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**Datasheet for the decision
of 14 November 2024**

Case Number: T 0901/22 - 3.2.06

Application Number: 17198652.4

Publication Number: 3403630

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
Fippi SpA

Headword:

Relevant legal provisions:

EPC Art. 100(c), 54(3), 123(2), 112(1)(a)
RPBA 2020 Art. 13(2)

Keyword:

Grounds for opposition - extension of subject-matter (yes)

Novelty - (no)

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

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

Referral to the Enlarged Board of Appeal - (no)

Decisions cited:

T 1137/21, T 1621/16, T 3142/19

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0901/22 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 14 November 2024

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 February 2022 concerning maintenance of the
European Patent No. 3403630 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: T. Rosenblatt
 J. Hoppe

Summary of Facts and Submissions

- I. The patent proprietor and opponents 1 and 2 filed respective appeals against the interlocutory decision of the opposition division in which it was found that European patent No. 3 403 630 in an amended form met the requirements of the EPC.
- II. The parties were summoned to oral proceedings before the Board.
- III. In a subsequent communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), the Board informed the parties of its provisional opinion on the case.
- IV. Oral proceedings before the Board were held on 14 November 2024.
- V. The appellant-proprietor requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or that the patent be maintained in amended form in the given order based on one of the following auxiliary requests: first to fourth auxiliary requests (referred to in the minutes as auxiliary requests 1 to 4), auxiliary requests 4bis, 4ter, 4quater, fifth auxiliary request (referred to in the minutes as auxiliary request 5), auxiliary requests 5bis, 5ter, sixth or seventh auxiliary requests (referred to in the minutes as auxiliary requests 6 and 7), all filed with the appellant-proprietor's grounds of appeal on 4 July 2022, or based on the eighth auxiliary request (i.e. to dismiss the appellant-opponents' appeals), or based on auxiliary requests 8bis, 8ter, 8quater, 8quinques, 8bis', 8ter', 8quater',

all filed with the appellant-proprietor's grounds of appeal on 4 July 2022, or based on one of ninth to sixteenth auxiliary requests (referred to in the minutes as auxiliary requests 9 to 16), filed with the appellant-proprietor's reply on 12 December 2022.

The appellant-proprietor further requested to submit the following four questions, as set out in a document presented during the oral proceedings, to the Enlarged Board of Appeal:

"1. When a claim refers to two possible embodiments using an "or" construction as in the following example, can a limitation to one of those two embodiments be considered to be a selection from a list as described in the Case Law of the Boards of Appeal, 2022, II.E. 1.6.2?

Example:

Claim 1: Article

Claim 2: Article of claim 1 in accordance with feature A or in accordance with feature B

2. If the answer is yes, would the answer have been different if the features were claimed as:

Claim 1: Article

Claim 2: Article of claim 1 in accordance with feature A.

Claim 3: Article of claim 1 in accordance with feature B.

3. If the answer to question 1 is yes, would the answer have been different if the features were described in the description as belonging to mutually exclusive embodiments (e.g. one suitable for females and another one suitable for males)?

4. Some case law decisions decided that a combination of features is disclosed if there is a pointer for the combination of features in the application as filed.

However, the caselaw is not clear in what constitutes a pointer. The following questions are relevant for this case:

4.1 Can a combination of originally filed claims result in non-compliance of Article 123(2) EPC if those claims explicitly refer to each other?

4.2 When such a combined claim contains two lists of features, and in each list an element is deleted, can this result in non-compliance with Article 123(2) EPC? What is considered to be a list? Can two alternatives be considered to be a list? Can a selection from two "lists" with each only two mutually exclusive alternatives be considered to be an infringement of Article 123(2) EPC?

4.3 If the answer to the last question of 4.1 is yes, would the answer be different if the patent application includes examples including the combination of claimed features indicated as preferred features of the examples, in combination with other preferred features of the examples?

4.4 If the answer to the last question of 4.1 is yes, would the answer be different if the patent application includes a technical advantage of each of the "selected" alternatives?"

During the oral proceedings the appellant-proprietor stated that in questions 4.3 and 4.4 it should read correctly "the last question of 4.2".

VI. The appellant-opponents 1 and 2 requested that the decision under appeal be set aside and the European

patent be revoked.

VII. Claims 1, 8 and 9 of the patent as granted read (the added feature numbering in square brackets is according to the impugned decision, pages 5 and 6):

"1. [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, said absorbent core having a first and second longitudinal edge and a first and second transverse edge, said absorbent core having a first portion and a second portion on either side of a transverse crotch line (L), wherein the first transverse edge is a front edge intended to be positioned at a front side of a person, and the second transverse edge is a rear edge intended to be positioned at a rear side of a person; wherein the first portion of the absorbent core is a front portion (130a), and the second portion a rear portion (130b);*

[F2] *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, characterized in that said plurality of attachment zones comprises at least*

[F3] *- a first and a second elongate attachment zone (140, 150) extending next each other, at least in the first portion of the absorbent core in the direction of the first transverse edge (133) and*

[F4] *- a third and a fourth elongate attachment zone (160, 170) extending next to each other, at least in the second portion of the absorbent core, in the direction of the second transverse edge (134);*

[F5] wherein, measured in a transverse direction, a first maximum distance (d_{12}) between the first and the second attachment zone is at least 5% bigger than a second maximum distance (d_{34}) between the third and the fourth attachment zone.

8. The absorbent article of any one of the previous claims, wherein the distance between the first and the second attachment zone is between 15 and 70% of the width of the absorbent core, more preferably between 20 and 50%.

9. The absorbent article of any one of the previous claims, wherein the distance between the first and the second attachment zone is between 10 mm and 100 mm, more preferably between 20 mm and 80 mm, even more preferably between 30 mm and 70 mm."

Claim 1 of the **first auxiliary request** corresponds to claim 1 as granted.

Claim 1 of the **second auxiliary request** is amended in feature F5 by replacing the lower limit value of 5% to 10%.

Claim 1 of the **third auxiliary request** is amended in feature F5 by replacing the lower limit value by 20%.

Compared to claim 1 of the first auxiliary request, in claim 1 of the **fourth auxiliary request** the following feature has been appended after feature F5:

wherein the first attachment zone is separated from the third attachment zone by absorbent material, and wherein the second attachment zone is separated from the fourth attachment zone by absorbent material.

Claim 1 of **auxiliary requests 4bis, 4ter and 4quater** is unchanged compared to the fourth auxiliary request.

Compared to claim 1 of the fourth auxiliary request, in claim 1 of the **fifth auxiliary request** the following feature has been added:

wherein, seen in a projection on a longitudinal direction, the first and second attachment zone do not overlap or only partially overlap with the third and fourth attachment zone.

Claim 1 of **auxiliary requests 5bis and 5ter** is unchanged compared to the fifth auxiliary request.

Compared to claim 1 of the fifth auxiliary request, in claim 1 of the **sixth auxiliary request** the option defined in the added final feature "*or only partially overlap*" has been deleted, so as to read:

wherein, seen in a projection on a longitudinal direction, the first and second attachment zone do not overlap with the third and fourth attachment zone.

