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**Datasheet for the decision
of 24 March 2025**

Case Number: T 0345/24 - 3.2.06

Application Number: 19164452.5

Publication Number: 3711729

IPC: A61F13/15, A61F13/531,
A61F13/475, A61F13/532,
A61F13/533, A61F13/42,
A61F13/536

Language of the proceedings: EN

Title of invention:
ABSORBENT ARTICLES

Patent Proprietor:
Ontex BV
Ontex Group NV

Opponents:
Drylock Technologies NV
Essity Hygiene and Health Aktiebolag

Headword:

Relevant legal provisions:
EPC 1973 Art. 100(c)
RPBA 2020 Art. 13(1), 13(2)

Keyword:

Amendments - added subject-matter (yes)

Amendment after notification of Art. 15(1) RPBA communication
(yes), exceptional circumstances (no)

Amendment to appeal case - amendment detrimental to procedural
economy (yes)

Decisions cited:

G 0002/10, T 0759/10, T 1634/13, T 1173/17, T 0099/13

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0345/24 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 24 March 2025

Appellant: Ontex BV
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Appellant: Ontex Group NV
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Party as of right: Essity Hygiene and Health Aktiebolag
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
2 January 2024 concerning maintenance of the
European Patent No. 3711729 in amended form.

Composition of the Board:

Chairman	M. Harrison
Members:	M. Hannam
	W. Ungler

Summary of Facts and Submissions

I. An appeal was filed by each of the appellant (opponent I) and the appellant (patent proprietor) against the interlocutory decision of the opposition division in which it found that European patent No. 3 711 729 in an amended form met the requirements of the EPC.

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

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or that the patent be maintained on the basis of the claims of one of auxiliary requests 1 to 26, or 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A, all filed with the statement of grounds of appeal.

III. Prior to the Board's communication under Article 15(1) RPBA being issued, the following additional requests were made:

Opponent I requested that the patent proprietor's appeal be rejected as inadmissible.

The patent proprietor requested that if any of the auxiliary requests lower ranked than auxiliary request 1 were to be considered, the case should be remitted to the opposition division. Furthermore the proceedings should be stayed in view of G 1/23 should the alleged prior use be taken into account.

IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional

opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request appeared to extend beyond the content of the application as filed.

V. It is noted here that opponent II, a party as of right, made no submissions during the appeal procedure and did not attend the oral proceedings before the Board.

VI. Oral proceedings were held before the Board on 24 March 2025, during which the patent proprietor filed a new auxiliary request 1 to be considered prior to the auxiliary requests already on file. At the close of the oral proceedings, the parties' requests were as follows:

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or that the patent be maintained on the basis of auxiliary request 1 filed during the oral proceedings before the Board, or on the basis of one of auxiliary requests 1 to 26, or 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A, all filed with the statement of grounds of appeal.

The appellant (opponent I) requested that the decision under appeal be set aside and the patent be revoked. Furthermore, it requested that the patent proprietor's appeal be rejected as inadmissible.

VII. Claim 1 of the main request reads as follows (including paragraph annotation as used by the proprietor in its grounds of appeal):

1.1 An absorbent article (10, 20, 300, 500, 600) comprising an absorbent core (101, 501, 601) sandwiched

between a liquid permeable topsheet (520, 620) and a liquid impermeable backsheet (521, 621), and

1.2 an acquisition distribution layer (522, 622) positioned between said topsheet (520, 620) and said absorbent core (101, 501, 601)

1.3 and positioned at a body-facing side of the absorbent core in contact with the body-facing side of the absorbent core, wherein

1.4 the absorbent core (101, 501, 601) comprises absorbent material selected from the group consisting of cellulose fibers, superabsorbent polymers and combinations thereof,

1.5 said absorbent core (101, 501, 601) comprising at least one interconnected channel (106) free of said absorbent material, wherein

1.6 said channel (106) has a length extending along a longitudinal axis (48) and the absorbent core (101, 501, 601) has a length extending along said longitudinal axis (48) and wherein the length of said channel (106) is from 10% to 95% of the length of said absorbent core (101, 501, 601), characterized in that

1.7 the acquisition distribution layer (522, 622) comprises synthetic fibers, wherein

1.8 said synthetic fibers are comprised at a level of greater than 80%wt by weight of said acquisition distribution layer (522, 622), and wherein

1.9 said acquisition distribution layer (522, 622) has a basis weight of from 10 to 50 g/m²,

1.10 said acquisition distribution layer (522, 622) consisting of a spunbond or carded thermobonded nonwoven.

Claim 1 of auxiliary request 1 filed at oral proceedings before the Board reads as follows:

An absorbent article (10, 20, 300, 500, 600) comprising an absorbent core (101, 501, 601) sandwiched between a liquid permeable topsheet (520, 620) and a liquid impermeable backsheet (521, 621), and an acquisition distribution layer (522, 622) positioned between said topsheet (520, 620) and said absorbent core (101, 501, 601) and positioned at a body-facing side of the absorbent core in contact with the body-facing side of the absorbent core, wherein the absorbent core (101, 501, 601) comprises absorbent material selected from the group consisting of cellulose fibers, superabsorbent polymers and combinations thereof, said absorbent core (101, 501, 601) comprising at least one interconnected channel (106) free of said absorbent material, wherein said channel (106) has a length extending along a longitudinal axis (48) and the absorbent core (101, 501, 601) has a length extending along said longitudinal axis (48) and wherein the length of said channel (106) is from 10% to 95% of the length of said absorbent core (101, 501, 601) characterized in that the acquisition distribution layer (522, 622) comprises synthetic fibers, wherein said synthetic fibers are comprised at a level of greater than 80%wt by weight of said acquisition distribution layer (522, 622), and wherein said acquisition distribution layer (522, 622) has a basis weight of from 18 to 35 g/m², said acquisition distribution layer (522, 622) consisting of a spunbond or carded thermobonded nonwoven; wherein the acquisition distribution layer (522, 622) consists of a single spunbond or carded nonwoven layer and is free of air-through-bonded, airlaid and meltblown (*sic*) nonwoven layers, wherein the acquisition distribution layer (522, 622) comprises a first center-position (C_{ADL}) and the absorbent core (101, 501, 601) comprises a second center-position (C_C), and wherein the

acquisition distribution layer (522, 622) is asymmetrically positioned over the absorbent core (101, 501, 601) such that the first center-position (C_{ADL}) and second center-position (C_C) are offset at least along the longitudinal axis (48).

A recitation of the specific wording of all remaining auxiliary requests is not necessary for the present decision.

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

Admissibility of the proprietor's appeal

The appeal was admissible. Agreement with the opposition division's conclusion regarding the subject-matter of auxiliary request 1 meeting the requirements of the EPC provided no acknowledgement that the subject-matter of claim 1 as granted lacked novelty. The grounds of appeal sufficiently contested the reasoning of the opposition division.

Main request

The ground for opposition under Article 100(c) EPC did not prejudice maintenance of the patent as granted. As regards the omission of the word 'good' in relation to the contact between the absorbent core and the acquisition distribution layer (ADL), lacking any clear technical implication or meaning, the word 'good' could be omitted without violating added matter requirements. This was the finding in G1/93. A 'good' contact did not clearly equate to any type or quality of contact. As a closed, layered structure (the ADL being positioned between the topsheet and the absorbent core - see paragraph [0282] for example) which was under pressure when worn, it was technically reasonable for contact to

unambiguously occur between the ADL and the absorbent core. The skilled person would also understand the passage in paragraph [0198] as filed to disclose a range of contact from 'close proximity' to 'good contact', all degrees of contact therebetween thus also being disclosed. It was clear that point contact or intermittent contact would also achieve the liquid distribution function of the ADL such that the qualifier 'good' would be seen by the skilled person as being implicit in the contact recited in claim 1. 'Contact' alone, without the qualifier 'good', was also directly and unambiguously derivable from the application as filed without reference to paragraph [0198]. For example paragraphs [0116] and [0117] as filed disclosed simply 'contact' between the ADL and the absorbent core.

As for feature 1.10 of claim 1 with the ADL consisting of a spunbond or carded thermobonded nonwoven, claim 1 as filed included the expression 'comprises a spunbond and/or carded nonwoven layer' and the amendment from 'comprising' to 'consisting' limited the scope of protection. The expression 'comprised' encompassed a spunbond or carded thermobonded nonwoven being present in the ADL, but since only two materials were mentioned, the skilled person would also see a disclosure of the ADL just including either of these two materials. This was further underlined by the pointer from samples B and C of the examples in paragraphs [0281], [0283], [0285] and [0287] as filed, in which either spunbond or carded thermobonded nonwoven layers were present in the ADL. Paragraph [0016] also disclosed the aims of the invention in terms of excellent acquisition times and low rewet which were achieved by the examples 4 and 6 with the ADL constructions of samples B and C. The examples were

100% spunbond or 100% carded nonwoven which were thus pointers in support of the view that the ADL consisting of either of these constructions was the original intention in the application as filed. All this was supported by the Case Law of the Boards of Appeal, 10th Edition, II, E, 1.15 and particularly by decisions T 759/10, T 99/13, T 1634/13 and T 1173/17.

Auxiliary request 1 filed during the oral proceedings before the Board

Exceptional circumstances justified this request being taken into account. The opponent had detailed the multiple different types of contact between the ADL and the absorbent core for the first time at oral proceedings and this was the first opportunity for the proprietor to react. The reliance on a single sentence of the opponent's submissions in order to elaborate on additional examples of 'contact' at oral proceedings also had to be seen as going beyond a mere development of existing arguments.

Auxiliary requests 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A

These requests should be admitted.

- IX. The arguments of opponent I (hereafter, simply the 'opponent') relevant to the present decision may be summarised as follows:

Admissibility of the proprietor's appeal

In point 5.1 of its grounds of appeal, the proprietor indicated agreement with the reasoning and conclusion of the opposition division in relation to claim 1 of auxiliary request 1 meeting the requirements of the EPC. Claim 1 of auxiliary request 1 differed from claim 1 of the main request only by the claimed basis weight

range, on which basis the opposition division found the subject-matter of claim 1 to be novel. In agreeing with the reasoning of the opposition division, the proprietor thus implicitly conceded that claim 1 of the main request was not novel over D1. It however failed to argue novelty over D1 in its defence of the main request such that its appeal as a whole was insufficiently substantiated and should be found inadmissible.

Main request

The subject-matter of claim 1 as granted extended beyond the content of the application as filed. Paragraph [0198] as filed specifically disclosed only 'good contact' between the ADL and the absorbent core. This thus provided no basis for the claimed 'contact' between the two, which was unlimited as to the nature of the contact. Small areas of contact between the ADL and absorbent core were now covered by claim 1 which the skilled person would not see as being 'good' contact. Paragraph [0198] merely disclosed two different positions, not a range of possibilities of different contacts between two extremes.

The amendment in claim 1 from 'comprising' to 'consists of' also lacked basis. The two examples failed to provide a pointer to the 'consists of' wording, not least since it was not unambiguous what the samples B and C pointed to. If anything, an ADL with 100% polypropylene fibres was all that was derivable from these samples. The cited decisions did not support a change from 'comprising' to 'consists of' in the present case, particularly when considering the specific situation which justified the amendment in these cited cases.

Auxiliary request 1 filed during the oral proceedings before the Board

This request should not be taken into account. No exceptional circumstances justified its admittance. The objection regarding 'good' contact had been under discussion since the start of the opposition proceedings. The examples provided of what kind of contact were included through the omitting of 'good' in claim 1 was responsive to the discussion at oral proceedings before the Board. Paragraph 7 of the opponent's grounds also discussed the type and quality of contact implied by the term 'good' which no longer limited claim 1. The amendment should thus have been filed earlier.

Reasons for the Decision

1. *Admissibility of the proprietor's appeal*
 - 1.1 According to Rule 101(1) EPC, the Board of Appeal shall reject an appeal as inadmissible if it does not comply with, *inter alia*, Rule 99 paragraph 2, which itself stipulates that the statement of grounds of appeal shall indicate the reasons for setting aside the decision impugned ... and the facts and evidence on which the appeal is based.
 - 1.2 In point 5.1 of its grounds of appeal, referring to auxiliary request 1 before the opposition division (which corresponds to auxiliary request 1 also on appeal), the proprietor states:
'This request was considered novel and inventive by the decision, and the patent was maintained on this basis. We agree with the reasoning and conclusion of the decision that this request satisfies all EPC

requirements.'

- 1.3 Firstly, this statement simply expresses the proprietor's agreement with the finding of the opposition division that auxiliary request 1 met the requirements of the EPC. The opponent's argument of an implicit acceptance that claim 1 of the main request lacked novelty over D1 is simply not derivable from the proprietor's statement.
- 1.4 The opposition division simply did not decide on novelty of the subject-matter of claim 1 of the main request relative to D1, rather (see e.g. page 11 of the decision under appeal) solely finding it to lack novelty over D5. Thus, in its grounds of appeal, the proprietor had absolutely no need to address novelty of the subject-matter of claim 1 relative to D1. An absence of such arguments by the proprietor concerning D1 therefore does not result in a lack of substantiation of its appeal (in the sense of dealing with all the reasons for the main request not being allowable, as argued by the opponent). The entirety of the reasons given by the opposition division for the non-allowability of the main request in its decision were thus fully addressed, the facts and evidence relied on explaining why the decision should be overturned. The appeal hence contains the required substantiation.
- 1.5 The requirements of Rule 99(2) EPC were thus met by the proprietor's statement of grounds of appeal. The proprietor's appeal is therefore admissible.

Main request

When referring to the 'application as filed' herebelow, reference is being made to the A-publication of the patent application, which was accepted as accurately reflecting the content of the application as filed.

2. *Article 100(c) EPC*

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

2.1 'Good' contact

2.1.1 Relative to claim 1 as filed, feature 1.3 has been introduced into the claim, in which the ADL is defined to be 'in contact with' the body-facing side of the absorbent core. The basis for this amendment was stated by the opposition division to be paragraph [0198] of the application as filed where, however, the ADL is disclosed to be 'in good contact with' the body-facing side of the absorbent core. The Board sees the omission of the qualifier 'good' to lack a direct and unambiguous basis in the application as filed.

2.1.2 Firstly in this regard, the Board finds the word 'good' in the expression 'good contact' to be technically relevant in the present context. For a skilled person, a good contact, at least in the technical field of absorbent articles, would imply face-to-face contact over a large area between two elements of the article. Conversely, if two elements are merely 'in contact' with one another, at one extreme the expression encompasses merely single point contact over a small area. This latter condition of minimal contact between two elements would not be considered by the skilled

person as embodying 'good' contact between the elements. Despite the term 'good' being somewhat imprecise, in the context in which it is used in the description it would be understood nonetheless to indicate a certain kind, amount and/or quality of contact. This type of contact is, however, left completely open through the omission of the term from claim 1. The proprietor's argument, with reference to G1/93, that the term 'good' could be omitted from claim 1 due to it lacking a technical meaning is thus not accepted.

- 2.1.3 The proprietor's further contention that 'good' contact did not clearly equate to any type or quality of contact is, at least in the present context, not accepted. It is noted that paragraph [0198] of the application as filed is directed to the ADL and its positioning between the topsheet and the absorbent core in the absorbent article. The purpose of an ADL in absorbent articles is to remove liquid deposited on a topsheet and ensure its distribution within itself, but also to ensure swift transfer of the liquid to the absorbent retention part of the core of the article. In this context, a 'good' contact between the ADL and the absorbent core must be contact which efficiently promotes the transfer of liquid from the ADL to the absorbent core such as, for example, by providing a large face-to-face contact area. Such a contact for promoting transfer of liquid is also suggested in paragraph [0198] by way of the ADL and the absorbent core being disclosed to be 'in close proximity or even in good contact', the 'good contact' thus being evidently superior to mere 'close proximity'. Consequently, at least a contact promoting swift transfer of liquids was implied through the expression 'good contact', which the word 'contact' alone fails to

achieve.

- 2.1.4 The proprietor's argument that the ADL being positioned between the topsheet and the absorbent core as a closed, layered structure unambiguously implied that significant face-to-face contact (i.e. 'good' contact) was achieved is not accepted, at least not in this generality. It is accepted that an ADL sandwiched between a topsheet and an absorbent core of an absorbent article will be in at least some contact with immediately neighbouring layers of the article. However, as was argued by the opponent during the oral proceedings, claim 1 does not exclude further layers being positioned between the ADL and the absorbent core which would allow, for example, contact of merely the peripheral edge of the ADL with the absorbent core. The Board concludes that a skilled person would not equate such peripheral contact over a limited area to be 'good' contact in the sense of the application as filed (see point 2.1.2 above). Consequently, the closed, layered structure of the claimed absorbent article does not unambiguously result in the contact between the ADL and the absorbent core being 'good', such that a reading of claim 1 to implicitly define 'good' contact is not accepted.
- 2.1.5 The Board also fails to see point or intermittent contact between the ADL and the absorbent core as reflecting a 'good' contact. Even if the function of liquid distribution to the absorbent core were at least minimally achieved by such contact, this does not allow it to be classed as 'good' contact which, (as mentioned above) at least in the context of layers in an absorbent article, would require large area face-to-face contact, also resulting from a technical perspective, in a more substantial liquid distribution

to the absorbent core.

- 2.1.6 The proprietor's argument that the passage in paragraph [0198] as filed disclosed a range of contact from 'close proximity' to 'good contact', such that all degrees of contact therebetween were also disclosed, is not accepted. Reading the disclosure of a range of different degrees of contact into paragraph [0198], rather than two discrete situations, is not unambiguous. The passage reading 'preferably in close proximity or even in good contact with' would linguistically be understood as disclosing preferably close proximity (i.e. not in contact) and even more preferably good contact between the ADL and the absorbent core. Consequently a direct and unambiguous basis for merely 'contact' between the ADL and the absorbent core is not derivable from paragraph [0198].
- 2.1.7 The proprietor's reference to paragraphs [0116] and [0117] of the application as filed also fails to provide basis for simply 'contact' to exist between the ADL and the absorbent core. These paragraphs define the terms 'directly over' and 'indirectly over' when used in the application and, whilst using the term 'contact' in the respective definitions, (albeit in terms of being direct or indirect contact), provide no indication of how 'contact' or even 'good contact' are to be understood in the application as filed. A direct and unambiguous basis for merely a 'contact' to be present between the ADL and the absorbent core can thus not be inferred from these paragraphs.
- 2.1.8 In summary, therefore, a direct and unambiguous basis cannot be derived from the application as filed for the inclusion of merely 'contact' rather than 'good

contact' in feature 1.3 of claim 1.

2.2 ADL consisting of a spunbond or carded nonwoven

2.2.1 Relative to claim 1 as filed which recited that the ADL comprises a spunbond and/or carded nonwoven layer, feature 1.10 of claim 1 recites the ADL consisting of a spunbond or carded thermobonded nonwoven. The wording of claim 1 as filed itself fails to provide a basis for the adopted wording since the ADL comprising a spunbond and/or carded nonwoven layer allows further elements to be present and does not provide a disclosure of the ADL consisting of (i.e. merely) a spunbond or carded thermobonded nonwoven i.e. without further elements. It is not relevant to the issue to be decided that the amendment limits the scope of protection relative to claim 1 as filed, rather the requirement is that the amendment can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the application as filed (see the 'gold' standard mentioned in G2/10).

2.2.2 The proprietor's argument that the expression 'comprised' encompassed just a spunbond or carded thermobonded nonwoven being present in the ADL such that the skilled person would see it reasonably just including these two materials is not accepted. It is not denied that the expression 'comprises' encompasses the possibility that just one of the two materials is present. However that is not the standard for a direct and unambiguous disclosure of solely one of these two materials being included in the ADL.

- 2.2.3 In further support of its argument, the proprietor referred to samples B and C in the examples disclosed in paragraphs [0285], [0288], [0291] and [0294] as filed, these allegedly providing a pointer to solely the spunbond or carded thermobonded nonwoven layers being present in the ADL. In each of examples 3 to 6, the samples B are all identical and the samples C are all identical. All the individual disclosures of sample B thus provide a single disclosure of a spunbond nonwoven layer forming the ADL, similarly sample C being a single disclosure of a carded thermobonded nonwoven layer forming the ADL. Such isolated, single disclosures of the ADL being either a spunbond nonwoven or a carded thermobonded nonwoven are not seen to provide an unambiguous pointer to the claimed 'consisting of' wording, when the sole unambiguous disclosure in the application as filed in regard to the material(s) of the ADL is in claim 1 in which the 'comprising' wording is used.
- 2.2.4 The proprietor further referred to the aims of the invention in paragraph [0016] of the application as filed. With examples 4 and 6 providing exemplary acquisition times and low rewet values for samples B and C in accordance with the aims of the invention, the proprietor argued that this also pointed to the type of nonwoven in samples B and C being the original intention of the 'comprising' wording in the application as filed. In addition to such single samples (i.e. one single sample for each possibility in claim 1, sample B being a spunbond layer and sample C being a carded thermobonded nonwoven layer) not being able to provide an unambiguous pointer, rather than several samples all consisting of one or the other material, samples B and C were each made of 100% polypropylene fibres such that, if anything, the

skilled person would tend to see at least this specific fibre material as having a significant impact on the acquisition times and rewet performance, rather than solely the specific type of nonwoven structure in samples B and C.

2.2.5 With reference to T 759/10, the proprietor argued that the amendment from 'comprising' to 'consisting of' did not extend beyond the content of the application as filed. In that case, claim 1 of auxiliary request 3 indeed differed from claim 1 as originally filed in that the wording 'the texturizing agent comprises' had been amended to 'the texturizing agent consists of', the amendment being found not to be subject-matter extending beyond the content of the application as filed. Even though it is clear that the Board is not bound by a decision from another technical Board of Appeal, it is noted that in that case, the amendment was based on an explicit disclosure in the application as filed of a texturizing agent consisting of fatty acid esters of sterols, fatty acid esters of stanols or mixtures of these' (see Reasons, point 7.1). The cited case thus differs significantly from the present case in which no explicit disclosure of the 'consists of' wording is to be found in the application as filed.

2.2.6 The proprietor also referred to T 1634/15 in which specific examples in the description led the Board to the conclusion that an amendment to the wording of claim 1 from 'comprising' to 'consisting of' was allowable. In that case, paragraph [0028] of the application as filed provided a general disclosure of a solder paste with different solder powder and flux proportion ranges, each combination of which however disclosed 100 wt% of the solder paste composition. This was further reflected by each of four examples

similarly disclosing solder powder and flux combinations which together added up to 100 wt% of the solder paste composition. In contrast, the present case provides but a single example, i.e. only one for each of the two types of nonwoven in the ADL as claimed, and with further restrictions in the samples, which, in the absence of any further indication of the ADL consisting of solely one or other of these nonwoven types, cannot be seen to provide the requisite direct and unambiguous disclosure of the claimed subject-matter.

2.2.7 The proprietor further referred to T 1173/17, yet in that case the change from 'comprising' to 'consisting of' was not found to have an unambiguous basis in the application as filed. Despite the description including several samples allegedly showing that micron-size particles were not envisaged in the washcoat composition, the Board in that case disagreed that this provided a direct and unambiguous disclosure of the claimed washcoat consisting of sub-micron particles, at least since further components of the washcoat slurry, which could comprise micron-size particles, were undefined (see Reasons, point 5). This decision thus provides no support for the proprietor's contention that the examples in the description of the present case provide a general pointer to the allegedly intended disclosure of an originally filed claim.

2.2.8 In view of all points 2.2.1 to 2.2.7 above, therefore, and even reflecting the skilled person's standpoint as argued by the proprietor based on T 99/13, the amendment from 'comprising' to 'consisting of' is not directly and unambiguously derivable for the skilled person from the whole of the application as filed.

2.3 With the amendments in claim 1 relating to 'good' contact and 'consisting of' both defining subject-matter extending beyond the content of the application as filed, the Board concludes that the ground for opposition under Article 100(c) EPC prejudices maintenance of the patent as granted.

3. *Auxiliary request 1 filed during the oral proceedings before the Board*

Article 13(2) RPBA

3.1 Relative to claim 1 of the main request, claim 1 of auxiliary request 1 narrowed the claimed basis weight range for the ADL and added further features taken from claims 8 and 12 as filed.

3.2 This request was submitted at oral proceedings before the Board in reaction to the main request being found not allowable. Having been filed after notification of a communication under Article 15(1) RPBA, according to Article 13(2) RPBA the request shall not be taken into account unless exceptional circumstances are identified.

3.3 The proprietor's argument that the opponent had detailed the multiple different types of contact between the ADL and the absorbent core for the first time at oral proceedings, and that this was an exceptional circumstance justifying the new request being taken into account, is not accepted. In point 11 of the opponent's reply to the proprietor's grounds of appeal, it was argued that deletion of the word 'good' from the expression 'good contact' resulted in any contact between the ADL and the absorbent core being included in the scope of protection, including overlap

of only small areas, for which there was no disclosure in the application as filed. This is seen as a key argument of the opponent's objection on this point, an example also being given of how this unallowably extended the claimed subject-matter. Consequently, the opponent providing further examples of contact between the ADL and the absorbent core at oral proceedings before the Board, not least with the communication under Article 15(1) RPBA having indicated in point 2.1.3 that this may be a matter of discussion, is seen to be nothing more than a normal development of the opponent's appeal case rather than an exceptional circumstance justifying a new request being taken into account.

3.4 The proprietor's further argument that the reliance on a single sentence of the opponent's submissions in order to elaborate on additional examples of 'contact' at oral proceedings had to be seen as going beyond a mere development of existing arguments is also not accepted. As the opponent argued, the specific objection relating to 'good' contact had been raised at the outset of the opposition proceedings and had been maintained ever since. Its grounds of appeal (see item 7) had also indicated that any kind, amount and/or quality of contact was included in claim 1 as granted, whereas solely 'good contact' was originally disclosed. The essentials of the opponent's objections were thus clearly presented as part of its complete appeal case (see Article 12(3) RPBA). The addition of extra examples of how 'contact' could be understood at oral proceedings, as opposed to 'good contact', were thus no more than a normal development of its existing case.

3.5 The Board thus exercised its discretion such that, due to the absence of exceptional circumstances, auxiliary

request 1 was not taken into account (Article 13(2) RPBA).

4. *Further auxiliary requests - auxiliary requests 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A as filed with the proprietor's grounds of appeal*

Article 13(1) RPBA

- 4.1 At oral proceedings before the Board, a higher ranking auxiliary request 1 was filed than all auxiliary requests previously on file. Consequently, all the auxiliary requests previously on file assumed a new ranking below auxiliary request 1 filed during the oral proceedings before the Board, such that e.g. auxiliary request 1 as filed with the grounds of appeal in fact becomes the second auxiliary request. The fact that the requests maintained their original numbering is irrelevant to the fact that these are now re-ranked. Such a re-ranking is (due to the procedural effects of such a change, such as consideration of alternate subject-matter) an amendment to the proprietor's appeal case and its admittance is at the discretion of the Board. Under such circumstances the Board's discretion is to be exercised in view of *inter alia* procedural economy (see Article 13(1) RPBA, last sentence).
- 4.2 Auxiliary request 1 filed at oral proceedings before the Board includes features taken from claims 8 and 12 as filed. The features of at least claim 12 as filed are, however, present in none of the lower ranking auxiliary requests 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A such that each of these lack convergence with the auxiliary request 1 filed at oral proceedings. A lack of convergence of requests

falling under Article 13(1) RPBA is usually seen to be contrary to procedural economy, not least since the opposing party and the Board would need to consider claims directed to subject-matter broader than that previously decided upon.

4.3 At oral proceedings the Board's preliminary view was given that auxiliary requests 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A were not convergent with the higher ranking auxiliary request 1 filed at oral proceedings before the Board. Consequently the re-ranking of these requests was an amendment to the proprietor's appeal case which was, in the present case, contrary to procedural economy and would not be admitted. To this preliminary opinion the proprietor explicitly refrained from providing any counter-arguments.

4.4 Although not ultimately decisive due to the aspect of adverse procedural economy, it may be added that the Board had also indicated (see the minutes) that none of the auxiliary requests anyway seemed to overcome the objection of added subject-matter with regard to the main request.

4.5 As a result of the foregoing, the Board confirmed its preliminary opinion and exercised its discretion under Article 13(1) RPBA not to admit auxiliary requests, which were still numbered 1 to 26, 1A, 6A, 7A, 8A, 9A, 16A, 17A, 18A, 19A, 23A, 24A and 26A, into the proceedings.

5. *Requests for remittal and stay of proceedings*

For completeness it is noted that the patent proprietor had initially requested that, if any of the auxiliary

requests lower ranked than auxiliary request 1 were to be considered, the case should be remitted to the opposition division. In the absence of any such auxiliary request (albeit all now re-ranked) being admitted, there was no request to be considered and thus no request on the basis of which a remittal could be ordered.

Likewise, the patent proprietor's initial request for a stay of proceedings pending the outcome of G 1/23 became moot, since the alleged public prior use did not require discussion.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated