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**Datasheet for the decision  
of 9 January 2020**

**Case Number:** T 0164/16 - 3.2.06  
**Application Number:** 10714522.9  
**Publication Number:** 2419066  
**IPC:** A61F13/532, A61F13/536,  
A61F13/42  
**Language of the proceedings:** EN

**Title of invention:**

ABSORBENT ARTICLES COMPRISING WETNESS INDICATORS

**Patent Proprietor:**

The Procter & Gamble Company

**Opponent:**

Essity Hygiene and Health Aktiebolag

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2)  
RPBA 2020 Art. 13(1), 25(1)

**Keyword:**

Amendments - added subject-matter (yes)  
Late-filed auxiliary request - request clearly allowable (no)

**Decisions cited:**

T 0634/16

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 0164/16 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 9 January 2020**

**Appellant:** Essity Hygiene and Health Aktiebolag  
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**Representative:** Hoffmann Eitle  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 27 November  
2015 rejecting the opposition filed against  
European patent No. 2419066 pursuant to Article  
101(2) EPC.**

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** P. Cipriano  
J. Hoppe

## Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the decision of the opposition division rejecting the opposition to European patent no. 2 419 066. The appellant requested that the decision be set aside and the patent be revoked in its entirety.
- II. In reply, the respondent (proprietor) requested that the appeal be dismissed and the patent be maintained as granted. It also filed auxiliary requests 1 to 4.
- III. The Board issued a summons to oral proceedings including a communication containing its provisional opinion, in which it indicated *inter alia* that, in regard to the auxiliary requests, it might need to be discussed whether the application as originally filed disclosed an absorbent article comprising a cellulose free absorbent core with the features P8 (a nonwoven layer) and P9 (a complex of absorbent polymer material and thermoplastic adhesive material) in combination with a wetness indicator with features P4 (a stabilizer), P5 (a colorant) and P6 (a matrix), as defined in granted claim 1, wherein the stabilizer is cetyl phosphate free acid, which is a specific stabilizer from the general list of stabilizers on page 16.
- IV. Oral proceedings were held before the Board on 9 January 2020, during which the respondent replaced all its previous requests by a new main request and a new auxiliary request.

The final requests were as follows:

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

The respondent (patent proprietor) requested that the patent be maintained in amended form based on the claims of the new main request, or as an auxiliary measure, based on the claims of the new auxiliary request, both requests filed during the oral proceedings (9 January 2020).

- V. The sole claim of the main request reads as follows:
- "1. An absorbent article comprising:  
a backsheet;  
a wetness indicator composition comprising: a stabilizer wherein the stabilizer is stearyl phosphate free acid, cetyl phosphate free acid or cetearyl phosphate free acid; a colorant wherein the colorant is a pH indicator, and a matrix;  
an absorbent core comprising a nonwoven layer and a complex of absorbent polymer material and thermoplastic adhesive material;  
wherein the wetness indicator composition is in direct contact with an inner surface of the backsheet and an outer surface of the nonwoven layer;  
wherein the complex of absorbent polymer material and thermoplastic adhesive material is in direct contact with an inner surface of the nonwoven; and  
wherein the absorbent core is substantially cellulose free,  
wherein the pH indicator of the wetness indicator composition is a sulfonephthalein pH indicator in the form of bromocresol green."

The sole claim of auxiliary request 1 differs from claim 1 of the main request in that the stabilizer is cetyl phosphate free acid (the options stearyl phosphate free acid and cetearyl phosphate free acid having been deleted).

- VI. The arguments of the appellant relevant to the decision may be summarised as follows:

*Main request - Article 123(2) EPC*

The subject-matter of claim 1 extended beyond the content of the application as originally filed.

The stabilizer ingredients on pages 14 to 16 related only to the more general wetness indicator compositions disclosed on pages 8 to 23. The skilled person did not directly and unambiguously derive that the claimed stabilizers and pH indicator from the paragraph bridging pages 15 and 16 constituted a single disclosure with an absorbent article comprising *inter alia* a cellulose free absorbent core wherein the wetness indicator composition was in direct contact with an inner surface of the backsheet and an outer surface of the nonwoven layer as defined in claim 1, since such an absorbent article was not disclosed on pages 8 to 23.

The section "summary of the invention" on page 4 disclosed an absorbent core with a long list of possible different features. The skilled person would thus not directly and unambiguously relate it to the wetness indicator composition on pages 8 to 23.

The skilled person would also not understand that the stabilizer ingredients on pages 14 to 16 directly and

unambiguously formed a single disclosure with the absorbent article of claim 1 as originally filed. The stabilizer ingredients were included in the general description of wetness indicator compositions in pages 8 to 23, that did not directly and unambiguously disclose an absorbent article with the features of claim 1 as originally filed. The absorbent article of claim 1 as originally filed and the wetness indicator composition of pages 8 to 23 would not be understood as related.

*Auxiliary request - admittance*

The auxiliary request should not be admitted into the proceedings, since it did not *prima facie* overcome the issues raised against the main request.

- VII. The arguments of the respondent relevant to the decision may be summarised as follows:

*Main request - Article 123(2) EPC*

The subject-matter of claim 1 did not extend beyond the content of the application as originally filed.

The subject-matter of claim 1 had its basis in the paragraph bridging pages 15 and 16 of the publication of the PCT application, which disclosed stearyl phosphate free acid, cetyl phosphate free acid or cetearyl phosphate free acid as stabilizers for the pH indicator bromocresol green. This disclosure was part of the general disclosure regarding stabilizer ingredients starting on page 14 that concerned wetness indicator compositions "of the present invention".

The skilled person would thus have directly and unambiguously derived that these wetness indicator compositions "of the present invention" were the wetness indicator compositions referred to in the "summary of the invention" section on page 4 or in claim 1 as originally filed.

Even if the wetness indicator compositions "of the present invention" on page 14 referred to the wetness indicator compositions described on page 8, the skilled person reading the description would still have directly and unambiguously derived that the compositions on page 8 belonged to the context of the ones referred to on page 4 or in claim 1 as originally filed.

Even if the "summary of the invention" section disclosed only an absorbent article with (a list of) several optional components that the absorbent article "may" comprise, the combination of features of claim 1 amounted to a selection from this single list of features.

*Auxiliary request - admittance*

The auxiliary request should be admitted into the proceedings.

**Reasons for the Decision**

1. Main request - Article 123(2) EPC
- 1.1 Since the main request was found not to meet the requirement of Article 123(2) EPC, as explained *infra*,



the issues surrounding admittance of the main request into the proceedings do not need to be addressed.

1.2 Claim 1 of the main request differs from claim 1 as originally filed and as granted in that:

- the stabilizer is stearyl phosphate free acid, cetyl phosphate free acid or cetearyl phosphate free acid,
- the colorant is a pH indicator
- the pH indicator of the wetness indicator composition is a sulfonephthalein pH indicator in the form of bromocresol green.

1.3 The Board finds that whilst the specific combination of the stabilizers stearyl phosphate free acid, cetyl phosphate free acid or cetearyl phosphate free acid with the pH indicator bromocresol green is disclosed in the paragraph bridging pages 15 and 16 of the publication of the PCT application, these are only disclosed in the general context of the wetness indicator compositions of page 8 and not in the more specific context of an absorbent article with the features of claim 1 as originally filed.

1.3.1 The first paragraph on page 8 relates to wetness indicator compositions "of the present invention" in general and describes that they comprise a colorant, a matrix and additional ingredients. The subsequent sections concerning the colorant, matrix, stabilizer and optional additional ingredients then follow this passage on page 8, such that the skilled person reading the description understands that these sections (and specifically the section concerning the stabilizer starting on page 14) relate to the general wetness indicator compositions referred to on page 8.

The same applies to the section regarding the substrate on pages 17 to 23, which the first paragraph on page 8 describes as being an optional attachment possibility for the wetness indicator.

- 1.3.2 The general wetness indicators disclosed on pages 8 to 23 therefore do not provide a basis for the specific absorbent article of claim 1 which comprises, for example, the combination of the pH indicator bromocresol green, the claimed phosphate free acids as a stabilizer and a cellulose free absorbent core. At least a selection from among the possible stabilizers and a further one from the possible substrates would be required in order to arrive at the subject-matter of claim 1. Further, none of the absorbent articles described on pages 17 to 23 comprises a cellulose free absorbent core as defined in claim 1.
  
- 1.4 The argument of the respondent that the skilled person reading the description would directly and unambiguously derive that the compositions on page 8 belonged to the context of the ones referred to on page 4 or in claim 1 as originally filed, is not found persuasive by the Board.
  - 1.4.1 The "summary of the invention" section on page 4 discloses an absorbent article, wherein all the features disclosed are optional (e.g. the absorbent article "may comprise" a wetness indicator, the wetness indicator "may comprise" a stabilizer, a colorant and a matrix). Contrary to the argument of the respondent, several combinations of this single list of features are possible and more than one selection from this single list would thus be required to arrive at a disclosure of an absorbent article comprising a wetness indicator composition comprising a stabilizer. Merely

because claim 1 includes a combination of all those features, it does not unambiguously mean that all optional features quoted on page 4 in the first paragraph must be understood necessarily as all being combined.

The skilled person would therefore not be able to derive from the very broadly worded "summary of the invention" section that the wetness indicator described in this section belongs to the same context as the one on pages 8 to 23, since they do not necessarily need to have the same features.

1.4.2 The skilled person would also not directly and unambiguously derive that the compositions on pages 8 to 23 belonged to the context of the ones referred to in claim 1 as originally filed. There is no direct and unambiguous disclosure among the wetness indicators disclosed on pages 8 to 23 of an absorbent article with the features of claim 1 as originally filed. For example, an absorbent article comprising a backsheet as a substrate together with a cellulose free absorbent core is not disclosed.

1.5 Since the skilled person cannot directly and unambiguously derive the specific combination of an absorbent article comprising a cellulose free absorbent core and a wetness indicator composition with one of the claimed stabilizers as well as bromocresol green as pH indicator from the whole content of the application as originally filed, the subject-matter of claim 1 does not fulfil the requirement of Article 123(2) EPC and the main request is thus not allowable.

2. Auxiliary request - admittance

- 2.1 Claim 1 of the auxiliary request has been amended with regard to claim 1 of the main request in that the stabilizer may only be cetyl phosphate free acid. The other optional phosphate free acids have been deleted.
- 2.2 The auxiliary request was filed during the oral proceedings on 9 January 2020, i.e. after the time limit for filing the response to the appeal grounds of the appellant. Due to the limiting amendments made, it constitutes an amendment to the respondent's complete appeal case.
- 2.3 Further, the auxiliary request was filed after the entry into force of the revised Rules of Procedure of the Boards of Appeal of the European Patent Office (hereinafter referred to as RPBA 2020) whereas the summons to oral proceedings was notified to the parties before their entry into force on the 1 January 2020.

According to the transitional provisions stipulated in Article 25(1) RPBA 2020, Article 13(1) RPBA 2020 applies to this case. Under Article 25(1) RPBA 2020, the RPBA 2020 apply to any appeal pending on its date of entry into force (see e.g. T 634/16, Reasons 7 to 14).

- 2.4 Article 13(1) RPBA 2020 stipulates that any amendment to the case may be admitted only at the Board's discretion. This discretion shall be exercised in view of, *inter alia*, the current state of the proceedings, the suitability of the amendment to resolve the issues which were admissibly raised and whether the party has demonstrated that any such amendment, *prima facie*, overcomes the issues raised by another party in the appeal proceedings or by the Board and does not give rise to new objections.

2.5 As explained above under point 1, there is no basis for the specific combination of the stabilizers and the pH indicator of the paragraph bridging pages 15 and 16 of the application as filed (see the published PCT application) with the features of claim 1 as originally filed. The Board finds that the deletion of two optional stabilizers from the possible stabilizers in claim 1 does not change the conclusion under point 1, nor did the respondent provide any further argument as to why it should.

2.6 Since the respondent did not even demonstrate why the Article 123(2) EPC issue leading to non-allowance of the main request was overcome by the auxiliary request (and nor can the Board see that it has been) the Board exercised its discretion under Article 13(1) RPBA 2020 not to admit this request into the proceedings.

## **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:



M. H. A. Patin

M. Harrison

Decision electronically authenticated