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**Datasheet for the decision  
of 1 July 2025**

**Case Number:** T 1069/23 - 3.2.06

**Application Number:** 18209871.5

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A61F13/496, A61F13/53

**Language of the proceedings:** EN

**Title of invention:**  
DISPOSABLE WEARABLE ARTICLE

**Patent Proprietor:**  
Unicharm Corporation

**Opponents:**  
Essity Hygiene and Health Aktiebolag  
Schöpf, Patrick  
The Procter & Gamble Company

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(a), 54  
RPBA 2020 Art. 12(4), 12(6)  
EPC 1973 Art. 84

**Keyword:**

Novelty - main request (no) - auxiliary request 2 (no)  
Amendment to case - reasons for submitting auxiliary request 1  
in appeal proceedings (no)  
Claims -auxiliary requests 3 to 9 - clarity (no)

**Decisions cited:**

G 0001/24

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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**Case Number:** T 1069/23 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 1 July 2025**

<b>Appellant:</b> (Patent Proprietor)	Unicharm Corporation 182 Shimobun Kinsei-cho Shikokuchuo-shi, Ehime 799-0111 (JP)
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<b>Party as of right:</b> (Opponent 2)	Schöpf, Patrick Daiserstr. 27 81371 München (DE)
<b>Representative:</b>	Samson & Partner Patentanwälte mbB Widenmayerstraße 6 80538 München (DE)
<b>Party as of right:</b> (Opponent 3)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnati, Ohio 45202 (US)
<b>Representative:</b>	Elkington and Fife LLP Prospect House 8 Pembroke Road Sevenoaks, Kent TN13 1XR (GB)

**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
10 May 2023 concerning maintenance of the  
European Patent No. 3494942 in amended form.

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** P. Cipriano  
J. Hoppe

## **Summary of Facts and Submissions**

- I. In its interlocutory decision the opposition division found that, account being taken of the amendments made by the patent proprietor during the opposition proceedings, European patent No. 3 494 942 met the requirements of the EPC.
- II. The appellant (proprietor) requested with its grounds of appeal that the decision under appeal be set aside and, as a main request, that the patent be maintained as granted or, as an auxiliary measure, based on one of auxiliary requests 1 to 9, where auxiliary request 2 was that found allowable by the opposition division.
- III. The appellant (opponent 1) requested that the decision under appeal be set aside and the patent be revoked.
- IV. The respondents (opponents 2 and 3) requested that the appeal by the proprietor be dismissed. Opponent 2 further requested initially that the case be remitted to the opposition division if the Board were to decide that claim 1 of the granted patent were novel over D1.
- V. The following documents are of relevance for this decision:  
D1 JP 2005-334626 and its English translation D1a
- VI. The Board issued a summons to oral proceedings and a subsequent communication in which it gave its provisional opinion *inter alia* mentioning that D1 to D5 seemed to disclose all the features of claim 1 of the main request. In addition the Board stated that it did not intend to admit auxiliary request 1 into the proceedings, that D1 also seemed to disclose all the

features of claim 1 of auxiliary request 2, that claim 1 of auxiliary request 3 did not seem to fulfil the requirements of Articles 84 and 123(2) EPC and that the amendments to claim 1 of auxiliary requests 4 to 9 did not seem to overcome the lack of clarity objection against claim 1 of auxiliary request 3.

VII. Oral proceedings were held before the Board on 1 July 2025.

At the close of the oral proceedings the parties' requests were thus as follows:

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted (main request) or as an auxiliary measure that the patent be maintained in amended form based on one of auxiliary requests 1 to 9, filed with the grounds of appeal.

The appellant (opponent 1) requested that the decision under appeal be set aside and the European patent be revoked.

The opponents 2 and 3 requested that the proprietor's appeal be dismissed.

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

"P1: A disposable wearable article having a vertical direction and a lateral direction, comprising:

P2: a front waist region;

P3: a rear waist region;

P4: a crotch region positioned between the front and rear waist regions; and

P5: an absorbent body positioned at least in the crotch region, wherein

P6: the absorbent body has both lateral sides opposing each other in the lateral direction in the crotch region, and a deformation guiding portion extending in the vertical direction in each of the lateral sides,

P7: elastic side flaps extending in the vertical direction are positioned at outer sides in the lateral direction of both of the lateral sides, and

P8: a dimension (W3) in the lateral direction of each of the elastic side flaps is larger than a dimension (W4) in the lateral direction from each lateral edge of the absorbent body to a lateral outside edge of each of the deformation guiding portions."

IX. Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the following features have been added at the end of the claim:

"P9: a liquid absorbent structure (12) including the absorbent body (66) and an outer surface sheet (64) positioned on the skin non-facing surface side of the absorbent body,

P10: wherein each of the elastic side flaps (70) has a plurality of leg elastic members (71) extending in the vertical direction,

P11: and a base sheet having the leg elastic members attached thereto,

P12: and the base sheet and the outer surface sheet (64) are formed integrally,

P13: wherein the liquid absorbent structure (12) further includes leakage barrier sheets (67) that are liquid impermeable, interposed between the absorbent body (66) and the outer surface sheet (64),

P14: and the leakage barrier sheets extend from both the lateral edges (66c) of the absorbent body to further outer side in the lateral direction,

P15: and a dimension in the lateral direction of the leakage barrier sheets (67) positioned in each of the elastic side flaps (70) is not less than 50% of the dimension in the lateral direction of each of the elastic side flaps."

- X. Claim 1 of auxiliary request 3 differs from claim 1 of the main request in that the following features have been added at the end of the claim:
- "each of the deformation guiding portions (78) has guiding ends (78a, 78b) at both ends in the vertical direction, and
- both guiding ends (78a, 78b) are inclined such that a dimension in a direction of thickness becomes gradually smaller from a skin facing surface side of the wearable article (10) toward a skin non-facing surface side of the wearable article (10), in the direction of thickness (Z) orthogonal to the lateral direction and the vertical direction."
- XI. Claim 1 of auxiliary request 4 differs from claim 1 of the main request in that the following features have been added at the end of the claim:



"each of the deformation guiding portions (78) has guiding ends (78a, 78b) at both ends in the vertical direction,  
both guiding ends (78a, 78b) are positioned in the crotch region (15), and the deformation guiding portions (78) do not overlap with the front and rear waist regions (13, 14) in a plan view, and  
both guiding ends (78a, 78b) are inclined such that a dimension in a direction of thickness becomes gradually smaller from a skin facing surface side of the wearable article (10) toward a skin non-facing surface side of the wearable article (10), in the direction of thickness (Z) orthogonal to the lateral direction and the vertical direction."

1. Claim 1 of auxiliary request 5 differs from claim 1 of auxiliary request 4 in that the following features have been added at the end of the claim:

"each deformation guiding portion (78) is formed into the shape of a concave groove, concave toward the skin non-facing surface from the skin facing surface, or a slot, in which the absorbent body (66) is not present, and  
the deformation guiding portions (78) are disposed to be spaced apart from each other at a predetermined dimension in the lateral direction in the crotch region (15)."

- XII. Claim 1 of auxiliary request 6 differs from claim 1 of auxiliary request 5 in that the absorbent body features read:

"an absorbent body (66) positioned at least in the crotch region (15), wherein  
the absorbent body has both lateral sides (66e) opposing each other in the lateral direction in the crotch region, a middle part (66d) having a width

dimension larger than a width dimension of each lateral side (66e), and a deformation guiding portion (78) extending in the vertical direction in each of the lateral sides (66e)".

XIII. Claim 1 of auxiliary request 7 differs from claim 1 of auxiliary request 6 in that the following features have been added at the end of the claim:

"an interval of the leg elastic members (71) becomes narrower gradually toward both lateral side edges (12f) of the liquid absorbent structure (12)".

XIV. Claim 1 of auxiliary request 8 differs from claim 1 of auxiliary request 7 in that the following features have been added at the end of the claim:

"the wearable article further comprises a waist panel (11) including a front waist panel (16) forming the front waist region (12), and a rear waist panel (17) forming the rear waist region (14),  
the front and rear waist panels (16, 17) respectively include inner-layer sheets (21, 22) positioned on the skin facing surface, outer-layer sheets (23, 24) positioned on the skin non-facing surface, and waist elastic members (51, 52, 53) formed of a plurality of string or strand-like elastic materials extending in the lateral direction, and contractively attached in a stretched state with hot-melt adhesive between the inner-layer sheets (21, 22) and outer-layer sheets (23, 24),  
the inner-layer sheets (21, 22) and outer-layer sheets (23, 24) are secured with hot-melt adhesive applied to a periphery of each of the waist elastic members (51, 52, 53),  
the liquid absorbent structure (12) has a front end part (12A) attached to the skin facing surface of the front waist panel (16) and a rear end part (12B)

attached to the skin facing surface of the rear waist panel (17), wherein the liquid absorbent structure (12) and the waist panel (11) are connected partially by applying hot-melt adhesive, and the leakage barrier sheets (67) and the outer surface sheet (64) are connected partially by applying hot-melt adhesive."

XV. The wording of claim 1 of auxiliary request 9 is as follows:

"A disposable wearable article (10) having a vertical direction and a lateral direction, comprising:  
a front waist region (13);  
a rear waist region (14);  
a crotch region (15) positioned between the front and rear waist regions; and  
an absorbent body (66) positioned at least in the crotch region (15), wherein  
the absorbent body has both lateral sides (66e) opposing each other in the lateral direction in the crotch region, a middle part (66d) having a width dimension larger than a width dimension of each lateral side (66e), and a deformation guiding portion (78) extending in the vertical direction in each of the lateral sides (66e),  
elastic side flaps (70) extending in the vertical direction are positioned at outer sides in the lateral direction of both of the lateral sides (66e), and  
a dimension (W3) in the lateral direction of each of the elastic side flaps (70) is larger than a dimension (W4) in the lateral direction from each lateral edge (66c) of the absorbent body to a lateral outside edge of each of the deformation guiding portions (78),  
the wearable article (10) further comprising a liquid absorbent structure (12) including a liquid permeable body-side liner (63), positioned on a skin facing

surface side, a water repellent outer surface sheet (64) positioned on a skin non-facing surface side, and the absorbent body in the form of a pad interposed between the body-side liner (63) and the covering sheet (64),

the liquid absorbent structure (12) further has end flaps (69) formed by the outer surface sheet (64) and the body-side liner (63) extending outward in the vertical direction of front and rear end edges (66a, 66b) of the absorbent body (66),

each of the elastic side flaps (70) is formed by the body-side liner (63) extending outward in the lateral direction of both lateral side edges of the liquid absorbent body (66c), the outer surface sheet (64), and the leakage barrier sheet (67),

each of the elastic side flaps (70) has a plurality of leg elastic members (71) extending in the vertical direction, and a base sheet having the leg elastic members attached thereto,

the base sheet and the outer surface sheet (64) are formed integrally,

the liquid absorbent structure (12) further includes leakage barrier sheets (67) that are liquid impermeable and made of a plastic film having an air-through property and a mass in the range of  $15 \text{ g/m}^2$  to  $22 \text{ g/m}^2$ , interposed between the absorbent body (66) and the outer surface sheet (64),

the leakage barrier sheets extend from both the lateral edges (66c) of the absorbent body to further outer side in the lateral direction,

a dimension in the lateral direction of the leakage barrier sheets (67) positioned in each of the elastic side flaps (70) is not less than 50% of the dimension in the lateral direction of each of the elastic side flaps,

each of the deformation guiding portions (78) has guiding ends (78a, 78b) at both ends in the vertical direction,

both guiding ends (78a, 78b) are positioned in the crotch region (15), and the deformation guiding portions (78) do not overlap with the front and rear waist regions (13, 14) in a plan view,

both guiding ends (78a, 78b) are inclined such that a dimension in a direction of thickness becomes gradually smaller from a skin facing surface side of the wearable article (10) toward a skin non-facing surface side of the wearable article (10), in the direction of thickness (Z) orthogonal to the lateral direction and the vertical direction,

each deformation guiding portion (78) is formed into the shape of a concave groove, concave toward the skin non-facing surface from the skin facing surface, or a slot, in which the absorbent body (66) is not present, the deformation guiding portions (78) are disposed to be spaced apart from each other at a predetermined dimension in the lateral direction in the crotch region (15),

an interval of the leg elastic members (71) becomes narrower gradually toward both lateral side edges (12f) of the liquid absorbent structure (12),

the wearable article further comprises a waist panel (11) having elasticity and being attached to the liquid absorbent structure (12), the waist panel (11) including a front waist panel (16) forming the front waist region (12), and a rear waist panel (17) forming the rear waist region (14),

the front waist panel (16) is substantially rectangular shaped, and has a proximal end edge (16a) extending in the lateral direction, intersecting with a front end edge (12A) of the liquid absorbent structure (12), a distal end edge (16b) extending in the lateral

direction, spaced apart to be opposite to the proximal end edge (16a) in the vertical direction, and both lateral side edges (16c) extending in the vertical direction between the proximal end edge (16a) and the distal end edge (16b),

the rear waist panel (17) is generally rectangular-shaped, and has a proximal end edge (17a) extending in the lateral direction, parallel to a rear end edge (12B) of the liquid absorbent structure (12), a distal end edge (17b) extending in the lateral direction, spaced apart to be opposite to the proximal end edge (17a) in the vertical direction, both lateral side edges (17c) extending in the vertical direction between the proximal end edge (17a) and the distal end edge (17b), and both corner edges (17d) connecting the lateral side edges (17c) and the proximal end edge (17a), and extending to be curved,

the front and rear waist panels (16, 17) respectively include inner-layer sheets (21, 22) positioned on the skin facing surface, outer-layer sheets (23, 24) positioned on the skin non-facing surface, and waist elastic members (51, 52, 53) formed of a plurality of string or strand-like elastic materials extending in the lateral direction, and contractively attached in a stretched state with hot-melt adhesive between the inner-layer sheets (21, 22) and outer-layer sheets (23, 24),

the inner-layer sheets (21, 22) and outer-layer sheets (23, 24) are secured with hot-melt adhesive applied to a periphery of each of the waist elastic members (51, 52, 53),

the liquid absorbent structure (12) has a generally rectangular shape and has a front end part (12A) attached to the skin facing surface of the front waist panel (16), a rear end part (12B) attached to the skin facing surface of the rear waist panel (17), and an

intermediate part (12C) forming the crotch region (15) extending in the vertical direction between the front and rear end parts (12A, 12B), wherein the liquid absorbent structure 12 and the waist panel 11 are connected partially by applying hot-melt adhesive, and the leakage barrier sheets (67) and the outer surface sheet (64) are connected partially by applying hot-melt adhesive."

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

*Main request - Articles 100(a) and 54 EPC*

D1 disclosed all the features of claim 1. The dimension (W3) in the lateral direction of each of the elastic side flaps would be seen by the skilled person as including the part that overlapped part of the absorbent core. Figure 6 of D1 disclosed a length L3 (corresponding to dimension W3 as defined in claim 1) that was larger than L2 (corresponding to dimension W4 as defined in claim 1).

*Auxiliary request 1 - admittance*

The objection referred to by the proprietor had arisen during adaptation of the description before the opposition division. This concerned the interpretation of claim 1 in respect of features which had come from granted claim 6, which defined leakage barrier sheets (plural) and that this meant more than one. Such an issue could not have surprised the proprietor and a request to address this should have been filed during opposition proceedings.

*Auxiliary request 2 - Article 54 EPC*

D1 disclosed the added features P9 to P15 of this request. The absorbent structure of Figure 6 in D1 also included the nonwoven fabric 60 and the resin film 68, which corresponded to an outer surface sheet and leakage barrier sheets as defined in features P9 and P13 of claim 1.

The elastics 61 in Figure 6 were leg elastic members as defined in features P10 and P11.

Only one selection was needed to arrive at the combination of features of claim 1 including feature P15.

*Auxiliary requests 3 to 9 - Article 84 EPC*

The feature added to claim 1 of auxiliary requests 3 to 9 "both guiding ends (78a, 78b) are inclined such that a dimension in a direction of thickness becomes gradually smaller from a skin facing surface side of the wearable article (10) toward a skin non-facing surface side of the wearable article (10), in the direction of thickness (Z) orthogonal to the lateral direction and the vertical direction" was not clear, since the skilled person could not derive in which direction the inclination was and it manifestly could not be in the thickness direction.

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

*Main request - Articles 100(a) and 54 EPC*



D1 did not disclose feature P8. Dimensions could not be derived from schematically drawn Figure 6 of D1, and paragraph [0081] of D1a disclosed a deviation between the fixed end 67 and the center position of the bending assist portion such that it would not be possible to establish the lateral dimension L3 of the side flap in comparison to the dimension L2 in the lateral direction from each lateral edge of the absorbent body to a lateral outside edge of each of the deformation guiding portions. The skilled person would consider that the feature P7 "elastic side flaps [...] positioned at outer sides in the lateral direction of both of the lateral sides" excluded positions (for the establishment of the dimension in feature P8) where the elastic side flaps overlapped with the absorbent body.

*Auxiliary request 1 - admittance*

Auxiliary request 1 addressed an issue raised for the first time during the oral proceedings of 23 March 2023 in relation to previous auxiliary request 1 (now auxiliary request 2). The grounds of appeal of the proprietor were the first opportunity to address this objection.

*Auxiliary request 2 - Article 54 EPC*

D1 did not disclose features P9, P10, P11, P13 and P15.

First, the absorbent structure in Figure 6 of D1 did not include an outer surface sheet and leakage barrier sheets as defined in features P9 and P13. The nonwoven fabric 60 and the resin film 68 in Figure 6 were not part of the absorbent structure.

Second, the elastic members 61 of D1 were not leg elastic members as defined in feature P11 of claim 1.

Third, even if the resin film 68 were considered to correspond to the leakage barrier sheet as defined in claim 1, D1 did not disclose that a dimension of the leakage barrier sheet positioned in each of the elastic side flaps was not less than 50% of the dimension in the lateral direction of each of the elastic side flaps as defined in feature P15 of claim 1.

*Auxiliary requests 3 to 9 - Article 84 EPC*

The skilled person taking the description into consideration would have understood that the added feature only defined the thickness direction in a number of different ways and that the inclination was in the vertical direction, which was the direction in which the guiding portions and their respective ends were aligned.

**Reasons for the Decision**

- 2. Main request - Article 100(a) EPC novelty
- 2.1 It was not disputed by the proprietor that the embodiment of Figure 6 of D1 disclosed the features P1 to P7. The Board also sees no reason to find otherwise.
- 2.2 It was only questioned whether D1 disclosed feature P8: "a dimension (W3) in the lateral direction of each of the elastic side flaps is larger than a dimension (W4) in the lateral direction from each lateral edge of the absorbent body to a lateral outside edge of each of the deformation guiding portions".

- 2.3 Figure 6 of D1 discloses a dimension L3, which corresponds to the width of the leak-proof cuff 6, defined between the fixed end 67, i.e. the position of the bending assisting portion 44, and the free end 62 of the leak-proof cuff 6 (see also paragraphs [0018], [0023] and [0024] of D1a).
- 2.3.1 The proprietor argued that L3 did not correspond to W3. According to G 1/24, the description and drawings (of the patent specification) shall always be consulted to interpret the claims. Thus, according to the proprietor, paragraphs [0042] and [0043], as well as Figure 4, of the patent specification taught the skilled person that feature P7 "elastic side flaps [...] positioned at outer sides in the lateral direction of both of the lateral sides" should be interpreted so as to exclude portions where the elastic side flaps overlapped with the absorbent body (for establishing the dimension of feature P8), because being positioned at "outer sides" referred to the outer sides from which they started.

The Board does not accept this argument. Paragraphs [0042] and [0043] do not disclose anything specific regarding dimensions in the lateral direction. These paragraphs describe how the flaps are brought and held into contact with the inner side of the thighs. This does not imply that the entire portion of the flap not overlapping the absorbent structure comes into contact with the thighs (nor is this actually shown in the Figures 6a and b to which these paragraphs make reference). On the contrary, the skilled person would understand that contact would necessarily be limited to an even smaller area of the flap that does not overlap, with the remaining area remaining loose to allow it to

adjust to leg movement. The skilled person would not derive from these paragraphs that the portions where the elastic side flaps overlap with the absorbent body should be excluded when establishing a dimension as defined in feature P8.

On the other hand, Figure 4 of the patent does indeed disclose a dimension W3, that extends from the outside lateral edge of the flap up to the lateral edge of the absorbent body, i.e. without any overlap with the core. However, even after consulting the description and the drawings, the skilled person would not find that the language of the claim is restricted to such an embodiment. Feature P8 defines "a dimension in the lateral direction" of each of the side flaps and therefore does not restrict the claim to any specific dimension, such as the one disclosed exemplarily in Figure 4. The skilled person knows that a dimension in the lateral direction of the elastic side flaps simply corresponds to an extension in that direction, but not necessarily to its whole width (i.e. the largest possible dimension).

In this particular case, the Board sees no reason to deviate from the wording of the claim and cut down its scope by implying into it additional features which appear only in the description of a specific embodiment. This is particularly true given that the broader/unrestricted interpretation of the wording of the claim also makes technical sense and is also encompassed by the description as a whole.

Therefore, even after consulting the description and the drawings, and taking into consideration the embodiment of a dimension W3 shown in Figure 4, the skilled person would in their act of interpretation of

the language of the claim not find that feature P8 of claim 1 is restricted to the specific example disclosed in Figure 4 of the patent.

- 2.4 The skilled person would consider that the length L3 of the leak-proof cuff 6 extending from the fixed end 67 to the free end 62 in Figure 6 corresponds to a dimension W3 in the lateral direction of each of the elastic side flaps defined in claim 1. The cuff 6 and the absorbent body 5 are indeed only attached at the fixed end 67, enabling the cuff 6 to flap around this point with regard to the absorbent body 5.
- 2.5 The proprietor argued that paragraph [0081] of D1 disclosed a deviation between the fixed end 67 and the center position of the bending assist portion 44, but this argument is not convincing. This paragraph states that these should "substantially coincide with each other in the diaper width direction" as the skilled person would also derive from Figure 6 of D1. The deviation values described there would be understood by the skilled person exactly as maximum manufacturing tolerances from the envisaged alignment, as their name suggests.
- 2.6 Figure 6 of D1 also discloses a dimension L2, which corresponds to the distance from the fixed end 67 of the leak-proof cuff 6 to the side edge portion 5c of the absorbent body 5 (see also paragraph [0023] of D1a). The skilled person would consider this distance to correspond to "a dimension (W4) in the lateral direction from each lateral edge of the absorbent body to a lateral outside edge of each deformation guiding portion", as defined in claim 1.

2.7 The skilled person would also derive from Figure 6 of D1 that dimension L3 is larger than the length L2. While both dimensions share the same end point 67, L3 extends noticeably further to the right in Figure 6, reaching the free end 62. Feature P8 is therefore disclosed.

2.8 The proprietor further argued that a normal interpretation of claim 1 was such that the dimensional difference  $W3 > W4$  had to be valid "along the entire vertical extent" and not just at one location, because the wording of feature P7 required an extension in the vertical direction of the side flaps.

However, the Board finds that while an extension in the vertical direction of the flaps is implied (and also present in D1), the position at which "a dimension" W3 of each of the flaps is taken for comparison with "a dimension" W4, contrary to the proprietor's argument that this was conventional drafting practice, does not imply that this dimensional difference must apply over the whole vertical extent of the flaps. Nevertheless, when considering Figs. 2 and 5 of D1 together, as argued by the opponents, the relationship of dimensions L3 to L2 does also satisfy claim 1 over a vertical extent, because the dimension L2 gradually decreases, tending to a zero dimension, when moving vertically along the deformation guiding portions 44. Hence L3 is always greater than L2, also over a significant vertical extent.

2.9 Although the proprietor had argued in writing that specific selections had to be made from the description of the various possible relative width dimensions regarding L, L1, L2 and L3 to arrive at the subject-matter of claim 1, this argument does not address the

fact that the embodiment of Fig. 6 is also a disclosure in its own right, disclosing to a skilled person that L3 is intended to be indicated as significantly greater than L2.

- 2.10 The embodiment of Figure 6 of D1 thus discloses all the features of claim 1. The ground for opposition under Article 100(a) EPC hence prejudices the maintenance of the patent as granted. Consequently the proprietor's main request is not allowable.

### 3. Auxiliary request 1 - admittance

- 3.1 Auxiliary request 1 was filed for the first time with the proprietor's grounds of appeal.

- 3.2 The proprietor argued that auxiliary request 1 addressed a new issue raised for the first time during the oral proceedings before the opposition division.

- 3.2.1 In points 4.1 and 4.2 of its preliminary opinion the Board stated:

"4.1 The Board does not consider this argument persuasive. The new objection seems to relate to the adaptation of the description. Otherwise the only issue under discussion was the interpretation of granted claim 6, according to which claim 6 defined leakage barrier sheets (plural) and that this should mean more than one. Such an issue could not have surprised the proprietor, who had neither argued otherwise and nor disagreed at the oral proceedings.

As opponent 1 pointed out on page 10, 4th paragraph of its reply to the proprietor's grounds of appeal, this was discussed and communicated to the proprietor during

the oral proceedings (see page 7 of the minutes) and then again during the adaptation of the description such that there seems to have existed ample opportunity to file the auxiliary request 1 before the opposition division.

4.2 Auxiliary request 1 thus appears to be an amendment of the proprietor's case that could and should have been filed in opposition proceedings and the Board intends not to admit it under Article 12(4)(6) RPBA."

3.3 During the oral proceedings, the proprietor merely referred to its written submissions such that the Board has no reason to deviate from its preliminary opinion, which is herewith confirmed.

3.4 The Board hence exercised its discretion under Article 12(4), (6) RPBA not to admit auxiliary request 1 into the proceedings.

4. Auxiliary request 2 - Article 54 EPC

4.1 Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that features P9 to P15 (see item IX above) have been appended at the end of the claim.

4.2 Regarding features P9 and P13, the proprietor, in agreement with the reasoning of the opposition division, argued that the leak-proof cuffs 6 in D1 were not part of a "liquid absorbent structure". The skilled person, consulting the drawings and the description as stipulated in G 1/24, would have allegedly understood that only the absorbent main body 5 of D1, which formed a module, corresponded to the liquid absorbent structure of claim 1 of AR1 and that the cuffs were merely attached to it.



This argument is, however, not persuasive. There is no reason as to why the cuffs 6 in D1 could not be considered part of a liquid absorbent structure as defined in features P9 and P13 of claim 1.

Consulting the description and the drawings, the liquid absorbent structure described in the patent and defined in claim 1 includes not only the absorbent body, but also an outer surface sheet and leakage barrier sheets as also argued by the opponents with reference to e.g. paragraphs [0016] and [0017]. The Board also notes, merely for completeness however, that D1 does not explicitly describe any module comprising the absorbent core and that Figure 3 shows the cuffs wrapped around the absorbent main body 5 with extra folds on top (e.g. see paragraphs [0038] and [0039] of D1a) in a way that the skilled person could also perceive as forming a sort of unit adhered to the exterior body 10, and hence a unit which can also be a liquid absorbent structure, even if claim 1 were to be understood (which it is not) to imply some type of separate combined structure.

There is thus no reason why a "liquid absorbent structure" in D1 should not include the cuffs 6 and, more specifically, the non-woven fabric 60 (which corresponds to an outer surface sheet as defined in feature P9) and the resin film 68 (which corresponds to the leakage barrier sheets defined in feature P13).

- 4.2.1 D1, Figure 6, therefore discloses a liquid absorbent structure including the absorbent body 5 and an outer surface sheet (the inner part of the non-woven fabric 60) positioned on the skin nonfacing surface side of the absorbent body as defined in feature P9 and that

the liquid absorbent structure includes leakage barrier sheets (the resin films 68) as defined in feature P13.

- 4.3 Regarding P10, it was not contested by the proprietor that the cuffs 6 in D1 have a plurality of elastic members 61 extending in the vertical direction. However, the proprietor argued that these elastics did not correspond to leg elastic members as defined in claim 1. According to the proprietor, only the elastic members 81 in D1 corresponded to the leg elastic members as defined in claim 1, since they encircled the entire thigh.

This argument is, however, not accepted. It was not contested by the proprietor and the Board also agrees with the opponents that the cuffs 6 and their elastic members 61 contact the inner part of the legs in the thigh region in a similar way to that described in paragraphs [0042] and [0043] of the patent with regard to the flaps.

Even though D1 also discloses further elastic members, such as elastic members 81, there is no reason why the skilled person would consider only the elastic members 81 to correspond to the elastic members defined in claim 1, since the claim does not define any specific function or shape for them. The Board notes that according to the case law of the Boards of Appeal, only technically illogical interpretations should be excluded and finds that the interpretation made by opponent 1 would not be illogical either and is also not excluded by the description.

- 4.3.1 The elastic members 61 in D1 correspond therefore to leg elastic members as defined in feature P10.

- 4.4        Consequently, D1, Figure 6, also discloses a base sheet (the outer layer of the non-woven fabric 60) having the leg elastic members 61 attached thereto as defined in feature P11.
- 4.5        It was not disputed that D1 also discloses that the base sheet and the outer surface sheet are formed integrally as parts of the nonwoven fabric 60 in Figure 6. D1 therefore also discloses feature P12.
- 4.6        As discussed above in paragraph 4.2, D1 discloses that the liquid absorbent structure includes leakage barrier sheets (the resin film 68 in each of the leak proof cuffs 6) as defined in feature P13.
- 4.7        Figure 6 of D1 additionally shows that the leakage barrier sheets (resin films 68) extend from both lateral edges of the absorbent body to further outer side in the lateral direction as defined in feature P14. This was also not disputed by the proprietor.
- 4.8        Regarding feature P15, the proprietor argued that, even if the resin film 68 were considered to correspond to the leakage barrier sheet of claim 1, D1 did not disclose a dimension of the leakage barrier sheet positioned in each of the elastic side flaps which is not less than 50% of the dimension in the lateral direction of each of the elastic side flaps. Several selections would allegedly be necessary for the skilled person to derive this combination of features. More specifically, it would require selecting the option in paragraph [0026] of D1a whereby the bending assisting portion 44 and the fixed end overlap, as well as the option that the width L of the resin film 68 (corresponding to a dimension in the lateral direction of the leakage barrier sheets positioned in each of the

elastic side flaps defined in feature P15) is 120% of the width L3 of the leak-proof cuff (which corresponds to the dimension in the lateral direction of each of the elastic side flaps defined in feature P15).

However, these arguments are not persuasive. In the embodiment of Figure 6, to which paragraphs [0024] and [0026] also belong, the bending assist portion 44 and the fixed end 67 already overlap such that the overlapping does not require a selection when using this depicted embodiment as a starting point. Furthermore, paragraph [0026] states that this is the desirable option, meaning that the skilled person would directly and unambiguously derive this feature from Figure 6, even when taking into account the whole disclosure.

Paragraph [0024] of D1 then discloses that L is preferably 20 to 120 % of L3, such that the skilled person would only need to make the single selection of the value 120% in order to arrive at a dimension in the lateral direction of the leakage barrier sheets positioned in each of the elastic side flaps being not less than 50% of the dimension in the lateral direction of each of the elastic side flaps as defined in feature P15.

- 4.8.1 The Board cannot recognize the need for any other selection and, even when specifically questioned where any further selection was required, the proprietor did not identify any specific additional one either.
- 4.9 D1 therefore discloses all the features of claim 1 such that the subject-matter of claim 1 of auxiliary request 2 is not novel over D1. Auxiliary request 2 is consequently not allowable.

5. Auxiliary requests 3 to 9 - Article 84 EPC

5.1 Claim 1 of each of auxiliary requests 3 to 9 defines *inter alia* the features:

"each of the deformation guiding portions (78) has guiding ends (78a, 78b) at both ends in the vertical direction, and both guiding ends (78a, 78b) are inclined such that a dimension in a direction of thickness becomes gradually smaller from a skin facing surface side of the wearable article (10) toward a skin non-facing surface side of the wearable article (10), in the direction of thickness (Z) orthogonal to the lateral direction and the vertical direction."

5.2 From this, it is not clear in which direction the inclination of the guiding ends is supposed to be. As stated by the opponents, the inclination could technically sensibly and usefully be in various different directions. However, in the claim, the expression "a dimension in the direction of thickness" is already referring to the thickness direction of the absorbent article, yet this thickness is then defined as becoming gradually smaller in the direction of thickness ("gradually smaller from a skin facing surface side of the wearable article (10) toward a skin non-facing surface side of the wearable article 10") which does not make technical sense (i.e. the thickness cannot vary along the thickness) and is not supported by the description. Figure 5 of the patent, for example, discloses that the thickness at both ends becomes gradually smaller in the vertical direction Y.

The claim then goes on to define the thickness with regard to the lateral and vertical directions

("orthogonal to the lateral direction and the vertical direction"). Whilst this expression *per se* makes technical sense, it does not define, or it does not clearly define, anything further about the direction in which the thickness should become gradually smaller and would possibly amount to a tautology defining the thickness in different words.

- 5.3 The proprietor argued that the skilled person consulting the description and the drawings (e.g. Figure 5) as stipulated in G 1/24 understood how both guiding ends should be inclined. It was allegedly clear that since the guiding ends of each of the deformation guiding portions were at both ends as seen in the vertical direction, this was also necessarily the direction of the inclination.

The Board, however, cannot concur with the proprietor's argument. The fact that the patent contains an embodiment in Figure 5 showing guiding ends inclined such that the depth of the guiding portions becomes less when moving in the vertical direction, cannot be used to ignore the wording of the claim, which defines another direction. The language used in the claim *per se* is clear but the technical meaning ensuing from it as regards the direction of inclination of the guiding ends is not clear. The claim hence lacks clarity.

- 5.4 The Board stated in its preliminary opinion that none of the additional amendments made to claim 1 of auxiliary requests 4 to 9 seemed to overcome this clarity issue and the proprietor did not put forward further arguments for auxiliary requests 4 to 9 with respect to the requirements of Article 84 EPC during the oral proceedings. In the absence of further

arguments the Board finds that the reasoning above also applies to claim 1 of auxiliary requests 4 to 9.

5.5 At least for this reason claim 1 of auxiliary requests 3 to 9 does not fulfil the requirement of Article 84 EPC. Auxiliary requests 3 to 9 are therefore not allowable.

6. In the absence of any set of claims which meets the requirements of the EPC, the Board can only accede to opponent 1's request that 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.

The Registrar:

The Chairman:



C. Spira

M. Harrison

Decision electronically authenticated