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**Datasheet for the decision  
of 13 May 2024**

**Case Number:** T 1673/22 - 3.2.01

**Application Number:** 17195872.1

**Publication Number:** 3453368

**IPC:** A61F13/532, A61F13/539,  
A61F13/15

**Language of the proceedings:** EN

**Title of invention:**

ABSORBENT ARTICLE WITH CHANNELS AND METHOD FOR MANUFACTURING  
THEREOF

**Patent Proprietor:**

Drylock Technologies NV

**Opponents:**

Ontex BV  
Fippi SpA

**Headword:**

**Relevant legal provisions:**

EPC 1973 Art. 54  
RPBA 2020 Art. 12(6), 12(5), 13(2)

**Keyword:**

Main request and Auxiliary requests 1-5 - Novel (no)  
Auxiliary requests I-IV - Discretion not to admit submission -  
requirements of Art. 12(6) RPBA 2020 met (no)  
Auxiliary request 6-7 - Discretion not to admit submission -  
requirements of Art. 12(3) RPBA 2020 met (no)  
Auxiliary requests 8-24 - Amendment after summons -  
exceptional circumstances (no)

**Decisions cited:**

J 0014/19, T 2091/18, T 0494/18, T 0482/19, T 1436/19,  
T 0853/17, T 1224/15, T 1480/16

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1673/22 - 3.2.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.01**  
**of 13 May 2024**

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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
4 May 2022 concerning maintenance of the  
European Patent No. 3453368 in amended form.**

**Composition of the Board:**

**Chairman**            G. Pricolo  
**Members:**            S. Mangin  
                          M. Millet

## Summary of Facts and Submissions

- I. The appeals were filed by the appellant (proprietor) and the appellant 1 and appellant 2 (opponent 1 and opponent 2 respectively) against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 5, the patent in suit (hereinafter "the patent") met the requirements of the EPC.
- II. The opposition division considered that:
- the subject-matter of independent claims 1 and 12 of the **main request** was not novel over D1 (WO 2012/170798 A1) and D2 (EP 2905000 A1);
  - claim 1 of **auxiliary requests 1, 2 and 3** contravened the requirements of Article 123(2) EPC;
  - **auxiliary request 4** met the requirements of Article 123(2) EPC but the subject-matter of claims 1 and 12 was not novel over D1 and D2;
  - **auxiliary request 5** was to be admitted in the proceedings, complied with the requirements of Articles 123(2) EPC and 84 EPC and the subject-matter of claim 1 was novel over D1 and D2 and involved an inventive step starting from D1;
  - The alleged "Dryway" and the "Ontex" prior uses could not be considered to constitute public prior uses.
- III. Oral proceedings were held before the Board on 13 May 2024 via videoconference.

The appellant (proprietor) requested that the appealed decision be set aside and the patent be maintained as granted (main request), or, in the alternative, that the patent be maintained in amended form on the basis of one of auxiliary requests I-IV and 1-4, filed with

the statement of grounds of appeal, or auxiliary request 5 (corresponding to the form allowed by the opposition division) and auxiliary requests 6 and 7 filed with the reply, or auxiliary requests 8 to 24 filed with the letter of 2 May 2024.

The appellants 1 and 2 (opponents 1 and 2 respectively) requested that the appealed decision be set aside and the patent be revoked.

IV. The main request comprises 4 independent claims:

(a) **Independent claim 1** of the main request reads as follows:

1. An absorbent article (100) comprising a liquid pervious topsheet, a liquid impervious backsheet, and an absorbent core (130) comprising an absorbent material between a top core wrap sheet (110) and a back core wrap sheet (120), said absorbent core being positioned in between said topsheet and said backsheet, wherein the absorbent core is provided with at least one attachment zone (140, 150) between the top core wrap sheet (110) and the back core wrap sheet (120), wherein a first binder is arranged in a first area between the top core wrap sheet (110) and the back core wrap sheet (120) at a distance from the at least one attachment zone (140, 150), on one of the top core wrap sheet (110) and the back core wrap sheet (120); and a second binder is arranged in a second area between the top core wrap sheet (110) and the back core wrap sheet (120), on the other of the top core wrap sheet (110) and the back core wrap sheet (120), wherein the first area is substantially complementary to the second area.

(b) **Independent claim 9** of the main request reads as follows:

A method for manufacturing an absorbent article, said method comprising:

- a. applying a first binder in a first area on a first side of first sheet material;
- b. applying a second binder in a second area on a first side of second sheet material;
- c. applying an absorbent material on the first side of the first sheet material;
- d. attaching the first sheet material to the second sheet material with the first sides facing each other, such that at least one attachment zone is formed; wherein one of the first sheet material and the second sheet material is a top core wrap sheet material and the other is a back core wrap sheet material; and the first area is arranged at a distance from the intended position of the at least one attachment zone wherein the first area and the second area are substantially complementary after the step of attaching the wrap sheets to each other.

(c) **Independent claim 12** reads as follows:

An absorbent article according to any of claims 1-8 manufactured according to the method of any one of the claims 9-11.

(d) **Independent claim 13** reads as follows:

An apparatus for manufacturing an absorbent article, said apparatus comprising:

- a. a first rotating member for guiding a first sheet material (110) along a surface thereof,

- b. a first means configured for applying a first binder to at least one portion of the first sheet material (110) arranged at a distance from the intended position of at least one attachment zone,
- c. a second rotating member for guiding a second sheet material (120) along a surface thereof,
- d. a second means configured for applying a second binder to at least one portion of the second sheet material (120),
- e. an application unit configured for applying an absorbent material on said first sheet material (110) on the rotating member such that the at least one portion on which the first binder has been applied is covered with absorbent material and substantially no absorbent material is present on areas in which the first binder was not applied;
- f. a sheet feed unit configured for applying the second sheet material (120) on top of the absorbent material on the first sheet material (110); wherein one of said first and second sheet material is a top core wrap sheet material, and the other one is a back core wrap sheet material;
- g. an attachment unit configured for attaching said first sheet material (110) to said second sheet material (120) at least in the areas where substantially no absorbent material is present, wherein the first means and second means are configured for applying the first binder and the second binder respectively, such that the portion of the first sheet material (110) to which the first binder is applied and the portion of the second sheet material (120) to which the second binder is applied are substantially complementary in the resulting absorbent article.

V. Auxiliary request I



Claim 1 of auxiliary request I corresponds to claim 1 of the main request with the additional following feature:

*"wherein the first area comprises a plurality of longitudinal stripes and the second area comprises a plurality of longitudinal stripes".*

The rest of the claims remained unchanged.

VI. Auxiliary request II

Claim 1 of auxiliary request II corresponds to claim 1 of the main request with the additional feature that the first binder and the second binder are arranged *"along a plurality of longitudinal, substantially parallel stripes"*.

The rest of the claims remained unchanged.

VII. Auxiliary request III

Claim 1 of auxiliary request III corresponds to claim 1 of the main request with the additional feature that the first and the second binder are arranged *"only along a plurality of longitudinal, substantially parallel stripes"*

The rest of the claims remained unchanged.

VIII. Auxiliary request IV

Claim 1 of auxiliary request IV corresponds to claim 1 of the main request with the additional feature that: *"the second binder is not applied to the entire surface area of the other of the top core wrap sheet (110) and the back core wrap sheet (120)".*

The rest of the claims remained unchanged.

IX. Auxiliary requests 1 and 2

Independent claims 1, 9 and 13 of auxiliary request 1 and 2 correspond to independent claims 1, 9 and 13 of the main request respectively with the additional feature that the first binder and the second binder are arranged *"along a plurality of longitudinal, substantially parallel stripes"*.

Auxiliary requests 1 and 2 differ in the position of the inserted additional feature within the claim.

X. Auxiliary request 3

Independent claims 1, 9 and 13 of auxiliary request 3 correspond to independent claim 1, 9 and 13 of the main request respectively with the additional feature that the first and the second binder are arranged *"only along a plurality of longitudinal, substantially parallel stripes"*.

XI. Auxiliary request 4

Independents claim 1, 9 and 13 of auxiliary request 4 correspond to claim 1, 9, 13 of the main request respectively with the additional feature that: *"the second binder is not applied to the entire surface area of the other of the top core wrap sheet (110) and the back core wrap sheet (120)"*.

XII. Auxiliary request 5

Claim 1 of auxiliary request 5 corresponds to claim 1 of the main request with the following changes:

*"wherein the absorbent core is provided ~~with at least one attachment zones~~ between the top core wrap sheet and the back core wrap sheet, wherein a first binder is arranged in a first area between the top core wrap sheet and the back core wrap sheet at a distance from the ~~at least one attachment zones~~, on one of the top core wrap sheet and the back core wrap sheet only in a plurality of longitudinal, substantially parallel stripes which do not overlap with the attachment zones; and a second binder is arranged in a second area along a plurality of longitudinal, substantially parallel stripes between the top core wrap sheet and the back core wrap sheet, on the other of the top core wrap sheet and the back core wrap sheet, wherein the first area is substantially complementary to the second area, wherein the second area includes the attachment zones".*

The rest of the claims remained unchanged.

XIII. Auxiliary request 6

Claim 1 of auxiliary request 6 corresponds to claim 1 of auxiliary request 5. The independent method claim 8 and the independent apparatus claim 12 are provided with amendments corresponding to those of claim 1.

XIV. Auxiliary request 7

Claims 1, 8 and 12 of auxiliary request 7 correspond to claims 1, 8 and 12, respectively, of auxiliary request 6 with the additional feature that:

*"substantially the entire surface of the absorbent article is provided with binder on either the first sheet material (110) or the second sheet material (120)".*

XV. Auxiliary requests 8-13

Claim 1 of auxiliary requests 8-13 corresponds to claim 1 of auxiliary requests 1, 2, 3, 5, 6 and 7 respectively, wherein the wording "along a plurality of longitudinal, substantially parallel stripes" has been amended to "as a plurality of longitudinal, substantially parallel stripes".

XVI. Auxiliary requests 14-20

Auxiliary requests 14-20 correspond to auxiliary requests 5, 1, 2, 3, 4, 6, and 7 wherein only the respective method claims are upheld, i.e. wherein claims aimed at the absorbent article and the apparatus have been deleted.

XVII. Auxiliary requests 21-24

Claim 1 of auxiliary requests 21-24 correspond to claim 1 of auxiliary requests 16, 17, 19 and 20 respectively, wherein the wording "along a plurality of longitudinal, substantially parallel stripes" has been amended to "as a plurality of longitudinal, substantially parallel stripes".

## **Reasons for the Decision**

1. Main request

1.1 Novelty over D1

The subject-matter of claim 1 is not novel over the embodiment of D1 comprising a supporting sheet 200, absorbent material 100, an adhesive 50 and a further supporting sheet 300 (reference is made to figure 2 of D1 and page 30, third paragraph and following).

- 1.1.1 The appellant (proprietor) argued that D1 did not anticipate the subject-matter of claim 1 for the following reasons:
- D1 related to a method and an apparatus for making absorbent structures. The specific arrangement of the adhesive in the end absorbent product was speculative.
  - In D1, the adhesive was said to be applied "uniformly and/or homogeneously" to the absorbent structure consisting of a sheet 200 and an absorbent material 100. However, this structure being three-dimensional, it could not be ascertained whether the uniform and/or homogeneous application was with respect to the plane or with respect to the surface of the structure as a whole.
  - The particulate absorbent material could not realistically be applied in a uniform manner and the supporting sheet was formed into undulation (penultimate paragraph of page 6 and penultimate paragraph of page 24 of D1). As a result, when adhesive was applied by unit 50 over the combination of sheet 200 and absorbent material 100, its distribution would be different not only between attachment zone areas and other areas, but would also vary within these other areas, depending on the rods onto which the sheet was deposited.
  - While the rods were described as optional in D1, they were discussed at length; all figures which showed mating strips 31 also included rods 36. The embodiment

considered by the opposition division involved a number of selections from D1.

- The behaviour of the "immobilization adhesive" was not specified in D1. It was therefore unclear whether and how much this adhesive would penetrate into the absorbent material. However, considering the adhesive used in D1 and its application in the form of fibres, the adhesive would actually penetrate through the absorbent material and reach the supporting sheet. Furthermore, whether, at the later stage in which a further supporting sheet 300 was added, the adhesive would still stick to sheet 300 was speculative. In any case, the skilled person would not regard such an indirect bringing into contact as a step of "applying a second binder".

The appellant (proprietor) further argued that D1 did not disclose the following feature of claim 1:

*"wherein a first binder is arranged in a first area between the top core wrap sheet (110) and the back core wrap sheet (120) at a distance from the at least one attachment zone (140, 150)".*

In D1 there was no distance, i.e. no space between the first binder and the attachment zones.

1.2 The Board is not convinced by the arguments of the appellant (proprietor).

The method and the apparatus for manufacturing the absorbent structure in D1 as regards the embodiment with a single absorbent structure are disclosed in such a way that the resulting absorbent structure will have the features of claim 1.

Indeed the provision of the supporting sheet 200, the arrangement of the absorbent material 100 outside the

mating strips 31 and the longitudinal rods 36 if present, the application of the adhesive by the adhesive unit 50 on the supporting sheet covered by the absorbent material (page 30, third paragraph) and the application of the further supporting sheet 300 will lead to an absorbent structure as defined in claim 1.

Whether the adhesive is applied as in D1 on the entire supporting sheet 200 covered by the absorbent material or on the supporting sheet 200 only where there is no absorbent material (first area) and on the supporting sheet 300 where the absorbent material is present (second area) leads in any case to the product defined in claim 1.

The three situations depicted by the appellant (proprietor) on pages 8 and 9 of their statement of grounds of appeal anticipate the core structure of claim 1. The type, the amount and the distribution of adhesive in the first and second area are not defined in claim 1. However, the Board is not convinced that the adhesive material could be provided in such an amount so as to penetrate through the entire thickness of the absorbent material and reach the supporting sheet. As argued by the appellants (opponents) this situation is technically not possible. Indeed, the adhesive 50 applied in the form of fibres (page 31, lines 12-15) creates a cross-linked layer of fibres on top of the absorbent layer and would not penetrate through the absorbent layer to reach the supporting sheet. As pointed out by appellant 2 (opponent 2), the production speed of such absorbent articles is such that the adhesive would not have time to go through the absorbent layer, but would adhere to the supporting sheet 300 when applied on the adhesive. Furthermore, as noted by the appellant 1 (opponent 1), having the

absorbent material, being either fluff or super absorbent, embedded in adhesive is to be avoided as the fluff and the super absorbent would functionally be hindered to absorb liquid.

Furthermore, the supporting sheet 200 not being covered by absorbent material at the location of rods 36 does not change the fact that the area of the adhesive where absorbent material is present is substantially complementary to the area where absorbent is not present.

Finally, leaving aside the question of admissibility, the interpretation by the appellant (proprietor) of the feature "*wherein a first binder is arranged (..) at a distance from the at least one attachment zone (140, 150)*", requiring a space between the first binder and the attachment zone cannot be followed. As argued by the appellants (opponents), without any indication of the value of the distance, this feature is to be interpreted as the first binder not overlapping the attachment zone, i.e. being arranged outside the attachment zone. As mentioned by the appellant 1 (opponent 1), this interpretation is supported by paragraphs [0022], [0138], [0139], [0141] and [0142] of the patent.

This interpretation also follows the interpretation of the opposition division under point 7.3 of the appealed decision, which was not contested by the appellant (proprietor) under point 7.3 of their reply to the statements of grounds of appeal of the appellants (opponents).

2. Auxiliary requests I-IV



Auxiliary requests I-IV, which have been filed for the first time in appeal, are not admitted in the appeal proceedings pursuant to Article 12(6) RPBA.

- 2.1 The appellant (proprietor) did not provide any reason for submitting these auxiliary requests only with the statement of grounds of appeal.

In their letter of 2 May 2024 and during oral proceedings, the appellant (proprietor) argued that auxiliary request I was filed as a reaction to the decision of the opposition division that auxiliary request 1 did not comply with the requirements of Article 123(2) EPC, this being the first time that the opposition division expressed this opinion. Moreover, from the discussion during the oral proceeding in opposition it was apparent that the opposition division would have other objections against auxiliary request I in addition to the Article 123(2) EPC objection. Filing auxiliary request I at that time was therefore not possible.

The appellant (proprietor) further submitted that auxiliary request II-IV correspond to requests that were filed in response to the summons to oral proceedings in opposition on 15 December 2021, with the only difference that amendments to claims 9 and 13 of these requests were reverted. In other words, claim 1 of auxiliary requests II-IV was the same as claim 1 of auxiliary requests 2-4 as filed in response to the summons to oral proceedings, and claims 9 and 13 of auxiliary requests II-IV were the same as claims 9 and 13, respectively, of the claims as granted. The filing of these requests with the grounds of appeal was a direct reaction to the outcome of the oral proceedings in opposition and to the decision of the opposition

division, in that, contrary to their preliminary opinion, the opposition division deemed claims 9 and 13 as granted novel over the cited prior art documents. Moreover, due to claim 1 of the respective auxiliary requests being deemed not allowable by the opposition division, there was no opportunity to file auxiliary requests II-IV earlier, i.e. during the oral proceedings.

- 2.2 The Board is not convinced by the arguments of the appellant (proprietor). As mentioned by appellant 1 (opponent 1) auxiliary request 1 was filed on 15 December 2021 after the opposition division's preliminary opinion of 20 April 2021. The opposition division then expressed during oral proceedings for the first time their opinion that auxiliary request 1 did not comply with Article 123(2) EPC based on the arguments provided by the appellant 1 (opponent 1) in their letter of 1 February 2022. The appellant 1 (opponent 1) could not have been surprised by the decision of the opposition division.

The appellant (proprietor) chose not to file auxiliary request I because from the discussion during the oral proceeding in opposition it was apparent that the opposition division would have other objections against auxiliary request I in addition to the Article 123(2) EPC objection. Similarly, the appellant (proprietor) chose not to file auxiliary requests II-IV, because claim 1 of these requests corresponds to claim 1 of auxiliary requests 2-4 which was considered unallowable.

However, the appellant (proprietor) could have filed auxiliary request I-IV before the oral proceedings or during oral proceedings in opposition.

The appellant (proprietor) chose not to file auxiliary requests I-IV during oral proceedings to avoid having a negative assessment. By retaining these auxiliary requests until the appeal proceedings, the opposition division could not take a decision on these requests, preventing the Board from reviewing the decision, being its primary function.

3. Auxiliary requests 1-5

Claim 1 of auxiliary requests 1 and 2 is amended to specify that the first and second binders are arranged *"along a plurality of longitudinal, substantially parallel stripes"*.

Claim 1 of auxiliary request 3 requires that the first binder and the second binder are arranged *"only along a plurality of longitudinal, substantially parallel stripes"*.

Claim 1 of auxiliary request 4 comprise the additional following feature: *"wherein the second binder is not applied to the entire surface area of the other of the top core wrap sheet (110) and the back core wrap sheet (120)"*.

Claim 1 of auxiliary request 5 corresponds to claims 1 and 2 of the main request with the following amendments:

*"wherein the absorbent core is provided with ~~at least one~~ attachment zones, between the top core wrap sheet and the back core wrap sheet, wherein a first binder is arranged in a first area between the top core wrap sheet and the back core wrap sheet at a distance from the ~~at least one~~ attachment zones, on one of the top core wrap sheet and the back*

*core wrap sheet only in a plurality of longitudinal, substantially parallel stripes which do not overlap with the attachment zones;*  
*and a second binder is arranged in a second area along a plurality of longitudinal, substantially parallel stripes between the top core wrap sheet and the back core wrap sheet, on the other of the top core wrap sheet and the back core wrap sheet, wherein the first area is substantially complementary to the second area, wherein the second area includes the attachment zones".*

The subject-matter of claim 1 of auxiliary requests 1-5 is not novel over D1.

- 3.1 The appellant (proprietor) submitted that D1 did not anticipate claim 1 of auxiliary requests 1-5 because D1 did not disclose in combination the embodiment with one supporting sheet 200, an absorbent material 100, an adhesive 50 disclosed on figure 2 and page 30, third paragraph in combination with the second moving endless surface comprising mating strips 31 and longitudinally extending rods 36 disclosed on figure 4 and page 22 last paragraph. In particular because an absorbent article having longitudinal channels extending along the whole length would be prone to leakage, the skilled person would not combine the two passages.

Furthermore, the first area with the first binder would not be complementary to the second area with the second binder.

- 3.2 The Board is not convinced by the arguments provided by the appellant (proprietor).

Under the section "Second endless moving surface (30)" starting at the bottom of page 17 of D1, the first

alternative discussed is the presence of longitudinal mating strips only, it is only starting on page 22 penultimate paragraph, that the alternative embodiments with rods either transversal or longitudinal are disclosed.

Therefore in the first embodiment disclosed, with longitudinal mating strips only (i.e. no rods), adhesive will be applied along a plurality of longitudinal parallel stripes, which correspond to the mating strips and the area between the mating strips. These areas are complementary. The resulting absorbent core will then have a first binder only in and along a plurality of longitudinal parallel stripes between the mating strips on one of the core wrap sheet (upper sheet 300) and a second binder only in and along a plurality of longitudinal parallel stripes between the mating strips, corresponding to the attachment zones on the other core wrap sheet (supporting sheet 200).

Another embodiment which anticipates claim 1 of auxiliary requests 1-5 is the one comprising in addition to the mating strips, longitudinal rods as disclosed on figure 4 and last paragraph of page 22 and following. In this embodiment the absorbent material will not be present at the location of the mating strips and the rods, which are longitudinal and parallel. As a result, the adhesive will be applied only in and along longitudinal substantially parallel stripes on the supporting sheet (300) along the absorbent material between the mating strips and the rods and on the supporting sheet (200) along the mating strips and rods. The area with the binder on the absorbent material will adhere to the supporting sheet (300) and will be complementary with the area with the binder on the supporting sheet (200).

As noted by appellant 1 (opponent 1), should the skilled person not consider longitudinal rods as they extend along the whole length of the absorbent core and lead to leakage, the same would apply with transversal rods extending along the whole width of the absorbent core, with leakage occurring on the side. The skilled person would thus only consider the former embodiment without rods, and arrive at the subject-matter of claim 1.

4. Auxiliary requests 6-7

Auxiliary requests 6-7 are not admitted in the proceedings under Article 12(3) and (5) RPBA.

During oral proceedings, the parties referred to their written submissions.

4.1 The appellant (proprietor) submitted that auxiliary requests 6 and 7 were filed in reaction to the grounds of appeal of the appellants 1 (opponents 1). Moreover, these requests could not have been filed earlier since they introduced further limitations as compared to the claims of auxiliary request 5 which was filed during the oral proceedings in opposition and which was upheld by the opposition division. In particular, these requests were filed as a precautionary measure against the novelty and inventive step objections against claims 1, 8, 11 and 12 of auxiliary request 5 as raised in the grounds of appeal of the appellants (opponents).

In addition, in auxiliary request 6 independent claims 8 and 12 were amended in accordance with the amendments to claim 1 of auxiliary request 5, and in auxiliary request 7 the additional amendments as first introduced corresponded to those of auxiliary request 5 as filed

on 15 December 2021 in response to the summons in opposition proceedings.

- 4.2 The appellant 1 (opponent 1) submitted that the appellant (proprietor) had not explained how auxiliary requests 6 and 7 addressed the novelty and inventive step objections. Accordingly, they had not substantiated auxiliary requests 6 and 7.

Regarding the justification for their late filing, the appellant (proprietor) could have filed auxiliary requests 6 and 7 prior to the oral proceedings or simultaneously with auxiliary request 5. Accordingly, there was no valid justification for the late filing of auxiliary requests 6 and 7.

- 4.3 The Board concurs with appellant 1 (opponent 1) that the auxiliary requests 6 and 7 have not been substantiated, neither upon filing with the reply to the appeal on 24 April 2023 nor subsequently with letter of 2 May 2024. The appellant (proprietor) has failed to explain how the amendments made to auxiliary requests 6 and 7 overcome the novelty and the inventive step objections as required by Article 12(3) RPBA 2020.

5. Auxiliary requests 8-13

Auxiliary requests 8-13 correspond to auxiliary requests 1, 2, 3, 5, 6 and 7 respectively, wherein the wording "*along a plurality of longitudinal, substantially parallel stripes*" has been amended to "*as a plurality of longitudinal, substantially parallel stripes*". They were submitted with letter of 2 May 2024 after the communication of the Board of appeal pursuant to Article 15(1) RPBA, less than two weeks before the oral proceedings.

The appellants referred to their written submissions regarding auxiliary requests 8-13.

Auxiliary requests 8-13 are not admitted in the proceedings pursuant Article 13(2) RPBA as no exceptional circumstances have been justified with cogent reasons by the appellant (proprietor).

- 5.1 The appellant (proprietor) argued that auxiliary requests 8-13 were submitted in reaction to the annotated figure which was first presented in section 4.5 of the submissions of appellant 1 (opponent 1) dated 26 March 2024 in the context of an attack of added subject-matter. The wording "along" was amended to "as" to more closely reflect the wording on page 16, lines 19-20 of the application as filed. The respective amendment was not complex as it only concerned the amendment of one word and therefore the impact to procedural efficiency would remain small.
- 5.2 The appellant 1 (opponent 1) requested auxiliary requests 8-13 not to be admitted because as set out in paragraph 4.4 of the letter of 26 March 2024, the argument illustrated with the annotated figure was already made in paragraph 6.26 of the letter of 20 April 2023; it was not a new argument. Accordingly, the inclusion of the annotated figure was not an exceptional circumstance justified with a cogent reason in the sense of Article 13(2) RPBA for the filing of auxiliary requests 8-13 less than two weeks before oral proceedings.
- 5.3 The Board is not convinced by the arguments of the appellant (proprietor). The figures in paragraph 4.5 of the letter of 26 March 2024 illustrate the argument



already submitted in the reply to the grounds of appeal of appellant 1 (opponent 1) under point 6.26, that the binder being arranged "*along substantially parallel stripes*" allows the binder to take other forms so long as it is arranged along substantially parallel lines. Therefore the annotated figure submitted by the appellant 1 (opponent 1) in the letter of 26 March 2024 does not provide exceptional circumstances for submitting auxiliary requests 8-13 at such a late stage in the proceedings.

6. Auxiliary requests 14-24

Auxiliary requests 14-20 have been restricted to the method claims of the main request and auxiliary requests 1-4, 6,7 respectively. All the other claims regarding the product and the apparatus have been deleted.

Auxiliary requests 21-24 correspond to auxiliary requests 16, 17, 19 and 20 respectively, wherein the wording "*along a plurality of longitudinal, substantially parallel stripes*" has been amended to "*as a plurality of longitudinal, substantially parallel stripes*".

Auxiliary requests 14-24 were submitted with letter of 2 May 2024 after the communication of the Board of appeal pursuant Article 15(1) RPBA.

6.1 The appellant (proprietor) requested auxiliary requests 8-20 to be admitted in the appeal proceedings for the following reasons:

6.1.1 Firstly, auxiliary requests 8-20, which were limited to method claims already on file, were submitted in reaction to the preliminary opinion of the Board

according to which claim 1 of the main request and auxiliary requests 1-5, the latter of which was maintained in opposition, lacked novelty over D1. In particular, the preliminary opinion of the Board seemed to remain silent about the requirement of the independent absorbent article claims that in the absorbent article *"the first binder is arranged in a first area between the top core wrap sheet and the back core wrap sheet at a distance from the at least one attachment zone"*.

However, the "at a distance" criterion was considered to be a key feature of the independent absorbent article claims of the respective requests. A deviation in the interpretation of this criterion warranted the filing of additional auxiliary requests.

6.1.2 Secondly, the new auxiliary requests as presently submitted corresponded with independent method claims which were already on file, were known to all parties, and did not negatively impact procedural economy. In addition, the auxiliary requests 14-20 as presently submitted prima facie overcame the raised issues regarding novelty (reference was made to section 3.4 of the Board's preliminary opinion).

6.1.3 Thirdly, claims 1-3 of auxiliary request 14, corresponded to claims 9-11 as granted and claims 9-11 of auxiliary request 5 based on which the opposition division maintained the patent in amended form. These method claims were thus present from the outset of the opposition procedure and were found allowable by the opposition division. Therefore, these requests did not alter the factual and legal scope of the appeal proceedings. Instead, auxiliary request 14 merely reduced the complexity of the proceedings by eliminating matters in dispute.

- 6.1.4 Fourthly, regarding auxiliary requests 21-24, these requests were submitted in reaction to the annotated figure which was first presented in section 4.5 of the submissions of appellant 1 (opponent 1) dated 26 March 2024 in the context of an attack in view of alleged extension of subject-matter.
- 6.2 The appellants (opponents) requested the auxiliary requests 14-24 not to be admitted in appeal proceedings for the following reasons:
- 6.2.1 Firstly, the appellant (proprietor) had not previously relied on the feature that *"the first binder is arranged (...) at a distance from the at least one attachment zone"* as a distinction over D1. Accordingly, there was no reason for the Board to comment on it. The appellant (proprietor) could not put forward a new novelty argument after the Board's preliminary opinion and then rely on the Board's lack of comment on this feature as justification for filing new auxiliary requests.
- 6.2.2 Secondly, it was the prevailing case law from the Boards of Appeal of the EPO that the filing of new auxiliary requests in which one or more independent claims and their associated dependent claims were deleted constituted an amendment of a party's case and therefore its admittance at this stage was subject to Article 13(2) RPBA (Reference was made to T 494/18). The appellant (proprietor) had failed to identify an exceptional circumstance justified with a cogent reason in the sense of Article 13(2) RPBA for the filing of auxiliary requests 14-24 less than two weeks before oral proceedings.

6.2.3 Thirdly, while the method claims 1-3 of auxiliary request 14 were present in the patent as granted (method claims 9-11) as well as in auxiliary request 5 (method claims 8-10) maintained by the opposition division, throughout the appeal proceedings the appellant (proprietor) did not refute the arguments submitted by the appellants (opponents) regarding the lack of inventive step of the method claims. If auxiliary request 14 were to be admitted in the proceedings the appellants (opponents) would be confronted for the first time with arguments from the appellant (proprietor) regarding the inventive step of the method claims, and this would change the factual and legal framework of the appeal.

6.3 The Board is not convinced by the appellant's (proprietor's) arguments.

Auxiliary requests 14-24, which only comprise the method claims (the product claims and the apparatus claim having been deleted) represent an amendment to the appellant's (proprietor's) appeal case made after the communication under 15(1) RPBA of the Board. The Board follows the case law outlined in decisions J14/19, T2091/18, T494/18 and T482/19 according to which the deletion of claims represents, in principle, an amendment to a party's case. Anyhow, in the present case the deletion of claims has implications going beyond the legal and factual framework established with the statement of grounds and the replies and thus in any case constitutes an amendment of the appellant's (proprietor's) case, as explained herein below.

According to Article 13(2) RPBA, such amendment shall, in principle, not be taken into account unless there

are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

- 6.3.1 Firstly, the Board is aware that in a number of decisions the deletion of claims which did not change the factual and legal framework constituted exceptional circumstances for admitting the auxiliary requests. In such cases, the prima facie allowability of the auxiliary request, overcoming all remaining objections without creating any new issues as well as the reduction of the complexity of the proceedings by eliminating matters in dispute were also considered for the admissibility of the late filed auxiliary request in view of the contribution to procedural efficiency (reference is made to decisions T1436/19, T0853/17, T1224/15, T1480/16).

In the present case, auxiliary request 14, limited to the method claims, was filed by the appellant (proprietor) in their letter of 2 May 2024 with the statement that *"in addition the new auxiliary requests as presently submitted prima facie overcome the raised issues regarding novelty, thereby referring to section 3.4 of the preliminary opinion"*. In this letter and throughout the appeal proceedings, the appellant (proprietor) however failed to specifically identify the effect of the differences between the subject-matter of the method claims and the prior art and their contribution to an inventive step.

While appellant 1 (opponent 1) specifically raised novelty and inventive step objections against the method claims (see in particular points 3 on page 3, point 4 on page 12 and point 13 on page 26 of the grounds of appeal of appellant 1 (opponent 1)), the appellant (proprietor) focused in their grounds of

appeal and their reply on the claim directed to the absorbent article. In fact, as acknowledged by the appellant (proprietor) during oral proceedings, the substantiation of the method claims for novelty and inventive step was made in writing by reference to the arguments submitted for the product claims only. Submitting for the first time in appeal two weeks before the oral proceedings auxiliary requests based on the method claims only, changes the focus of the appellant's (proprietor's) appeal case in an unforeseeable manner. If the auxiliary requests were to be admitted in the proceedings, specific arguments of the appellant (proprietor) on inventive step in reply to the above-mentioned appellants' (opponents') objections would have to be discussed for the first time during the oral proceedings. Indeed, a mere reference to the novelty and inventive step arguments submitted for the product claims of previous requests would be useless, as these arguments had already been discussed. Accordingly, admitting the requests would be tantamount to allowing the appellant (proprietor) to make a fresh case on novelty and inventive step for the method claims during the oral proceedings.

- 6.3.2 Secondly, the newly identified distinguishing feature of claim 1 over D1 as put forward in the letter dated 2 May 2024, less than two weeks before the oral proceedings, cannot justify the filing of auxiliary requests 14-24. In the Board's communication under Article 15(1) the "at a distance" feature was not addressed because neither the appealed decision nor the appellants in their statement of grounds or in their reply addressed this feature in particular. This feature was not disputed and did not require for the Board to address it.

6.3.3 Thirdly, the preliminary opinion of the Board is not an invitation to file new auxiliary requests. In its preliminary opinion pursuant to Article 15(1) RPBA, the Board indicated under point 3.4 that the subject-matter of claim 9 was not anticipated by D1. This statement is only limited to novelty over D1 (i.e. it is not a general statement of allowability of claim 9) and cannot anyway justify the filing of auxiliary requests 14-24.

6.3.4 To conclude, no exceptional circumstances justified with cogent reasons were presented by the appellant (proprietor) that would justify the admission of auxiliary requests 14-24.

## Order

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

The appealed decision is set aside.

The patent is revoked.

The Registrar:

The Chairman:



M. Schalow

G. Pricolo

Decision electronically authenticated