Compared to claim 1 of the sixth auxiliary request, in claim 1 of the **seventh auxiliary request** the following additional features have been appended:

*wherein the first attachment zone (140) and the second attachment zone (150) are substantially parallel and extend in a longitudinal direction of the absorbent core (130);
wherein the third attachment zone (160) and the fourth attachment zone (170) are substantially parallel and extend in the longitudinal direction of the absorbent core (130).*

Claim 1 of the **eighth auxiliary request** is based on claim 1 of the fourth auxiliary request, with the following feature appended:

wherein, seen in a projection on the longitudinal direction of the absorbent core, the first and the second attachment zone extend over a length which is less than the length of the third and fourth attachment zone.

The identical amended claim 1 of **auxiliary requests 8bis, 8ter, 8quater, 8quinques** is based on claim 1 of the first auxiliary request and comprises the same feature appended after feature F5 as added in the eighth auxiliary request.

Claim 1 of **auxiliary requests 8bis', 8ter', 8quater'** is unchanged compared to the eighth auxiliary request.

Claim 1 of the **ninth auxiliary request** is based on claim 1 of the eighth auxiliary request, with the further feature appended as in the sixth auxiliary request, i.e.

wherein, seen in a projection on a longitudinal direction, the first and second attachment zone do not overlap with the third and fourth attachment zone.

Claim 1 of the **tenth auxiliary request** is based on claim 1 of the ninth auxiliary request, with the further features appended as in the seventh auxiliary request, i.e.

wherein the first attachment zone (140) and the second attachment zone (150) are substantially parallel and extend in a longitudinal direction of the absorbent core (130);

wherein the third attachment zone (160) and the fourth attachment zone (170) are substantially parallel and extend in the longitudinal direction of the absorbent core (130).

Claim 1 of the **eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth auxiliary requests** is based respectively on claim 1 of the fifth, sixth, seventh, eighth, ninth and tenth auxiliary requests, with the lower limit value in feature F5 increased from 5% to 10%.

The patent as granted and all auxiliary requests also comprise a second independent claim 2, the wording of which is not relevant for the present decision.

VIII. The following document from the opposition proceedings is relevant to the present decision:

D4: EP 3 342 386 A1

IX. The arguments of the appellant-proprietor may be summarised as follows.

Main request - Article 100(c) EPC

Claims 8 and 9 of the patent defined two alternative ways of giving guidance for the distances between the attachment zones, either in relative or in absolute terms. This was supported by original claim 9 and paragraph 24 of the application as filed. The expressions "preferably" and "for example" in these passages of the application as filed should not be analysed on a purely linguistic and formalistic level, without taking into account what the skilled person would derive directly and unambiguously, using common

general knowledge, from the whole of these documents as filed.

First auxiliary request - Article 54(3) EPC

The decision of the opposition division on novelty of claim 1 was based on an unreasonably broad interpretation of the expression "attachment zone". It was neither disputed that the various attachment zones could be connected in some way to each other, nor that additional attachment zones could be present in the absorbent core. However, feature F2 in claim 1 referred to a plurality of attachment zones, which would appear meaningless if one attachment zone could always be seen as being constituted as a plurality of contiguous attachment zones. Paragraph 18 of the patent and claim 13 implied identifiable structural end points or semi-permanent attachment zones allowing for the distinction of the different attachment zones even in contiguous channels.

The reasoning of the opposition division greatly relied on the unreasonable mental subdivisions of the one U-shaped zone shown in Figure 1 of D4. Figure 1 of D4 would not be understood by the skilled person to disclose four elongate attachment zones, in particular since D4 emphasized in paragraph 121 the advantages of such "substantially interconnected channels". The several channel "portions" disclosed in D4 did not correspond to the claimed attachment zones.

During the oral proceedings before the Board, the appellant-proprietor argued that D4 did not disclose attachment zones according to feature F2 of claim 1, notably in regard to the required attachment of the top core wrap sheet to the back core wrap sheet. Bonding of

the top and lower wraps would have been disclosed in D4 only as an optional feature, for which it was not clearly derivable that it was realised also in the embodiment of Figure 1. Consequently, it would be required to apply the same strict standard in the assessment of novelty as for selection inventions in view of the requirement of added subject-matter as developed in the recent case law of the Boards of Appeal, as for example in T 1137/21. This argument, which was linked to the arguments concerning the interpretation of the expression "attachment zone" and constituted a development of the arguments already having been raised in the statement of grounds of appeal, reference being made to the third paragraph on page 4 and the last paragraph on page 7 to the first full paragraph on page 8.

Second and third auxiliary requests - Article 54(3) EPC

While it was acknowledged that, as a result of the perceived lack of novelty of claim 2 in the impugned decision an assessment of claim 1 of these requests was not strictly necessary, it would have been useful in this case.

Fourth auxiliary request - Article 123(2) EPC

Claim 1 was based on the combination of features derived from original claims 1, 3, 7 and 13. Claim 7 depended directly on claim 3 and so did claim 13 by its dependence on claim 7. The features derived notably from claims 3 and 7 did not involve any selection from lists of alternative features at all. The limitation of the difference between the maximum distances in the two portions of the absorbent article to the lowest lower limit, i.e. being at least 5% as disclosed in original

claim 3, constituted a quantification of a feature which was already defined in original claim 1 and therefore did not involve any selection among further features which might have been added to claim 1. The different options defined in claim 7 were directed to mutually exclusive embodiments of an absorbent article. The first option corresponded to products intended for male users whereas the second option was for female users, as further disclosed in paragraphs 21 and 22. Claim 7 could have been formulated as two dependent claims, so that no further selection amongst such options would then have been involved. The addition of the features corresponding to the first option of claim 7 only led to a limitation of the absorbent article to a product for male users. Paragraphs 11 and 14 together specifically taught that the maximum distance between the attachment zones should be bigger in the front portion than in the rear portion for male persons, without being linked to a difference of 5%. The embodiments in Figures 24A and 27B, together with paragraphs 292, 293, 298 provided further pointers to the combination of the lower limit of 5% for the difference in maximum distance for male users. Paragraph 30 pointed to the specific advantage of capillary bridges arising from the features derived from the first option of claim 13 in absorbent articles for female and male users, as was apparent from the application as a whole. Also this feature was present in the embodiments of Figure 24A and 27B and further supported or pointed to by paragraph 301. Claim 1 comprised all features which were also disclosed in the context of the embodiments of Figures 24A and 27B. All other features mentioned in the corresponding paragraphs of their description were disclosed as being optional and therefore did not require definition in the claim. Moreover, support for claim 1 was also found

in the embodiments of Figures 10, 11 and 12.

If the resulting subject-matter were considered to be based in part on selections at all, no selections from long lists were involved, contrary to the situation underlying recent decision T 1137/21. Moreover, the case law of the Boards of Appeal evolved in different directions as to the criteria to be applied for deciding on the disclosure of subject-matter deriving from several selections. For example, T 3142/19, T 1621/16 or the previously mentioned T 1137/21 all were based on longer lists, contrary to the present case. From this discrepancy it appeared necessary to refer questions to the Enlarged Board of Appeal (see above point V.).

Fifth to seventh auxiliary requests and auxiliary requests 4bis, 4ter, 4quater, 5bis and 5ter - Article 123(2) EPC

Support in the embodiments of the figures was sufficient, no further selections were made, the requirement of Article 123(2) EPC was thus fulfilled.

Eighth auxiliary request - Article 123(2) EPC

Claim 1 was based on a mere combination of original claims 1, 3, 5, 7 and 13 and did not involve any selections, as was clear from the explicit dependencies in claims 3, 5, 7 and 13. Its subject-matter was further supported by Figure 24A, in combination with paragraphs 292 and 293. The definition of ends was not required. Claim 1 was worded slightly differently, referring to elongated zones. These zones implicitly had an end. All other features of this embodiment not defined in claim 1 were disclosed as preferred

features. Further support could be found in Figure 27B, as also acknowledged by the opposition division in point 11.1.2 of the impugned decision, in which particularly the length feature was optional.

Auxiliary requests 8bis, 8ter, 8quater, 8quinques - Article 54(3) EPC

Claim 1 was novel over the absorbent article known from Figure 1 of D4. The added feature implied that the attachment zones comprised well-defined and distinguishable end points. A mental separation of the U-shape in Figure 1 of D4 in individual zones was artificial and would not have been understood from that figure with a mind willing to understand. If zones could be split arbitrarily, the entire definition made no sense. No lengths of corresponding attachment zones could be distinguished in Figure 1.

Auxiliary request 8bis', 8ter', 8quater', and ninth to sixteenth auxiliary requests - Article 123(2) EPC

For the corresponding reasons provided in respect to claim 1 of the respective seventh and eighth auxiliary requests, on which claim 1 of the tenth auxiliary request was based, the requirements of Article 123(2) EPC were met. Furthermore, Figure 24A as well as Figure 27B provided support and disclosure for the resulting subject-matter. The amended claim now defined that the attachment zones extend parallel and do not overlap, so that all features disclosed for these embodiments were now defined in combination. These considerations also applied to the sixteenth auxiliary request.

X. The arguments of appellant-opponents 1 and 2 may be summarised as follows.

Main request - Article 100(c) EPC

The separation of originally filed claim 9 into granted claims 8 and 9 added subject-matter. The application as filed did not provide a basis for separating the claimed percentage range from the claimed dimensional range for the distance between the first and second attachment zones. The expression "preferably" in original claim 9 clearly linked these two ranges. The first and second sentences of paragraph 24 did not relate to alternatives. They were rather drafted in conjunctive language.

First auxiliary request - Article 54(3) EPC

The appellant-proprietor's interpretation of the expression "attachment zone" was not supported by the wording of the claim. Paragraph 18 explicitly stated that attachment zones could be connected and claim 13, relating to semi-permanent zones, was a dependent claim, so that claim 1 was broader and thus included connections without requiring semi-permanent zones.

The appellant-proprietor's arguments submitted during the oral proceedings, directed to the alleged lack of disclosure of feature F2, constituted an amendment to its case which should not be admitted. No arguments regarding this newly alleged difference had been submitted with the appeal grounds in reply to the corresponding reasoning in the impugned decision. No exceptional circumstances had been indicated justifying the admittance of these arguments.

Second and third auxiliary requests - Article 54(3) EPC

Claim 1 of the second and third auxiliary requests simply amended claim 1 of the first auxiliary request by the distance d12 being respectively 10% and 20% bigger than distance d34. These features were already present in D4, in e.g. paragraph [0134] and claim 5.

Fourth auxiliary request - Article 123(2) EPC

Claim 1 was based on at least eight selections of features, involving selections of particular dependent claims and among options defined in these selected claims. There was neither a single disclosure nor a pointer to such a specific combination of all these features. The passages from the description referred to by the appellant-proprietor did not support the alleged disclosure. The final sentence of paragraph 14 indicated to the skilled person that a difference of 5% in the maximum distances between the attachment zones was not sufficient and should instead be bigger. Figure 24A was a photograph of an absorbent article which had attachment zones of specific configuration, positioning and dimensions, which were however not defined in claim 1. Figures 24B and 24C showed the same article in the wet state where the attachment zones, which were separated in the dry state according to Figure 24A, were connected. Similarly, Figure 27B was a specific embodiment relating indeed to one of the options disclosed in original claim 13. However, the absorbent core in Figure 27B was linked to the absorbent article shown in Figure 27A, as per the corresponding paragraphs 297 and 298. Many features, like the fastening system, of the absorbent article of Figure 27A were not included in claim 1. Moreover, paragraph 298, relating to Figure 27B, stated that the distance between the third and fourth attachment zones "is"

between 5 and 60% of the width of the absorbent article, which was thus not presented as an optional feature and was therefore unallowably omitted.

Concerning Figures 10 to 12, these were directed to specific embodiments and features, all of which were not included in the claims e.g. non suction zones and sealing patterns, as was clear from column 19, line 50 to column 20, line 27 of the application as filed.

*Fifth to seventh auxiliary requests - Article 123(2)
EPC*

Claim 1 of the fifth auxiliary request included the same limitations as the fourth auxiliary request. Hence, claim 1 already contained the same added matter issues. Claim 1 included a further limitation. If this amendment was seen to be based on original claim 12, the latter lacked the further option "partially overlap" now defined in claim 1.

The sixth auxiliary request corresponded to the fifth auxiliary request, but without the "partially overlap" option. Hence, for at least the same reasons as applied to the fifth auxiliary request, claim 1 of the sixth auxiliary request comprised added subject-matter.

Claim 1 of the seventh auxiliary request had the same limitations as the sixth auxiliary request. Hence, claim 1 already contained the same added matter issues as the sixth auxiliary request. The additional feature added to claim 1 was allegedly based on paragraphs 37 and 38 of the original application. However, these paragraphs showed that a further selection had to be made between either the substantially parallel arrangement or being at angles less than 5°. There was

no pointer to such a specific combination of the totality of these features.

Eighth auxiliary request - Article 123(2) EPC

Claim 1 was based on more than eight selections of features based on original claims 1, 3, 5, 7 and 13, involving selections of particular dependent claims and among options defined in these selected claims. Out of all possible feature combinations arising from the original claims, the appellant-proprietor had selected a very specific number of features in a very specific combination, which combination did not appear in any single embodiment in the application as filed. In as far as reliance was additionally placed on Figures 24A or 27B, these showed specific shaping, dimensioning and positioning of exactly four attachment zones, nothing of which was defined in claim 1.

Auxiliary requests 8bis, 8ter, 8quater, 8quinques - Article 54(3) EPC

In its statement of grounds of appeal (section 5.2.1), appellant-opponent 1 highlighted the contradiction in the reasoning of the opposition division, in sections 11.2 and 6.2.7.1 of the impugned decision concerning the conceptual sub-division of the channels or attachment zones known from D4. It argued in particular with respect to the feature directed to the different lengths of extension of the two couples of attachment zones, specified in claim 1 of the present auxiliary requests 8bis, 8ter, 8quater, 8quinques, that with an acknowledged conceptual sub-division of such U-shaped channels in different attachment zones, the expression "length" could also not define or require a specific length for the respective channels. At least relative

length difference, as required by *inter alia* claim 1, could be derived from the Figures in D4 for the four zones.

Auxiliary request 8bis', 8ter', 8quater', and ninth to sixteenth auxiliary requests

The requests lacked substantiation and should not be admitted into the proceedings. To the extent that they related to combinations of other auxiliary requests, they would have the same deficiencies and would *inter alia* contravene Article 123(2) EPC.

Reasons for the Decision

Main Request - Article 100(c) EPC

1. The Board agrees with the finding of the opposition division in the impugned decision that the subject-matter of granted claim 9 extends beyond the content of the application as originally filed.
- 1.1 The question to be examined under the opposition ground pursuant to Article 100(c) EPC and similarly with respect to the compliance of later amendments in regard to the requirement of Article 123(2) EPC, is whether the relevant claim defines subject-matter which is directly and unambiguously derivable by a skilled person, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the documents as filed (see e.g. Reasons 4.3 in the Decision of the Enlarged Board of Appeal

G 2/10, OJ EPO 2012, 376).

1.2 For the purpose of examining the patent in regard to the opposition ground pursuant to Article 100(c) EPC, or for examining amended claims for compliance with the requirements of Article 123(2) EPC, reference will be made to the published application (EP 3 403 630 A1) which may be considered to be identical in content with the originally filed application underlying the patent in suit.

1.3 Dependent claims 8 and 9 of the granted patent are based on originally filed dependent claim 9, which reads

"The absorbent article of any one of the previous claims, wherein the distance between the first and the second attachment zone is between 15 and 70% of the width of the absorbent core, more preferably between 20 and 50%; wherein preferably the distance between the first and the second attachment zone is between 10 mm and 100 mm, more preferably between 20 mm and 80 mm, even more preferably between 30 mm and 70 mm."

The first part of originally filed claim 9, relating to the relative distance of attachment zones compared to the core's width, corresponds to the subject-matter of granted claim 8 and the second part, following on from the expression "wherein preferably..." and relating to absolute distances of the attachment zones, corresponds to the subject-matter of granted claim 9. By the expression "wherein preferably" in original claim 9 the skilled person would have understood the absolute distances defined in the second part of original claim 9 as constituting preferred distances of the attachment zones when their relative distances fall within the

precedingly defined percentage ranges.

1.4 Both of the granted claims are made dependent "on any one of the previous claims". The absolute distances in granted claim 9 have thus been defined independently of the relative distances in granted claim 8. The dependency of the absolute distances as a preferred embodiment of the attachment zones when they have the relative distances of granted claim 8, as defined in originally filed claim 9, is no longer required, leading to subject-matter which is not disclosed in the originally filed claims.

1.5 As further support for its contention that the subject-matter of granted claim 9 was disclosed independently of the first part of original claim 9, now forming the subject-matter of granted claim 8, the appellant-proprietor relied on paragraph 24 of the application as filed. Paragraph 24 reads

"The distance between the first and the second attachment zone may be between 15 and 70% of the width of the absorbent core, more preferably between 20 and 50%. For example, the distance between the first and the second attachment zone may be between 10 mm and 100 mm, more preferably between 20 mm and 80 mm, preferably between 30 mm and 70 mm."

According to the appellant-proprietor, this passage, as well as the wording of original claim 9 would be understood by the skilled person as two alternative ways of giving guidance for determining suitable distances, one in relative terms and the other in absolute terms.

1.6 As already indicated in its communication pursuant to Article 15(1) RPBA, the Board can agree that the interpretation of the appellant-proprietor of the relevant parts of the application as filed (claim 9 and paragraph 24 of the published application) as referring to two alternative ways of giving guidance for determining suitable distances, is a possible one. However, the other reading adopted by the opposition division and the appellant-opponents cannot be excluded. Hence the relevant parts of the application as filed at least do not unambiguously disclose the two features defined in granted claims 8 and 9 as being independent of each other.

1.7 During the oral proceedings before the Board, the appellant-proprietor essentially maintained its written submissions, acknowledging also that the combined reading of the two alternate ways of defining the distances was not excluded. The Board therefore had no reason to change its provisional opinion which was consequently confirmed.

2. The Board thus concludes that the ground for opposition pursuant to Article 100(c) EPC prejudices maintenance of the patent as granted. The main request of the appellant-proprietor is therefore not allowable.

First auxiliary request - Article 54 EPC

3. The Board also confirms the conclusion of the opposition division in the impugned division in regard to lack of novelty of the subject-matter of claim 1 with respect to the absorbent article comprising an absorbent core according to Figure 1 of D4 (Article 54(3) EPC).

- 3.1 Based on its interpretation of the wording of claim 1 in section 6.2.3 of the reasons for the impugned decision, the opposition division substantiated (in the subsequent section 6.2.7.1.3) its conclusion that the subject-matter of claim 1 lacked novelty in view of the absorbent article comprising an absorbent core according to Figure 1 of D4.
- 3.2 The appellant-proprietor's central argument submitted with the statement of grounds of appeal and by which the conclusion of the opposition division on this aspect was contested, relied in essence on a narrow interpretation of the expression "attachment zone". The expression allegedly implied the presence of identifiable ends, making each one of the plurality of attachment zones recognisable also in case the attachment zones were connected to each other.
- 3.3 However, as already stated in the Board's communication pursuant to Article 15(1) RPBA, the wording of claim 1 does not support such a narrow interpretation. It was even acknowledged by the appellant-proprietor that attachment zones may be connected to each other. However, claim 1 does not refer to specific (structurally) identifiable end points. The passages referred to by the appellant-proprietor in paragraph 18 and in claim 13, if they were to imply the presence of such identifiable ends at all, are not in the claims and thus do not limit the claimed subject-matter.

The Board cannot see any difference in terms of structural features implied by the expression "attachment zone" when a first and a third zone are arranged so as to form a continuous attachment zone compared to the substantially interconnected channel 106 disclosed in Figure 1 of D4. In paragraph 129 of

D4, reference is made indeed to several, thus a plurality of channel "portions" (107,108,109,110,111) which are comprised by the interconnected channel 106. Without any further clear structural limitation defined by claim 1 of auxiliary request 1, the feature "[attachment] zone" in claim 1 cannot be distinguished from a "[channel] portion" as known from D4.

3.4 During the oral proceedings, the appellant-proprietor further contested that the channel disclosed in Figure 1 of D4 comprised attachment zones within the meaning of feature F2 of claim 1, disputing specifically that the top and lower wrap sheets used in the embodiment of Figure 1 of D4 were attached or bonded to each other. Bonding of sheets would have been disclosed only as an optional step of forming the channels. The novelty objection thus required multiple selections in D4, which was not compliant with the requirement for a direct and unambiguous disclosure.

3.4.1 The allegation that claim 1 differed by a further feature from the disclosure in D4 and the arguments in support of this were submitted for the first time during the oral proceedings before the Board, rather than with the appellant-proprietor's statement of grounds of appeal. The question thus arose whether these constituted an amendment to the appellant-proprietor's case within the meaning of Article 13 RPBA, and if so, whether they should be admitted under the provision of Article 13(2) RPBA.

3.4.2 The Board was not convinced by the appellant-proprietor's contention considering the arguments as a development of its case submitted in the statement of grounds of appeal for the following reasons.

The appellant-proprietor notably referred to the passage bridging pages 7 and 8 of its statement of grounds of appeal. However the arguments in that passage are directed to a novelty objection against the other independent claim 2, based on a different embodiment of D4, namely Figure 4D. The specific paragraph 138 of the description cited by the appellant-proprietor in this context is explicitly directed to that Figure. In regard to the novelty objection against claim 1 and based on the different embodiment of Figure 1 of D4, the appellant-proprietor did not question the reasoning of the opposition division in the impugned decision in regard to the requirement that the nonwoven webs forming the top and back wraps for the absorbent core in the embodiment of Figure 1 of D4 were attached to each other so as to form a channel (portion) corresponding to attachment zones according to feature F2 of claim 1.

The appellant-proprietor's argument in the statement of grounds of appeal in regard to claim 2 is moreover limited to the contention that the nonwoven webs were not attached and for this reason could not be considered to constitute attachment zones within the meaning of the claim. The contention that this was a novel feature over the disclosure in D4 based on the argument that multiple selections had to be performed in D4 in order to arrive at the subject-matter of claim 1 was not made.

Neither the further passage of the statement of grounds of appeal referred to by the appellant-proprietor, i.e. the third paragraph on page 4, nor any other paragraph in this section of the statement of grounds of appeal, comprises any indication that the disclosure of feature F2 in the embodiment of Figure 1 of D4 was challenged

on the mentioned aspects.

Furthermore, appellant-opponent 1 highlighted in section 2.2 on the third page of its reply to the appellant-proprietor's statement of grounds of appeal that the appellant-proprietor's arguments were essentially concentrating on the issue of claim interpretation. In none of the appellant-proprietor's letters submitted after the reply of appellant-opponent 1 were there any further substantive submissions in the aforementioned regard, besides those based on claim interpretation as presented in its statement of grounds of appeal.

The Board therefore concluded that the submissions referred to above and made for the first time during the oral proceedings were far from being a development of the appellant-proprietor's case and instead constituted an amendment to the appellant-proprietor's appeal case.

- 3.4.3 Since this amendment was made after notification of a communication under Article 15(1) RPBA, it shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned (Article 13(2) RPBA).

In the present case there are no such exceptional circumstances.

The appellant-proprietor only pointed to a notionally ever more strict approach of the Boards of Appeal when examining the extension of subject-matter beyond the content of the original application where multiple selections may be involved. However, the Board cannot

see that the decision T 1137/21 cited by the appellant would have introduced a stricter approach to this issue which could have had an unexpected effect when applied by analogy to the question of novelty in the present case. Finally, the appellant also did not provide any reasons why the new submissions during the oral proceedings could not have been submitted earlier.

3.4.4 For these reasons the Board exercised its discretion not to take the appellant-proprietor's amended case into account (Article 13(2) RPBA).

3.5 The Board therefore concluded that the subject-matter of claim 1 of the first auxiliary request does not comply with the requirements of Article 54 EPC.

4. The appellant-proprietor's request to maintain the patent in amended form with the claims according to the first auxiliary request cannot therefore be allowed.

Second and third auxiliary requests - Article 54(3) EPC

5. In the communication pursuant to Article 15(1) RPBA, the Board gave the following preliminary opinion on the novelty of claim 1 of the second and third auxiliary requests:

"In independent claim 1 of auxiliary requests 2 and 3 respectively, the lower boundary of the difference between the first maximum distance of the first and second attachment zones and the second maximum distance of the third and fourth attachment zones has been changed to 10% and 20%, respectively. The appellant-proprietor has not argued that this modification could change the finding on novelty of claim 1 (according to the

main or first auxiliary request) in regard to the absorbent article comprising an absorbent core according to Figure 1 of D4. The appellant-proprietor's argument appears to rely seemingly only on the perceived difference of the claimed subject-matter to this embodiment in view of the meaning of the term "attachment zone". This argument is however considered unconvincing by the Board for the reasons set out above. In view of the disclosure in paragraph 134 of D4, the Board considers claim 1 of both requests to still lack novelty (Article 54(3) EPC)."

During the oral proceedings before the Board the appellant-proprietor elected not to make any further submissions in this regard. The Board therefore has no reason to deviate from the preliminary opinion, which is hereby confirmed.

6. Since the subject-matter of claim 1 of the second and third auxiliary requests does not meet the requirement of Article 54 EPC, the appellant-proprietor's request for maintenance of the patent in amended form based on the claims according to these requests cannot be allowed.

Fourth auxiliary request - Article 123(2) EPC

7. The conclusion of the opposition division that the subject-matter of claim 1 of the fourth auxiliary request met the requirements of Article 123(2) EPC does not withstand a review by the Board. On the contrary, the Board concludes that the subject-matter of claim 1 of the fourth auxiliary request extends beyond the content of the application as filed.

7.1 It is undisputed that original claims 1, 3, 7 and 13 form the basis for claim 1 of the fourth auxiliary request. Claims 1, 3, 7, and 13 have the following wording:

"1. 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, said absorbent core having a first and second longitudinal edge and a first and second transverse edge, said absorbent core having a first portion (130a), (130b) and a second portion (130b), (130a) on either side of a transverse crotch line (L), 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, said plurality of attachment zones comprising at least

- a first and a second elongate attachment zone (140, 150); (160, 170) extending next each other, at least in the first portion of the absorbent core in the direction of the first transverse edge (133), (134), and*
- a third and a fourth elongate attachment zone (160, 170); (140, 150) extending next to each other, at least in the second portion of the absorbent core, in the direction of the second transverse edge (134), (133);*

wherein, measured in a transverse direction, a first maximum distance (d12), (d34) between the first and the second attachment zone is bigger than a second maximum distance (d34), (d12) between the third and the fourth attachment zone."

"3. The absorbent article of claim 1, wherein the first distance between the first and the second attachment zone is at least 5%, preferably at least 10% bigger, even more preferably at least 20% bigger than a second distance between the third and the fourth attachment zone"

"7. The absorbent article of any one of the previous claims,
wherein the first transverse edge is a front edge intended to be positioned at a front side of a person, and the second transverse edge is a rear edge intended to be positioned at a rear side of a person; wherein the first portion of the absorbent core is a front portion, and the second portion a rear portion;

or

wherein the first transverse edge is a rear edge intended to be positioned at a rear side of a person, and the second transverse edge is a front edge intended to be positioned at a front side of a person; wherein the first portion of the absorbent core is a rear portion, and the second portion a front portion"

"13. The absorbent article according to claim 1 optionally in combination with any one of the claims 7-12, wherein the first attachment zone is separated from the third attachment zone by absorbent material, and wherein the second attachment zone is separated from the fourth attachment zone by absorbent material;

and/or

wherein the first attachment zone is connected to the third attachment zone through a first semi-permanent attachment zone and wherein the second

attachment zone is connected to the fourth attachment zone through a second semi-permanent attachment zone."

- 7.2 More specifically, compared to original claim 1, claim 1 of the fourth auxiliary request is based on the following combination of features. The difference of the first and second maximum distances (d12, d34), for which original claim 1 required only the first to be bigger than the second maximum distance, has been limited to being bigger by at least 5% (see feature F5 in granted claim 1), according to the broadest range specified in original claim 3. Additionally, the features corresponding to the first option of original claim 7 have been inserted (see feature F1, before feature F2, of granted claim 1) and the features corresponding to the first option of original claim 13 have been added after feature F5.
- 7.3 This combination of features is not directly and unambiguously derivable from the claims as originally filed.
- 7.3.1 Contrary to the appellant-proprietor's view, the resulting combination of features is based on specific choices made amongst multiple options available to amend original claim 1, which are given by the dependencies defined in the cited dependent claims and by the options or alternatives defined in each of them. Whether such choices among these multiple possibilities could be considered conceptually as corresponding to selections from longer or shorter lists is irrelevant for the issue to be decided. The question to be answered is simply the one referred to in point 1.1 above.

7.3.2 The feature combination arising solely from original claims 1 and 3 relies on at least two selections amongst a number of alternative choices available to limit the subject-matter of original claim 1, as also argued by appellant-opponent 1 in its statement of grounds of appeal with respect to a similar combination of features underlying claim 1 of the eighth auxiliary request and in its reply to the appellant-proprietor's statement of grounds of appeal in the context of the present auxiliary request. A first selection involves the limitation of the absorbent article of original claim 1 by further specifying a lower limit for the difference between the first and second maximum distances (d12, d34) according to original claim 3, whereas, for example, the limitation in claims 4 and 5 or 8 (which also also depend on claim 1 and which represent alternative feature combinations) could equally have been chosen.

Requiring the difference in the first and second distances to be "at least 5%" relies on a further selection among the options defined in original claim 3. The appellant-proprietor considers this limitation of the subject-matter of original claim 1 by the feature of original claim 3 to only constitute a quantification of a feature already defined in the original claim 1, rather than a selection of an additional feature. In regard to the question to be answered according to point 1.1 above, the Board considers it irrelevant whether an additional (structural) feature is added to claim 1 or whether some feature defined in it is further specified (or quantified). Both types of amendments result in specifically limited subject-matter for which the above question must be answered.

7.3.3 While an amendment to claim 1 based exclusively on a selection of features taken from a single dependent claim, depending exclusively on claim 1, such as here original dependent claim 3, could generally be considered as being compliant with the requirements of Article 123(2) EPC, this conclusion does not necessarily hold any more in the case that further features taken from other dependent claims are combined with it. There may of course be instances where features from many dependent claims could be combined without infringing Article 123(2) EPC, for example, if the dependent claims are linked by direct and unambiguous dependencies. However, there is no general rule for deciding on what may be allowable, it is rather a question which has to be decided on the facts of each case (see also the last paragraph in Reasons 1.4 of T 1137/21).

7.3.4 In the present case, the back-references in original dependent claim 13 do not directly and unambiguously link the feature corresponding to its first option to that of, for example, the first option in original claim 7. Such a combination of features may indeed be seen to be "covered" by original claim 13 as argued by the appellant-proprietor. However, it is not enough to be covered. A claim referring to an electric conductor made of metal may cover all sorts of metallic conductors, without nevertheless disclosing a conductor made e.g. of silver. Similarly, the dependency in claim 13, which only optionally goes back to any of claims 7 to 12, covers many options by the back-references and even more by the presence of optional features specified in these individual claims, without disclosing any specific feature combination of one of the options according to claim 13 and one of the features resulting from any of the other dependent

claims covered. Amongst the possible permutations of features covered by original claim 13, many do not at all involve a combination with any of the features of original dependent claim 7, or such permutations may involve the second or third option of claim 13 in combination with the second option in claim 7. It is, moreover, not apparent that the features corresponding to the first option of claim 13 would unambiguously require the presence of the feature corresponding to the first option selected from claim 7. Still further, the possible multiple combinations arising from the dependencies and optional features defined in claim 13 do not necessarily require the presence of a lower boundary for the maximum distance relationship as defined in original claim 3. Consequently, the fact that claim 13 explicitly refers to claim 7, which in turn explicitly refers to claim 3, does not lead to a different conclusion.

7.3.5 The subject-matter of claim 1 therefore relies on a number of selections from the multiple options defined in the cited dependent original claims leading to subject-matter which is not directly and unambiguously derivable from the claims themselves.

7.4 Contrary to the appellant-proprietor's arguments, the Board can also not find any support, let alone a disclosure for this claimed combination of features in the remaining parts of the application as filed, i.e. in the description and figures.

7.4.1 The Board is neither convinced that the passages from the description or figures provide a pointer to the combination of the specific features based on original claims 3 and 7 as being particularly advantageous for male users, nor that there is some pointer to

embodiments of absorbent articles for male users (or female users) comprising a capillary bridge as allegedly implied by the features based on the first option of original claims 13.

It is first noted that neither the original claims nor present claim 1 comprise any indication that such a combination of features is intended for male users, let alone for absorbent articles for male users comprising capillary bridges.

The passages from the different parts of the description (paragraphs 11, 14, 21, 292, 293, 298) or the Figures 24A or 27B, referred to by the appellant-proprietor in this context, do not support its contention for the existence of a pointer, let alone that they could provide a direct and unambiguous disclosure for the combination of features in the claimed generality.

- (a) Paragraph 11, in the general part of the description, mentions that for a male person the maximum distance of attachment zones may be bigger in a front portion than in the rear portion (and inversely for a female person). Although such a configuration would indeed correspond to an absorbent article comprising the features of claim 1 and according to the first option of claim 7, there is no lower limit, as in claim 3, indicated for the difference between the maximum distances in the respective front and rear portions, let alone any indication pointing to the features of original claim 13 (or to a particular relevance of providing capillary bridges between attachment zones).
- (b) The content of the first sentence of paragraph 14 from the general part of the description

corresponds essentially to original claim 3 (see above point 7.1). According to the next sentence of that paragraph the difference between first and second maximum distances may be optimised in function of the desired use. This is followed by the statement "[f]or example, for male persons the difference may be bigger", on which the appellant-proprietor relied in particular. The Board however finds that the skilled person would understand this last statement in the context of the entire paragraph. Taking into account the three gradually increasing lower limits indicated for this difference in the first sentence, the skilled person would understand that a difference being bigger for application to a male user would specifically point away from such difference being only "at least 5%". It rather indicates a higher difference than 5%, as also argued by appellant-opponent 1 during the oral proceedings. Moreover, this paragraph does not indicate whether the attachment zones with bigger maximum distance lie in the front or back portion, as further argued by appellant-opponent 1.

- (c) The statements in paragraphs 21 and 22, which correspond in wording to the two (mutually exclusive) options defined in original claim 7, neither establish any link to the features concerning the difference between first and second maximum distances nor to features providing a capillary bridge function as mentioned in paragraph 30.
- (d) Paragraph 30 indeed relates to the features corresponding to the first option defined in original claim 13, setting out their usefulness for providing a capillary bridge between attachment zones. However there is no link to any of the other

features considered before, let alone to specific advantages for male users.

- (e) The embodiments of absorbent articles according to Figures 24A and 27B, together with the relevant passages of the description relied upon by the appellant-proprietor (paragraphs 292, 293, 298, 301, 303), do not put a different light on the issue to be decided. Although these embodiments indeed comprise all features defined in claim 1, they cannot be considered to constitute a pointer to or provide a basis for the more general subject-matter of claim 1. The Board can accept that many of the features of these embodiments are indeed marked as preferred in the cited passages, as argued by the appellant-proprietor. However, both cited figures and the cited paragraphs also disclose a number of features for which there is no indication that they may be optional. For example, the description in paragraphs 292 and 293 relies on Figure 24A, which is a photograph of an absorbent article. This absorbent article has specifically shaped and dimensioned attachment zones at specific locations, as also pointed out by appellant-opponent 1 during the oral proceedings. Claim 1, on the other hand, does not exclude that, for example, more than four attachment zones may be present and, moreover, does not define any specific shape or extent of the attachment zone. Figure 24A discloses exactly four straight attachment zones. The absorbent article disclosed in Figure 27B, together with its description in paragraphs 298 to 308, very similar to the one of Figure 24A, also comprises exactly four straight attachment zones with their respective ends all adjacent absorbent material (see also paragraph 301). Both embodiments have many more features in common, which are not

disclosed as optional, than only the features taken from original claim 3 and from the respective first options defined in original claims 7 and 13, so that a pointer to such generalised subject-matter, let alone a direct and unambiguous disclosure of it, cannot be found in these passages.

- 7.5 At least for these reasons claim 1 of the fourth auxiliary request contravenes Article 123(2) EPC.

Referral of questions to the Enlarged Board of Appeal

8. In the course of the parties' oral submissions on the question of whether claim 1 of the fourth auxiliary request met the requirements of Article 123(2) EPC, the appellant-proprietor submitted a set of questions to be referred to the Enlarged Board of Appeal (see above point V.). The Board decided to refuse this request for the following reasons (Article 112(1) (a) EPC).
- 8.1 According to Article 112(1) (a) EPC, the Board of appeal shall, following a request from a party to the appeal, refer any question to the Enlarged Board of Appeal if it considers that a decision is required in order to ensure uniform application of the law, or if a point of law of fundamental importance arises.
- 8.2 The Board does not consider a decision on the referred questions by the Enlarged Board of Appeal necessary, because it is on the one hand not apparent from the appellant-proprietor's submissions that the law is not applied uniformly on the relevant issues.

No divergent case law has been identified by the appellant-proprietor on the outstanding issues. The three decisions cited by the appellant-proprietor,

T 1621/16, T 3142/19 and T 1137/21, just turn on their own facts. It has not been demonstrated that the respective deciding Board had reached diverging conclusions or applied contradicting principles when deciding on the requirement of Article 123(2) EPC.

8.3 The Board also cannot see that a point of law of fundamental importance arises from the considerations relevant to the outcome of the present case and is also not addressed in the presented questions. As far as relevant to the present case, the Board is also competent to answer the questions itself:

(a) *"1. When a claim refers to two possible embodiments using an "or" construction as in the following example, can a limitation to one of those two embodiments be considered to be a selection from a list as described in the Case Law of the Boards of Appeal, 2022, II.E.1.6.2?"*

Example:

Claim 1: Article

Claim 2: Article of claim 1 in accordance with feature A or in accordance with feature B"

The Board answers this in the affirmative.

(b) *"2. If the answer is yes, would the answer have been different if the features were claimed as:*

Claim 1: Article

Claim 2: Article of claim 1 in accordance with feature A.

Claim 3: Article of claim 1 in accordance with feature B."

This question is not relevant to the outcome of the present case, since the underlying facts are

different; correspondingly (re-)worded claims are not a subject of these appeal proceedings.

(c) "3. *If the answer to question 1 is yes, would the answer have been different if the features were described in the description as belonging to mutually exclusive embodiments (e.g. one suitable for females and another one suitable for males)?*

4. *Some case law decisions decided that a combination of features is disclosed if there is a pointer for the combination of features in the application as filed.*

However, the caselaw is not clear in what constitutes a pointer. The following questions are relevant for this case:

4.1 *Can a combination of originally filed claims result in non-compliance of Article 123(2) EPC if those claims explicitly refer to each other?*

4.2 *When such a combined claim contains two lists of features, and in each list an element is deleted, can this result in non-compliance with Article 123(2) EPC? What is considered to be a list? Can two alternatives be considered to be a list? Can a selection from two "lists" with each only two mutually exclusive alternatives be considered to be an infringement of Article 123(2) EPC?*

4.3 *If the answer to the last question of 4.1 is yes, would the answer be different if the patent application includes examples including the combination of claimed features indicated as preferred features of the examples, in combination with other preferred features of the examples?*

4.4 *If the answer to the last question of 4.1 is yes, would the answer be different if the patent*

application includes a technical advantage of each of the "selected" alternatives?"

In as far as the questions can be regarded as relevant to the present case at all, the answers to the questions 3 and 4, 4.1 to 4.4. are dependent on the particular facts of each case and therefore do not address questions of law of fundamental importance.

9. Since claim 1 of the fourth auxiliary request does not meet the requirement of Article 123(2) EPC, the patent cannot be maintained on the basis of this request.

Fifth to seventh auxiliary requests and auxiliary requests 4bis, 4ter, 4quater, 5bis and 5ter - Article 123(2) EPC

10. For similar reasons to those set out above, the Board concluded that also claim 1 of the fifth to seventh auxiliary requests and of auxiliary requests 4bis, 4ter, 4quater, 5bis and 5ter contravenes Article 123(2) EPC.

- 10.1 Claim 1 of auxiliary requests 4bis, 4ter and 4quater is unchanged compared to the fourth auxiliary request.

In claim 1 of the fifth auxiliary request, a feature based on original claim 12, with the expression "*[...do not overlap] or only partially overlap [with...]*" inserted in its wording, has been added to claim 1 of the fourth auxiliary request.

Claim 1 of auxiliary requests 5bis and 5ter is unchanged compared to the fifth auxiliary request.

In claim 1 of the sixth auxiliary request, the expression "*or only partially overlap*" has been deleted again.

Claim 1 of the seventh auxiliary request is based on claim 1 of the sixth auxiliary request with further features added at its end which are based on wording derived from paragraphs 37 and 38 of the description as filed.

- 10.2 In its communication pursuant to Article 15(1) RPBA, the Board opined that the amendments to claim 1 of the fifth to seventh auxiliary requests and of auxiliary requests 4bis, 4ter, 4quater, 5bis and 5ter would not not remedy the outstanding objection under Article 123(2) EPC against claim 1 of the fourth auxiliary request for similar reasons as set out above.

The appellant-proprietor did not submit any further arguments in this respect. The Board therefore has no reason to change its preliminary opinion on this aspect, which is consequently confirmed.

11. Since the respective claim 1 of the fifth to seventh auxiliary requests and of auxiliary requests 4bis, 4ter, 4quater, 5bis and 5ter does not meet the requirement of Article 123(2) EPC, the patent cannot be maintained based on any of these requests.

Eighth auxiliary request - Article 123(2) EPC

12. For similar reasons to those set out above in regard to the fourth auxiliary request, the Board concludes that claim 1 of the eighth auxiliary request contravenes Article 123(2) EPC.

- 12.1 Claim 1 of the eighth auxiliary request is based on claim 1 of the fourth auxiliary request. The additional feature added at the end of the claim are derived from original dependent claim 5, which is dependent on original claims 1 or 3.
- 12.2 To the extent that the appellant-proprietor relied on arguments corresponding to those submitted in regard to the fourth auxiliary request - i.e. contesting that the combination of the features based on original claims 1, 3, 5, 7 and 13 involved multiple selections, submitting that they merely defined subject-matter which was present in the originally filed claims and which was moreover supported by pointers in the description, notably here Figure 27B and paragraphs 298, 302 and 303 of the description - the reasons given above with respect to the fourth auxiliary request apply by analogy (points 7.3 and 7.4). The addition of the further features derived from original claim 5, though depending directly *inter alia* on claim 3, cannot change the above findings. At least it has not been argued by the appellant-proprietor that the added features from claim 5 would remedy the defect found in regard to the combination of the features of only original claims 1, 3, 7 and 13. In as far as the appellant-proprietor's argument is directed to the now allegedly implicit presence of ends (when compared to the fourth auxiliary request), introduced in claim 1 by the definition of the feature "length of extension", based on original claim 5, the Board is not convinced that this could overcome the outstanding objection pursuant to Article 123(2) EPC. The Board is not persuaded that the added feature defines any specific ends for the attachment zone (see also below), so as to bring the claimed subject-matter in compliance with the disclosed embodiments of Figures 24A and 27B referred to above.

There would still be other features missing, such as the specific shapes, positions, dimensions and specific number of attachment zones of these embodiments. Both Figures disclose exactly four straight attachment zones. Each of the four attachment zones has both of its ends adjacent to absorbent material (see also column 60, lines 26 to 32), whereas claim 1 does not exclude that respective attachment zones extend, for example, to the border of the absorbent core where no absorbent material is adjacent to their respective ends.

13. The request for maintenance of the patent on the basis of the claims found allowable by the opposition division, corresponding to the appellant-proprietor's request to dismiss the appeals of the appellant-opponents, is thus rejected.

Auxiliary requests 8bis, 8ter, 8quater, 8quinques - Article 54(3) EPC

14. Claim 1 of auxiliary request 8bis contravenes the requirements of Article 54(3) EPC, its subject-matter being disclosed by Figure 1 of D4.
- 14.1 Compared to claim 1 of the first auxiliary request, claim 1 of the present auxiliary request has been complemented by the feature derived from original claim 5, i.e. "*wherein, seen in a projection on the longitudinal direction of the absorbent core, the first and the second attachment zone extend over a length which is less than the length of the third and fourth attachment zone*".
- 14.2 The addition of this feature does not alter the Board's previous conclusion on lack of novelty of claim 1 with

respect to the absorbent article comprising an absorbent core according to Figure 1 of D4. Contrary to the interpretation adopted by the opposition division in the impugned decision and also insisted upon by the appellant-proprietor in the appeal procedure, the Board does not agree that the feature "length of extension" implies distinguishable end points. The Board instead agrees with appellant-opponent 1, that the impugned decision lacks consistency. While having considered that the channels in D4 could conceptually be subdivided in attachment zones according to the claims of the first auxiliary request (point 6.2.7.1.3 of the impugned decision), the opposition division's consideration in point 11.2 constitutes a rupture of this conceptual view. In their reasoning in regard to the novelty objection against claim 1 based on D4, confirmed by the Board (see above), the opposition division correctly reached its conclusion on the assumption that different zones could be continuous channels. Indeed, the identification of the respective zones in D4 was not based on specific, structurally discernable end points, but rather in correspondence with the breadth of the term "zone". Although it can be accepted that the requirement to compare lengths of extension between the two groups of first/second and third/fourth attachment zones implies the determination of end points of the respective zones, the location where some conceptual zone may be considered to start or end, and therefore where the corresponding end points may be situated, is no more precisely defined than by the expression "attachment zone".

14.3 For these reasons the Board cannot see a clear distinction of the subject-matter of claim 1 of the eighth auxiliary request from the absorbent article comprising an absorbent core according to Figure 1 of

D4. Attachment zones in accordance with the additional requirement introduced in claim 1 can be identified also in the known absorbent core, so that the requirement of novelty is not met (Article 54(3) EPC).

15. The same conclusion applies to auxiliary requests 8ter, 8quater and 8quinques, which was not contested by the appellant-proprietor.

16. It follows that the request for maintenance of the patent in amended form on the basis of any of auxiliary requests 8bis, 8ter, 8quater and 8quinques cannot be allowed.

Auxiliary request 8bis', 8ter', 8quater', and ninth to sixteenth auxiliary requests - Article 123(2) EPC

17. In its preliminary opinion the Board had opined that, irrespective of the question of admittance of *inter alia* the auxiliary requests 8bis', 8ter' and 8quater', and the ninth to sixteenth auxiliary requests, it was *prima facie* not apparent how the amendments to claim 1 of any of these auxiliary requests could overcome the (above) outstanding objection under Article 123(2) EPC.

17.1 In reply to the Board's preliminary opinion, i.e. during the oral proceedings, the appellant-proprietor did not submit any comments in regard to auxiliary requests 8bis', 8ter' and 8quater', nor in regard to the ninth and eleventh to fifteenth auxiliary requests.

The Board therefore has no reason to deviate from its provisional opinion, which is hereby confirmed. Hence, auxiliary requests 8bis', 8ter', 8quater', the ninth auxiliary request and eleventh to fifteenth auxiliary requests do not meet the requirements of Article 123(2)

EPC for corresponding reasons as set out with respect to the fourth and eighth auxiliary requests.

17.2 Claim 1 of the tenth auxiliary request corresponds to that of the ninth auxiliary request with the further limitation that the first and second as well as the third and fourth attachment zones extend substantially parallel. These additional features are based on paragraphs 37 and 38.

This amendment, however, does not overcome the outstanding objection under Article 123(2) EPC.

17.2.1 The combination of features in claim 1 is now based on the original claims 1, 3, 5, 7, 12 and 13 together with the features derived from the two cited paragraphs of the description. For similar reasons to those with respect to the fourth and eighth auxiliary request (see above points 7.3 and 12.2), these original claims, together with the two paragraphs from the description, do not disclose this combination of features.

17.2.2 Contrary to the view of the appellant-proprietor, the embodiments of Figure 24A and 27B do not disclose the subject-matter in the claimed generality. Merely as one example, and as mentioned above, the figures show exactly four specific attachment zones, whereas the claim does not exclude that there may be more.

17.3 Claim 1 of the sixteenth auxiliary request is based on claim 1 of the tenth auxiliary request, in which the lower limit of the difference between the distances of the first/second and third/fourth attachment zones has been increased from 5% to 10%. It has not been argued and the Board is also unable to see that this amendment could change anything in regard to the previous

conclusions on the requirements of Article 123(2) EPC.

17.4 In summary, the subject-matter of claim 1 of auxiliary requests 8bis', 8ter', 8quater', and of the ninth to sixteenth auxiliary requests does not comply with the requirement of Article 123(2) EPC. Consequently the the patent cannot be maintained in amended form based on any of these auxiliary requests either.

18. In the absence to any set of claims meeting the requirements of the EPC, the request of the appellant-opponents has to be allowed and the patent be revoked.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for referral to the Enlarged Board of Appeal is refused.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated