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**Datasheet for the decision  
of 20 June 2024**

**Case Number:** T 0337/23 - 3.2.06

**Application Number:** 17198065.9

**Publication Number:** 3292849

**IPC:** A61F13/539, A61F13/532

**Language of the proceedings:** EN

**Title of invention:**

METHOD AND APPARATUS FOR PRODUCING COMPOSITE STRUCTURE

**Patent Proprietor:**

Drylock Technologies NV

**Opponent:**

Ontex BV

**Headword:**

**Relevant legal provisions:**

EPC Art. 100(c), 76(1)

**Keyword:**

Grounds for opposition - subject-matter extends beyond content of earlier application (yes)

**Decisions cited:**

G 0002/10

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0337/23 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 20 June 2024**

**Appellant:** Drylock Technologies NV  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 20 December  
2022 revoking European patent No. 3292849  
pursuant to Article 101(3)(b) EPC.**

**Composition of the Board:**

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

## Summary of Facts and Submissions

- I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division revoking European patent No. 3 292 849.
- II. With its statement setting out the grounds of appeal, the appellant requested that the decision under appeal be set aside and the patent be maintained as granted (main request), auxiliarily that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 89 as filed with the statement of grounds of appeal.
- III. In its reply to the appeal, the respondent (opponent) requested that the appeal be dismissed.
- IV. Both parties requested that the case be remitted to the opposition division should novelty or inventive step need to be considered.
- V. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that there was seemingly no disclosure in the earlier application
  - for a continuously connected absorbent material pattern of absorbent material clusters together with both permanent primary bonding regions and temporary secondary bonding regions (see item 1.1), nor was there a disclosure
  - for a continuously connected absorbent material pattern of absorbent material clusters together with primary bonding regions being arranged in a primary attachment grid composed of continuous lines [...] wherein said continuous lines are

adjoining the absorbent material clusters (see item 1.2).

The Board also noted that these deficiencies applied to all requests.

- VI. The respondent requested that the oral proceedings be held by videoconference.
- VII. In a communication of the Registry, the Board confirmed that the oral proceedings would take place as summoned.
- VIII. Oral proceedings were held in person before the Board during which the respondent no longer maintained its request for a videoconference.
- IX. The parties' final requests remained as stated above under items II and III.
- X. Claim 1 of the main request reads as follows:

"A process for producing an absorbent structure comprising the following steps:

- providing a carrier layer (101);
- depositing and positioning absorbent material (110) onto the carrier layer according to a continuously connected absorbent material pattern of absorbent material clusters with areas where substantially no absorbent material is present, in between the absorbent material clusters; wherein the areas are intended to act as additional distribution and transport channel facilitating the flow of liquid away from the point of insult and toward the absorbent material clusters;
- providing an auxiliary layer (102) covering the absorbent material so as to form a sandwich

- structure of the carrier layer (101), the auxiliary layer (102) and the absorbent material (110);
- attaching an adhesive to the carrier layer (101) and/or to the auxiliary layer (102) prior to the bringing together of the sandwich structure;
  - after the bringing together of the sandwich structure, attaching the carrier layer (101) to the auxiliary layer (102) to provide permanent primary bonding regions (111) and substantially detachable or temporary secondary bonding regions (115); said secondary bonding regions being configured to release under the swelling force of the absorbent materials and/or under the influence of water; and said primary bonding regions being arranged in a primary attachment grid composed of continuous lines so as to allow for additional liquid distribution and transport; wherein said continuous lines are adjoining the absorbent material clusters."

XI. The main request also contains a corresponding apparatus claim 10.

XII. Each of auxiliary requests 1 to 89 contains an independent process or apparatus claim with the same combination of features as the corresponding claim of the main request, which combination the Board ultimately found as containing subject-matter extending beyond the content of the earlier application as filed. Since the appellant did not argue that the decisive issue (as set out for the main request in the reasons below) was overcome by any of these requests, it is unnecessary to reproduce the claims of those requests here.

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

The subject-matter of claim 1 of the patent as granted did not extend beyond the content of the earlier application as filed. There was a basis for the combination of both primary and secondary attachments in all embodiments and thus also in the left-hand drawing of figure 3. This figure therefore not only showed primary and secondary bonding regions in combination, it also showed primary bonding regions arranged in a primary attachment grid composed of continuous lines. The clusters of absorbent material were, in turn, laid out in a continuously connected pattern. This was also corroborated by the description, on pages 35 to 37.

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

The subject-matter of claim 1 of the patent as granted extended beyond the content of the earlier application as filed. The left-hand drawing of figure 3 was the only drawing in which the absorbent material was laid out in a continuously connected pattern. However, it did not show both primary and secondary attachments. Figure 3 was thus no basis for the claimed subject-matter. Further, the left-hand drawing of figure 3 did not show primary bonding regions arranged in a primary attachment grid composed of continuous lines adjoining the absorbent material clusters. These features were actually incompatible. The description, including page 37, did not comprise any statement to this combination either.

## Reasons for the Decision

### 1. *Main request - Article 100 (c) EPC*

The ground for opposition under Article 100(c) EPC prejudices maintenance of the patent as granted.

1.1 The contested patent stems from a divisional application based on earlier International application PCT/EP2011/005138, published under International publication number WO 2012/048878 A1. In the following, this publication will be referred to as 'the earlier application'.

1.2 Claim 1 of the contested patent defines a process for producing an absorbent structure in which, among other defined steps,

- (a) absorbent material is deposited and positioned onto a carrier layer according to a continuously connected absorbent material pattern of absorbent material clusters,
- (b) permanent primary bonding regions and substantially detachable or temporary secondary bonding regions are provided,
- (c) wherein the permanent primary bonding regions are arranged in a primary attachment grid composed of continuous lines,  
and in which
- (d) said continuous lines are adjoining the absorbent material clusters.

There is no basis in the earlier application for the combination of these features.



1.3 The appellant argued that page 35, line 7ff, together with figures 1A-D, 2 and 3 provided a basis for the presence of both primary and secondary attachments in all embodiments, at least in preferred forms thereof. It argued that the formulation "joined by secondary attachments 115 and preferably also via primary attachments 111" made it apparent that in all embodiments shown in figures 1A-D, 2 and 3 it was preferred to provide both types of attachments. This preference thus also existed as a disclosure for the embodiment shown in figure 3, left-hand drawing. A skilled person with a mind willing to understand the teaching of the patent would thus allegedly interpret figure 3, left-hand drawing to comprise both types of attachments as being present even if only temporary secondary attachments are specifically indicated therein by reference numeral 115.

First, the Board does not accept that a preference means the same as a necessity in the sense that all that is described as being preferred would be regarded as implicitly present, for every embodiment, and this even in combination with other features. Contrary to the appellant's argument, merely because page 35, line 11ff discusses the primary and secondary attachments, also with respect to a primary attachment grid, does not alter the fact that such is not necessarily present in the left hand drawing in figure 3, even if (as for example in the right hand drawing of figure 3) some specific embodiments may conform to this preference.

The appellant further argued in this regard that the presence of the primary attachment grid was also a clear and essentially unavoidable preference because the whole invention was based on the primary attachment grid remaining basically intact while the secondary

attachments released upon swelling. Thus a skilled person would understand each embodiment to include the primary attachment grid. Again, however, the Board cannot concur with this argument. As mentioned also by the respondent, the particular manner of operation of the structure of a continuously connected pattern of absorbent material is not explained in the earlier application, secondary attachments being seemingly viable by themselves, such that a preference could not be read into being an implicit presence in the left-hand drawing in figure 3.

Second, even if the foregoing argument concerning a preference were accepted (which the Board does not), a disclosure of both primary and secondary bonding regions in combination with the permanent primary bonding regions being arranged in a primary attachment grid composed of "continuous lines" would still be lacking. Other than argued by the appellant, it cannot be ascertained with any certainty that the left-hand drawing of figure 3 shows an attachment grid (be it a primary or secondary one) composed of any lines which are continuous. The quality of the figure, in particular in certain areas thereof, makes it impossible to determine the form of the lines in those parts where the round areas of absorbent material meet to thereby form a continuously connected pattern. As a consequence, it cannot be determined, even from the figure, whether the lines of attachment are continuous and adjoin the absorbent material clusters.

- 1.4 In this regard, the respondent argued that it was even unfeasible that, at the same time, the absorbent material formed a continuously connected pattern while the lines forming the primary attachment grid were continuous. During the oral proceedings, the appellant

made a sketch showing continuous lines passing over the circular areas of absorbent material at their respective contact regions. In this regard it explained that some absorbent material could be present at these regions and the carrier layer and the auxiliary layer could still be glued or welded together also at the intersections with the attachment grid.

Leaving aside the question of whether such a continuous pattern of absorbent material, intertwined with a grid of continuous lines, could be implemented in an actual absorbent structure, such teaching or disclosure is not derivable from the left-hand drawing of figure 3, at least not directly and unambiguously, this being the 'gold standard' applied by the Boards when determining extension of subject-matter (see G 2/10). As acknowledged by the appellant, the drawings of figure 3 are schematic, and, as argued by the respondent, not a single line therein is drawn in such a clear way that it would be possible to tell whether it is solid or dashed or even dotted. It is thus not possible to establish how long these lines are and whether they are continuous. Even less so is it possible to determine the form of the lines in the left-hand drawing in those regions where several lines meet, such as the contact areas of the circles. A skilled person with a mind willing to understand cannot determine with any certainty whether these lines are continuous, nor whether they adjoin the absorbent material. Indeed, as the opponent pointed out, even in the regions located between the areas of absorbent material, several of these appear to have a non-continuous partial cross-like form.

The left-hand drawing of figure 3 thus fails to directly and unambiguously show at least the features

related to the permanent primary bonding regions being arranged in a primary attachment grid composed of continuous lines, which continuous lines are adjoining the absorbent material clusters.

- 1.5 The appellant also referred to page 37 of the earlier application, lines 12ff, where different surface sizes of attachments are listed. It further referred to lines 17ff on the same page, in which the following is stated:

"In another embodiment of this invention, the primary attachments 111 are arranged in a primary attachment grid composed of continuous lines so as to allow for additional liquid distribution and transport,..."

The appellant argued that the juncture beginning in line 12 would be understood to relate to the figure 2 embodiment with its discrete attachments. The second juncture, beginning with "in another embodiment" would consequently be understood to relate to the figure 3 embodiment, which therefore comprised a primary attachment grid composed of continuous lines as explicitly stated in line 18.

This is not accepted. It cannot be determined to which other embodiment the foregoing sentence, in which the continuous lines are mentioned, relates. This might or might not be an embodiment depicted in a figure. It is pure speculation to conclude that the paragraph starting at line 12 on page 37 implicitly relates to a comparison of elements of figures 2 and 3. As additionally argued by the respondent, in the whole application up until page 37, there is no reason for a skilled person to think of attachment regions comprising continuous lines at all. Such are only mentioned on page 37 for the first time, and then with

respect to "another embodiment" of unknown nature. Hence, the passage on page 37 cannot provide an unambiguous basis for a grid of primary bonding regions arranged in a grid composed of continuous lines in combination with a continuously connected pattern of absorbent material, let alone for the pattern in the figure 3 left hand drawing.

1.6 The appellant further argued that also with regard to other figures (e.g. Fig. 1D) it was easy to imagine primary and secondary attachments lines, even if only secondary ones were shown. This is however not the relevant standard for the assessment of whether a particular disclosure can be directly and unambiguously derived. Even if something might be easily imagined, such imagination does not form part of what is directly and unambiguously disclosed in the application as filed.

1.7 There is thus no direct and unambiguous disclosure in the description either, of permanent primary bonding regions being arranged in a primary attachment grid composed of continuous lines, which continuous lines are adjoining the absorbent material clusters.

1.8 Claim 1 of the main request therefore contains subject-matter extending beyond the content of the earlier application as filed (Article 100(c) EPC).

1.9 The main request is thus not allowable.

2. *Auxiliary requests 1-89 - Article 76(1) EPC*

Each of the auxiliary requests 1-89 contains one or more independent claims claiming the combination of the features found, with regard to the main request, to

extend beyond the content of the earlier application as filed (see the features listed above under item 1.2), such that all these requests fail to meet the requirement of Article 76(1) EPC. This was not contested by the appellant. Moreover the appellant did not argue that, with respect to these features, the amendments made in these requests made any difference in respect of the objection to extension of subject-matter. The appellant further stated that these requests were filed with the aim to overcome other objections. In such a situation, the Board has no reason to find otherwise in view of the said features in the auxiliary requests than it found with respect to the main request.

- 2.1 Each of these requests thus includes subject-matter extending beyond the content of the earlier application as filed. The requirement of Article 76(1) EPC is thus not fulfilled.
- 2.2 None of the auxiliary requests is therefore allowable.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated