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**Datasheet for the decision  
of 15 May 2025**

**Case Number:** T 1181/23 - 3.2.06

**Application Number:** 18161032.0

**Publication Number:** 3536294

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**Language of the proceedings:** EN

**Title of invention:**  
ABSORBENT ARTICLE WITH CHANNELS

**Patent Proprietor:**  
Drylock Technologies NV

**Opponent:**  
Ontex BV

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(c), 123(2)  
RPBA 2020 Art. 13(2)

**Keyword:**

Amendments - added subject-matter - main request, auxiliary requests 1 to 14 and 29 (yes)  
Amendment after notification of Art. 15(1) RPBA communication (yes) - taken into account (no)

**Decisions cited:**

T 0901/22

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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**Case Number:** T 1181/23 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 15 May 2025**

**Appellant:** Drylock Technologies NV  
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**Representative:** Wall, Leythem  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
12 June 2023 concerning maintenance of the  
European Patent No. 3536294 in amended form.

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** M. Hannam  
S. Ruhwinkel

## **Summary of Facts and Submissions**

- I. An appeal was filed both by the appellant/opponent and by the appellant/patent proprietor against the interlocutory decision of the opposition division in which it found that European patent No. 3 536 294 in an amended form met the requirements of the EPC.
- II. The appellant/opponent requested that the decision under appeal be set aside and the patent be revoked.
- III. The appellant/patent proprietor requested that the decision under appeal be set aside and the patent be maintained as granted or, in the alternative, that the patent be maintained according to one of auxiliary requests 1 to 32.
- IV. The Board issued a summons to oral proceedings and a subsequent communication under Article 15(1) RPBA containing its provisional opinion, in which it indicated *inter alia* that the ground for opposition under Article 100(c) EPC seemed prejudicial to maintenance of the patent as granted and that none of auxiliary requests 1 to 30 appeared to overcome this objection of added subject-matter. It further indicated that auxiliary requests 31 and 32 would likely not be admitted.
- V. Oral proceedings were held before the Board on 15 May 2025, during which the appellant withdrew auxiliary requests 15 to 28 and 30 to 32. It also filed a new auxiliary request which the Board numbered auxiliary request 33. At the close of the oral proceedings the parties' requests were thus as follows:

The appellant/proprietor requested that the decision under appeal be set aside and the patent be maintained

- according to the main request (as granted),
- alternatively according to one of auxiliary requests 1 to 14 filed with the statement of grounds of appeal dated 23 October 2023;
- alternatively according to auxiliary request 29 filed with the reply dated 5 March 2024;
- alternatively according to auxiliary request 33 filed at oral proceedings before the Board.

The appellant/opponent requested that the decision under appeal be set aside and the patent be revoked.

VI. Claims 1 and 9 of the main request (as granted) read as follows:

1. An absorbent core (130) comprising an absorbent material (105) between a top core wrap sheet (110) and a back core wrap sheet (120), said absorbent core having a first and second longitudinal edge (131, 132) and a first and second transverse edge (133, 134),  
wherein the absorbent core is provided with at least a first elongated attachment zone where the top core wrap sheet is attached to the back core wrap sheet,  
said first attachment zone has a first width (w1) at a first position (P1) and a second width (w2) at a second position (P2), wherein the first width is larger than the second width and the width of the first attachment zone increases from the second position to the first position;  
wherein the first position is at a first end of the first attachment zone and the second position is at a second end of the first attachment zone;  
wherein a contour of the first attachment zone is adjacent to absorbent material;

wherein the first attachment zone extends from a crotch region in the direction of the first and/or second transverse edge.

9. The absorbent core of any one of the previous claims, wherein the length of the first attachment zone is larger than 10% of the length of the absorbent core; and/or wherein the first width is at least 3 mm; and/or wherein said first attachment zone is permanent attachment zones which remain attached when wetted wherein the attachment is realized by any one of the following or a combination thereof: pressure bonding, thermobonding, sonic bonding, chemical bonding, adhesive, mechanical bonding.

Claim 1 of auxiliary requests 1 and 2 reads as for claim 1 of the main request while claim 9 of auxiliary requests 1 and 2 reads as follows:

'The absorbent core of any one of the previous claims, wherein the length of the first attachment zone is larger than 10% of the length of the absorbent core; and/or wherein the first width is at least 3 mm; and/or wherein said first attachment zone is permanent attachment zones which remain attached when wetted.'

Claim 1 of auxiliary requests 3, 4 and 5 reads as for claim 1 of the main request with the following features appended:

'wherein the width of the first attachment zone is measured perpendicularly to a center line (CL) of the first attachment zone;  
wherein the first width is at least 2% larger than the second width.'

Claim 7 of auxiliary request 3 reads as for claim 9 of the main request.

Claim 7 of auxiliary requests 4 and 5 reads as for claim 9 of auxiliary requests 1 and 2.

Claim 1 of auxiliary requests 6, 7 and 8 reads as for claim 1 of the main request with the following features appended:

'wherein the width of the first attachment zone is measured perpendicularly to a center line (CL) of the first attachment zone;  
wherein the first width is at least 8% larger than the second width.'

Claim 7 of auxiliary request 6 reads as for claim 9 of the main request.

Claim 7 of auxiliary requests 7 and 8 reads as for claim 9 of auxiliary requests 1 and 2.

Claim 1 of auxiliary requests 9, 10 and 11 reads as for claim 1 of auxiliary requests 3, 4 and 5 with the following feature further appended:

'wherein the length of the first attachment zone is larger than 10% of the length of the absorbent core and wherein the first width is at least 3mm.'

Claim 1 of auxiliary requests 12, 13 and 14 reads as for claim 1 of auxiliary requests 9, 10 and 11 with the following feature still further appended:

'wherein in the first attachment zone substantially no absorbent material is present between the top core wrap

sheet and the back core wrap sheet.'

Claim 1 of auxiliary request 29 reads as for claim 1 of auxiliary requests 12, 13 and 14 with the following feature appended:

'wherein said first attachment zone is a permanent attachment zone which remains attached when wetted.'

Claim 1 of auxiliary request 33 reads as follows:

An absorbent core (130) comprising an absorbent material (105) between a top core wrap sheet (110) and a back core wrap sheet (120), said absorbent core having a first and second longitudinal edge (131, 132) and a first and second transverse edge (133, 134),

wherein the absorbent core is provided with at least a first elongated attachment zone where the top core wrap sheet is attached to the back core wrap sheet,

said first attachment zone has a first width (w1) at a first position (P1) and a second width (w2) at a second position (P2), wherein the first width is larger than the second width and the width of the first attachment zone increases from the second position to the first position;

wherein the first position is at a first end of the first attachment zone and the second position is at a second end of the first attachment zone;

wherein a contour of the first attachment zone is adjacent to absorbent material;

wherein the first attachment zone extends from a crotch region in the direction of the first and second transverse edge;

wherein the width of the first attachment zone is measured perpendicularly to a center line (CL) of the



first attachment zone;

wherein the center line of the first attachment zone is a straight line;

wherein the first width is at least 2% larger than the second width;

wherein the length of the first attachment zone is larger than 10% of the length of the absorbent core and wherein the first width is at least 3mm;

wherein in the first attachment zone substantially no absorbent material is present between the top core wrap sheet and the back core wrap sheet;

wherein said first attachment zone is a permanent attachment zone which remains attached when wetted;

wherein the distance between the first position and the second position along the center line of the first attachment zone is larger than 4% of the length of the absorbent core;

wherein the absorbent material comprises cellulosic fluff pulp and/or superabsorbent particles;

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

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

Main request

The ground for opposition under Article 100(c) EPC was not prejudicial to maintenance of the patent as granted. The features included in claim 9 found basis in claim 14, Fig. 8 and paragraphs [0214], [0215] and [0220] in connection with Figures 1A to 1E, all of the A1 publication. No selections had been made, simply the broadest ranges disclosed for the width and the length being included in the claim, the >10% length and >3mm width features each covering all the possible ranges of these features disclosed in claim 14 as filed. The specific materials used in the absorbent core defined as an optional feature in claim 14 were not important for the function of the invention. Paragraphs [0299] to [0307] as filed, directed to the embodiment of Fig. 2A also provided a pointer to the claimed subject-matter. The 'summary' on page 3 as filed also confirmed that the preferred features of the invention had been included in the subject-matter of claim 9.

Auxiliary requests 1 to 8

The same arguments supported the claims of these requests all meeting the requirement of Article 123(2) EPC.

Auxiliary requests 9 to 11

The basis for the subject-matter of claim 1 was in the Fig. 2A embodiment of the invention detailed in paragraphs [0299] to [0307] as filed. Paragraph [0300] disclosed the first width being at least 3mm and paragraph [0302] disclosed the length of the first attachment zone being larger than 10% of the length of the absorbent core. Neither of these was a selection from a list of options, such that the sole selection required in claim 1 was the combination of these two parameters. These were now also linked by 'and' in claim 1 rather than 'and/or'. The subject-matter of

claim 1 of each of these requests thus met the requirement of Article 123(2) EPC.

Auxiliary requests 12 to 14

Claim 1 of each of these requests additionally recited that substantially no absorbent material was present between the top core wrap sheet and the back core wrap sheet in the first attachment zone, which was included in paragraph [0304] as filed. The Article 123(2) EPC objection was thus overcome.

Auxiliary request 29

The same arguments as for the preceding requests supported the subject-matter of claim 1 meeting the requirement of Article 123(2) EPC.

Auxiliary request 33

This request should be taken into account (Article 13(2) RPBA). The opponent's grounds of appeal merely objected to the two lists of five options from which a selection had allegedly been made, no elaboration of the 'and/or' objection having been made. Likewise, in point 1.1.3 of the Board's preliminary opinion an objection is thus raised only in the context of no basis having been provided for the 'first attachment zone is permanent attachment zones which remain attached when wetted' and an opportunity to address the objection concerning selections from multiple lists should be afforded to the proprietor.

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

Main request

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

The combination of the first attachment zone being larger than 10% of the length of the absorbent core and the first width being at least 3mm was a double selection from two lists of five in claim 14, which already itself included 'and/or' language with respect to these separate lists. Even if the claimed >10% length and >3mm width were covered by the various options included in claim 14, this did not mean that they were disclosed in combination. The passages of the description relating to the Fig. 2A embodiment did not provide a pointer to the claimed subject-matter, the features from paragraphs [0301] and [0304] not having been included in the subject-matter of claim 9. In support of the opponent's argument, T 901/22 had found that multiple ranges included in dependent claims did not provide an unambiguous basis for a particular combination of values from these ranges.

Auxiliary requests 1 to 8

The claimed subject-matter in each of these requests failed to meet the requirement of Article 123(2) EPC for the same reasons as those presented with respect to the main request.

Auxiliary request 9

Even if the proprietor's reliance on the Fig. 2A embodiment for the first time at oral proceedings before the Board were not seen as an amendment of its appeal case, this embodiment still required the singling out of the 10% of the length of the absorbent core and the 3mm width of the first attachment zone from the respective lists in which they were disclosed, which extended the claimed subject-matter beyond the content of the application as filed.

Auxiliary requests 10 to 14

The same objections to the foregoing requests all applied here too.

Auxiliary request 29

Due to at least the two selections required to reach the claimed subject-matter, this request was also not allowable.

Auxiliary request 33

This request should not be taken into account under Article 13(2) RPBA as it could and should have been filed earlier. The objection to the selection from lists of the 10% of the length of the absorbent core and the 3mm width of the first attachment zone features had been present from the outset of the appeal proceedings (and already in the first instance opposition proceedings). No new objection had been raised by the Board which presented exceptional circumstances for taking this request into account. The sole new arguments presented by the opponent were responsive to the entirely new basis presented by the proprietor for the two features selected for inclusion in the claimed subject-matter, which embodiment was selected from the vast multitude of embodiments in the application as filed.

## Reasons for the Decision

### 1. Main request

#### *Article 100(c) EPC*

1.1 The ground for opposition under Article 100(c) EPC is prejudicial to maintenance of the patent as granted.

1.1.1 The proprietor indicated in its reply to the opponent's grounds of appeal that the basis for the subject-matter of claim 9 is a combination of claims as filed, namely claims 1, 2, 6, 7 and 14.

1.1.2 Claim 9 specifically recites, *inter alia*, that

'the length of the first attachment zone is larger than 10% of the length of the absorbent core; and/or the first width [of the first attachment zone] is at least 3mm'.

These features (hereafter the '10% length feature' and the '3mm width feature') are originally disclosed in claim 14 as filed in the following context:

'wherein the length of the first attachment zone is larger than 10% of the length of the absorbent core, preferably larger than 20%, more preferably larger than 30%, even more preferably larger than 40%, most preferably larger than 50%; and/or  
- wherein the first width is at least 3mm, preferably at least 5mm, more preferably at least 7mm, even more preferably at least 9mm, most preferably at least 11mm'.

Albeit not necessary for the Board's decision, it may

be noted merely for completeness that a plurality (ten sets, as argued by the opponent) of further optional features are also present in claim 14 as filed, all separated by and/or conjunctions.

- 1.1.3 Contrary to the argument of the proprietor, the Board concurs with the opponent that the original disclosure of both the 10% length feature and the 3mm width feature are in a respective list of five possible percentage length values and five possible width values for the first attachment zone. Inclusion of the 10% length feature into claim 1 thus requires a first selection to be made and inclusion of the 3mm width feature requires a second selection to be made. Such a selection of features from two lists lacks a direct and unambiguous disclosure in claim 14 as filed.
- 1.1.4 Whilst the 10% length feature and the 3mm width feature are originally disclosed in a single dependent claim, this is not seen, at least from a point of view of original disclosure, to be any different to a selection of two features from two lists disclosed in a description of a patent. In both cases, a selection must be made from each of two lists of features which entails a singling out of one combination of features, for which the lists themselves provide no direct and unambiguous disclosure.
- 1.1.5 As also pointed out by the opponent, the situation in the present case relates to the same question to that in case T 0901/22 of the same Board, albeit under a different composition. In that case at least two selections from a number of alternative choices included in dependent claims as filed had to be made in order to reach the claimed subject-matter, such selections being found to lack a direct and unambiguous

basis in the claims as filed (see Reasons, points 7 to 7.3.5). Similarly in the present case, at least two selections from lists included in claim 14 as filed must be made in order to reach the subject-matter of claim 9, such a singling out lacking an unambiguous basis in claim 14.

- 1.1.6 The proprietor's reference to further features in claim 14, other than the 10% length and 3mm width features, which did not have to be included, since these were relevant to an absorbent core with a plurality of attachment zones, does not change the Board's conclusion of subject-matter extending beyond the content of the application as filed since the inclusion of the 10% length and 3mm width features alone in claim 9 lacked a direct and unambiguous basis, irrespective of whether the omission of further features in claim 14 had basis or not. The presence of these further feature sets all being "and/or" alternatives or additions does however help to make the issue of selections even more apparent.
- 1.1.7 The proprietor's reference to Fig. 8 and the corresponding portions of the description for providing support for the subject-matter of claim 9 is not persuasive, not least since Fig. 8 depicts an absorbent core with specifically two elongated attachment zones 140 and 150, also referred to as 'channels' in the description. Even leaving out the fact that other features are additionally disclosed in this embodiment, this figure in combination with the description thus cannot provide a basis for the claimed absorbent core which is directed to 'at least a first elongated attachment zone' (see claim 1) i.e. also comprising just one single elongated attachment zone.



1.1.8 The proprietor's reference to paragraphs [0214], [0215] and [0220] in connection with Figures 1A to 1E, as filed (all references to the application as filed being to the A1-publication) also fails to provide an unambiguous basis for the subject-matter of claim 9. Paragraph [0214] indeed discloses the 3mm width feature, as does paragraph [0220] the 10% length feature, of claim 9, yet each of these disclosures is of the individual features in the same list of five options as in claim 14 as filed. The skilled person would therefore, using their common general knowledge, seen objectively and relative to the date of filing, be similarly unable to directly and unambiguously derive the claimed subject-matter from these references to the description either.

1.1.9 In the context of the 10% length feature and the 3mm width feature being the broadest ranges disclosed in the respective lists, the inclusion of these features in claim 9 is still found to require a selection from the lists in which they are respectively disclosed. Moreover, it is noted that the 10% length feature is the least preferable option of the five included in claim 14 and paragraph [0220] as filed, the 3mm width feature similarly being the least preferable option of the five in claim 14 and paragraph [0214]. Thus, if any combination of features from these two lists might perhaps be seen as unambiguously disclosed to a skilled person, as has been the case in a particular previous decision (albeit with a different set of factual circumstances), it would seemingly then be a combination of the most preferable alternatives i.e. more than 50% length and at least 11mm width. However, the Board is not required to decide on that specific issue because this is not the combination of selections from the lists which has been made in this case by the

proprietor. It is additionally noted that, even though the broadest disclosed options of larger than 10% length and at least 3mm width have been chosen for inclusion in claim 9 and these options are broad enough to cover each of the more preferable options disclosed in the respective lists, this does not enable any conclusion to be reached that these broadest options are unambiguously disclosed in combination in the application as filed. Quite to the contrary, they are disclosed merely as discrete members of two lists of options, the claimed combination of the two requiring a selection to be made from each list which lacks a direct and unambiguous disclosure.

- 1.1.10 For the first time at oral proceedings before the Board the proprietor referred to paragraphs [0299] to [0307] as filed, directed to the embodiment of Fig. 2A, which it alleged provided a pointer to the claimed subject-matter. The argument that this provides a pointer is, irrespective of whether this was an amendment of the party's appeal case, however, not accepted. Similarly to both claim 14 and paragraph [0215] and [0220] as filed, both already addressed above, paragraph [0300] of this alleged pointer discloses the 3mm width feature as one option out of five possibilities, paragraph [0302] the 10% length feature also as one option out of five possibilities, with no suggestion of specifically these two selections being combined in the inventive absorbent core. The alleged "pointer" thus fails to provide any disclosure going beyond that already considered and found not to provide a direct and unambiguous basis for the subject-matter of claim 9.
- 1.1.11 The proprietor's further reference to the 'Summary' [of the invention] starting in paragraph [0008] as filed, provides no different context of disclosure for the 10%

length or 3mm width features. Each of these are disclosed in the context of being one of five options (see paragraphs [0022] and [0023]) such that, as explained above, no direct and unambiguous basis supports the singling out of the combination of these two specific length and width features from the summary of the invention.

- 1.1.12 The subject-matter of claim 9 thus, at least for this reason, lacks the requisite direct and unambiguous disclosure in the application as filed. Consequently, the ground for opposition under Article 100(c) EPC prejudices maintenance of the patent as granted.

2. *Auxiliary requests 1 to 8*

*Article 123(2) EPC*

- 2.1 After having announced the Board's conclusion on the main request, the Chair indicated that, at least preliminarily, the same conclusion would appear to apply to auxiliary requests 1 to 8, albeit under Article 123(2) EPC, at least due to the presence of the same subject-matter selected from claim 14 as filed, either in claim 1 or in the subject-matter arising from the combination of claim 1 and the respective dependent claim containing those features.
- 2.2 To this preliminary conclusion, the proprietor presented no counter-arguments.
- 2.3 The Board thus confirms its preliminary opinion that the subject-matter of claim 9 of each of auxiliary requests 1 and 2 and the subject-matter of claim 7 of each of auxiliary requests 3 to 8 fail to meet the requirement of Article 123(2) EPC. Consequently

auxiliary requests 1 to 8 are not allowable.

3. *Auxiliary request 9*

*Article 123(2) EPC*

- 3.1 In this request the 10% length feature and the 3mm width feature have been included in independent claim 1 and have been linked by 'and' rather than 'and/or'.
- 3.2 As a basis in the application as filed for the subject-matter of claim 1, the proprietor relied on paragraphs [0299] to [0307] as filed, directed to the embodiment of Fig. 2A which had been used previously solely as a pointer to the claimed subject-matter with respect to the main request.
- 3.3 As already found in point 1.1.10 above, paragraph [0300] discloses the 3mm width feature as one option out of five possibilities, paragraph [0302] the 10% length feature also as one option out of five possibilities. Combining these two individual disclosures in the claimed subject-matter requires a double selection, one feature from each list, for which no unambiguous basis is to be found in any of the paragraphs describing this embodiment.
- 3.4 The proprietor's contention that including the 10% length feature and the 3mm width feature in claim 1 did not require selections from lists to be made is not accepted. The Board can see the original disclosure of these features in paragraphs [0302] and [0299] in no other way than their being presented as individual members of respective lists of options for the percentage length and the width dimension of the first attachment zone of the absorbent article. Inclusion of

these two features in claim 1 thus requires two individual selections from respective lists to be made for which no unambiguous basis has been identified by the proprietor.

3.5 For at least this reason the subject-matter of claim 1 thus fails to meet the requirement of Article 123(2) EPC. Auxiliary request 9 is not allowable.

3.6 Although the subject-matter of claim 1 of auxiliary request 9 is already not allowable for the above reasons, merely for the purposes of additional context, the following may be added. As also argued by the opponent in reply to the proprietor's newly given basis during oral proceedings, the paragraphs concerning Fig. 2A relied upon by the proprietor are themselves, also a further selection among the various paragraphs of features describing that particular embodiment.

4. *Auxiliary requests 10 and 11*

*Article 123(2) EPC*

4.1 After having announced the Board's conclusion with respect to auxiliary request 9, the Chair indicated that, at least preliminarily, the same conclusion for the same reasons would appear to apply to auxiliary requests 10 and 11.

4.2 To this preliminary conclusion the proprietor presented no counter-arguments.

4.3 The Board thus confirms its preliminary opinion that the subject-matter of claim 1 of each of auxiliary requests 10 and 11 fail to meet the requirement of Article 123(2) EPC. Consequently auxiliary requests 10

and 11 are not allowable.

5. *Auxiliary requests 12 to 14*

*Article 123(2) EPC*

- 5.1 Relative to claim 1 of each of auxiliary requests 9 to 11, claim 1 of each of auxiliary requests 12 to 14 additionally recites that in the first attachment zone substantially no absorbent material is present between the top core wrap sheet and the back core wrap sheet.
- 5.2 This amendment has no influence on the finding in each of the foregoing requests that at least the presence of the 10% length feature and the 3mm width feature in the claimed subject-matter requires selections from two lists to be made which lack a direct and unambiguous basis. The proprietor also presented no further argument to question this finding.
- 5.3 The subject-matter of claim 1 of each of auxiliary requests 12 to 14 thus fail to meet the requirement of Article 123(2) EPC. Auxiliary requests 12 to 14 are thus not allowable.

6. *Auxiliary request 29*

*Article 123(2) EPC*

- 6.1 Relative to claim 1 of auxiliary requests 12 to 14, claim 1 of auxiliary request 29 additionally recites that said first attachment zone is a permanent attachment zone which remains attached when wetted.
- 6.2 This amendment to claim 1 has no impact on the finding for the foregoing requests. The proprietor also

presented no additional arguments in support of this request.

- 6.3 The subject-matter of claim 1 of auxiliary request 29 thus fails to meet the requirement of Article 123(2) EPC. Auxiliary request 29 is thus not allowable.

7. *Auxiliary request 33*

*Article 13(2) RPBA*

- 7.1 After having received the Board's conclusions on the foregoing requests at oral proceedings, the proprietor filed auxiliary request 33. Being an amendment to the proprietor's appeal case made after notification of the communication under Article 15(1) RPBA, according to Article 13(2) RPBA the amendment shall not be taken into account unless there are exceptional circumstances which have been justified with cogent reasons.
- 7.2 The proprietor submitted that this request was responsive to the preliminary opinion of the Board and to the introductory comments at oral proceedings by the Chair allegedly in which, for the first time, an objection under Article 123(2) EPC had been raised that the inclusion of merely the 10% length feature and the 3mm width feature in the claimed subject-matter unallowably omitted a plurality of further features in claim 14 as filed which were also optionally disclosed using 'and/or' language.
- 7.3 This argument is not persuasive to justify the change in the proprietor's appeal case to be taken into account. In both its reply and its subsequent submissions, the proprietor had largely relied upon the disclosure of the 10% length and 3mm width features in

claim 14 as filed to provide a basis for the claimed subject-matter. With claim 14 including a large number of additional or optional features all linked with 'and/or' language, it would be unreasonable (and incomplete) for the Board to limit its analysis to solely the small part of claim 14 including the 10% length and 3mm width features, regardless of the fact that, at first sight, even those selections appeared unallowable. If a proprietor relies on a particular claim in support of a basis for the claimed subject-matter, it should not be surprised by the Board checking the reliance on this claim for its voracity, not least in cases such as this in which the claim relied upon includes many optional features all linked in the same manner as the two which were concretely objected to by the opponent in its grounds of appeal.

7.4 The proprietor's contention that the opponent's grounds of appeal and reply had only objected to the two lists of five options in claim 14 and had not elaborated on the 'and/or' element of the disclosure is not accepted. In the opponent's grounds of appeal (see last paragraph on page 4) the combination of the 10% length feature and the 3mm width feature is argued to require 'a double selection from two lists of five in claim 14' and continues to indicate that claim 14 'already itself includes 'and/or' language with respect to these separate lists'. This is found to clearly indicate the extent of the opponent's objection not only to the inclusion of these two features in the claimed subject-matter but also to the 'and/or' language linking the two.

7.5 It is additionally noted that, whilst the Board indeed identified in point 1.1.3 of its preliminary opinion that the omission of the feature 'the first attachment



zone is permanent attachment zones which remain attached when wetted' extended the claimed subject-matter beyond the content of the application as filed, the eventual conclusions on all higher ranking requests to auxiliary request 33 have been based merely on the inclusion of the 10% length and the 3mm width features in the claimed subject-matter requiring two selections. This objection has been on file in the opponent's submissions at least since its grounds of appeal.

7.6 In conclusion, therefore, considering all of the above, absent exceptional circumstances justifying its late filing only at the oral proceedings, the Board decided not to take auxiliary request 33 into account (Article 13(2) RPBA).

8. The proprietor indicated that it had no further requests for consideration.

## **Order**

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

1. The decision under appeal is set aside.
2. The European Patent is revoked.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated