendments - extension beyond the content of the application  
as filed (yes)

**Decisions cited:**

T 1220/21

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 0658/22 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 23 September 2024**

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(Patent Proprietor)

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**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
10 January 2022 concerning maintenance of the  
European Patent No. 3403632 in amended form.**

**Composition of the Board:**

**Chairman**            M. Harrison  
**Members:**           M. Dorfstätter  
                            J. Hoppe

## **Summary of Facts and Submissions**

- I. An appeal was filed by the patent proprietor and opponents 1 and 2 against the decision of the opposition division dated 10 January 2022, in which it found that, account being taken of the amendments made during the opposition proceedings in auxiliary request 5, European patent No. 3 403 632 met the requirements of the EPC.
- II. Since all parties have appealed, they will be referred to as the 'patent proprietor', 'opponent 1' and 'opponent 2' respectively.
- III. The patent proprietor requested in writing that the decision under appeal be set aside and the patent be maintained as granted, or, as an auxiliary measure, that the patent be maintained in amended form based on one of the auxiliary requests 1 to 29 as filed on 18 July 2024.
- IV. The opponents requested that the decision under appeal be set aside and the European patent be revoked.
- V. The following document is relevant for the present decision:
- D7            US 2014 / 0 039 437 A1
- VI. The Board issued a summons to oral proceedings and a subsequent communication in which it indicated, *inter alia*, that the subject-matter of claim 1 of the main request might not be novel. It referred to D7 and other prior art documents on file which might need to be

discussed. It further noted that it had doubts whether the subject-matter of claim 1 of auxiliary requests 1, 4 and 5 was novel and that claim 1 of auxiliary request 5 was considered *inter alia* to lack clarity. Further, the Board added that claim 1 of auxiliary request 2 might include subject-matter extending beyond the content of the application as filed and that it saw no reason to overturn the discretionary decision of the opposition division not to admit auxiliary request 3 into the proceedings. The Board did not give its provisional opinion on any of auxiliary requests 6 to 29, since it considered these as not being substantiated upon their submission together with the patent proprietor's reply to the opponents' appeal grounds. The reasons for this were also given in the Board's communication.

VII. Oral proceedings were held before the Board in the absence of opponent 2.

During the oral proceedings, the patent proprietor withdrew auxiliary request 1 and submitted auxiliary request 3\*.

At the end of the oral proceedings, opponent 1 maintained its initial requests i.e. that the decision under appeal be set aside and the European patent be revoked.

The patent proprietor requested that the decision under appeal be set aside and the patent be maintained as granted,

or as an auxiliary measure, that the patent be maintained in amended form based on one of the following auxiliary requests in the given order:

- auxiliary request 18,

- auxiliary request 3,
  - auxiliary request 3\*,
  - auxiliary request 2,
  - auxiliary request 4,
  - auxiliary request 5,
  - auxiliary requests 6 to 17,
  - auxiliary requests 19 to 29,
- where auxiliary request 3\* was filed during the oral proceedings before the Board and all other requests were filed with letter of 18 July 2024.

VIII. Claim 1 of the main request reads as follows (with the feature-by-feature analysis as used by the opposition division in the contested decision):

- F1 "An absorbent article comprising a liquid pervious topsheet, a liquid impervious backsheet, and an absorbent core comprising an absorbent material between a top core wrap sheet and a back core wrap sheet, said absorbent core being positioned in between said topsheet and said backsheet,
- F1.1 said absorbent core having a first and second longitudinal edge (131, 132) and a first and second transverse edge (133, 134), said absorbent core having a longitudinal center line (CL) dividing the absorbent core in a first longitudinal portion and a second longitudinal portion on either side of the longitudinal center line, said absorbent core having a transverse crotch line (L) dividing the absorbent core in a front portion (130a) and a rear portion (130b) on either side of the transverse crotch line (L),
- F1.2 wherein the absorbent core is provided with a plurality of attachment zones where the top

core wrap sheet is attached to the back core wrap sheet,

- F1.3 said plurality of attachment zones comprising a first and second elongate attachment zone, said first and second elongate attachment zone extending next to each other from a crotch region in the direction of the first and/or second transverse edge;  
characterized in that
- F2 said first elongate attachment zone crosses said longitudinal center line (CL) in at least a first crossing point, from the first longitudinal portion to the second longitudinal portion;
- F3 and said second elongate attachment zone crosses said longitudinal center line (CL) in at least a second crossing point, from the second longitudinal portion to the first longitudinal portion;
- F4 wherein said first and second crossing point may be the same point or a different point, and may be located in said front portion and/or in said rear portion."

IX. Claim 1 of auxiliary request 18 reads as for the main request but with the following features amended (additions underlined, deletions struck-through):

- F1.3a said plurality of attachment zones being permanent attachment zones which remain attached when wetted and comprising a first and second elongate attachment zone, said first and second elongate attachment zone extending next to each other from a crotch region in the direction of the first and/or second transverse edge;



F4a        wherein the first and second crossing point correspond with substantially the same point ~~said first and second crossing point may be the same point or a different point~~, and may be located in said front portion and/or in said rear portion."

X.        Claim 1 of auxiliary request 3 keeps the amendments made to feature F1.3 in auxiliary request 18 (i.e. feature F1.3a), but not those made to feature F4 (which thus reads as for the main request). Additionally, the following feature is appended to claim 1:

F6        "wherein said first and second attachment zone each extends, seen in the transverse direction of the absorbent core, over the transverse distance which is at least 5 mm."

XI.       Claim 1 of auxiliary request 3\* combines the amendments made to claim 1 of auxiliary request 18 and 3. It thus reads as for the main request, but with features F1.3 and F4 substituted by F1.3a and F4a, respectively, and with feature F6 appended.

XII.      Claim 1 of auxiliary request 2 reads as for the main request but with the following features amended (additions underlined, deletions struck-through):

F1.3b    said plurality of attachment zones being permanent attachment zones which remain attached when wetted and consisting of ~~comprising~~ a first and second elongate attachment zone, said first and second elongate attachment zone extending next to each other

from a crotch region in the direction of the first and/or second transverse edge;

XIII. Claim 1 of auxiliary request 4 reads as for the main request but with the following feature inserted after feature F1.3:

F1.4 "wherein said first and second attachment zone each extends, seen in the transverse direction of the absorbent core, over the transverse distance which is at least 1 mm, preferably at least 3 mm, more preferably at least 4 mm, even more preferably at least 5 mm, most preferably at least 6 mm;"

XIV. Claim 1 of auxiliary request 5 reads as for the main request but with the following features appended:

F5 "wherein upon wetting of the absorbent core two elongate channels are created,

F5.1 wherein a first elongate channel extends from a first left position to a second right position, where the first left position is closer to the first transverse edge than the second right position, and a second elongate channel extends from a further second right position to a further first left position, where the further second right position is closer to the first transverse edge than the further first left position,

F5.2 such that, immediately after wetting, liquid is guided in the first and/or second elongate channel from left to right and/or from right to left, respectively, whilst flowing towards the crotch region or away from the crotch region."

XV. Auxiliary requests 6 to 17 and 19 to 29 were not admitted into the proceedings. The claims of these requests are not reproduced here as their content is not relevant for the decision.

XVI. The patent proprietor's arguments which are relevant to the present decision may be summarised as follows:

The subject-matter of claim 1 of the main request was novel. D7 did not show elongate attachment zones as the discontinuous attachments were not identifiable as such zones without arbitrarily choosing pathways along them. When reading the description of the opposed patent, it was clear to a skilled person that the attachment zones formed channels upon wetting. Therefore, channels were implicit in claim 1. Such channels were not created by the arrangement of D7.

Auxiliary request 18 should be admitted into the proceedings. This request was substantiated and not surprising as it corresponded to auxiliary request VI''' filed earlier in the proceedings, which in turn corresponded to an auxiliary request already relied upon in the proceedings before the opposition division and being a combination of amendments made in even earlier requests. It was clear that the reference to these earlier requests also referred to the respective arguments provided with these earlier requests which therefore still applied for auxiliary request 18 such that the request was substantiated. Furthermore, the request should be admitted as a reaction to a new drawing made on the flip chart during the oral proceedings before the Board as the request was apt to overcome the novelty objection based on D7 and illustrated on the flip chart and it was the first time

this particular drawing had been used for the novelty attack.

Auxiliary request 3 should be admitted into the proceedings. It was *prima facie* clear that the opposition division's reasoning for not admitting this request into the proceedings was wrong as the request was *prima facie* allowable. The opposition division's discretionary decision was thus to be overturned.

Auxiliary request 3\* should be admitted into the proceedings. It was a reaction to new information given by the Board and opponent 1 for the first time in the oral proceedings. The drawing presented on the flip chart had to be regarded as a new objection based on a new interpretation.

Claim 1 of auxiliary request 2 did not contain subject-matter extending beyond the content of the application as filed. It was clear to a skilled person that the provision of the first and second elongate attachment zones provided improved fluid distribution without the need for additional features.

The subject-matter of claim 1 of auxiliary request 4 was novel over D7 for the same reasons as for auxiliary request III.

Claim 1 of auxiliary request 5 was clear. The formulations 'upon wetting' and 'immediately after wetting' related to the time when mass flow was created and liquid was guided in the channels. The structural limitation lay in the attachment zones being formed, allowing this to happen.

Auxiliary requests 6 to 17 and 19 to 29 should be admitted into the proceedings. The respective claim 1 of auxiliary requests 24-29 and 19-23 was novel and involved an inventive step at least for the reasons given for the higher ranking requests, the amendments of which were merely combined in the lower ranking requests.

XVII. The opponents' arguments which are relevant to the present decision may be summarised as follows:

The subject-matter of claim 1 of the main request was not novel. D7 showed elongate attachment zones formed by pathways along the discontinuous attachments as shown in annotated Fig. 2 of D7. In claim 1 of the main request, the attachment zones were not linked to the formation of channels. This was also not implicit. Nor was the description to be used to interpret claim 1 in such a way.

Auxiliary request 18 should not be admitted into the proceedings. When filing it on appeal, this request was unsubstantiated. It was not filed as an attachment during the opposition proceedings and also not with the proprietor's grounds of appeal or reply. It could also not be regarded as a reaction to the drawing as set out in the oral proceedings since this was nothing new but merely served to illustrate the objection and drawings that were already on file. Moreover, the request was not convergent, did not overcome the novelty objections on file and resulted in problems under Article 123(2) EPC.

Auxiliary request 3 should not be admitted into the proceedings. The patent proprietor did not show that the decision not to admit it was an error in the

opposition division's use of discretion, nor that the circumstances of the appeal case justified its admittance.

Auxiliary request 3\* should not be admitted into the proceedings. The information given by the Board was not new. By stating how the Board understood the opponents' arguments, the Board actually helped the patent proprietor to select its further requests. Moreover, the request was not *prima facie* allowable and raised new issues under Article 123(2) EPC.

Claim 1 of auxiliary request 2 related to subject-matter extending beyond the content of the application as filed. The added limitation was not derivable from the application as filed without inclusion of further features.

The subject-matter of claim 1 of auxiliary request 4 was not novel over D7 since the additional limitation was already found in Figures 2 and 5 thereof.

Claim 1 of auxiliary request 5 was not clear. The formulations 'upon wetting' and 'immediately after wetting' did not specify how much wetting was necessary nor how much time was implied by either of these expressions.

Auxiliary requests 6 to 17 and 19 to 29 should not be admitted into the proceedings as they were unsubstantiated upon filing them in the appeal proceedings.

## Reasons for the Decision

### 1. *Main request*

The subject-matter of claim 1 lacks novelty over D7 (Article 54 EPC). Therefore, the ground for opposition under Article 100(a) EPC prejudices maintenance of the patent as granted.

1.1 The embodiment of Fig. 2 of D7 shows all features of claim 1. As also argued by the opponents already in writing, the series of attachments indicated in opponent 1's annotated representation of Fig. 2 represent a plurality of attachment zones including a first and a second elongate attachment zone in the sense of the contested patent.

1.2 In 2.2.5.2.2 of the impugned decision, the opposition division explained which features were disclosed in D7. With its grounds of appeal the proprietor contested these findings specifically only with respect to the disclosure of attachment zones. The patent proprietor argued that the opponents and the opposition division in its decision had artificially selected and thereby created attachment zones which were not present in D7 as such. D7 remained silent about the first and second elongate attachment zones according to features F1.3, 2, 3 and 4. It was allegedly clear to a skilled person that, even if discontinuous attachment zones were not excluded by the claim, the attachment zone had to be clearly identifiable. Therefore, the space between the individual attachments had to be small. As could be derived from paragraph [0012] of the patent, the attachments were linked to the channels being formed upon wetting. They were furthermore linked to a certain

width according to paragraph [0199] of the patent. The patent proprietor further argued that, as there was no incentive provided in D7 supporting a particular selection of individual attachments, considering the discrete primary and secondary attachments as being attachment zones in the sense of the patent could only be based on hindsight. Based on the description, the skilled person would understand that the attachment zones were linked to the channels which were implicit in the claim.

The Board does not accept these arguments. As also argued by opponent 1, none of these alleged limitations is reflected in claim 1. That channels are created is an effect that is only described in the description and that is only achieved if certain further conditions are met. This cannot be considered as limiting a claim that does not define the effect or the necessary conditions. Hence, for example, merely because claim 1 defines attachment zones does not mean that channels are implicitly part of the claim.

The Board also fails to see a reason as to why any of the pathways drawn by opponent 1 in its annotated representation of Fig. 2 of D7 in the written submissions could not be regarded as being an elongated attachment zone in the sense of the patent. This is not a selection made by a skilled person, nor is it based on hindsight, because any other pathway would equally qualify as an attachment "zone". The reason why opponent 1 had chosen to argue on two particularly indicated pathways is not relevant if, as in the present case, the subject-matter of claim 1 is not novel due to the indicated pathways corresponding to the definition in claim 1. Novelty must be present over any conceivable variant within what is disclosed in the



prior art, even if, for example, particular effects etc. are not described for the elements in question in the same way as described in the patent.

Furthermore, and as also accepted by the patent proprietor, discontinuous attachments in an attachment zone are not excluded by the wording of claim 1 (the proprietor even referring to Fig. 11E of its own patent in this regard). Other than argued by the patent proprietor, there is however no limitation to a particular ratio between the size of or distance between attached and unattached portions either. Furthermore, even if the individual attachments are followed by unattached spots with or without absorbent material therein, this series of individual attachments also represents an elongate attachment region. The Board is unable to determine in Fig. 2 of D7 that the largest part of the lines drawn by opponent 1 include unattached regions (as argued by the patent proprietor). Even if the distances between the individual attachments may actually be greater than shown in Fig. 2, the series of attachments formed by them would still qualify as an attachment zone. In summary, claim 1 contains no definition which would exclude such series of attachments being defined as an attachment zone.

The Board also concludes that it is anyway implicit that "channels" would be formed along any series of attachments in D7, noting further that claim 1 is not even restricted to the formation of channels.

- 1.3 The patent proprietor did not argue that there were further differences over D7 defined in claim 1 other than the first and second attachment zones. As the Board followed the opponents' view that the indicated

pathways qualified as 'elongate attachment zones', the subject-matter of claim 1 is therefore not novel over D7, rendering the main request not allowable.

2. *Auxiliary request 18*

The Board exercised its discretion not to admit auxiliary request 18 into the proceedings with reference to Article 12(3) and (5) RPBA (see point 2.1 below) and not to admit the "refiling" of this request and the related explanations under Articles 13(1) and (2) RPBA (see point 2.2 below).

2.1 *Lack of substantiation of auxiliary request 18 (previously auxiliary request VI''')*

2.1.1 Auxiliary request VI''' (later renamed auxiliary request 18 by the patent proprietor) was first relied upon in the appeal proceedings in the patent proprietor's reply to the opponents' appeals where it was merely stated that the request corresponded to then auxiliary request V' as submitted with letter of 29 September 2021. The request was however not attached to the proprietor's reply nor was it actually submitted at any other time in the opposition proceedings. Only with the submission of 18 July 2024 was a respective attachment submitted, a short statement for the former auxiliary request VI''' was given with respect to the alleged basis, and it was stated that "Auxiliary Request VI'' - XI'' and Auxiliary Requests VI''' - XI''' [were] novel and inventive at least for the reasons as elaborated in view of the higher ranking auxiliary requests which [were] combined in the respective requests". In the oral proceedings the proprietor explained why it considered auxiliary

request 18 to have overcome the novelty objection regarding D7.

The proprietor argued that, for reasons of procedural efficiency, the request was not actually submitted but it had explained in its reply to the opponents' grounds of appeal (page 14, penultimate paragraph) that it corresponded to auxiliary request V' as submitted with the reply to the summons to oral proceedings before the opposition division. In that reply referred to by the patent proprietor, auxiliary request V' was, in turn, not actually submitted either. Instead, at that time, the patent proprietor only explained that auxiliary request V' corresponded to auxiliary request V, filed with that reply, but also including the amendments of auxiliary request I (in the nomenclature used in that reply, which should seemingly not be confused with auxiliary request I as had been on file until then).

Opponent 2 thus argued that auxiliary request VI''' (later renamed auxiliary request 18) had never been filed in either opposition or appeal proceedings, at least not before 18 July 2024.

For the present decision, it can however be left unanswered whether auxiliary request 18 had been validly filed before 18 July 2024, because the Board did not admit it due to it being unsubstantiated, as explained below.

2.1.2 Article 12(3) RPBA sets out the following:

*"The statement of grounds of appeal and the reply 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" (emphasis added by the Board).*

Contrary to the requirement of Article 12(3) RPBA, the patent proprietor's reply did not specify the arguments which the patent proprietor eventually relied upon, making it impossible for the Board and the opponents to understand, at the time when the request was filed, which objections the patent proprietor considered auxiliary request 18 to overcome, nor why.

- 2.1.3 The patent proprietor argued that it had provided a substantiation by referring to arguments brought forward in the several submissions made in the written proceedings before the opposition division.

This is however not accepted. As they were filed prior to the opposition division handing down its decision, the submissions in the written proceedings cannot, by their very nature, take into account the reasoning given in the decision. The mere general reference to earlier submissions do not thus (normally, and specifically not in this case) help in substantiating a party's case on appeal (see also: Case Law of the Boards of Appeal, 10th edition, V.A.3.2.2; T 1690/22, Reasons 2.8; T 1079/22, Reasons 1.2).

Furthermore, contrary to the proprietor's argument, the statement in its reply on page 14 was not even a reference to earlier submissions, but rather the mere explanation that auxiliary request VI''' (later renamed auxiliary request 18) was "corresponding with" auxiliary request V' as submitted with the submission of 29 September 2021. Moreover, in that submission,

neither a basis for the amendments nor any specific arguments as to why the request would overcome any particular objection, was given for what was then referred to as auxiliary request V' (becoming auxiliary request VI''' on appeal, and even later being renamed auxiliary request 18). With its reply, the patent proprietor thus neither explicitly nor implicitly explained the specific amendments that were made in the request, their basis in the application as filed nor which objections in appeal it considered to be overcome by the amendments made in this request nor why this was the case.

- 2.1.4 The Board also concluded that the proprietor's later explanations in the submission of 18 July 2024 with respect to auxiliary request VI''' (renumbered auxiliary request 18 at the end of that submission) were not apt to substantiate its request and thus do not change the foregoing considerations.

In that submission, the patent proprietor explained that auxiliary request VI''' (renamed auxiliary request 18 at the end of that submission) corresponded to auxiliary request V' as submitted with the reply to the summons to oral proceedings before the opposition division and that the amendments made in claim 1 had basis in claim 10 as filed and in the third option of claim 6 as filed. In particular, the patent proprietor still did not explain specifically which objections it considered to be overcome by the amendments made in this request nor why this was the case. The mere general statements in the letter of 18 July 2024 that auxiliary requests "V'''- XI'''" as filed in the opposition proceedings "build further on auxiliary request I and combine the amendments of this request with those of AR VI-XI, respectively" and that

"Auxiliary Requests VI'' - XI''... are novel and inventive at least for the reasons as elaborated in view of the higher ranking auxiliary requests which are combined in the respective requests" do not include any explanation which amendment in auxiliary request VI'' was considered to overcome the objections on file and why this should be the case if the amendments in the combined requests would not serve to overcome these objections. The provided information is thus neither complete nor understandable and it is not the task of the Board or the opponents to take up several pieces of information to form a complete puzzle. Rather, according to Article 12(3) RPBA, it is upon the proprietor to provide all the required reasoning explicitly, which implies that it is presented in a reasonable manner that does not force the other parties and the Board to speculate about the arguments underlying the request (see also Case Law of the Boards of Appeal, 10th edition, A.4.3.5 a)). Hence, even considering the information provided in the letter of 18 July 2024, the request was not substantiated. Therefore, there was no need to assess whether this submission should anyway not have been admitted under Article 13(1) RPBA.

- 2.1.5 The patent proprietor provided additional explanations with respect to substantiation during the oral proceedings before the Board. It explained what the amendments were, what their basis was in the application as filed, and why the request was allegedly apt to overcome the novelty objection based on D7 Fig 2.
- 2.1.6 As these arguments were only presented in the appeal proceedings after having received the Board's

communication under Article 15(1) RPBA, they are an amendment of the patent proprietor's appeal case. Article 13(2) RPBA sets out that any amendment to a party's appeal case made after notification of a communication under Article 15, paragraph 1, shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

- 2.1.7 Providing the necessary arguments for substantiation only later in the proceedings clearly runs counter to the objective of enabling the Board and the other parties to start working on the case on the basis of each party's complete submissions and can in the present case not be regarded as exceptional circumstances according to Article 13(2) RPBA. The explanations are also not admitted as a reaction to an allegedly new argument in oral proceedings (see below point 2.2), which would anyway not justify that they were not substantiated upon being filed. The additional explanations are therefore not taken into account for the assessment of the requirements of Article 12(3) RPBA.

As a consequence, the assessment is to be based on the submissions provided by the proprietor in writing before the oral proceedings. As set out above, these do not fulfil the requirements of substantiation according to Article 12(3) RPBA.

- 2.1.8 The sanction for not fulfilling the requirements of Article 12(3) RPBA is set out in Article 12(5) RPBA which reads as follows:

*"The Board has discretion not to admit any part of a submission by a party which does not meet the requirements in paragraph 3."*

- 2.1.9 As also reasoned in T 1220/21 (see Reasons 4.5), when exercising its discretion under Article 12(5) RPBA, the Board will take into account the specific circumstances of the case with a particular view on the purpose of Article 12(3) RPBA, which is to ensure fair proceedings for all parties and to enable the Board and the other parties to start working on the case on the basis of each party's complete submissions, without being forced to speculate on the intentions of the other parties (see also Case Law of the Boards of Appeal, 10th edition, A.4.3.5 a)). The extent to which the lack of substantiation runs counter to this objective is a factor that may be taken into account when exercising discretion under Article 12(5) RPBA. This includes addressing the question of whether the amendments, their basis in the application as filed, and the chain of logic underlying the claim requests are self-explanatory.
- 2.1.10 In the present case, none of these requirements can be seen as being met.

Firstly, the amendments and their basis in the application as filed are not self-explanatory. Since the claim requests were not actually formulated and filed separately, the Board and the other parties would have needed to investigate the file in order to learn that:

Auxiliary request 18 corresponds to auxiliary request VI''' as first relied upon in the reply to the opponents' appeal grounds;  
which auxiliary request VI''' in turn corresponds



to auxiliary request V' as first relied upon in the patent proprietor's reply to the summons for oral proceedings before the opposition division; with what was then auxiliary request V' corresponding to a combination of the amendments made in other requests.

In order to find out what the amendments in auxiliary request 18 are, they would then have had to find out what the remaining amendments made to the (then) auxiliary request V were. Regarding these, the patent proprietor explained in the same submission that:

Auxiliary request V corresponded to auxiliary request I as submitted on 29 October 2020.

This is a claim request filed together with an even earlier submission. In that submission, the patent proprietor explained (on page 37) that:

Auxiliary request I had basis in the third option of claim 6 as granted.

In other words, after having referred to several submissions of the appeal and opposition proceedings, one could only understand that auxiliary request 18 was actually first submitted with the patent proprietor's letter of 18 July 2024, and that its claim 1 was a combination of granted claims 1, the third option of claim 6 and claim 10. It is noted that, even if one had undertaken the investigation as set out above, one would still not know the basis in the application as filed. It is also noted that the claims as such do not make it immediately apparent that auxiliary request 18 is a mere combination of features of granted claims, since at least claim 6 was not incorporated therein in full. As will be appreciated, the relabelling of requests throughout the procedure created a further obstacle in trying to decipher the proprietor's submissions and their relevance to any particular request.

Secondly, there is no clearly identifiable chain of logic in the order of the different auxiliary requests as submitted in the appeal proceedings. Without knowing the intention of the patent proprietor, it is not self-evident if not impossible to understand which amendments should address which objection made by the opponents. It is thus not immediately apparent which objection(s) could potentially be overcome by which amendment in which request.

The submissions were thus not self-explanatory.

Moreover, in exercising discretion, it should be noted that the additional (but still insufficient) submissions in the letter of 18 July 2024 were only filed after the proprietor's reply and only shortly before the oral proceedings, which further contravenes the purpose of Article 12(3) RPBA to ensure fair proceedings for the respective party by the requirement of filing the complete case with the grounds of appeal/reply.

2.1.11 Hence, having considered the circumstances of the case in view of the criteria for exercising discretion under Article 12(5) RPBA, the Board concluded that due to insufficient substantiation, auxiliary request 18 should not be admitted.

2.2 "Refiling" of auxiliary request 18

2.2.1 In a second line of arguments, the patent proprietor argued that the filing of auxiliary request 18 and the related explanations were a reaction to new information from the Board and thus a surprising development during

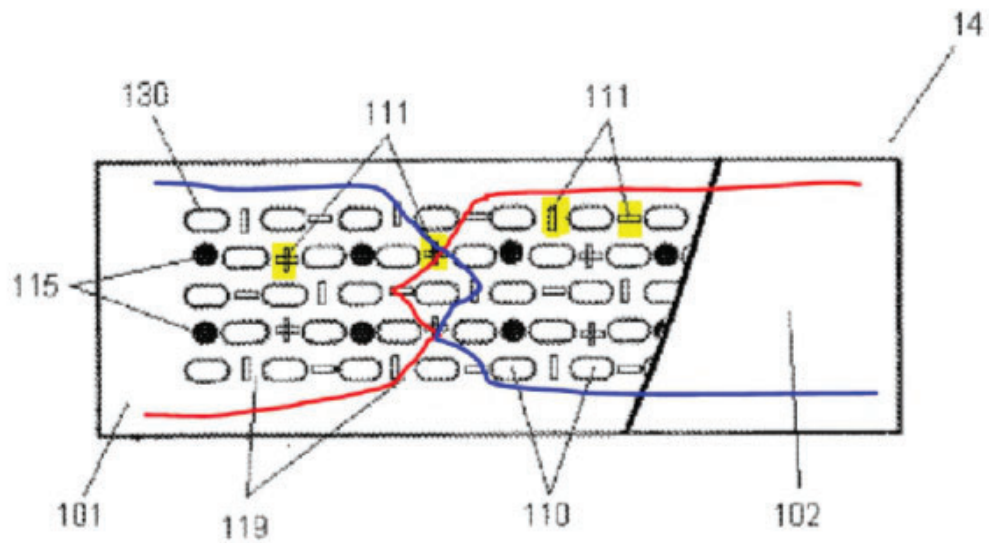
the oral proceedings, and that it should be admitted as a legitimate reaction thereto.

2.2.2 The Board found differently however. No new information was given by the Board. Nor was there a surprising development of the case.

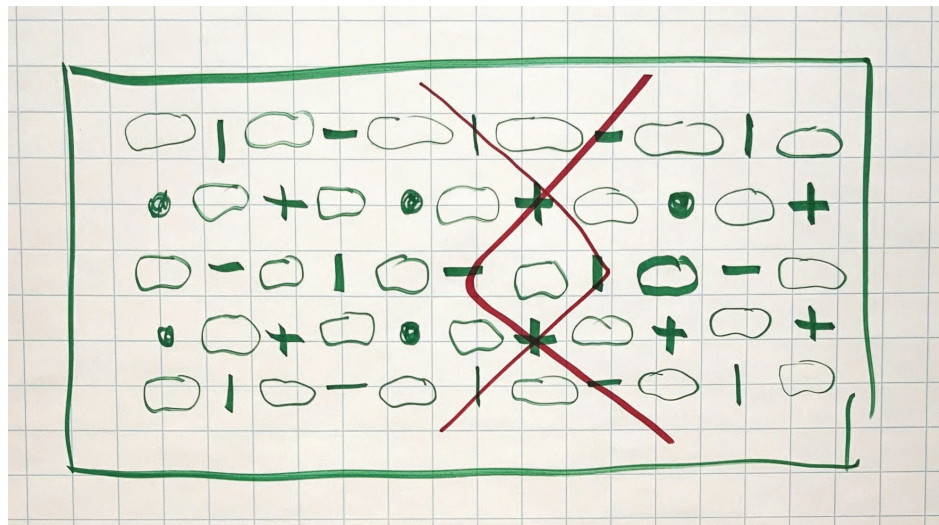
2.2.3 Article 13(2) RPBA

During the oral proceedings before the Board, and directly after the Chairman had announced the Board's conclusion on the main request, the Chairman explained the Board's understanding of opponent 1's novelty attack based on Fig. 2 of D7 to allow the proprietor to decide with which request it wished to proceed. He referred to Fig. 2 as annotated by opponent 1 in its grounds of appeal, page 12 (a copy thereof is reproduced below). To facilitate the understanding, the rapporteur then reproduced this drawing on the flip-chart, but did not include the longitudinal portions of the lines representing the attachment lines as perceived by opponent 1. The Chairman explained that these longitudinal portions were not necessary because the remaining portions already represented attachment lines fulfilling the wording of claim 1 of the main request, with the attachment zones being formed by permanent attachments only. Without being explicitly stated, it was clear that this aspect could become relevant for the assessment of novelty of the other pending claim requests, some being limited to 'permanent attachment zones' (e.g. auxiliary request 1 as then still on file, or auxiliary request 2 or 3), whilst several others lacked this limitation (e.g. auxiliary request 4 or 5).

FIGURE 2



Opponent 1's drawing as reproduced on page 12 of it's grounds of appeal



The drawing as reproduced by the rapporteur during the oral proceedings

The patent proprietor argued that the specific embodiment drawn by the rapporteur, i.e. without the longitudinal lines along the sides, and the explanations given by the Board, represented new information and that it was the first time that this particular embodiment was used for the novelty attack.

In response thereto, it argued that it had a right to present a new claim request as was done with auxiliary request 18 to overcome this objection.

This is not accepted. As also argued by opponent 1, the rapporteur's drawing evidently was an attempt to explain to the patent proprietor why the Board found the opponent 1's attack convincing and to give the patent proprietor the necessary understanding to be able to make a well-founded decision on the question of which auxiliary requests to proceed with.

The explanation given by the Board and the drawing on the flip-chart do not contain new information. They merely summarise and illustrate arguments already presented by opponent 1 and focus on those arguments which the Board followed and which were relevant for the disclosure of the claimed subject-matter in Fig. 2 of D7. The drawing reflected in particular the argument of opponent 1 that - based on the understanding of attachment zones as defined on page 2 of the reply and referring to paragraph [0210] of the specification of the patent in suit - any areas in Fig. 2 of D7 could be regarded as attachment zones as long as these encompassed primary or secondary attachments (111, 115) such that the claimed course of zones was disclosed in the embodiment of Fig. 2 in D7. Based on this reasoning and as also explicitly stated by opponent 1 in its reply, the lines defined in the reproduced drawing of Fig. 2 in the impugned decision were only exemplary and are not apt to limit the arguments provided thereon.

Hence, the Board merely focussed on the relevant aspects of arguments and figures which were already on file. Contrary to the proprietor's argument, this cannot be regarded as a new objection or a new

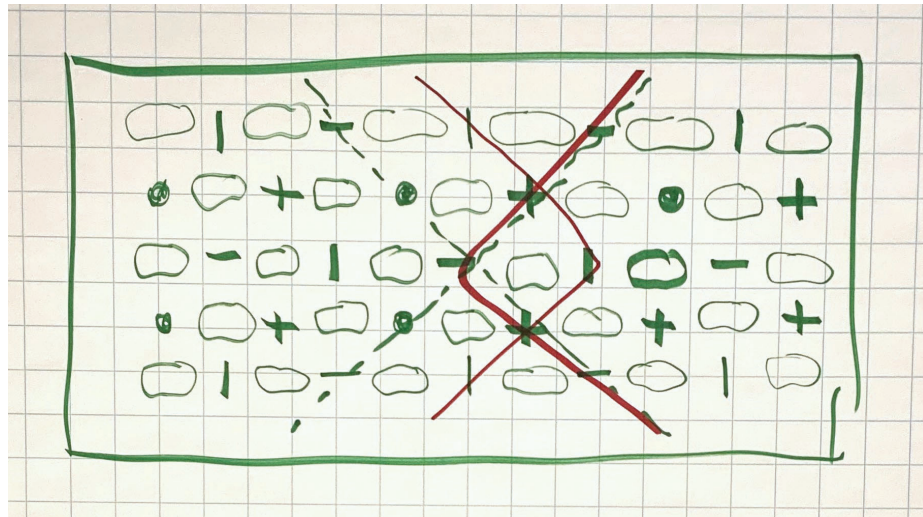
interpretation. Showing the parties a clear picture of the Board's considerations and conclusions in this manner does not establish exceptional circumstances in the sense of Article 13(2) RPBA that could justify the "refiling" of auxiliary request 18 only at this stage of the proceedings.

#### 2.2.4 Article 13(1) RPBA

Additionally to Article 13(2) RPBA, for a claim request submitted at this late stage of proceedings, the conditions set out in Article 13(1) RPBA also apply. As laid out therein, 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. It further states that 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.

In the present case, it has not been demonstrated that auxiliary request 18 overcomes, *prima facie*, the issues raised by the opponents because the subject-matter of claim 1 is not *prima facie* novel over D7. As argued by opponent 1, depending on the interpretation of the added feature of 'permanent attachment zones', these

can still be seen as covering zones including both permanent and non-permanent attachments. With the latter interpretation, 'permanent attachment zones' can be drawn in Fig. 2 of D7 which meet the further added feature that 'the first and second crossing point correspond with substantially the same point', i.e. that the attachment zones cross in a single point. During the discussion, this was indicated by dashed lines drawn by one of the parties in the rapporteur's drawing as follows:



The drawing as reproduced by the rapporteur and amended by one of the parties during the oral proceedings

Discussion would thus be necessary as to whether the claim was to be interpreted narrowly such that attachment zones with both permanent and non-permanent attachments were excluded. At least at first sight, the Board cannot see any reason to interpret the claim in a more limited way. The subject-matter of claim 1 is thus not *prima facie* novel over D7.

Therefore, the Board concluded that claim 1 of auxiliary request 18 was not *prima facie* allowable and

that Article 13(1) RPBA thus represented a further impediment for the admittance of this request into the proceedings.

2.3 The Board therefore exercised its discretion not to admit auxiliary request 18 into the proceedings.

3. *Auxiliary request 3*

The Board did not admit auxiliary request 3 into the proceedings, for several reasons.

3.1 Firstly, by changing the order of its requests, the patent proprietor has amended its appeal case. After it had withdrawn auxiliary request 1 and after it had decided to proceed with auxiliary request 18, auxiliary request 3 is no longer convergent with the higher ranking requests, because claim 1 of auxiliary request 3 does not contain the limitations introduced in auxiliary request 18. This is evidently detrimental to procedural economy, a factor to be taken into account under Article 12(4) RPBA when taking the discretionary decision of whether an amendment of a party's appeal case should be admitted by the Board.

Based on Article 12(4) RPBA, the Board thus exercised its discretion not to admit auxiliary request 3 into the appeal proceedings.

3.2 Additionally, in the proceedings before the opposition division, auxiliary request 3 was not admitted as it was late filed during the oral proceedings and the opposition division found that D7 was "*prima facie* relevant for the novelty of claim 1" (see reasons 6.3.3). As also stated in the Board's communication (see item 5.2.3, first and second sentence), the Board



sees no reason to overturn the discretionary decision of the opposition division not to admit this request. Nor did the patent proprietor argue that the opposition division applied its discretion in an improper way. The proprietor's argument that the opposition division's assessment of *prima facie* allowability was wrong, does not rely on a mistake in the application of the principles guiding the exercise of discretion.

During the oral proceedings before the Board, the patent proprietor instead argued that, if the Board found that the opposition division was fundamentally wrong in its substantive assessment, it had discretion to admit an auxiliary request even if the opposition division had applied its discretion correctly.

This is however not the case here, as the Board agrees with the opposition division's finding that D7 is *prima facie* relevant for the assessment of novelty. In other words, the subject-matter is not *prima facie* novel over D7. This was also stated in the Board's communication (see item 5.2.3) in which it indicated that it did not see a reason to deviate from the opposition division's assessment.

According to Article 12(6) RPBA, the Board shall not admit requests which were not admitted in the proceedings leading to the decision under appeal, unless the decision not to admit them suffered from an error in the use of discretion (which was not even argued by the patent proprietor, see above) or unless the circumstances of the appeal case justify their admittance. No such justifying circumstances are apparent. Nor have they been argued by the patent proprietor.

Based on Article 12(6) RPBA, the Board thus came to the same conclusion as with Article 12(4) RPBA. Auxiliary request 3 is thus not admitted into the proceedings.

4. *Auxiliary request 3\**

During the oral proceedings before the Board, and in reaction to the Board not admitting auxiliary request 18 or auxiliary request 3 into the proceedings, the patent proprietor filed a new auxiliary request 3\*, combining in its claim 1 the amendments made in auxiliary requests 3 and 18. However, despite both these amendments, the Board decided not to take auxiliary request 3\* into account (Article 13(2) RPBA), again for several reasons.

4.1 Firstly, inasmuch as it is based on auxiliary request 18, which itself was not substantiated and not admitted, auxiliary request 3\* is also not substantiated and thus does not fulfil the requirements of Article 12(3) RPBA, rendering it inadmissible under Article 12(5) RPBA (see section 2.1 above). The further attempts by the proprietor to provide substantiation during the oral proceedings before the Board cannot alter the Board's conclusion that no substantiation was provided earlier when required.

4.2 Secondly, for auxiliary request 3\* to be admitted under Article 13(2) RPBA, there would need to be exceptional circumstances that are justified with cogent reasons by the patent proprietor. As set out above (see section 2.2 above) the patent proprietor's argument that the information given by the Board was tantamount to a new case being put forward in the oral proceedings, is not accepted.

Also, by providing an explanation of the Board's understanding of the opponent's argument "that an attachment zone with some permanent attachments and one semi-permanent attachment zone is a permanent attachment zone" cannot be equated with a new objection by the Board. The opponent 1's argument that D7 shows permanent attachment zones is not new, as it was not presented for the first time during the oral proceedings before the Board. Explaining that this argument still applies to attachment zones comprising both permanent and non-permanent attachments is not a new argument. If anything, it is an explanation of how broad opponent 1 interprets the feature of 'permanent attachment zones' in claim 1 of auxiliary request 3\*, which was already evident from its submissions including the various drawings supplied.

4.3 The Board did thus not take auxiliary request 3\* into account.

5. *Auxiliary request 2*

Contrary to Article 123(2) EPC, claim 1 of auxiliary request 2 defines subject-matter extending beyond the content of the application as filed.

In its communication (see item 5.2.2), the Board indicated that it considered claim 1 as extending beyond the content of the application as filed. It further stated that paragraph [0010] of the published application (page 3, line 26 to page 4, line 2 of the application as filed) did not seem to provide a direct and unambiguous basis for the provision of exactly two channels in general, i.e. without the further definitions of their geometry.

After receipt of the communication, the patent proprietor did not provide any comment in this regard. Nor did it wish to discuss this matter at the oral proceedings. The Board thus has no reason to deviate from its preliminary opinion and confirms it herewith.

Auxiliary request 2 is thus not allowable.

6. *Auxiliary request 4*

The subject-matter of claim 1 of auxiliary request 4 is not novel over D7 (Article 54 EPC).

6.1 Claim 1 of auxiliary request 4 is further limited over the main request by feature F1.4, which defines that the first and second attachment zone each extends, seen in the transverse direction of the absorbent core, over the transverse distance which is at least 1 mm, preferably at least 3 mm, more preferably at least 4 mm, even more preferably at least 5 mm, most preferably at least 6 mm. In its broadest sense, the claim is thus limited to a transverse distance of the attachment zone of at least 1 mm.

6.2 In its communication (see item 5.2.4) the Board indicated that the subject-matter of claim 1 of auxiliary request 4 is seemingly not novel over D7. This was also argued by opponent 1 (see its reply to the patent proprietor's grounds of appeal, page 6, item 5.)

6.3 The patent proprietor presented no comments or arguments against this preliminary finding of the Board, nor against the objection of opponent 1. Only in the patent proprietor's grounds of appeal (see page 17, in particular the section titled "Novelty and inventive

step over D7" and the second paragraph thereof), did it refer to the "reasons as elaborated in view of the main request and auxiliary request III, *mutatis mutandis*".

The arguments with respect to the main request are however not convincing (see section 1. above) and the arguments in view of auxiliary request III do not apply, because claim 1 of auxiliary request III (now renamed as auxiliary request 3) is further limited to a transverse distance of at least 5 mm, as opposed to at least 1 mm as claimed in auxiliary request 4.

- 6.4 The Board thus has no reason to deviate from its preliminary opinion as given in its communication, which opinion is confirmed herewith.

Auxiliary request 4 is thus not allowable.

7. *Auxiliary request 5*

Claim 1 of auxiliary request 5 is not clear (Article 84 EPC).

- 7.1 As argued by both opponents in their respective grounds of appeal (opponent 1, section 5.2; opponent 2, section 3.), claim 1 of auxiliary request 5 includes the terms "upon wetting" and "immediately after wetting". Opponent 1 argued that for the channels to be created upon wetting, they could not exist before wetting. It was however not clear how much wetting was required for the channels to come into existence, whether any liquid and any amount led to their creation, and how quickly after wetting liquid was guided. Opponent 2 argued similarly. In its communication, the Board gave its preliminary opinion that the expressions in question were considered as lacking clarity in view of the

amount of wetting and the time these expressions might imply.

7.2 The patent proprietor argued that the structural features were the attachment zones which were present in the absorbent article when dry, and which accommodated the formation or creation of channels upon wetting due to swelling of the absorbent material in the absorbent core. In the oral proceedings before the Board, it further explained that this feature put a structural limitation on the attachment zones, as they had to be formed in a way which allowed guiding liquid from left to right and from right to left.

Even if this were accepted, it cannot change the Board's opinion as it does not clarify the terms "upon wetting" and "immediately after wetting" with respect to the amount of wetting or the time. The further argument of the patent proprietor that a skilled person knew that swelling of the absorbent material occurred upon wetting, is not convincing either. A skilled person certainly knows about this functionality. Yet it is unclear as a claim feature that should define the subject-matter to be protected by the patent, as the amount of time between the start of the wetting and the formation of channels is not clearly defined by the formulation "upon wetting". It cannot thus be distinguished what time is covered by the claim and what time lies outside thereof.

7.3 The patent proprietor further argued that the feature "two elongate channels are created ... such that, immediately after wetting, liquid is guided..." referred to a point in time when the channels are created and guide the fluid by mass flow, which mass flow is much higher than the capillary flow dominating

until the formation of channels. It should thus be clear what time was implied by the added feature.

This is not accepted either. The feature defines a result to be achieved, without stating the structural feature that actually achieves it. The claim thus covers any channels that start to guide liquid "immediately after wetting" without giving a clear definition of how long it may take to create the channels which should be those according to the invention. The skilled person also cannot know whether a given short duration is to be considered "immediately after wetting", while selecting several parameters such as the amount and type of absorbent material in order to arrive at the desired duration. At least for these reasons, such a claim is not clear in the sense of Article 84 EPC.

8. *Auxiliary requests 6-17 and 19-29*

Auxiliary requests 6-17 and 19-29 were not admitted into the proceedings (Article 12(5) RPBA). None of these requests was substantiated upon their filing, contrary to the requirements of Article 12(3) RPBA for the same reasons as set out above for auxiliary request 18. No different arguments than those already presented for auxiliary request 18 concerning any reason for the lack of substantiation of these requests, at least when filing the reply to the opponents' grounds of appeal, were given.

Also, in the oral proceedings before the Board, the patent proprietor abstained from making any further submissions in regard to the lacking substantiation of these requests, which had already been mentioned by the Board in its provisional opinion.

Therefore, with regard to their lacking substantiation, the same reasoning as given above for auxiliary request 18 applies *mutatis mutandis* to these requests.

Therefore, the Board exercised its discretion not to admit these requests according to Article 12(5) RPBA.

9. In summary, the patent proprietor's requests are thus either not admitted into the proceedings or are not allowable, such that the opponents' requests for revocation of the patent are justified.

## Order

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

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

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated