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**Datasheet for the decision
of 10 March 2025**

Case Number: T 0930/23 - 3.2.06

Application Number: 05821835.5

Publication Number: 1959903

IPC: A61F13/472, A61F13/535,
A61F13/47

Language of the proceedings: EN

Title of invention:
ABSORBENT ARTICLE

Patent Proprietor:
Essity Hygiene and Health Aktiebolag

Opponent:
THE PROCTER & GAMBLE COMPANY

Headword:

Relevant legal provisions:
EPC Art. 56
RPBA 2020 Art. 12(4), 12(3), 12(5)

Keyword:

Main request and auxiliary request 3- Inventive step - (no)
Auxiliary requests 1, 2 and 4 to 24- Discretion not to admit
submission - requirements of Art. 12(3) RPBA 2020 met (no)

Decisions cited:

T 1862/15

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0930/23 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 10 March 2025

Appellant: THE PROCTER & GAMBLE COMPANY
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Respondent: Essity Hygiene and Health Aktiebolag
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Representative: Valea AB
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 29 March 2023
rejecting the opposition filed against European
patent No. 1959903 pursuant to Article 101(2)
EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the decision of the opposition division to reject the opposition against European patent No. 1 959 903.
- 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 revoked.
- III. In its reply to the appeal, the respondent (patent proprietor) requested that the appeal be dismissed and the patent be maintained as granted, or, in the alternative, that the patent be maintained in amended form on the basis of one of auxiliary requests 1-24 which were filed on 5 January 2023 during opposition proceedings.
- IV. Initially, both parties conditionally requested oral proceedings in case their respective main request was not granted.
- V. The following documents referred to by the appellant in its grounds of appeal are relevant to the present decision:
- | | |
|-----|---------------------------|
| D1 | US 2003/0225385 A1 |
| D2 | WO 02/45636 A1 |
| D3 | JP 2002-238948 |
| D3a | English translation of D3 |
| D4 | WO 95/15139 |
- VI. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional

opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request seemingly did not involve an inventive step. The Board stated that it concurred with the appellant that, if the sole distinguishing feature of the subject-matter of claim 1 over the Figure 2 embodiment in D2 were merely the particular range of ratios between 3% and 20%, this would be no more than an arbitrary selection. As to the auxiliary requests, the Board noted that it had discretion not to admit them into the appeal proceedings even though they were submitted within the time limit set by the opposition division. In this regard, the Board also noted that considerations as to whether the auxiliary requests were admissibly raised and maintained included the questions of substantiation and convergence. The Board further noted that it was apparent that substantiation of many of the requests on appeal was lacking.

VII. In a letter dated 3 March 2025 the respondent withdrew its request for oral proceedings and indicated that it would not attend any oral proceedings that might be held.

VIII. Claim 1 of the main request reads as follows:

"An absorbent article, especially an incontinence pad, having a length and a width extension, said length being greater than said width, and comprising absorbent core material, characterised by the absorbent core material forming a central portion (6) and a pair of longitudinal extending side portions (7), wherein a pair of folding lines is provided so as to divide said absorbent core material into said central portion (6) and said pair of longitudinal side portions (7) and wherein the flexural rigidity of the article (1) at the

side portions (7) is between 3 and 20 % of the flexural rigidity of the article (1) at the central portion (6), at a location opposite the side portions (7), preferably between 4 and 15%, most preferred between 4 and 10%; said flexural rigidities being calculated in accordance with the procedures of the description."

IX. Claim 1 of auxiliary request 1 reads as for the main request, except for the flexural rigidity of the article at the side portions being between 4 and 15% of the flexural rigidity of the article at the central portion.

X. Claim 1 of auxiliary request 2 reads as for the main request, except for the flexural rigidity of the article at the side portions being between 4 and 10% of the flexural rigidity of the article at the central portion.

XI. Claim 1 of auxiliary request 3 reads as for the main request, with the following feature appended:

"and wherein the thickness of the article (1) at the side portions (7) is between 50 and 70% of the thickness of the article (1) at a location opposite the side portions."

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

"and wherein the folding lines (5) are formed by compression of the absorbent material."

XIII. Claim 1 of auxiliary request 5 reads as for the main request, except for the article being limited to "being an incontinence pad".

- XIV. Claim 1 of auxiliary request 6 reads as for auxiliary request 5, except for the flexural rigidity of the article at the side portions being between 4 and 15% of the flexural rigidity of the article at the central portion.
- XV. Claim 1 of auxiliary request 7 reads as for auxiliary request 5, except for the flexural rigidity of the article at the side portions being between 4 and 10% of the flexural rigidity of the article at the central portion.
- XVI. Claim 1 of auxiliary request 8 reads as for auxiliary request 5, with the following feature appended:
- "and wherein the folding lines (5) are positioned and extending along a length such that when the article is in use, the folding lines (5) are generally positioned so as to extend along the crotch area of a user, starting from the gracilis tendons and ending in the region of the perineum."
- XVII. Claim 1 of auxiliary request 9 reads as for auxiliary request 8, with the following feature appended:
- "whereby the side portions (7) extend from the central portion (6) towards the user so as to form an arc shape as seen in a transversal direction of the article (1)."
- XVIII. Claim 1 of auxiliary request 10 reads as for auxiliary request 5, with the same feature appended as for auxiliary request 3.

XIX. Claim 1 of auxiliary request 11 reads as for auxiliary request 5, with the same feature appended as for auxiliary request 4.

XX. Claim 1 of auxiliary request 12 reads as for auxiliary request 5, with the following feature appended:

"wherein the absorbent core material comprises an upper absorbent core (8) and a lower absorbent core (9), and wherein the least wide of the cores (8, 9) as measured at the side portions (7) is generally hour-glass shaped."

XXI. Claim 1 of auxiliary request 13 reads as for auxiliary request 5, with the following feature appended:

"wherein the absorbent core material comprises an upper absorbent core (8) and a lower absorbent core (9), and wherein the widest of the cores (8, 9) as measured at the side portions (7) is generally circular or oval."

XXII. Claim 1 of auxiliary request 14 reads as for auxiliary request 5, with the following feature appended:

"and wherein said absorbent material forms outer longitudinal edges forming three convex lobes (2, 3, 4), said pair of folding lines (5) extend concavely between the longitudinal ends of the middle one (3) of said three lobes (2, 3, 4), so as to divide the absorbent core material into said central portion (6) and said pair of longitudinal side portions (7), such that, when the article (1) is in use, the folding lines (5) are generally positioned so as to extend

along the crotch area of a user, starting from the gracilis tendons and ending in the region of the perineum, whereby the side portions (7) may extend from the central portion (6) towards the user so as to form an arc shape as seen in a transversal direction of the article (1)."

- XXIII. Claim 1 of auxiliary request 15 reads as for auxiliary request 5, with the further limitation that the incontinence pad is provided with an adhesive at a garment-facing side thereof.
- XXIV. Claim 1 of each of auxiliary requests 16 to 24 reads as for auxiliary request 15, but with the further amendments as for auxiliary requests 6 to 14 respectively.
- XXV. The appellant's arguments relevant to the decision may be summarised as follows:

The subject-matter of claim 1 of the main request did not involve an inventive step. The problems identified by the respondent of better comfort and avoiding unwanted leakage were not plausibly solved by the distinguishing feature. Claim 1 placed no limits on stiffness and flexibility in absolute terms, and instead merely specified a relationship between the side portions and the central portions. The claim thus covered an article having side portions that were "too stiff", provided the central portion was even stiffer. Similarly, the claim covered an article having side portions that were "too flexible", provided that the side portions were less flexible than the central portion.

The auxiliary requests should not be admitted into the proceedings. The respondent had not demonstrated that these requests were admissibly raised in the proceedings leading to the decision under appeal.

The subject-matter of claim 1 of auxiliary request 3 did not involve an inventive step. No technical effect was associated with the ratio claimed in the feature added to claim 1 of auxiliary request 3.

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

The subject-matter of claim 1 of the main request involved an inventive step. In D2, the side bodies did not deform, but were instead folded when the article was laterally compressed between the thighs of the user, such that the article would assume a cross-sectional shape like an upside-down bucket. This differed from the article of claim 1 of the patent for which the side portions deformed prior to the central portion. D2 was silent about the bending properties of the materials used in the central portions and in the side portions. There was no hint or motivation in D2 to work with the bending properties of the materials.

Reasons for the Decision

1. *Main request - inventive step*

The subject-matter of claim 1 of the main request lacks inventive step (Article 56 EPC).

1.1 As also argued by the appellant, claim 1 differs from D2 (and D1, D3 or D4) only by the requirement for the

flexural rigidity at the side portions being between 3% and 20% of the flexural rigidity at the central portion (with said flexural rigidities being calculated in accordance with the measurement procedures set out in the description). The appellant further noted that this had not been contested by the respondent. The Board concurs with this, and communicated same to the parties in its communication under Article 15(1) RPBA.

- 1.2 The respondent did not contest the appellant's argument and instead discussed in its reply to the grounds of appeal whether in D1-D4 the central and side portions deform, bend or fold. As also explained in the Board's communication, even if there might in use be differences in the bending behaviour of D1-D4 and particular articles falling under claim 1 of the contested patent, the decisive aspect as regards inventive step remains that the flexural rigidities (measured according to the respective procedures given in the description) of the central portion and of the side portions are different, the flexural rigidity in the side portions being less than that in the centre. The Board considers this being implicitly the case in D2, for example discernible from Figure 2 of D2 showing a central portion of greater thickness than the side portions and where the side portions 5, 6 only use one of the two layers (i.e. layer 9 or layer 10) present in the central portion and the core portion is relatively rigid. This was not only argued by the appellant but also explained in the Board's communication (see point 1).

In that communication, the Board further explained that with the sole distinguishing feature merely being the particular range of ratios between 3% and 20%, this was an arbitrary selection, because there was no technical

effect attributable to the particular values, and because the advantages of comfort and avoidance of leakage are primarily dependent on the absolute stiffness of the side portions and the central portion. Hence the respondent's arguments about folding/bending behaviour are not relevant to the issue to be decided.

As further argued by the appellant in its submission dated 20 June 2024, claim 1 places no limit on stiffness in absolute terms. Claim 1 thus covers an article having side portions that are "too stiff", provided that the central portion is even stiffer. The same would apply for an article having side portions that are "too flexible", provided that the central portion is merely stiffer to a degree falling within the claimed range. The claimed ratio of flexural rigidities would hence not solve the problems relied on by the respondent, i.e. that the article can be uncomfortable or that there is a risk of unwanted leakage (see its reply, item 5.5).

Indeed there are no test results in the patent or provided in the submissions which would show the contrary. Thus, the Board concurs with the appellant's opinion that, with no technical effect being attributable to the claimed range, and D2 having a range (albeit an unknown one), the problem to be solved is merely to find a possible alternative flexural rigidity relationship. Lacking any technical effect, the claimed range and thus the subject-matter of claim 1 would consequently be obvious to a skilled person.

1.3 This reasoning was also given in the Board's communication. The respondent did not provide further arguments in response thereto, and only withdrew its request for oral proceedings, stating that it would not

take part in oral proceedings if they were held. The Board thus has no reason to deviate from its provisional opinion that the subject-matter of claim 1 is obvious, and confirms same herewith.

- 1.4 Further, with no technical effect being attributable to the distinguishing feature, the further arguments of the respondent that D2 was silent about the bending properties of the materials used in the central portions and in the side portions and that there was no hint or motivation in D2 to work with the bending properties of the materials, are irrelevant. Features that do not provide a technical effect and which would be implemented as part of the normal design of such articles which are deemed suitable in the circumstances, are an obvious choice for a skilled person even if there is no specific hint or pointer towards exactly the claimed range. It is thus not necessary in the circumstances of the present case (where there is no proven technical effect and no technical problem solved across the scope of the claim by the distinguishing feature) to find a hint by way of common general knowledge or in the prior art, contrary to the reasoning of the opposition division in the impugned decision on page 4, third paragraph. In a case merely involving an arbitrary selection from obvious alternatives, the prior art does not need to contain an incentive for the skilled person to select the particular solution claimed, rather all possible and suitable solutions are considered to be suggested to the skilled person (T 1862/15, reasons 8).

2. *Auxiliary requests - admittance*

Auxiliary requests 1, 2 and 4 to 24 are not admitted into the appeal proceedings as they lack substantiation

as to which objections might be overcome by the various amendments and how such amendments actually overcome them (Articles 12(3) and (5) RPBA).

2.1 In its communication (see item 2.1 thereof), the Board noted that the appellant objected to the admittance of the auxiliary requests into the appeal proceedings under Article 12(4) RPBA. The Board explained that merely submitting these within the time limit under Rule 116 EPC set by the opposition division did not necessarily mean that these requests were admissibly raised pursuant to Article 12(4) RPBA. It further stated that substantiation of the requests on appeal under Article 12(3)/(5) RPBA was a further matter which might require discussion. In this regard, the Board noted that many of the requests lacked substantiation in the sense that the respondent had not explained what objections were allegedly overcome by these requests and how. No substantive reply to the Board's communication was received from the respondent.

2.2 This lack of substantiation applies for example to auxiliary requests 1 and 2, where the respondent merely stated that the claimed narrower ranges in claim 1 thereof were "particularly useful". The respondent did not provide any indication as to why the narrower ranges were "particularly useful" in a way which would not be obvious. The respondent's reference in item 7.6 of its reply to the grounds of appeal to paragraph [0121] of the patent also provides no additional information in this regard. The Board is also unable to understand which technical effect the respondent considers to be achieved or which technical problem it considers to be solved and why. Whilst the application of the problem solution approach is not mandatory, the respondent at least needs to provide an explanation as

to why the objection of inventive step could be overcome by the amendments.

- 2.3 The same applies to auxiliary request 4, where the respondent stated that applying compression lines was an "advantageous way of providing the folding lines". As for auxiliary requests 1 and 2, this phrasing does not allow the Board to understand why the respondent considers an inventive step to be involved by the added features. Whether something is considered "advantageous" goes no way to explaining why this allegedly advantageous feature is not obvious. Likewise, the respondent's reference to paragraph [0026] of the patent provides nothing additional in this respect.
- 2.4 As regards auxiliary request 5, the limitation to an incontinence pad again fails by itself to provide a reason why the limitation should involve an inventive step. In particular, since the contentious matter is inventive step and the (closest) prior art is D2, which (as many of the other prior art documents) also discloses an incontinence pad, it is not clear to the Board what objection(s) was/were intended to be overcome by this limitation.
- 2.5 This finding also applies to auxiliary requests 6 and 7 for which no further arguments were given by the respondent.
- 2.6 With regard to auxiliary request 8, the respondent merely stated that the article of claim 1 differed in its shape from the article of D2. Again, this does not explain why an inventive step was involved, nor can the Board deduce same.

- 2.7 The same considerations apply to auxiliary requests 9 to 11, for which the respondent merely referred to its arguments presented for auxiliary requests 8 and 3-5, respectively.
- 2.8 As to auxiliary request 12, the respondent merely argued that "[f]or none of the cited documents, the least wide core [was] generally hour-glass shaped". From this it is again not clear why an inventive step should be involved.
- 2.9 The same considerations apply to auxiliary request 13, for which the respondent merely stated that "[f]or none of the cited documents, the widest core [was] generally circular or oval".
- 2.10 This is, once again, the same for auxiliary request 14, for which the respondent simply stated that "none of the articles of the cited documents [had] the shape as disclosed in Auxiliary request 14".
- 2.11 Claim 1 of auxiliary requests 15 to 24 includes the further limitation that the incontinence pad is provided with an adhesive at a garment-facing side, and is otherwise identical to claim 1 of auxiliary requests 5 to 14. With respect to the feature added to claim 1 of these requests, the respondent merely argued that this "narrow[ed] the scope of protection to products provided with an adhesive at a garment-facing side thereof" and that "[t]his feature typically differ[ed] from diapers and heavy-incontinence protectors". As explained above in view of many other requests, this does not allow the Board to deduce why an inventive step should be involved.

- 2.12 The Board thus availed itself of its discretion not to admit auxiliary requests 1, 2 and 4 to 24 into the proceedings having regard to Article 12(5) RPBA.
- 2.13 The only auxiliary request that is substantiated is auxiliary request 3. In this respect, the respondent argued that the added features made the side portions more easily foldable than the central portion at the location opposite the side portions, which contributed to the tendency of the side portions to fold and deform rather than the central portion. It can thus be understood why the respondent considers the added features to involve an inventive step.

3. *Auxiliary request 3 - inventive step*

The subject-matter of claim 1 of auxiliary request 3 lacks inventive step (Article 56 EPC).

- 3.1 As also argued by the appellant, in the articles of D2 and D3, the thickness of the side portions is less than the thickness of the central portion owing to the presence of additional layers in the central portions. This was not contested by the respondent.
- 3.2 Instead, the respondent argued that D2 and D3 were silent about thickness values and that the thickness ratio claimed in auxiliary request 3 could not be derived from D2. To form a relationship according to the added feature of claim 1 of auxiliary request 3, two thicknesses had to be selected: that of the central portion and that of the side portion. Making selections from two different ranges allegedly involved an inventive step.

This is, however, not persuasive. As also stated in the Board's communication (see item 2.2, fourth paragraph), similar considerations as for the ratio of flexural rigidities in claim 1 of the patent as granted apply to the ratio of thicknesses. This means that, with the further distinguishing feature being merely the unknown ratio of thicknesses, and with no technical effect being attributable to the claimed range of 50% to 70%, the problem to be solved is merely to find a possible alternative thickness relationship. Consequently, the claimed range merely defines a set of several equally obvious thickness ratios.

- 3.3 The subject-matter of claim 1 of auxiliary request 3 thus lacks an inventive step (Article 56 EPC).

4. To summarise, the respondent's requests are thus either not admitted into the proceedings or are not allowable. The patent therefore has to be revoked in accordance with the appellant's request.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated