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**Datasheet for the decision  
of 29 April 2025**

**Case Number:** T 0922/23 - 3.2.06

**Application Number:** 16817570.1

**Publication Number:** 3318229

**IPC:** A61F13/49, A61F13/494

**Language of the proceedings:** EN

**Title of invention:**

DISPOSABLE DIAPER

**Patent Proprietor:**

Unicharm Corporation

**Opponents:**

Essity Hygiene and Health Aktiebolag  
The Procter & Gamble Company

**Headword:**

**Relevant legal provisions:**

EPC Art. 100(a), 100(b), 123(2), 56  
RPBA 2020 Art. 11

**Keyword:**

Grounds for opposition - insufficiency of disclosure (no)

Inventive step - (no)

Amendments - added subject-matter (yes)

**Decisions cited:**

T 0320/15, T 2007/19, T 0500/23

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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**Case Number:** T 0922/23 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 29 April 2025**

**Appellant:** Essity Hygiene and Health Aktiebolag  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 6 April 2023  
rejecting the opposition filed against European  
patent No. 3318229 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

<b>Chairman</b>	M. Hannam
<b>Members:</b>	M. Dorfstätter
	J. Hoppe

## **Summary of Facts and Submissions**

- I. Appeals were filed by the appellants (opponent 1 and opponent 2) against the decision of the opposition division rejecting the opposition against European patent No. 3 318 229.
- II. The appellants requested that the decision under appeal be set aside and the European patent be revoked.
- III. In the written proceedings, the respondent (patent proprietor) requested that the appeals be dismissed, or, as an auxiliary measure, that the patent be maintained in amended form based on one of auxiliary requests 1 to 11, filed with the reply on 29 December 2023.
- IV. The Board issued a summons to oral proceedings and a subsequent communication, in which it gave its preliminary opinion *inter alia* on the issues of sufficiency of disclosure, novelty and inventive step.
- V. During the oral proceedings before the Board, the respondent requested that the case be remitted to the opposition division for further prosecution, if the Board were to find the main request not allowable.
- VI. Other than that, the requests at the end of the oral proceedings were as stated above.

VII. The following documents are relevant for the present decision:

D1 WO 00/07534 A1  
D3 JP 2007-97920 A  
D4 EP 1 767 176 A1

VIII. Claim 1 of the main request reads as follows (with the feature-by-feature analysis as also reproduced in the contested decision at page 3 and 4):

P1 "A disposable diaper (10) having a front waist region (11), a rear waist (12) region and a crotch region (13) located between the front and rear waist regions and  
P2 includes a vertically long absorbent chassis (21) extending toward the front and rear waist regions centering on the crotch region, wherein:  
P3 the absorbent chassis (21) includes an absorbent structure (22) and  
P4 a pair of side flaps (31) extending outward in the lateral direction (X) from both side edges (23) of the absorbent structure;  
P5 each of the side flaps (31) is formed of layered sheet materials and include distal edge (32) being spaced apart in the lateral direction from the side edge (23) of the absorbent structure and extending in the vertical direction (Y),  
P6 a cuff branch line (33) defined between the side edge of the absorbent structure (22) and the respective distal edge (32) so as to extend in the vertical direction (Y),  
P7 a leg-opening elasticized area (41) extending between the cuff branch line (33) and the distal edge (32) and

- P8a a leakage-barrier cuff (51) branched from the cuff branch line (33) and
- P8b extending in a direction intersecting with the leg-opening elasticized area (41);
- P9 the leakage-barrier cuff (51) has a free edge (52) parallelly-spaced in the lateral direction from the cuff branch line (33) so as to extend in the vertical direction;
- P10 a distance (L1) from the cuff branch line (33) to the distal edge (32) is larger than a distance (L2) from the cuff branch line (33) to the free edge (52);
- P11 the number of sheet material layers included in the leg-opening elasticized area is larger than the number of the sheet material layers included in the leakage-barrier cuff (51);
- P12 the leakage-barrier cuff (51) is formed separately from the leg-opening elasticized area (41);
- P13a each of the leakage-barrier cuffs includes two layers of the sheet material (29) and
- P13b at least one cuff-elastic member (53) joined under tension in the vertical direction between two layers of the sheet material; and
- P14 at least one of the two layers of the sheet material (29) extends into the leg-opening elasticized area (41) so as to be included therein."

IX. Claim 1 of auxiliary request 1 reads as for the main request, but with the following feature appended:

"and a region in which at least one sheet material extending in the lateral direction (X) of the absorbent chassis (21) to the leg-opening elasticized area (41)

overlaps with the leg-opening elasticized area has a width dimension at least 80% of the distance from the cuff branch line (33) to the distal edge (32)."

- X. Claim 1 of auxiliary request 2 reads as for auxiliary request 1, but with the following features appended:

"a leakage-barrier sheet (67) is located on a non-body-facing surface of the absorbent structure (22) so as to extend outward in the lateral direction (X) beyond the absorbent structure (22);

and the leakage-barrier sheet (67) is spaced apart in the lateral direction (X) from the distal edge (32) of the side flaps (31)."

- XI. Claim 1 of auxiliary request 3 reads as for auxiliary request 1, but with the following features appended:

"the absorbent chassis (21) includes a body-side liner (66) located on a body-facing surface of the absorbent structure (22), an exterior composite sheet (28) located on a non-body-facing surface of the absorbent structure (22) so as to extend in the lateral direction (X) beyond both side edges of the absorbent structure (22) and a pair of body-side composite sheets (29) respectively located on the outer sides in the lateral direction (X) of the absorbent structure (22) and joined to a body-facing surface of the exterior composite sheet (28);

the paired side flaps (31) extending outward from both side edges (23) in the lateral direction (X) of the absorbent structure (22) are formed of laminated sheet materials including the parts of the exterior composite sheet (28) extending outward in the lateral direction (X) beyond both side edges of the absorbent structure (22) and the paired body-side composite sheets (29);



the exterior composite sheet (28) includes a rectangular leakage-barrier sheet (67) formed of a plastic film located on the non-body-facing surface of the absorbent structure (22) so as to extend outward in the lateral direction (X) beyond the absorbent structure (22) and a rectangular backsheet (68) located on a non-body-facing surface of the leakage-barrier sheet (67) so as to extend outward in the lateral direction (X) beyond the absorbent structure (22); a dimension in the lateral direction (X) of the backsheet (68) is larger than a dimension in the lateral direction (X) of the leakage-barrier sheet (67);

parts of the backsheet (68) extending outward in the lateral direction (X) beyond both side edges of the leakage-barrier sheet (67) are folded back inward along side edges (67a) of the leakage-barrier sheet (67) and joined to a body-facing surface of the leakage-barrier sheet (67);

fold lines along which the backsheet (68) is folded back along the side edges (67a) of the leakage-barrier sheet (67) correspond to the distal edge (32) of the side flaps (31); and

the leakage-barrier sheet (67) is spaced apart in the lateral direction (X) from the distal edge (32) of the side flaps (31)."

XII. Claim 1 of auxiliary request 4 reads as for auxiliary request 3, but with the following feature appended:

"and outer edges (29c) of the body-side composite sheets (29) joined to the backsheet (68) keep a distance from the distal edges (32) of the side flaps (31)."

XIII. Claim 1 of auxiliary request 5 reads as for auxiliary request 4, but with the following features appended:

"border lines between parts of the body-side composite sheets (29) joined to the backsheet (68) and parts of the body-side composite sheets (29) not joined to the backsheet (68) define the cuff branch lines (33) extending in the vertical direction (Y); areas in the body-side composite sheets (29) extending from the cuff branch lines (33) to the free edges (52) of the leakage-barrier cuffs (51) define the leakage-barrier cuffs (51); and areas in the body-side composite sheets (29) extending from the cuff branch lines (33) to the distal edges (32) of the respective side flaps (31) are included in the leg-opening elasticized areas (41)."

XIV. Claim 1 of auxiliary request 6 reads as for auxiliary request 5, except for feature P14 being amended as follows:

~~"at least one of~~ the two layers of the sheet material (29) extends into the leg-opening elasticized area (41) so as to be included therein."

XV. Claim 1 of auxiliary request 7 reads as for auxiliary request 6, but with the following feature appended:

"in each of the side flaps (31), a single leg-elastic member (42) is located so as to be overlapped with the cuff branch line (33)."

XVI. Claim 1 of auxiliary request 8 reads as for auxiliary request 7, but with the following features appended:

"between the leakage-barrier sheet (67) and the backsheet (68) folded back, a plurality of leg-elastic members (42) are contractibly secured under tension in the vertical direction (Y);  
a stretch ratio of the leg-elastic members (42) is gradually lower in the lateral direction (X) from the cuff branch lines (33) toward the distal edges (32) of the side flaps (31);  
the leg-elastic members (42) are located in an intermediate region (25) of the absorbent chassis (21) so as to extend toward a front end (24) and a rear end (26) of the absorbent chassis (21); and  
both ends of the leg-elastic members (42) are secured to the front end (24) and the rear end (26) of the absorbent chassis (21) with hot melt adhesives."

- XVII. Claim 1 of auxiliary request 9 reads as for auxiliary request 8, but with the following feature appended:

"the body-side composite sheets (29) are not joined to the body-side liner (66) of the absorbent structure (22)."

- XVIII. Claim 1 of auxiliary request 10 reads as for auxiliary request 9, but with the following feature inserted just before the feature reading *"between the leakage-barrier sheet (67) and the backsheet (68) folded back, a plurality of leg-elastic members (42) are contractibly secured under tension in the vertical direction(Y) ;"*:

"both distal ends (68a) in the vertical direction (Y) of the backsheet (68) folded back are located beneath the non-body-contact surface of the absorbent structure (2") and fixed between the absorbent structure (22) and the leakage-barrier sheet (67);"

- XIX. Claim 1 of auxiliary request 11 reads as for auxiliary request 1, except for feature P14 being amended in the same way as in auxiliary request 6.
- XX. The appellants' arguments relevant to the present decision may be summarised as follows:

*Main request - Interpretation*

Despite features P12 and P14 being, in themselves, clear, they needed to be interpreted in a broad sense to reconcile that they were mutually exclusive. The leakage-barrier cuff could not be formed separately from the leg-opening elasticised area as required by feature P12, if at least one of the layers of sheet material forming the leakage-barrier cuff extended into the leg-opening elasticised area so as to be included therein as required by feature P14. Being formed separately was incompatible with sharing components.

Furthermore, the article illustrated in Figure 4 of the patent was not covered by claim 1 and was thus not an embodiment of the claimed invention. In the embodiments described and depicted, the leakage-barrier cuffs were not formed separately from the leg-opening elasticised areas.

Illogical or technically inaccurate features could not simply be disregarded either.

If an attempt were made to resolve the conflict between features P12 and P14, a reconciliation could be achieved in various ways. Consequently, a broad interpretation had to be adopted. As it had to be possible that the invention was carried out across the

whole scope of the claim, an interpretation was needed which deviated from the literal meaning.

To establish what was intended constituted an undue burden.

Since the discrepancy of features P12 and P14 needed to be reconciled by interpretation, it was sufficient for these features to be fulfilled that the leakage-barrier cuff and the leg-opening elasticised area shared a common member.

*Main request - Inventive step with D1 as the starting point*

The subject-matter of claim 1 did not involve an inventive step. The sole distinguishing feature P12 did not provide a technical effect, nor did the patent associate an effect with this feature. The mere possibility that different effects could be imparted could not outweigh the infinite number of possibilities where no such effect was achieved. The possibility of effects could thus not be seen as an effect attributable to the distinguishing feature, nor to an effect achieved over the entire ambit of the claim.

The objective technical problem to be solved was thus merely to find an alternative configuration. Faced with this problem, the skilled person found such alternative construction in the respective figure 3 of D3 or D4.

*Remittal*

The respondent's request for remittal should neither be admitted nor allowed.

The request was only submitted during the oral proceedings before the Board. It was thus a change of the respondent's case which was to be dealt with under the provisions of Article 13(2) RPBA.

No special reason was apparent that would justify remitting the case. It was not unusual that the opposition division did not deal with auxiliary requests as it had found the patent proprietor's main request allowable.

*Auxiliary request 1*

The subject-matter of claim 1 did not involve an inventive step. With the added features all being known from the figure 7 embodiment of D1, the distinguishing feature was the same as for the main request.

*Auxiliary request 2*

The amendments made in claim 1 introduced subject-matter extending beyond the content of the application as filed. A leakage-barrier sheet not extending out all the way to the distal edge 32 of the side flaps was only disclosed in the application as filed in paragraph [0025] in combination with both the backsheet 68 and the leakage-barrier sheet 67 having rectangular shapes. This was also necessary such that the backsheet could be folded back inward along the side edge 67a of the leakage-barrier sheet 67. The rectangular shapes were thus inextricably linked to the features added to claim 1. By not including the rectangular shape, the subject-matter of claim 1 represented an unallowable intermediate generalisation. The further mention of the leakage-barrier sheet 67 and it being spaced apart from the distal edge 32 of the side flaps 31 in paragraph

[0039] also included a reference to the illustrated embodiment and could thus not be considered an isolated disclosure.

*Auxiliary requests 3 to 10*

Claim 1 of auxiliary request 3 contained significant amendments based on the description and resulted in an unallowable intermediate generalisation of the specific embodiment. There was no basis for extracting the features set out in paragraphs [0023] and [0025] of the application as filed and adding them to claim 1 while omitting the features in paragraphs [0020] and [0021] relating to the structure of the diaper comprising front and rear waist panels to which the absorbent chassis was fixed, and which waist panels were joined to form a waist opening.

This objection equally applied to each of auxiliary requests 4 to 10.

*Auxiliary request 11*

The subject-matter of claim 1 did not involve an inventive step as it still only differed from D1 in feature P12, the same as for the main request. The feature appended to claim 1 was the same as for auxiliary request 1 such that the same arguments applied. The amendment to feature P14 that *the two layers* of the sheet material (as opposed to only at least one layer) extended into the leg-opening elasticised area so as to be included therein, was derivable from the prior art starting point as shown in figure 7 of D1 such that this did not establish a further difference. With the same distinguishing feature as for the main request, the same objective

technical problem of finding an alternative construction was to be formulated and the same conclusion for a lack of inventive step had to be drawn.

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

*Main request - Interpretation*

Claim 1 had to be interpreted with a mind willing to understand. The alternative interpretations could not be arrived at with the description and the invention's purpose in mind, which purpose was to enhance stiffness within the elasticised leg opening area.

There was no undue burden for the skilled person as to how the disclosure translated to the requirements of features P12 and P14.

According also with the preliminary opinion of the Board, the formulation "formed separately" was to be understood to mean that the leakage-barrier cuff had been produced as a separate part prior to it being attached to the chassis.

*Main request - Inventive step with D1 as the starting point*

The subject-matter of claim 1 involved an inventive step. The distinguishing feature P12 potentially provided further characteristics of the leakage-barrier cuff and the leg-opening elasticised area. It thus provided greater freedom in the choice of materials and the application of adhesive. Thereby, the leakage-barrier cuff had greater independence from the leg-



opening elasticised area and could be made stiffer. It was thus plausible that, due to the presence of feature P12, the leakage-barrier cuff could be made to better maintain its risen state and not fold into a bellows shape.

The objective technical problem to be solved was thus the provision of an absorbent article having improved prevention of leakage in the leg-opening elasticised area during use. Faced with this problem, the skilled person would not turn to D3 or D4. Even if they looked into D3, no advantage was described therein in relation to the separate formation of the leg flap portion 5 of D3. Instead, D3 was concerned with a different problem which was the feel of the article. If the skilled person looked into D4, this was not concerned with leak prevention from the leg-opening either, but with protection from soiling of the genital region. There was thus no motivation to include the construction shown in D4 in the article of D1. Any argument that the skilled person would modify D1 in the light of D3 or D4 was based on hindsight.

#### *Remittal*

If the Board were to find that the main request was not allowable, the case should be remitted to the opposition division for further prosecution.

The primary object of the appeal proceedings was to review the decision under appeal in a judicial manner. Since the opposition division only dealt with the claims as granted and did not allow multiple starting points for the inventive step attacks, the parties should get an opportunity to develop their arguments with respect to patentability of the auxiliary

requests. The situation was comparable to the one in the case underlying T500/23 in which special reasons justifying a remittal were acknowledged.

*Auxiliary request 1*

The subject-matter of claim 1 involved an inventive step. The amendment to claim 1 defined a concrete feature from which the enhanced stiffness could be realised. This was achieved by a large bonding area provided by the substantial degree to which the sheet constituting the leakage-barrier cuff extended into the leg-opening elasticised area. As bonding was anyway an implicit feature at this location, a higher stiffness was indeed achieved by the added feature.

*Auxiliary request 2*

The amendments made in claim 1 did not introduce subject-matter extending beyond the content of the application as filed.

A skilled person would not consider the leakage-barrier sheet disclosed in paragraph [0025] of the application as filed as being inextricably linked to the other features of paragraph [0025]. The leakage-barrier sheet was further discussed in isolation in paragraph [0039], including the positional relationship between the leakage-barrier sheet 67 and the distal edge 32 of the side flap 31.

*Auxiliary requests 3 to 10*

Claim 1 of auxiliary request 3 did not result in an unallowable intermediate generalisation. The basis for the features added to claim 1 was to be found in

paragraphs [0023] and [0025] of the application as filed.

The amendments made to claim 1 of auxiliary requests 4 to 10 were further based on paragraphs [0029], [0036], [0026] and [0028] of the application as filed.

#### *Auxiliary request 11*

The subject-matter of claim 1 involved an inventive step. The added features further clarified that the stiffness might be enhanced thereby imparting properties to the leg-opening elasticised area that were different from the leakage-barrier cuff. Since two layers of the sheet material extended into the leg-opening elasticised area, the number of the sheet material layers in the respective leg-opening elasticised area was increased and the stiffness was enhanced, which resulted in the cuff being maintained in the risen state.

### **Reasons for the Decision**

#### *1. Interpretation - main request*

- 1.1 The Board considers that the combination of features P12 and P14, despite seemingly being individually clear in themselves, gives rise to the need for interpretation. Thereby, the wording of the claim should typically be given its broadest technically sensible meaning. It is clear that, as argued by both appellants, the leakage-barrier cuff and the leg-opening elasticised area cannot be formed separately from each other, in the sense of being separately formed entities in the claimed article, if they also

have to share components. Such an interpretation is thus to be ruled out by a skilled person.

An alternative interpretation needs to be found that is both technically feasible and yet is based on the wording of the claim. One such interpretation is according to what the opposition division adopted in the contested decision, with features P12 and P14 meaning that the leakage-barrier cuff and the leg-opening elasticised area have been formed separately, but come into close contact once they are assembled in the final product. Thus, in the final product, at least one sheet of the two layers of the sheet material of the leakage-barrier cuffs may extend into the leg-opening elasticised area so as to be included therein, although these parts have initially been formed separately from each other.

- 1.2 In order to find possible interpretations for an unclear claim, several ways of interpretation are available, including using the description and the drawings. If thereafter indeed various ways can be found that achieve a reconciliation of features P12 and P14, the basic rule remains that the claim should be given its broadest technically sensible meaning by a skilled reader.
- 1.3 The broadest technically sensible meaning for each feature does not necessarily translate to the broadest conceivable scope for the claim as a whole. In particular, the Board disputes that it was sufficient that the leakage-barrier cuff and the leg-opening elasticised area share a common member to fulfil both features P12 and P14, as argued by appellant/opponent 1. Although this interpretation would be in line with the embodiment shown in figure 4 of the

patent, still a meaningful interpretation of feature P12 needs to be found, because this feature cannot simply be ignored.

- 1.4 The Board considers that feature P12 is to be understood as a product-by-process feature. This was, at least at the oral proceedings, also accepted by the respondent. For feature P12 to be fulfilled, the leakage-barrier cuff must, at least initially, have been formed separately from the leg-opening elasticised area, e.g. by having been produced separately from the side flaps (which is the structural feature at which the leg-opening elasticised area is located). It must thus be clearly discernible that at least at some point in time during the production process these two entities have existed separately of each other.
- 1.5 The Board thus confirms the interpretation found by the opposition division and corroborates that features P12 and P14 are not mutually exclusive. Something that has been formed separately from something else can then, at a later stage of the production process, be combined in order to be included therein. It is to be noted that this understanding is, on the one hand, not limited to the way in which the embodiments of the contested patent are depicted in the figures. On the other hand, this understanding excludes illogical or non-working interpretations which are not part of the scope of the claim.
- 1.6 Even if this interpretation of the claim were perceived to deviate from the literal meaning of its individual features, the Board finds that the process of searching for the correct construction does not constitute an undue burden (as was argued by appellant/opponent 2). On the contrary, the effort of interpreting a claim, no

matter how tedious it may be, is an inevitable inconvenience whenever an ambiguous claim has been granted.

2. *Article 100(a) EPC - main request - inventive step starting from D1*

The subject-matter of claim 1 does not involve an inventive step in the sense of Article 56 EPC when considering D1 as the starting point. The ground for opposition under Article 100(a) EPC thus prejudices maintenance of the patent as granted.

- 2.1 It was uncontested by the respondent that all other features of claim 1 except for feature P12 can be derived from the embodiment shown in figure 7 of D1. The respondent contested however that D1 gave a clear and unambiguous disclosure of a leakage-barrier cuff that was formed separately from the leg-opening elasticised area (feature P12).
- 2.2 The Board does not follow the interpretation proposed by appellant/opponent 1 that the barrier layer 174 and the elastomeric members 138 in figure 7 of D1 could be seen as conjointly constituting the leg-opening elasticised area in the sense of the patent. Also, and as reasoned above in view of interpretation of claim 1, the Board does not accept that the leakage-barrier cuff and the leg-opening elasticised area sharing a common member satisfied features P12 and P14 of claim 1. A meaningful interpretation of feature P12 must lead to the same construction as above, namely that it must be clearly discernible that at least at some point in time during the production process the leakage-barrier cuff and the leg-opening elasticised area have existed separately of each other.

Thus, even if it were accepted that the appellants' understanding applied to the fabric layer 176 in figure 7 of D1, it would not be derivable from D1, less so clearly and unambiguously, that the fabric layer 176 constituting the leakage barrier cuff was formed separately from the two components "barrier layer 174" and "elastomeric members 138". The passages cited by the respondent (i.e. *inter alia* claim 1 and page 9, lines 5-13 of D1) suggest them being simultaneously formed. Even the passage at page 35, lines 24-29 as cited by appellant/opponent 1 during the oral proceedings before the Board, fails to unambiguously disclose that, at any point in time, the two components "barrier layer 174" and "elastomeric members 138" existed as a separate entity in the sense that they were attached to each other but not yet to the fabric layer 176.

- 2.3 The Board thus considers that the "barrier layer 174" and the "elastomeric members 138" do not form a leg-opening elasticised area in the sense of the patent. The Board further considers that it is not clearly and unambiguously derivable from D1 that the leakage barrier cuff in the form of containment flap section 144 was, at any point in time, formed separately from these two entities.

Therefore, the subject-matter of claim 1 differs from D1 by feature P12.

- 2.4 The Board concludes however that feature P12 has no technical effect, at least not over the whole ambit of claim 1.

The respondent's argument, that the distinguishing feature P12 provided greater freedom in choosing the materials and thereby *potentially* provided further characteristics of the leakage-barrier cuff and the leg-opening elasticised area, is not convincing. The mere potential for an effect is not sufficient for it being considered as being attributable to a particular feature. In fact, whether any of the effects listed by the respondent, such as that the leakage-barrier cuff potentially being made stiffer and that it could be made to better maintain its risen state and not fold into a bellows shape, is dependent on the presence and type of further features which are not even mentioned in the claim. As argued by the respondent, the choice of materials and the application of adhesive will affect the stiffness of the leg-opening elasticised area. This is however only achieved if a stiffer material is actually chosen for the leg-opening elasticised area or more adhesive is actually provided in this area and not because of the mere possibility to do so. Nor is the greater stiffness achieved by a greater independence of the leakage-barrier cuff from the leg-opening elasticised area. In fact, the different number and type of layers in the containment flap section 144 and the leg gusset section 142 shown in figure 7 of D1, already provides the possibility to independently choose the respective characteristics such as a different stiffness.

- 2.5 Since feature P12 does not achieve the alleged effect of providing different characteristics to the leakage-barrier cuff and the leg-opening elasticised area, the objective technical problem to be solved cannot be 'the provision of an absorbent article having improved prevention of leakage in the leg-opening elasticised area during use' as formulated by the respondent.



Rather, as argued by the appellants, with no technical effect being attributable to feature P12, the objective technical problem is to be seen as 'the provision of an alternative configuration of the leakage-barrier cuff and leg-opening elasticized area'.

2.6 The Board having given its interpretation of features P12 and P14, it was uncontested by the parties that the respective figure 3 of D3 and D4 showed an alternative construction in the sense of these features as interpreted.

However, it was contentious whether the skilled person would even turn to D3 or D4, and, if they were to do so, whether they found a motivation to include the construction shown in D3 or D4 in the article of D1.

Contrary to the respondent's arguments, with the objective technical problem being to find an alternative configuration, it is irrelevant whether particular advantages or a technical effect achieved by this alternative is described in the prior art. Consequently, a specific incentive to include the alternative construction is not required.

A clear disclosure of the alternative construction (such as in D3 or D4) already provides the solution to the objective technical problem of finding an alternative. In view of this problem, there is no need for a further motivation for the skilled person, even less so for incentivising the skilled person to turn to a particular piece of prior art. The mere existence of the alternative construction is a sufficient pointer when the objective technical problem is no more than to find an alternative.

Nor is the skilled person detained from using the alternative configuration of D3 or D4 in the article of D1 due to these documents being concerned with different problems. The solution of these further problems comes in addition to the solution of the objective technical problem of finding an alternative configuration.

The respondent's contention that the skilled person modifying D1 in the light of D3 or D4 was based on hindsight, is thus rejected. No hindsight is necessary for a skilled person to understand that the construction shown in D3 or D4 provides an alternative design to the construction of D1.

- 2.7 With no technical effect being attributable to the sole distinguishing feature P12, and with the objective technical problem merely being to find an alternative configuration, applying the construction of either D3 or D4 in the article of D1 is thus seen as a straightforward design modification with no inventive step being involved.

The main request is thus not allowable.

3. *Remittal*

Irrespective of whether the request for remittal constitutes an amendment of the respondent's appeal case and leaving aside whether it should be admitted into the appeal proceedings, the Board decided not to remit the case to the opposition division for further prosecution, in line with the provisions of Article 11 RPBA.

- 3.1 As also argued by the appellants/opponents, the opposition division did not deal with the auxiliary requests, but this is not, as such, a special reason that would justify remitting the case. It is indeed not unusual that an opposition division finds the patent proprietor's main request allowable and rejects an opposition, which renders dealing with the auxiliary requests unnecessary. That the Board should take a different view to the opposition division with regard to allowing multiple starting points for the inventive step attacks was foreseeable, as this is in fact long-standing practice in opposition and opposition-appeal proceedings well reflected by the case law.
- 3.2 In this sense, the Board noted in its preliminary opinion (see item 3.1) that a claim found to define inventive subject-matter must not be obvious vis-à-vis all reasonable starting points. The situation referred to in the Guidelines G-VII, 5.1 and its underlying decision T320/15 (both cited by the respondent) differ from the present case in that the issue to be decided upon there was whether the opposition division had violated the opponent's right to be heard by only considering attacks starting from one prior art document. The deciding board found that the right to be heard did not give an opponent the right to present unlimited inventive step attacks. However, for a claim to be considered to involve an inventive step, it is not sufficient that its subject-matter is not obvious vis-à-vis a single piece of prior art that appears to be the most promising springboard. Assessing inventive step with respect to all attacks raised by an opponent is also common practice in appeal proceedings (see also T2007/19, reasons 3.2-3.2.6).

3.3 The parties should thus have developed their arguments with respect to patentability of the auxiliary requests already when filing their appeals or statement of reply to the appeals, respectively. Other than argued by the respondent, the situation is also not comparable to the one in the case underlying T500/23 in which special reasons justifying a remittal were acknowledged. In that case, the deciding board reasoned (see reasons 7.2) that it had, through its finding with respect to claim 1 of the main request, overturned the entire basis on which the opposition division had understood D1 to subsequently conclude that the claims before it met the requirements of the EPC. In the present case, however, only the interpretation of feature P13a has changed, a feature that is not even relevant for the assessment of inventive step with D1 as the starting point, because it is uncontestedly shown in D1. This is notably so in both the broad interpretation adopted by the Board (with it being sufficient that the the two layers are present at some area of the leakage-barrier cuff) and the narrow interpretation followed by the opposition division and the respondent (with it being necessary that the two layers are present over the whole area of the leakage-barrier cuff).

In further contrast to the facts underlying T500/23, by not remitting the case, the Board is not considering the specific issues with respect to inventive step for the very first time on a totally different basis. Therefore, no special reasons (Article 11 RPBA) exist for remitting the case.

4. *Auxiliary request 1 - inventive step*

The subject-matter of claim 1 does not involve an inventive step (Article 56 EPC).

- 4.1 In figure 7 of D1, the sheet material (fabric layer 176) extends in the lateral direction of the absorbent chassis to the leg-opening elasticised area and fully overlaps with the leg-opening elasticised area. In the language of the added feature, it thus has a width dimension of 100% of the distance from the cuff branch line to the distal edge. This clearly fulfils the definition of "at least 80%" in the added feature.

Therefore, and as argued by the appellant/opponents, the distinguishing feature over the figure 7 embodiment of D1 is the same as for the main request. As reasoned above, the Board finds that a skilled person would find a solution to the objective technical problem (which is merely to find an alternative configuration) in any of D3 or D4 and apply it to D1 without an inventive step being involved.

- 4.2 It is further noted that the technical effect alleged by the respondent cannot be attributed to the added feature. The respondent's argument that this was a concrete feature from which the enhanced stiffness could be realised by the large bonding area is not convincing. Similarly to the effects allegedly present for claim 1 of the main request, any such enhanced stiffness could only be realised if bonding was actually performed over a large area.

Even if, as argued by the respondent, bonding were an implicit feature at this location, a higher stiffness is not achieved merely by the claimed overlap of at least 80% but by actually bonding over a large area. The alleged effect is thus not achieved by the feature added to the claim. It potentially *could* be achieved by a particular way of realising the claimed 80% overlap

(i.e. with bonding over a large area bonding), but this feature is not included in the claim. As already reasoned for the main request, the mere potential for a technical effect to be achieved for certain configurations is not sufficient for an inventive step to be acknowledged over the whole scope of the claim.

- 4.3 The Board thus concludes that a skilled person would arrive at the subject-matter of claim 1 of auxiliary request 1 without an inventive step being involved, for the same reasons as laid out for the main request.

Auxiliary request 1 is thus not allowable.

5. *Auxiliary request 2 - Article 123(2) EPC*

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

- 5.1 Contrary to the arguments of the respondent in the written procedure, the Board finds that the leakage-barrier sheet disclosed in paragraph [0025] of the application as filed is inextricably linked to the other features of paragraph [0025]. As argued by the appellants, the leakage-barrier sheet is only described in combination with both the backsheet 68 and the leakage-barrier sheet 67 having rectangular shapes. The Board shares the appellants' understanding that this shape is necessary such that the backsheet can be folded back inwardly along the side edge 67a of the leakage-barrier sheet 67. The rectangular shapes are thus indeed inextricably linked to the features added to claim 1.

5.2 The respondent's argument that the leakage-barrier sheet was further discussed in isolation in paragraph [0039] is not accepted. Even though only the positional relationship between the leakage-barrier sheet 67 and the distal edge 32 of the side flap 31 are mentioned in this paragraph absent its rectangular shape, this paragraph includes, in its introductory clause, a reference to the illustrated embodiment. It cannot thus be considered an isolated disclosure. Paragraph [0039] is thus to be interpreted as referring to an embodiment with both a leakage-barrier sheet and a backsheet having rectangular shapes.

5.3 During the oral proceedings, after having been asked by the chairman about the basis for the amendments made in auxiliary request 2, the respondent argued that in claim 1 two features were added that enabled the possibility of improved leakage prevention and that this was sufficient to be added to the claim without adding other features.

The Board notes that this statement does not address the arguments brought forward by the appellants in view of Article 123(2) EPC. The respondent's statement cannot thus alter the conclusion of the Board, which is as follows.

5.4 As set out for auxiliary request 1, there is no basis in the application as filed for a disposable diaper according to claim 1 of auxiliary request 2 without the leakage-barrier sheet and the backsheet having rectangular shapes. The claimed subject-matter therefore extends beyond the content of the application as filed.

Auxiliary request 2 is thus not allowable.

6. *Auxiliary request 3 to 10 - Article 123(2) EPC*

Contrary to the requirement of Article 123(2) EPC, the amendments made in claim 1 of each of auxiliary requests 3 to 10 introduce subject-matter extending beyond the content of the application as filed.

- 6.1 As argued by appellant/opponent 2, claim 1 of auxiliary request 3 contains significant amendments which are extracted from the features set out in paragraphs [0023] and [0025] of the application as filed. The further features mentioned in paragraphs [0020] and [0021] relating to the structure of the diaper comprising front and rear waist panels to which the absorbent chassis is fixed and which waist panels are joined to form a waist opening, are however omitted.

The respondent did not present any argument as to why this intermediate generalisation of the specific embodiment described and shown throughout the application should be considered allowable. The basis mentioned by the respondent in paragraphs [0023] and [0025] of the application as filed clearly and exclusively refers to the specific construction with front and rear waist panels to which an absorbent chassis is fixed. There is thus no clear basis for a claim not being limited to this structure.

This was also communicated to the parties in the Board's preliminary opinion. No further arguments were received from the respondent thereafter. During the oral proceedings, the respondent merely referred to its arguments presented in the written procedure. The Board has thus no reason to deviate from its preliminary opinion and confirms it herewith.



Contrary to the requirement of Article 123(2) EPC, claim 1 of auxiliary request 3 defines subject-matter extending beyond the content of the application as filed since the amendments made therein result in an unallowable intermediate generalisation.

- 6.2 As the features relating to the specific construction with front and rear waist panels to which an absorbent chassis is fixed are also lacking in claim 1 of auxiliary requests 4 to 10, this finding equally applies to each of these requests.

None of auxiliary requests 3 to 10 is thus allowable.

7. *Auxiliary request 11 - inventive step*

The subject-matter of claim 1 does not involve an inventive step (Article 56 EPC).

- 7.1 The respondent's arguments as to the effects of two layers (and not just one) of the sheet material extending into the leg-opening elasticised area cannot alter the Board's inventive step conclusion with respect to the main request. When considering the embodiment of figure 7 of D1 as the starting point, this is not a further distinguishing feature. Figure 7 of D1 shows that the two layers of the fabric layer 176 forming the containment flap section 144 (corresponding to the leakage-barrier cuff) both extend into the the leg-opening elasticised area so as to be included therein. It is noted that the appended feature (based on claim 6 as filed) only refers to "at least one sheet material". It is thus sufficient for the amended and the appended features to be fulfilled that two layers extend into the the leg-opening elasticised area,

whilst only one of them overlaps for at least 80% of the distance from the cuff branch line to the distal edge.

- 7.2 The respondent's argument that the added features resulted in the stiffness being enhanced resulting in the cuff being maintained in the risen state is thus not convincing. Any such effect is not attributable to a distinguishing feature and cannot thus form the basis for an inventive step.
- 7.3 Consequently, the subject-matter of claim 1 only differs from D1 in feature P12, the same as for the main request. With the same distinguishing feature as for the main request, the Board concludes that the objective technical problem is the same, namely finding an alternative configuration. Suitable alternatives are known from e.g. D3 or D4 which the skilled person would apply in the article of D1.

Therefore, the Board can only come to the same conclusion as for the main request, namely that the subject-matter of claim 1 lacks an inventive step.

Auxiliary request 11 is thus not allowable.

8. As none of the respondent's requests is allowable, the Board acceded to the appellants' requests.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The request for remittal is refused.
3. The patent is revoked.

The Registrar:

The Chairman:



D. Grundner

M. Hannam

Decision electronically authenticated