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Datasheet for the decision of 13 February 2025

Case Number: T 0315/24 - 3.2.06

Application Number: 18213171.4

Publication Number: 3498117

IPC: A41D13/015, A41D13/018, B62J27/00

Language of the proceedings: EN

Title of invention:
GARMENT FOR A USER'S PROTECTION COMPRISING AN INFLATABLE MEMBER

Patent Proprietor:
Dainese S.p.A.

Opponent:
Alpinestars S.p.A.

Headword:

Relevant legal provisions:
EPC Art. 100(a), 54, 56, 112(1)(a)

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It can be changed at any time and without notice

Keyword:
Grounds for opposition - Novelty (yes) - inventive step - main request (no)
Inventive step - auxiliary request (yes)
Referral to the Enlarged Board of Appeal - (no)

Decisions cited:
G 0003/98

Catchword:

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Case Number: T 0315/24 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 13 February 2025

Appellant: (Opponent)	Alpinestars S.p.A. Viale Enrico Fermi 5 31011 Asolo (TV) (IT)
Representative:	Dragotti & Associati S.R.L. Via Nino Bixio, 7 20129 Milano (IT)
Respondent: (Patent Proprietor)	Dainese S.p.A. Via Louvigny, 35 36064 Colceresa (Vicenza) (IT)
Representative:	Manfrin, Marta Società Italiana Brevetti S.p.A. Stradone San Fermo 21 sc. B 37121 Verona (VR) (IT)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 2 January 2024 rejecting the opposition filed against European patent No. 3498117 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	M. Harrison
Members:	T. Rosenblatt
	S. Ruhwinkel

Summary of Facts and Submissions

I. The appellant (opponent) filed an appeal against the decision of the opposition division rejecting the opposition against European patent No. 3 498 117.

II. The parties were summoned to oral proceedings before the Board.

III. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), the Board informed the parties of its provisional opinion on the case. The Board opined that granted claim 1 appeared to lack an inventive step over D3. In regard to objections raised by the respondent against the admittance of the appellant's objections under Article 56 EPC based on D3 as the closest prior art against *inter alia* auxiliary requests 7 and 8, the Board indicated that these issues could be discussed during the oral proceedings and indicated that a detailed opinion on the merits of these objections appeared premature. The Board nevertheless briefly stated with respect to auxiliary request 8, that irrespective of the question of whether the objections under Article 56 EPC based on D3 as the closest prior art should be considered, the features added to claim 1 in auxiliary request 8 did not appear to be disclosed or suggested in D4. With respect to the features added in claim 1 of auxiliary request 7, the Board noted however that they did not appear to introduce a further distinction over D3.

IV. In response to the Board's communication, the respondent submitted further arguments with its letter dated 30 January 2025 and requested that the following

two questions be referred to the Enlarged Board of Appeal:

"*(a) When a part of a document appears to have a particular meaning when interpreted literally and in isolation from the remainder of the document, which particular meaning is inconsistent with the contextual meaning of that part of the document having regard to the remainder of the document, should such particular meaning be considered disclosed and therefore belonging to the prior art?*
(b) Would the answer to question (a) be different if the person skilled in the art recognizes that such particular meaning is erroneous in light of their common general knowledge and/or the remainder of the document?"

V. Oral proceedings before the Board were held on 13 February 2025.

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

VII. The respondent (patent proprietor) requested that the appeal be dismissed (main request), or that the patent be maintained in amended form according to one of auxiliary requests 7 or 8, submitted with its reply to the statement of grounds of appeal.

The respondent further requested that the questions submitted with its letter dated 30 January 2025 be referred to the Enlarged Board of Appeal.

VIII. Claim 1 of the patent as granted reads (the added feature numbering in square brackets is according to

the impugned decision, pages 2 and 3):

> "[**1.1**] Garment (1) for the protection of a user comprising [**1.2**] an inflatable member (100) and [**1.3**] at least one seat (20) configured to receive the inflatable member (100), [**1.4**] wherein said inflatable member is apt to assume an inflated condition and a deflated condition, and [**1.5**] wherein said seat (20) includes at least one first region (20a) intended to receive said inflatable member (100) in the deflated condition and one second region (20b) free or without said inflatable member (100) in the deflated condition and adapted to receive at least a part of said inflatable member (100) in inflated condition;
> [**1.6**] wherein said second region (20b) is open, or seamless, towards said first region (20a) to receive at least a part of said inflatable member (100) in inflated condition;
> the garment is characterized in that,
> [**1.7**] at least a first part of the body of the garment (1) has one or more ventilation openings and/or is made of a material allowing the air to flow and
> [**1.8**] wherein said first part corresponds to, or comprises, at least the second region (20b) of the seat (20) for receiving the inflatable member (100); and
> [**1.9**] in that said first part is a chest region of the garment (1)."

The patent as granted also comprises a second independent (method) claim 15, the wording of which is not relevant for the present decision.

IX. In claim 1 of auxiliary request 7 (headed "7th auxiliary request" in the submitted documents) the following features have been added at the end of the claim:

> "wherein in a deflated condition said inflatable member (100) is at least partially folded on itself so as to form sub-portions (100a, 100b, 100c) arranged one above the other, and
> wherein said sub-portions (100a, 100b, 100c) are joined together by connecting means (140)"

In this auxiliary request, all method claims have been deleted.

X. In claim 1 of auxiliary request 8 (headed "8th auxiliary request" in the submitted documents) the following further features have been appended to claim 1 of auxiliary request 7:

> "wherein said connecting means (140) include one or more elements able to break when the inflatable member (100) inflates, or wherein said connecting means include an elastic tubular body apt to accompany an extension of the inflatable member"

Again, all method claims have been deleted.

XI. The following documents from the opposition proceedings are relevant to the present decision:

D3 : US 2004/0183283 Al
D4 : WO 2011/148353 Al

XII. The arguments of the appellant may be summarised as follows.

Main request - Articles 100(a) and 54 EPC

Claim 1 lacked novelty over D3.

The disclosure of features 1.1 to 1.6 was undisputed. In contrast, the conclusion of the opposition division and the view of the respondent in regard to feature 1.7 of claim 1 was incorrect. It followed from paragraphs 12 and 13 of D3 already that in the case that airbags were inserted into pockets, those pockets comprised regions of porosity to allow for breathability. In particular, paragraph 13 disclosed airbags inserted into pockets as an alternative to the embodiment where the airbag was manufactured as being part of the garment as previously disclosed in paragraph 12. Notably, it did not disclose that such pockets in which airbags were inserted were necessarily made of gas-impermeable material. The disclosure in paragraphs 68, 93, 102 and 103 also did not support the conclusion of the opposition division or the respondent's interpretation of D3, because these paragraphs referred to embodiments where the airbags were compartments of the garments and not received inside a pocket. Paragraphs 42 and 44 rather confirmed the appellant's interpretation of paragraph 13. The respondent's interpretation of paragraph 44 in combination with paragraph 13, according to which the garment could be provided with smaller airbags so that it could be made to breathe in the areas external to such small airbags, was simply not in line with the wording of paragraph 44.

Feature 1.8 of claim 1 was disclosed in paragraph 44. This paragraph disclosed, for the second embodiment where an airbag was inserted in a pocket, that this could be done in a folded or rolled configuration so that the airbag occupied a reduced portion of the pocket. The use of the word "thus" in the following sentence indicated that as a result of such configuration, the garment could be made to breathe through much or most of its surface area, namely the porous portion of the pocket which was not overlapping with the rolled or folded airbag. Moreover, paragraph 10 of D3 disclosed that pockets could be provided on or in the garment. And, since claim 1 of the request under consideration did not exclude that the seat receiving the airbag could be on the garment, it was irrelevant whether the pockets of D3 were on or in the garment.

Feature 1.9 of claim 1 was disclosed in D3 at least by the reference in paragraph 38 "for full torso inflation" or by Figures 8A and 8B. In T 1849/08 the Board stated that what was decisive for the information content of a prior art document was what a person skilled in the art reading the document would understand from it. A person skilled in the art understood from D3 that: i) each garment could be provided with an airbag inserted in a gas-permeable pocket; ii) to improve the breathability of the garment, the airbag could be folded inside the pocket; iii) the APG garment could be in the form of a jacket provided with an airbag that protected the torso, namely the chest region of the user. Consequently, by reading D3 as a whole, the skilled person understood that the pocket housing the airbag in a folded configuration to improve the breathability was also arranged over the chest region as schematically shown

in figures 8 and 8A.

Main request - Articles 100(a) and 56 EPC

Claim 1 was neither limited to a garment for use by a motorcyclist, nor for any other specific use. Therefore, if feature 1.9 of claim 1 was considered to be a distinguishing feature over the garment known from paragraphs 42 and 44 of D3, the objective technical problem could be seen as providing a suitable positional arrangement of the inflatable member in a garment. No particular surprising technical effect or advantage was apparent when arranging the first part of the garment comprising at least the second region of the seat on the chest region as compared to any other part of the body. The chest region constituted just one of the well known possibilities available for its location. D3 itself taught for example the protection of the full torso of the user. The solution of the objective problem according to claim 1 of the opposed patent would thus have been obvious in view of the teaching of D3 alone.

Auxiliary requests 7 and 8 - Articles 54 and 56 EPC

Besides lacking novelty over D4, notably in view of the second embodiment disclosed on page 28, lines 2 to 19, claim 1 of auxiliary request 7 lacked an inventive step for the same reasons as claim 1 of the patent as granted, starting from D3 as the closest prior art, since the added features did not provide a further distinction when interpreted in the sense mentioned in the Board's communication.

Moreover, claim 1 of auxiliary requests 7 and 8 lacked an inventive step over the combination of D3 with D4.

The containment sack disclosed on page 28 of D4 served the function to keep the non-inflated airbag in its folded condition and to allow the airbag to inflate and expand in the previously unoccupied areas by breaking of suitable means comprised by the sack. This was the same function obtained by the connecting members according to granted claim 9 when read in view of granted claim 8 of the opposed patent. It was also disclosed as such in paragraph 50 of the opposed patent. When maintaining the folded airbag in its folded state according to the embodiment of page 28 of D4, the airbag's sub-portions were joined by means of the containment sack. Thus, the containment sack corresponded to the connecting means joining the sub-portions of the airbag together. The containment sack comprised means suitable for breaking upon inflation of the airbag as required by granted claim 9. The skilled person would therefore have applied the features known from this embodiment of D4 to the garment comprising a folded airbag in a pocket according to paragraph 44 of D3 with a reasonable expectation of success and thus with no inventive skill.

XIII. The arguments of the respondent may be summarised as follows.

Main request - Articles 100(a) and 54 EPC

The opposition division correctly found D3 not to disclose features 1.7, 1.8 and 1.9. Applying the correct criteria for the interpretation of a prior art document as established in the Case law of the Boards of Appeal (see for example sections I.C.4.1 and 4.4.3), the only possible interpretation of D3, when objectively read without thinking of the invention of the opposed patent, was that whenever pockets were

referred to in D3, these would be understood by the skilled person as always being made of gas-impermeable material. D3 nowhere mentioned breathable or ventilated pockets. The provision of separate pockets on the garment made of gas-impermeable material was already apparent from the summary of the invention as disclosed in paragraphs 12 and 13. Notably the first two sentences of paragraph 13 disclosed an alternative to the garments described before in paragraph 12 comprising airbags formed as part of the garment by non-gas-porous layers. According to the alternative disclosed in paragraph 13, airbags were not formed as part of such layers constituting the garment but as separate pockets of non-gas-permeable material. Either these pockets, made of non-gas-permeable material, constituted airbags by themselves (first sentence) or could simply be fitted to accommodate a small, self-contained airbag and pressure source. In any case, there was no disclosure, and no reason other than knowledge of the invention, to conclude that such pockets would be formed of gas-permeable material.

In all specific embodiments disclosed in D3, the garment compartments making the airbags or the external pockets hosting removable airbags were repeatedly, consistently and explicitly described as gas-impermeable, as apparent from paragraphs 68, 93, 102, 103, 112, 115 together with the corresponding the Figures.

Concerning paragraphs 41 to 44, these developed the disclosure of D3 from airbags protruding outside of garment portions (paragraph 41) to airbags confined in garment pockets having isolated airbags (paragraphs 42 to 44). Such isolated airbags had reduced volume requirements since only those areas of a garment which

were most likely to be hit during a fall of a person wearing the garment, required protection (paragraphs 42 and 43). Furthermore and according to paragraph 42, isolated airbags explicitly allowed the garment, rather than the pockets, to be made more breathable since only a portion of its surface was covered by impermeable compartments or airbags. According to paragraph 44, airbags are also meant being tightly fitted into the pockets. This was indicated by the expression "airbag fits into a pocket", meaning the airbag should fill the pocket tightly. Hence pockets should generally be reduced in size. From paragraph 44 it followed that isolated airbags could be further reduced in size by being rolled or folded so that the pocket surface area could be kept small, "thus" allowing the (remaining part of the) garment, i.e. again, not the pocket, to breathe "through, much or most" (i.e. not the entirety) of its surface area. The term "thus" in the second sentence of paragraph 44 referred to the possibility of keeping the pockets' surface area small with respect to the garment surface. The expression "made to breathe through much or most of its surface area" in this same sentence additionally confirmed that it was only the reduction of the pocket size and the resulting increase of the garment area free of pockets which led to the increase in breathability. If an increase of the garment's breathability would have been meant to result from an increase of the uncovered area of porous pockets holding folded or rolled airbags, as considered by the appellant, such condition would have been expressed by the formulation "made to breathe through much more of its surface area". The understanding of paragraph 44 suggested by the appellant reflected merely a semantic rather than a technically-sensible reading, inconsistent with the overall teaching of D3, according to which pockets holding airbags were always

constituted by gas-impermeable materials. At the very least, paragraph 44 did not disclose feature 1.8 of claim 1 directly and unambiguously.

Feature 1.7 of claim 1 also lacked a disclosure in D3, since the technical meaning of "ventilation capability" as required by feature 1.7 and "breathability" as referred to in paragraph 44 were different. A breathable material, such as for example Gore-Tex®, only allowed water vapour to pass (from the inside to to the outside of the garment) whereas due to its inherent windblocking properties it did not allow any air to flow (from the outside to the inside or vice versa). The skilled person knew of membranes which allowed water droplets to pass but air molecules to be blocked.

As far as feature 1.9 of claim 1 was concerned, paragraph 44 did not relate to any particular body region and therefore did not disclose the location of the second region of the seat comprised by the first part of the garment to be at the chest region of the garment. The mention of the full torso in paragraph 38 did not specifically disclose the chest region and was anyway not related to the disclosure of paragraph 44.

Request for a referral of questions to the Enlarged Board of Appeal - Article 112(1)(a) EPC

The appellant's and the Board's interpretation, as set out in its preliminary opinion, of paragraph 44 of D3, in isolation from the remaining content, was in contradiction to the overall disclosure of D3. This was also in contradiction to the established case law of the Boards. If the Board intended to confirm such an interpretation, the questions of law submitted with the

letter dated 30 January 2025 should first be referred to the Enlarged Board of Appeal.

Main request - Articles 100(a) and 56 EPC

The technical effect provided by the distinguishing features was twofold. The features allowed the chest area to be protected against physical impact (during a fall of the user) and also against air impact during high-dynamic, sporting activities, in particular motorcycling. These two types of impact had opposing requirements and were specific for the chest region and for high-dynamic, as opposite to static, activities so that the garment implicitly referred to a garment for motorcyclists. The objective technical problem was thus to provide a garment for motorcyclists with top performance against the two types of impact having opposing requirements.

D3 taught a technical prejudice in paragraph 108, according to which applications of the arrangement to motorcycling activities required the provision of additional layers as protection against abrasion for example. The skilled person understood from paragraph 13 of D3 that the airbag had to be placed on anatomical regions to be protected but nothing suggested application to the chest region. Paragraph 38 rather generally referred to the full torso and only mentioned arms, abdomen or back region. Protection of the chest region was specifically required for sporting activities and, as taught in paragraph 108, these required additional layers. No indication could be found in D3 that the chest region should be protected for rather static activities as performed by elderly persons. Figure 8B had to be read in the context of paragraphs 96 and 104, relating to garments comprising

rather big isolated chambers, i.e. not small-sized airbags held in pockets, or employing further layers, which went against the requirement of ventilation.

Moreover, a person skilled in the art knew that the human chest included vital organs which needed protection, especially for motorcyclists (see also paragraph 45 of the opposed patent). Therefore, starting from D3, a person skilled in the art would have been prompted to protect the chest by locating the rolled/folded deflated airbag of D3 on the chest. Consequently, the person skilled in the art would have located the free portion of the pocket of D3 in a different zone of the body of the user, not in the chest region.

Auxiliary request 7 - Article 56 EPC

During opposition proceedings, the appellant had attacked granted claim 8 only for lack of novelty in view of D4, and, inventive step, in view of D3 and common general knowledge, as well as based on a combination of D4 with D3. The appellant had not gone into any detail concerning the objection of lack of inventive step starting from D3 as the closest prior art in combination with common general knowledge or D4. The only admissible attack raised by the appellant against claim 1 of auxiliary request 7 was thus the novelty objection based on D4.

D3 did not represent the most promising starting point for the invention, because D3 did not address ventilation issues on the chest.

Claim 1 was moreover inventive since any combination of paragraph 44 of D3 with other parts of D3 implied a

selection of features that was not directly and unambiguously disclosed as such. D3 taught away from using connecting means. In particular, paragraph 44 of D3 referred to the embodiment where the airbag fitted into the pockets, therefore the pocket stabilized the airbag and there was no need to keep the airbag in the folded position by means of connecting means. Moreover, following the Board's preliminary approach, as set out in its communication, and for consistency of rationale, paragraph 44 of D3 should be read in the sense that the pocket was much larger than the airbag, and therefore there was no indication to join and connect the sub-portions of the airbag.

Auxiliary request 8 - Article 56 EPC

In regard to the appellant's allegation that claim 1 lacked an inventive step over D3 and common general knowledge, this argument could not succeed since D3 was not only completely silent about the chest region of any garment, but also about any connecting means able to stably keep the inflatable member in a folded condition.

Besides being a late-filed attack, the objection based on D3 as the closest prior art in combination with D4 was unconvincing. In regard to the embodiment of a garment disclosed in D4 on pages 28, lines 8 to 19, it was not disclosed that the containment sack mentioned therein was designed to break.

Reasons for the Decision

Main request - Articles 100(a) and 54 EPC

1. The Board confirms the conclusion reached by the opposition division that the ground for opposition under Articles 100(a) and 54 EPC does not prejudice maintenance of the patent in regard to the prior art known from D3. Contrary to the reasoning provided by the opposition division in the impugned decision and the arguments of the respondent submitted during the appeal proceedings, the Board concludes however that the subject-matter of claim 1 is distinguished over the garment known from D3 only by feature 1.9, rather than additionally by features 1.7 and 1.8.

In the following the expressions "airbag" and "inflatable member" are used synonymously.

1.1 It is common ground between the parties that features 1.1 to 1.6 are disclosed in D3. The garment described in paragraph 44 of D3 implicitly discloses these features in combination. The paragraph reads:

> "*Where the airbag fits into a pocket on the garment, the airbag may be made to be rolled or folded so as to occupy less than a full portion of the pocket. Thus, the garment may be made to breathe through much or most of its surface area. The airbag will unfurl, unroll, unfold, expand, or enlarge to fill the pocket following activation and inflation.*"

It was uncontested that the airbag mentioned in this paragraph corresponds to the "inflatable member"

according to features 1.2 and 1.4 and the pocket represented a "seat" according to feature 1.3. Although during the oral proceedings the respondent argued for the first time that the meaning of the verb "fits" in the first sentence would imply a tight fit of the pocket around the airbag, in contrast to verbs like "holding" or "accommodating" which would allow a looser form of arrangement of the airbag inside the pocket, it was not contested that features 1.5 and 1.6 are disclosed by the above paragraph. In a graphical illustration provided by the respondent on a flipchart during the oral proceedings before the Board, the respondent confirmed its understanding of the cited paragraph, being derived in particular from the expressions "*rolled or folded so as to occupy less than a full portion of the pocket*" and "*airbag will unfurl, unroll, unfold* [...] *to fill the pocket following activation*" that features 1.5 and 1.6 were disclosed.

1.2 Before addressing features 1.7 and 1.8 it is noted that the disclosure in paragraph 44 of D3 is entirely silent about the body region to be protected by the airbag. Consequently, feature 1.9, relating specifically to the chest region, is not disclosed for a garment according to paragraph 44 of D3.

1.3 The combination of features 1.7 and 1.8 requires the first part of the body of the garment to correspond or comprise at least the second region of the seat (i.e. the pocket in paragraph 44), so that the garment's body part requiring the properties of ventilation and/or air flow according to feature 1.7 must correspond to or comprise the region of the seat or pocket which is initially free or unoccupied by the un-inflated airbag. The critical issue in regard to the question of the disclosure of features 1.7 and 1.8 is whether the cited

paragraph directly and unambiguously disclosed that the pockets mentioned therein comprised "*one or more ventilation openings and/or were made of a material allowing air to flow*".

1.3.1 The Board concludes that the skilled person understands from paragraph 44 that the pockets themselves, rather than the material of the garment lying possibly under or around the pockets, is responsible for much or most of the garment's surface area being breathable as mentioned in the second sentence. The Board notably agrees with the arguments submitted by the appellant in its statement of grounds of appeal that the adverb "thus" at the beginning of the second sentence indicates a consequence of the statement in the preceding sentence, according to which the rolled or folded airbag occupies less than a full portion of the pocket (see above point 1.1). With an objective reading of that passage, the skilled person would unambiguously understand from the first sentence that the considered arrangement of an (uninflated) airbag in a pocket in a rolled or folded condition occupying less than a full portion of a pocket is being compared to a situation of the same (uninflated) airbag in an unfolded/unrolled state in a pocket of the very same size. If the rolled/folded condition contributes as a consequence ("thus") to much or most of the garment's surface area being made breathable, the skilled person understands this to be the result of the reduced ("less") area being occupied by the rolled/folded airbag in the pocket. This necessarily means that the relative improvement in the garment's breathability requires the pocket also to be breathable, otherwise less occupied surface area in a pocket could not have an impact on garment breathability. This conclusion is moreover independent of the specific arrangement of the pocket on or in the

garment. Also a pocket, into which an airbag is inserted, placed on the garment's surface would necessarily require breathability if an embodiment of a garment disclosed in paragraph 44 shall be realised.

1.3.2 Due to the use of the concatenated conjunction "and/or", feature 1.7 defines three alternative features, i.e. "garment has one or more ventilation openings" or "garment made from a material allowing the air to flow" as well as both in combination, it is sufficient if one of these alternatives is disclosed in the relevant prior art in order that feature 1.7 is anticipated. The Board cannot see any difference in terms of structural features implied between a "breathable material", as known from paragraph 44 of D3 and a "material allowing air to flow" according to feature 1.7 of claim 1 of the opposed patent.

1.3.3 The Board therefore concludes that features 1.7 and 1.8 in combination with features 1.1 to 1.6 are also known from paragraph 44 of D3.

1.4 The respondent's arguments relied on the following key issues

(a) the reading of document D3 by a skilled person, without thinking of the invention of the opposed patent, would have led to the understanding that all pockets mentioned in D3, irrespective of forming airbags themselves or being formed to receive separate airbags in them, would be comprised of gas-impermeable material, so that the teaching of paragraph 44 was inconsistent with the overall teaching of D3, or was erroneous, and could not be considered to disclose all the features of claim 1, when applying the principles derived from the consistent case law of the Boards of

appeal on the interpretation of the content of (prior art) documents;

(b) the teaching of paragraph 44 actually meant that the pocket size was reduced, so that the pockets did not require to be breathable themselves;

(c) a breathable material did not disclose the ventilation properties required according to feature 1.7 of claim 1, since breathability and ventilation represented different technical concepts.

None of these arguments were found convincing for the reasons indicated below.

1.4.1 The Board adheres to the principles of interpretation of documents as arising from the Case law of the Boards of Appeal of the EPO (10th Edition 2022), including those summarised in sections I.C.4.1, 4.3, or 4.9 and explicitly cited by the appellant. However, the Board does not agree with the respondent's contention that the true meaning and thus the content and disclosure of D3, taken as a whole and read by a skilled person, teaches that in garments according to D3 all pockets intended to receive separate airbags in them, are made of gas-impermeable material. In the Board's view, such an interpretation could only be arrived at when reading D3 with knowledge of the invention claimed and trying to establish a difference, rather than by an objective, unbiased reading.

It is first noted that there is no explicit statement in D3 supporting the respondent's interpretation (such as, for example, "all pockets for receiving an airbag are always made of non-gas-porous material" or the like).

The respondent's view is rather based on a narrow interpretation of paragraphs 12 and 13, which read as follows:

> "[0012] *The active protection garment* [also referred to as "APG" in the following; note added by the Board] *for an elderly person, can be a pair of shorts, or briefs, that are worn about the waist and extend downward to cover and provide active protection for the hips. The APG components can be built into baffles in the underwear or outerwear. These APG shorts can be underwear or undershorts so that a more stylish garment may be worn over top of the functional underwear. The APG shorts may comprise part of a garment that is worn as the outer layer of clothing. The APG shorts may have an elastic waistband that is easy to take on and take off. The leg openings may be close fitting, again for ease of the user. The APG shorts can be fabricated from two separate fabric layers of non-gas-porous material, such as, but not limited to, rip-stop nylon, polyester, Kevlar, polyolefin, ePTFE, and the like. The separate layers can be further subdivided into pockets or chambers that are isolated from each other. The fabric layers of the APG comprise regions of porosity to allow for breatheability* [sic].
>
> [0013] *Alternatively, the APG may enclose separate pockets of non-gas-permeable material that serve as the airbags. The pockets themselves may comprise airbags or may be simply fitted to accommodate a small, self-contained airbag and pressure source. The location, size and volume of the airbags are determined by the anatomic area to be protected. The size of the individual airbags is kept to a*

minimum to provide rapid, full inflation with a small amount of gas. Small individual airbags will limit the size and weight of the gas sources required for optimal inflation."

1.4.2 Paragraph 12 relates to active protective garments for an elderly person in the form of shorts or briefs which can be built into baffles in the underwear or outerwear. It is mentioned that such shorts can be fabricated from separate fabric layers of non-gas-porous (i.e. gas-impermeable) material and that the separate layers can be further sub-divided into individual pockets or chambers. The fabric layers, however, comprise regions of porosity for breathability. From this paragraph the skilled person receives the general indication that whereas gas-impermeable fabric layers can be employed in such shorts, the shorts comprise regions of porous materials to provide breathability.

Whereas paragraph 12 mentions pockets and chambers as sub-divided regions in a garment made of a fabric composed of two gas-impermeable layers, paragraph 13 concerns the alternative that the garment may enclose separate pockets of non-gas permeable material serving as the airbags, where the pockets themselves may comprise airbags or may be fitted to accommodate a self-contained airbag and its pressure source. The skilled person understands the necessity for pockets serving, themselves, as airbags to be made of gas-impermeable material. However, this understanding would not be extended to pockets which only accommodate a self-contained airbag and its pressure source. The skilled person understands that, in this situation, there is simply no technical logic of having such accommodating pockets being made of gas-impermeable

material.

D3 envisages many different applications of the garment, including underwear (see for example paragraph 12, second sentence, or paragraph 10, fourth sentence). The skilled person understands that forming such garments of gas-impermeable material is technically not excluded. However, the use of gas-impermeable materials would be, rather, limited to portions where this property is of a particular use, for example for protecting against humidity, such as rain or even incontinence, or in portions of a garment serving themselves as airbags. However, if such gas-impermeability is not required for technical reasons, the skilled person naturally understands that corresponding portions of a garment would be expected to be made of materials providing gas-permeability or breathability, just for the sake of user comfort.

No potential use of gas impermeable pockets is mentioned anywhere in D3 for pockets accommodating self-contained (gas impermeable) airbags. The respondent also did not indicate any reason why this would be required for such pockets accommodating self-contained airbags. For these reasons the skilled person would understand the second sentence of paragraph 13 in a more general sense, i.e. without confining its teaching to mean that every pocket, including those accommodating self-contained airbags, would be made of gas-impermeable material.

Confirmation for this understanding even for the embodiment referred to in paragraph 44 is already in the earlier paragraph 42, where garments are considered which either comprise the airbags as part of the garment or where "they are added to the garment by

placing them into pockets (like a pita pocket) on the garment". It is further stated that the airbags are held in the pockets using fasteners such as snaps, Velcro®, zippers, buttons and the like. As discussed during the oral proceedings, the Board held the views that amongst these fasteners at least Velcro® fasteners cannot provide gas-impermeability (which was also not contradicted by the respondent). No mention of an air-tight sealing of the pockets receiving the airbags is made elsewhere in this context. The skilled person would thus understand that it makes no sense to form such pockets, which evidently are not required to be air-tight, of gas-impermeable material. Moreover, in the following sentences, emphasis is put on the fact that by such an arrangement the "garment is also more breathable because only a portion of the surface is covered by gas impermeable compartments or airbags". This indeed highlights the normal understanding of the skilled person when reading D3 that breathable materials are to be used wherever possible and gas-impermeable materials only where needed for their specific function.

Although the Board acknowledges that most of the specific embodiments (paragraphs 68, 93, 102, 103, 112, 115 in combination with the corresponding Figures cited therein) to which the respondent referred, employ gas-impermeable materials for airbag portions together with selectively breathable regions separated from the inflatable parts, there is no disclosure found in these passages that would support the appellant's reading that every pocket, including those accommodating removable airbags, is always disclosed as being made of gas-impermeable material. Figure 10 shows a garment with pockets (100) receiving removable airbags ("APG chambers 108"). The pockets are integral with the base

garment and secured in place by "fasteners and fastener holes" (see paragraph 113), of the type mentioned previously in paragraph 42 (see paragraph 115). The garment indeed comprises a plurality of breathable regions (110) separated from a base material (see paragraph 112). However, the base material is not specified for this embodiment, so that it is not clearly stated whether the base material is gas-impermeable in all other regions different from the explicitly mentioned breathable regions 110, but such a choice would make no technical sense if the fastener means (e.g. Velcro®) holding the airbag in the pockets cannot maintain such air tightness.

In summary, the respondent's contention in point 1.4(a) above is unconvincing.

1.4.3 The same applies to the respondent's argument that paragraph 44 actually concerns reducing the pocket size (see point 1.4(b) above). Such reading does not correspond to the actual wording, which implies the folded or rolled airbag to expand in previously unoccupied regions of the pocket extending essentially along the garment's surface as explained above in point 1.3.2. The understanding of that paragraph as presented in detail by the respondent during the oral proceedings, so as to mean that a pocket is reduced in its extension along the garment's surface and instead could extend more outward from the garment's surface, to provide the necessary, previously unoccupied space available for the unfolding airbag, is considered to be far-fetched. Such an arrangement would reduce the extension of the protective area offered by the garment, which certainly is not what the skilled person would understand to be the intention of the embodiment

disclosed in paragraph 44 of D3.

1.4.4 Similarly, the respondent's distinction between breathability, as mentioned in paragraphs 42 and 44 of D3, and "a material allowing the air to flow", according to the second option defined by feature 1.7, cannot be accepted. The skilled person in the field of textiles and garments knows that breathability is common to all conventionally formed woven, knitted and non-woven materials, where the yarns or filaments do not form a poreless, entirely closed fabric layer. In more advanced materials such as Gore-Tex®, which constitute waterproof though breathable fabrics, microporous membranes are used. It is well known to the skilled person that the micropores are small enough to allow water vapour to pass but to block larger water droplets. However, if water vapour passes through such pores so must the constituents of air. This is the reason why such materials are qualified as being breathable. The Board is not aware of any (breathable) material used in garments allowing water vapour to pass but blocking air flow. The contrary statement of the respondent remains an unproven allegation. The designation "wind stopper" frequently used in the garment industry for outdoor materials employing microporous membranes does not mean that air is completely blocked from passing the material, but simply refers to a highly reduced air flow through the membrane.

Referral of questions to the Enlarged Board of Appeal

2. The respondent's request to refer the two questions recited under point IV. above to the Enlarged Board of Appeal is refused.

2.1 According to Article 112(1)(a) EPC, in order to ensure uniform application of the law, or if a point of law of fundamental importance arises, the Board of Appeal shall, following a request from a party to the appeal, refer any question to the Enlarged Board of Appeal if it considers that a decision is required for the above purposes. If the Board of Appeal rejects the request, it shall give the reasons in its final decision.

2.2 According to the established case law of the Boards of Appeal, the referred question must be relevant to the decision on the appeal (see also Article 112(3) EPC), which is not the case if the referring board reaches the same decision regardless of the answer to the question referred (Case law of the Boards of Appeal of the EPO, 10th Edition 2022, V.B.2.3.3, e.g. G 3/98, OJ 2001, 62, Reasons 1.2.3). A decision by the Enlarged Board on the questions at issue is not required to decide on the present case. To start with, the premise in the first question (a) is not met. The respondent's underlying assumption that the Board's interpretation of paragraph 44 would be inconsistent with the contextual meaning of that part of the document having regard to the remainder of the document cannot be accepted. The reason for this has been given above in points 1.4.1 and 1.4.2. Therefore the alleged inconsistency between the meaning of paragraph 44 and the remainder of the content of D3 does not exist. Also question (b) does not require an answer by the Enlarged Board of Appeal. There is no reason to assume that the understanding of the skilled person as set out by the Board above in point 1.3.1 is manifestly erroneous in the light of the common general knowledge and/or the remainder of document D3.

Main request - Articles 100(a) and 56 EPC

3. Based on the identification of a single distinguishing feature, 1.9, of claim 1 of the patent in suit over D3, the Board cannot agree with the conclusion of the opposition division in regard to the opposition ground pursuant to Articles 100(a) and 56 EPC. The Board instead concludes that the subject-matter of claim 1 lacks an inventive step for the following reasons.

3.1 Starting from the embodiment of a garment disclosed in paragraph 44 of D3 as the closest prior art, the distinguishing feature 1.9 does not have any particular technical effect other than allowing, in an uninflated condition of the inflatable member, for air to flow to or from a chest region and, in an inflated condition, to protect the same chest region against impact. The garment of the closest prior art (paragraph 44 of D3) allows (in an uninflated condition) air to flow to some undefined region of the garment and to protect (in an inflated condition) that same region against impact. The technical effects achieved by the distinguishing feature 1.9 on the respective body region underlying the first part of the body of the garment are thus the same, but for the particular region affected.

The further technical effects relied upon by the respondent are not reflected by any feature of claim 1. The claim is directed to a garment in general and does not comprise any particular features which imply a limitation to high dynamic, sporting activities, such as motorcycling, as opposed to more static activities. In particular, the amount of ventilation allowed by feature 1.7 is not defined, nor is any impact force to be absorbed by the inflatable member defined. It is also noted here that paragraph 1 of the patent in suit

itself also refers to other general applications, such as a "working activity" where the garment could be used.

Moreover, it is noted that the chest region is mentioned in paragraph 14 of the patent in suit only as one option among several others, without mentioning any particular or surprising advantage, as pointed out also by the appellant during the oral proceedings before the Board.

Hence, even taking into account what the patent description itself states, none of the further limitations postulated by the respondent can be read into claim 1.

3.2 Therefore, the technical problem considered by the respondent to be solved by feature 1.9, i.e. to provide a garment for motorcyclists with top performance against the two types of impact having opposing requirements, is not an objective one.

As already stated in the Board's communication pursuant to Article 15(1) RPBA, an objective technical problem can be seen as providing a suitable positional arrangement of the inflatable member in a garment.

3.3 The solution of this technical problem by the combination of features according to claim 1 is obvious for the skilled person. D3 already discloses at several junctures garments in the form of coats, vests, shirts or undershirts (see paragraphs 10, 38 or 46). The location of the airbags is to be determined by the anatomic area to be protected (paragraph 13), such areas including specific (full or partial) torso regions, including the back or the abdomen or the arms

(paragraph 38). Figure 8B discloses in a side-view a jacket in inflated condition, extending over the entire torso of the user. As also acknowledged by the respondent, the skilled person knows that the human chest includes vital organs and could require specific protection. Therefore, despite not mentioning the chest region explicitly, the repeated explicit indications in D3 of protecting different portions of the torso would have led the skilled person to also consider the alternative of protecting the chest region (as also argued by the appellant in the oral proceedings). It is then obvious that for applying the embodiment according to paragraph 44 of D3 for the protection of the chest region, the skilled person would have chosen to place that part of the pocket (or seat) being unoccupied by the uninflated airbag in that part of the garment which, in an inflated condition is to be protected, namely the chest region, thereby arriving without an inventive step at the subject-matter of claim 1 of the patent in suit.

3.4 The arguments submitted by the respondent against this conclusion are unconvincing.

3.4.1 The respondent's argument that D3 actually taught a technical prejudice against applications to motorcycling activities is irrelevant in view of the subject-matter to be protected by claim 1. Neither the garment of claim 1 nor the closest prior art garment disclosed in paragraph 44 of D3 are directed to motorcyclist garments. Whether such specific garments would require, in the chest region, additional layers as mentioned in paragraph 108 of D3 to protect against abrasion in case of an accident is not relevant for a general garment to be adapted so as to solve the above objective technical problem. Moreover, claim 1 anyway

does not exclude the provision of additional layers on the claimed garment.

3.4.2 It is also not decisive that Figure 8B and paragraphs 96 or 104 relate merely to big, isolated chambers rather than to small-sized airbags held in pockets. Neither claim 1 nor paragraph 44 indicate any limitation in regard to the size of the airbags or the seats/pockets receiving them.

3.4.3 The respondent acknowledged the importance of the protection of the chest region, due to the presence of vital organs. Its conclusion that the skilled person would locate the free portion of the pocket according to paragraph 44 of D3 in a zone of the body of the user outside the chest region, is then a non sequitur. The free portion of the pocket is the portion into which the airbag is to expand upon inflation (see paragraph 44 of D3, as well as features 1.5 and 1.7 and 1.9 of claim 1). There is no requirement, neither in claim 1 nor in paragraph 44 of D3, that the two portions or regions of the seat or pocket, i.e. the free portion and the portion originally occupied by the uninflated (rolled or folded) airbag, must be situated in different parts of the garment's body corresponding to different regions of the user's body to be protected. Because the skilled person is aware of the importance of protecting vital organs in the chest region, the skilled person would obviously place the pocket such that this purpose is achieved.

3.5 For the above reasons the ground for opposition pursuant to Articles 100(a) and 56 EPC prejudices maintenance of the patent. The respondent's main request (to dismiss the appeal) is therefore not

allowable.

Auxiliary request 7 - Article 56 EPC

4. As already indicated in its communication pursuant to Article 15(1) RPBA (see item 8(e)), the subject-matter of claim 1 of auxiliary request 7 does not involve an inventive step (Article 56 EPC), because the features added to claim 1 do not establish any further distinction over D3.

4.1 The features added to claim 1 (see above point IX. above) are in fact necessarily embodied by an airbag in a folded condition as mentioned in paragraph 44 of D3. Such folded airbag or inflatable member, in its deflated condition, is necessarily at least partially folded on itself so as to form (at least two) sub-portions arranged one above the other. Such sub-portions of the folded airbag are joined by bending portion(s) extending between these sub-portions. These bending portions constitute connecting means within the meaning of the final feature added to claim 1 in auxiliary request 7.

4.2 In the oral proceedings the respondent did not contest this interpretation by the Board of the added features of amended claim 1.

4.3 The respondent's argument that D3 does not constitute the most promising starting point for the invention is unconvincing. D3 leads in an obvious way to the subject-matter of granted claim 1, so that there is no reason to exclude this piece of prior art for the assessment of inventive step on a further limited claim.

4.4 The respondent's further arguments provided in the written procedure, based on the allegation that paragraph 44 of D3 actually taught away from using connecting means, are also unconvincing since they do not contradict the fact that the added features as set out in the Board's preliminary opinion are already present in that embodiment.

4.5 Consequently the Board has no reason to change the interpretation as given in the preliminary opinion and hereby confirms it. Since there is no further distinguishing feature added to claim 1, the conclusion reached by the Board in regard to granted claim 1 (see above point 3.) applies by analogy to claim 1 of auxiliary request 7. The respondent's request for maintenance of the patent in this amended form is, hence, also not allowable.

4.6 For the sake of completeness it is noted that the respondent had objected to the admittance of objections raised by the appellant under Article 56 EPC based on D3 as the closest prior with common general knowledge or D4 (see for example page 9 of the reply to the grounds of appeal). The Board notes first that the above objection does not rely on such a "combination" of prior art, but is based on an interpretation of the features added to claim 1 which was introduced by the Board in its preliminary opinion. During the oral proceedings, the respondent did not question the admittance of this objection and a decision on the admittance of the appellant's objections is thus not required. Moreover, even though no objection was raised, it should be apparent that when a conclusion has first to be reached on the features which differentiate claim 1 from the prior art, as was a matter of dispute for the main request in regard to D3

(see above), such further consideration by the Board of whether an added feature in a later request actually provides any further difference, is to be expected (see also Article 114(1) EPC.

Auxiliary request 8 - Article 56 EPC

5. As further indicated in the Board's communication pursuant to Article 15(1) RPBA, and irrespective of the question of the admittance of the appellant's objections under Article 56 EPC, the subject-matter of claim 1 of auxiliary request 8 indeed involves an inventive step (Article 56 EPC).

5.1 The technical effect achieved by the features added to claim 1 (see above point X. above), compared to auxiliary request 7, may be seen as being to maintain the folded configuration of the airbag during use and to permit the unfolding of the airbag upon inflation, as also argued by the appellant.

Starting from the closest prior art garment disclosed in paragraph 44 of D3, an objective technical problem may therefore be seen as being the provision of a garment comprising a folded airbag in a pocket allowing the folded configuration of the airbag to be maintained during use and permitting the unfolding of the airbag upon inflation.

5.2 Contrary to the appellant's view, D4 does not disclose or suggest in the embodiment of lines 8 to 19 of page 28 the features corresponding or leading to the claimed solution. The embodiment of an airbag device disclosed in this passage comprises an inner inflation chamber which may be identified with the inflatable member according to claim 1 or the airbag disclosed in

paragraph 44 of D3. Lines 10 to 19 on page 28 of D4 read:

> "*According to an embodiment, said inner inflation chamber 35 is folded upon itself and said containment sack 36 is fixedly connected determining a small section thereof through means suitable for breaking, or opening 37, once a predetermined pressure has been reached in the folded chamber, so as to determine a subsequent widening of the section of the inflation chamber for a free flow of the inflation fluid at separate times in different portions of the airbag*."

The Board is not convinced by the appellant's argument that the containment sack mentioned in this passage constitutes connecting means according to the combination of features added to claim 1 of auxiliary request 8, including those added in auxiliary request 7. First, it should be stated that the interpretation adopted by the Board in the context of auxiliary request 7 (see point 4.1 above) for the folded portions of the airbag itself providing the connecting means cannot be applied to the breakable connecting elements in auxiliary request 8 as these portions of the airbag are not "able to break" in the context of the claim. Stated more completely, the connecting means cannot be identified with the bending portions of the folded airbag extending and connecting the folded sub-portions, since they must be able to break upon inflation (which the folded portions do not, otherwise the airbag would not function). The claimed connecting means must nevertheless join the sub-portions. They must therefore be constituted by one or more elements separate from the folded inflatable member and joining the sub-portions. The Board does not agree with the appellant that the containment sack mentioned in the

cited passage of D4 "joins" the sub-portions in the folded inflatable member. The containment sack can be seen to hold the portions together in a folded condition but not to "join" them, as also indicated in the Board's preliminary opinion. Moreover, the sentence quoted above does not unambiguously disclose one or more breakable elements within the meaning of the features added to claim 1. The exact constitution of the "containment sack" and the "means suitable for breaking, or opening" in that sentence lacks any unambiguously understandable meaning.

For these reasons, D4 cannot be regarded as disclosing the features added in combination to claim 1 of auxiliary requests 7 and 8.

5.3 The fact that the containment sack of D4 may achieve a similar function to the added features of claim 1 does not alter the Board's conclusion. The solution in D4 is different. It is not apparent that the skilled person would, without involving an inventive step, modify the containment sack of D4 so as to arrive at the claimed combination of features based on customary practice. This was anyway not argued by the appellant.

5.4 Consequently, the combination of features according to claim 1 of auxiliary request 8 is not derivable in an obvious manner from the combination of D3 and D4.

6. For the sake of completeness and although the appellant did not follow up this line of argument in the oral proceedings, in its written submissions the appellant had raised a novelty objection based on D4 against claim 1 of auxiliary request 8. At least for the reasons given above in point 5.3, this objection is

unconvincing.

7. The Board thus concludes that there are no objections which prejudice maintenance of the patent in an amended form on the basis of the claims of auxiliary request 8.

Order

For these reasons it is decided that:

1. The request for referral to the Enlarged Board of Appeal is refused.

2. The decision under appeal is set aside and the case is remitted to the opposition division for maintenance of the patent in amended form with the following documents:

   Claims 1 to 11 of auxiliary request 8, submitted with the submission dated 6 September 2024,

   and a description to be adapted thereto.

The Registrar: The Chairman:

D. Grundner M. Harrison

Decision electronically authenticated