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**Datasheet for the decision  
of 24 April 2018**

**Case Number:** T 0213/14 - 3.2.06

**Application Number:** 04730532.1

**Publication Number:** 1694898

**IPC:** D04H3/00, D04H1/54, D04H1/56,  
D01F8/04, D01D5/00, D01D5/08

**Language of the proceedings:** EN

**Title of invention:**  
POLYETHYLENE-BASED, SOFT NONWOVEN FABRIC

**Patent Proprietor:**  
Fitesa Germany GmbH

**Opponent:**  
Carl Freudenberg KG

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(c), 104(1), 112(1), 123(2), 123(3)  
RPBA Art. 13(1), 16  
EPC R. 139

**Keyword:**

Amendments - added subject-matter - main request (yes)  
Late-filed auxiliary requests I to IV - admitted (no)  
Referral to the Enlarged Board of Appeal - refused  
Apportionment of costs - refused

**Decisions cited:**

G 0002/98, G 0002/10

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 0213/14 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 24 April 2018**

**Appellant:**  
(Patent Proprietor)

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 28 November  
2013 revoking European patent No. 1694898  
pursuant to Article 101(3) (b) EPC.**

**Composition of the Board:**

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

## Summary of Facts and Submissions

- I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division revoking European Patent No. 1 694 898 in which it found that the subject-matter of claim 1 as granted met with objections under Article 100(c) EPC.
- II. With its grounds of appeal, the appellant requested that the decision be set aside and the patent be remitted back to the opposition division for further prosecution. Auxiliarily it requested that the patent be maintained as granted or that it be maintained according to one of auxiliary requests I to IV.
- III. The respondent (opponent) requested that the appeal be dismissed.
- IV. The Board issued a summons to oral proceedings.
- V. With letter of 28 August 2017, the appellant filed replacement auxiliary requests I to IV.
- VI. In a subsequent communication containing its provisional opinion, the Board indicated *inter alia* that the subject-matter of at least claim 1 met with objections under Article 100(c) EPC. It furthermore indicated that the subject-matter of claim 1 of each of auxiliary requests I to III appeared not to meet the requirement of Article 123(2) EPC, whilst claim 1 according to auxiliary request IV appeared not to meet the requirement of Article 84 EPC.
- VII. With letter of 20 March 2018 the respondent requested that the appellant pay the respondent's costs in relation to the submissions and auxiliary requests

filed on 28 August 2017.

- VIII. With letter of 9 April 2018 the appellant filed a replacement auxiliary request I and with letter of 18 April 2018 a replacement auxiliary request II.
- IX. Oral proceedings were held before the Board on 24 April 2018, during which the appellant filed a replacement auxiliary request IV. At the close of the proceedings, the requests of the parties were as follows:

The appellant (patent proprietor) requested that the decision under Article 100(c) EPC be set aside and the case be remitted to the opposition division for further prosecution (main request);

auxiliarily that the patent be maintained as granted;  
or

that the patent be maintained in amended form on the basis of auxiliary request I filed with letter dated 9 April 2018, or on the basis of auxiliary request II filed with letter dated 18 April 2018, or on the basis of auxiliary request III filed with letter dated 28 August 2017, or on the basis of auxiliary request IV filed during the oral proceedings of 24 April 2018.

Furthermore, the appellant requested auxiliarily that the questions indicated on page 3 of its letter dated 9 April 2018 be referred to the Enlarged Board of Appeal.

The respondent (opponent) requested that the appeal be dismissed, auxiliarily that the case be remitted to the opposition division for further prosecution.

Furthermore, it requested a different apportionment of costs in favour of the respondent.

X. Claim 1 of the patent as granted reads as follows:

"Nonwoven fabric (52) manufactured with a device according to any of claims 15 to 33 with a method according to any of claims 34 to 39 the fibers of which have a polyethylene at least on the surface, where the fibers are bonded and the nonwoven fabric has an abrasion rate less than  $0.8 \text{ mg/cm}^2$ , whereby the nonwoven fabric is thermally bonded only once and has a consolidation area fraction of less than 35%, especially less than 32%, preferably less than 28%."

Claim 1 of auxiliary request I reads as follows:

"Nonwoven fabric (52) manufactured with a device according to claim 13 and with a method according to claim 32 the fibers of which have a polyethylene at least on the surface, where the fibers are bonded and the nonwoven fabric has an abrasion rate less than  $0.2 \text{ mg/cm}^2$ , especially in the range between  $0.2$  to  $0.09 \text{ mg/cm}^2$ , whereby the nonwoven is thermally bonded only once and has a consolidation area fraction of less than 32%, preferably less than 28%."

Claim 1 of auxiliary request II reads as for claim 1 of auxiliary request 1 except for the consolidation area fraction percentage reading:

"and has a consolidation area fraction of below 16%."

Claim 1 of auxiliary request III reads:

"Nonwoven fabric (52) manufactured with a device according to claim 13 and with a method according to claim 32, where the fibers consist essentially of polyethylene, where the fibers are bonded and the

nonwoven fabric has an abrasion rate less than 0.2 mg/cm<sup>2</sup>, especially in the range between 0.2 to 0.09 mg/cm<sup>2</sup>, whereby the nonwoven is thermally bonded only once and has a consolidation area fraction of less than 35%, especially less than 32%, preferably less than 28%."

Claim 1 of auxiliary request IV reads:

"Use of a nonwoven fabric (52) on the outside of a product (51, 54) manufactured with a device according to one of claims 13 - 31 and/or with a procedure according to one of claims 32 - 37 on the outside of product (51; 54), as covering."

XI. The appellant's arguments may be summarised as follows:

The subject-matter of claim 1 met with objections under Article 100(c) EPC. Page 1, lines 31 to 34 of the application as filed disclosed the claimed interrelationship between the independent claims to the fabric, the device for manufacturing the fabric and the method of its manufacture. The 'and/or' linking the reference to these claims provided the basis for the combination of features in claim 1. Page 1, lines 26 to 29 also linked the fabric and the manufacture of the fabric. Page 31, lines 13 to 15 referred to properly chosen parameters, which could only be those of the method, in the context of the fabric and the device for its manufacture. Claim 45 as filed also provided a clear pointer to the combinability of the fabric, device and method.

Should the Board find the subject-matter of claim 1 to lack basis, this would deviate from well-established case law. In this case, the following point of law

should be referred to the Enlarged Board of Appeal:

- "1. Does a statement which indicates that the task of the invention is accomplished by means of A, B and/or C, explicitly disclose the following seven separate embodiments A; B; C; A + B; A + C; B + C; and A + B + C?
2. If such statement does not disclose these seven separate embodiments, which separate embodiments would such statement explicitly disclose?
3. If such statement does not explicitly disclose all seven separate embodiments as summoned in question 1, which separate embodiments would implicitly be disclosed in said statement?
4. If such statement does implicitly disclose particular separate embodiments, would such implicitly disclosed separate embodiments meet the requirements of Article 123(2) EPC?"

The auxiliary requests should be admitted. The amended features of claim 1 of auxiliary request I relative to claim 1 of the main request found basis on page 2, lines 4 to 8. The additional features of claim 1 of auxiliary request II were disclosed on page 2, lines 14 to 17 in combination with page 2, lines 4 to 6. Similar arguments to those for auxiliary requests I and II applied as the basis for the amended features in claim 1 of auxiliary request III. All objectionable features of the nonwoven fabric had been deleted from claim 1 of auxiliary request IV.

As regards the respondent's request for apportionment of costs, there were no good reasons for the Board to grant this request.

XII. The respondent's arguments may be summarised as follows:



The subject-matter of claim 1 of the main request met with objections under Article 100(c) EPC. Page 1, lines 31 to 34 disclosed separate solutions to the posed problems in lines 26 to 29, not subject-matter which was a combination of solutions. Page 31, lines 13 to 15 was also a specific disclosure of the system of Fig. 1 and could not provide a basis for the combination of the independent claims as filed. Claims 1, 2 and 4 as filed were not dependent on each other, page 2, lines 6 to 9 not providing an unambiguous link between the features of these claims either. Overall, the description disclosed simply a multitude of independent embodiments, the combination of which was not disclosed.

The subject-matter of claim 1 of auxiliary requests I to III did not overcome at least the objection regarding the combination of features to the fabric, the device and the method raised in the main request, the requirement of Article 123(2) EPC thus not being met. The subject-matter of claim 1 of auxiliary request IV extended the scope of protection relative to the claims as granted, contrary to Article 123(3) EPC.

Costs should be apportioned in favour of the respondent at least in respect of the costs associated with responding to the auxiliary requests filed with letter of 28 August 2017. This was justified under Article 16(1)(a), 16(1)(c) and 16(1)(e) RPBA. The appellant had failed to fully respond to objections, particularly under Article 100(c) EPC, which had been on file since the start of the opposition procedure, preferring to delay this until the last possible moment. In not filing marked-up copies of amendments made, the appellant had also made analysis of amendments

unnecessarily difficult. This unfair and procedurally uneconomical behaviour amounted to an abuse of procedure.

## **Reasons for the Decision**

### *Main request*

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

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

1.2 The subject-matter of claim 1 extends beyond the content of the application as filed since the claimed combination of the nonwoven fabric with a device of claim 15 and a method of claim 34 is not directly and unambiguously disclosed to the skilled reader in the application as filed.

1.2.1 The appellant's primary argument regarding a basis for this combination of features is page 1, lines 31 to 33 as filed, which reads:

"This task is accomplished by means of a nonwoven fabric comprising the features of claim 1, in a device according to the features of claim 17 and/or according to a method comprising the features of claim 39."

The 'task' referred to in this passage is disclosed in the previous paragraph , page 1, lines 26 to 29, which reads:

"It is the task of the present invention to make

available a nonwoven fabric that on the one hand feels soft and on the other is sufficiently robust for numerous applications; the manufacture of the nonwoven fabric should be as economical as possible".

- 1.2.2 The 'task' disclosed in lines 26 to 29 is simply a statement of the problems being addressed by the nonwoven fabric of the invention itself and its method of manufacture; it notably fails to disclose any combination of features of the fabric with features relating to its method of manufacture.
- 1.2.3 As regards page 1, lines 31 to 33, this solely discloses three individual independent claims of different categories (product, device and method) which each solve the problem in lines 26 to 29. One or more of the independent claims are disclosed to solve the problem through the 'and/or' wording, however still only as individual independent claims in their own right; the paragraph on page 1, lines 31 to 33 does not disclose a combination of the features of the nonwoven fabric with the features of the independent device claim and with the features of the independent method claim, which is what claim 1 however includes in its subject-matter.
- 1.2.4 The Board does not accept the appellant's argument that page 31, lines 13 to 15 also links the method with the fabric and the device for its manufacture. The passage on page 31 referred to by the appellant is part of a more detailed description of Fig. 1, from page 30, line 25 to page 31, line 18. This is however a very specific disclosure of the system of Fig. 1, yet provides neither an unambiguous disclosure of the combination of features of the fabric, device and method defined in claim 1, nor of the further parameters of abrasion rate

and consolidation area fraction included in the claim.

1.2.5 The appellant's further argument that claim 45 as filed provided a basis for the claimed subject-matter is also not accepted. Claim 45 is directed to the 'use of a nonwoven fabric, built in accordance with one of the preceding claims, manufactured with a device and/or with a procedure according to one of the preceding claims ...'. Whilst the claim does disclose a combination of the nonwoven fabric, a device and a procedure for its manufacture, this is all in the context of the use of the nonwoven fabric and thus provides no direct and unambiguous disclosure of the subject-matter of claim 1 directed to the nonwoven fabric *per se*.

1.2.6 In summary, the lack of basis for the claimed combination of the nonwoven fabric with a device of claim 15 and a method of claim 34 alone results in the subject-matter of claim 1 meeting with an objection under Article 100(c) EPC.

1.3 The subject-matter of claim 1 further extends beyond the content of the application as filed (Article 100(c) EPC) as explained below.

1.3.1 Contrary to the argument of the appellant, the subject-matter of claim 1 does not find basis in claims 1, 2 and 4 as filed in combination with page 2, lines 4 to 8 as filed.

1.3.2 The individual features of claim 1 are to be found in claims 1, 2 and 4 as filed, although, with claim 4 not being dependent on claim 2, these originally filed claims alone cannot provide the basis for this combination of features. The appellant's further

reliance on page 2, lines 4 to 8 also fails to provide a clear and unambiguous basis since this reads '... a nonwoven fabric with a consolidation area fraction of less than 0.2 mg/cm<sup>2</sup>, especially less than 32%, preferably less than 28%.' The consolidation area fraction of less than 0.2 mg/cm<sup>2</sup> is clearly an error yet, contrary to the opinion of the appellant which suggests this should read 35%, the correction of this error is not obvious in the sense of Rule 139 EPC. The amount of 35%, as the alleged obvious correction, is indicated in just two places in the application as filed: claim 4 as filed includes a consolidation area fraction of less than 35% - yet this is not unambiguously applicable to the passage on page 2, lines 4 to 8 which simply concerns 'one implementation', not necessarily that of claim 4; page 20, lines 15 to 17 also discloses a consolidated area fraction of 35% although in relation to specific patterns on the engraved roller of the calender unrelated to the implementation on page 2, lines 4 to 8. Exactly how the error on page 2, lines 4 to 8 should be corrected is thus not evident; certainly a correction to 35% is not obvious. The passage on page 2, lines 4 to 8 thus fails to provide the basis for the range of consolidation area fractions included in the subject-matter of claim 1.

- 1.3.3 The subject-matter of claim 1 further extends beyond the content of the application as filed since the claimed combination of the nonwoven fabric with a device of claim 15 and a method of claim 34 includes many features not present in the combination of the nonwoven fabric with the independent device claim 17 and independent method claim 39 as originally filed. This is most clearly illustrated by considering the features in claim 15 as granted which, compared to

claim 17 as originally filed, additionally includes the following features: a boring through which the polymer flows in the spinning plate having a diameter greater than 0.4mm, the spinning plate having a hole density of 4.5-6.3 holes/cm<sup>2</sup> and a heatable calender being attached that has a smooth-surfaced roller and an engraved roller that are heated to different extents. All these features are missing in claim 17 as originally filed from which the alleged basis for the subject-matter of claim 1 of the main request at least partially relies. There is thus, also for this reason, no direct and unambiguous basis for the subject-matter of claim 1.

1.4 With the subject-matter of claim 1 lacking a basis in the application as filed, the ground for opposition under Article 100(c) EPC is prejudicial to the maintenance of the patent according to the main request. The main request is thus not allowable.

## 2. *Referral to the Enlarged Board of Appeal*

2.1 Before concluding that the main request was not allowable (as explained *supra*) during the oral proceedings, the appellant requested the referral of four questions to the Enlarged Board of Appeal under Article 112(1)(a) EPC (cf. point XI above).

2.2 It is firstly noted that Article 112(1) EPC provides for the Enlarged Board of Appeal only to have questions referred to it by a Board of Appeal in order to ensure uniform application of the law, or if a point of law of fundamental importance arises. In this regard, the Enlarged Board of Appeal has already clearly defined the general principles which govern the requirements of Article 123(2) EPC *inter alia* in G2/98 and G2/10, i.e.

that the skilled person must be able to derive the claimed subject-matter directly and unambiguously, using common general knowledge, from the previous application as a whole.

2.3 This general principle must be applied to the specific disclosure of the application as a whole in each case. The issue to be dealt with in the present case is not the general question whether '*a statement which indicates that the task of the invention is accomplished by means of A, B, and/or C explicitly disclose the following seven separate embodiments A; B; C; A + B; A + C; B + C; A + B + C ?*' as indicated by the appellant, but rather the question whether the specific passages in the specific context of the application as a whole disclose the claimed subject-matter directly and unambiguously. Thus, in view of the above it is clear that the question put forward by the appellant in its generality is not decisive for the present case, but depends on the interpretation of the specific passages of the application as originally filed. Even for this reason alone the requested referral must be refused.

2.4 However, for the sake of completeness, the following is added. In the present case, using the analogy of the appellant that the nonwoven fabric be designated A, the device B and the method C, page 1, lines 31 to 34 indeed discloses the task (of the present invention) being accomplished by A, B and/or C. However, claim 1 according to the main request is not directed to A, B and/or C, but rather to a combination of the features of A, B and/or C for which page 1, lines 31 to 34 does not provide a direct and unambiguous basis (see the reasoning in this regard given in point 1.2 to 1.2.6 above). It thus follows that not one of the questions

submitted by the appellant for referral to the Enlarged Board of Appeal is decisive for the present finding on the issue of Article 100(c) EPC (nor indeed for any later issue in this case concerning Article 123(2) EPC).

2.5 The appellant did not argue that the Board's conclusion in the present case represented a divergence in case law and indeed the Board also sees no divergence, its conclusion following established case law as referenced in G2/98 and G2/10 above.

2.6 In view of the above, the referral of questions to the Enlarged Board of Appeal is refused.

*Auxiliary requests I to IV*

3. *Admittance (Article 13(1) RPBA)*

3.1 In appeal proceedings, the Rules of Procedure of the Boards of Appeal (RPBA) apply. Article 12(2) RPBA specifies that the statement of grounds of appeal and reply must contain the party's complete case. After filing the grounds of appeal or reply, any amendment to a party's case may be admitted and considered at the Board's discretion, which is set out in Article 13(1) RPBA, such discretion being exercised *inter alia* in view of the need for procedural economy. As is established case law of the Boards of Appeal, such procedural economy implies that amended requests should at least be *prima facie* allowable in order to be admitted.

3.2 The appellant filed auxiliary request I with letter of 9 April 2018, auxiliary request II with letter of 18 April 2018, auxiliary request III with letter of 28



August 2017 and auxiliary request IV during oral proceedings before the Board. Each of these auxiliary requests thus represents a change to the respondent's complete case as defined in Article 12(2) RPBA and their admittance may be considered at the Board's discretion under Article 13(1) RPBA.

3.3 As regards auxiliary request I, the appellant's argument that page 2, lines 4 to 8 provided a basis for the subject-matter of claim 1 is not accepted. The fundamental deficiency identified with respect to claim 1 of the main request regarding the claimed combination of the nonwoven fabric with the independent device claim and independent method claim has *prima facie* not been overcome by the amendment made to claim 1 of this request. For similar reasons therefore to those found to prejudice the allowability of the main request, the subject-matter of claim 1 *prima facie* does not meet the requirement of Article 123(2) EPC.

3.4 As regards auxiliary request II, the appellant's argument that page 2, lines 14 to 17 in combination with page 2, lines 4 to 6 provided a basis for the subject-matter of claim 1 is also not accepted. These two passages of page 2 are introduced with 'according to one implementation...' and 'according to one of the further developments...' respectively and thus fail to provide a direct and unambiguous basis even for the combination of the specific features disclosed in these two passages, let alone for the whole subject-matter of claim 1. Therefore, at least for the same reasons identified above for claim 1 of auxiliary request I, the subject-matter of claim 1 *prima facie* does not meet the requirement of Article 123(2) EPC.

3.5 As regards auxiliary request III, lacking any further arguments of the appellant in defence of this request and the subject-matter of claim 1 still including the combination of the nonwoven fabric with the independent device claim and independent method claim found in each of the foregoing requests to extend beyond the content of the application as originally filed (Article 123(2) EPC / Article 100(c) EPC), the Board saw no reason to find differently here.

3.6 As regards auxiliary request IV, claim 1 is directed to the use of a nonwoven fabric. Claim 1 as granted, which was the broadest claim to the nonwoven fabric, included features to its abrasion rate and consolidation area fraction. The nonwoven fabric subject to the use in claim 1 of auxiliary request IV includes no limitation to its abrasion rate or consolidation area fraction. Thus, relative to claim 1 as granted, claim 1 of auxiliary request IV has extended the scope of protection conferred *prima facie* contravening the requirement of Article 123(3) EPC.

3.7 Therefore, the subject-matter of claim 1 of each of auxiliary requests I to IV is *prima facie* not allowable, which would be necessary for fulfilling the need for procedural economy and consequently admitting the requests. Accordingly, the Board exercised its discretion under Article 13(1) RPBA not to admit auxiliary requests I to IV into the proceedings.

4. *Request for apportionment of costs*

4.1 According to Article 104(1) EPC, each party to the opposition proceedings shall bear the costs it has incurred unless the opposition division, for reasons of equity, orders ... a different apportionment of costs.

Article 16(1) RPBA provides examples of when the Board may order a party to pay some or all of another party's costs, these *inter alia* including any:

- amendment pursuant to Article 13 to a party's case;
- acts or omissions prejudicing the timely and efficient conduct of oral proceedings; and
- abuse of procedure.

4.2 The respondent argued that all of the above failures justifying an apportionment of costs had been committed by the appellant.

4.2.1 As regards the amendment of the appellant's case pursuant to Article 13 RPBA, the present circumstances did not warrant a divergence from each party bearing its own costs. A proprietor filing new requests in order to defend its position subsequently to oral proceedings being appointed or receiving a negative preliminary opinion of the Board is, with regard at least to the present case, not seen as an extraordinary circumstance justifying an apportionment of costs. Article 13(1) RPBA provides the Board with a sanction not to admit requests which are filed after the parties' complete cases have been presented, which indeed was the outcome with respect to auxiliary requests I to IV in the present case. Whilst these requests could arguably have been filed as part of the appellant's complete case, the later filing of these cannot be understood to have resulted in significantly greater work for the respondent. Indeed, as regards the requests filed in this case, it can only be expected that the respondent should have considered what objections were to be made, including, where appropriate, possible objections as regards admittance

of such requests into the proceedings.

4.2.2 The respondent's argument that the appellant had adversely affected the timely and efficient conduct of oral proceedings through not responding in great detail or, in its view, comprehensively, to the raised objections and not providing marked-up versions of its amendments is not accepted. Firstly, there is no statutory requirement on a proprietor to provide marked-up copies of amendments made to its requests filed during appeal proceedings, even though this may facilitate understanding of what has been changed and possibly reduce complexity in considering the amendments made. Equally, there is no requirement to have to respond in great detail or with lengthy arguments to any objections raised by the opponent. Nonetheless, failing to fully respond to objections and leaving such response to a later stage carries the risk that such submissions will not be admitted under Article 13 RPBA. However, in the present case, the respondent has not indicated in what way the alleged 'salami tactics' in responding to objections has adversely affected the timely and efficient conduct of the oral proceedings; nor can the Board see why this is so in the present case.

4.2.3 The Board also fails to see how the appellant's conduct amounts to an abuse of procedure. Whilst the appellant's failure to respond to all objections at the earliest possible stage of the appeal procedure is perhaps not ideal for the respondent, it does not amount to an abuse of procedure. The Board having discretion not to admit late filed requests under Article 13(1) RPBA, as indeed was exercised in the present case with respect to auxiliary requests I to IV, is an appropriate sanction for the appellant's

chosen handling of its case and the timing of its requests.

- 4.3 The Board thus does not consider a divergence from the principle that each party should bear its own costs as appropriate in the circumstances of the present case. The respondent's request for an apportionment of costs is therefore refused.

## Order

### For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for referral of questions to the Enlarged Board of Appeal is refused.
3. The request for apportionment of costs is refused.

The Registrar:

The Chairman:



L. Malécot-Grob

M. Harrison

Decision electronically authenticated