

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 20 July 2021**

**Case Number:** T 1577/16 - 3.2.06

**Application Number:** 07751959.3

**Publication Number:** 1991191

**IPC:** A61F13/551, A61F13/496

**Language of the proceedings:** EN

**Title of invention:**  
DISPOSABLE PULL-ON GARMENT

**Patent Proprietor:**  
THE PROCTER & GAMBLE COMPANY

**Opponent:**  
SCA HYGIENE PRODUCTS AB

**Headword:**

**Relevant legal provisions:**

EPC Art. 100(b)  
RPBA 2020 Art. 13(1)

**Keyword:**

Sufficiency of disclosure - main request (no) - enabling disclosure (no)

Late-filed auxiliary requests - admitted (no) - requests clearly allowable (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 1577/16 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 20 July 2021**

**Appellant:** SCA HYGIENE PRODUCTS AB  
(Opponent) Patent Department  
405 03 Göteborg (SE)

**Representative:** Jardle, Marie-Louise  
Valea AB  
Box 1098  
405 23 Gothenburg (SE)

**Respondent:** THE PROCTER & GAMBLE COMPANY  
(Patent Proprietor) One Procter & Gamble Plaza  
Cincinnati, OH 45202 (US)

**Representative:** Russell, Tim  
Venner Shipley LLP  
200 Aldersgate  
London EC1A 4HD (GB)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 14 June 2016  
rejecting the opposition filed against European  
patent No. 1991191 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** P. Cipriano  
W. Ungler

## **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. 1 991 191. It requested that the decision under appeal be set aside and the patent be revoked.
- II. With its response, the respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained according to one of auxiliary requests 1 to 7 filed therewith.
- III. With letter dated 24 February 2020, the respondent filed new auxiliary requests 1 and 2 replacing its previous auxiliary requests.
- 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 ground for opposition under Article 100(b) EPC seemed to prejudice maintenance of the patent as granted and that the admittance of auxiliary requests 1 and 2 might require discussion under Article 13(1) RPBA 2020.
- V. Oral proceedings were held before the Board on 20 July 2021.

At the close of oral proceedings the requests were the following:

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

The respondent (patent proprietor) requested that the appeal be dismissed, auxiliarily that the patent be maintained in amended form on the basis of one of auxiliary requests 1 or 2 filed with letter dated 24 February 2020.

Claim 1 of the main request reads as follows (including the feature annotation adopted in opposition proceedings and taken over on appeal in the grounds of appeal, item 2.1):

- a. A disposable pull-on garment (20) contained in a package,
- b. the pull-on garment (20) having a waist opening (36) and leg openings (34), and having a longitudinal centerline (L1) and a transverse centerline (L1),
- c. the pull-on garment (20) comprising a main portion (10) and side portions (11) extending transversely outwardly from the main portion (10),
- d. the pull-on garment (20) having longitudinal side contour lines (120) to define a transverse width of the pull-on garment,
- e. the pull-on garment (20) having a first transverse width between the longitudinal side contour lines (120) at the waist opening (36) and a second transverse width between the longitudinal side contour lines (120) at the side portions (11),
- f. the second transverse width being greater than the first transverse width and being the greatest transverse width at the side portions (11) in a flat contracted and unfolded condition of the pull-on garment (20), wherein
- g. the side portions (11) are folded along a folding line (126) toward the longitudinal center line (L1) when the pull-on garment (20) is contained in a package

- h. such that the second transverse width decreases and the difference between the first transverse width and the second transverse width decreases when the side portions (11) are folded compared with when the side portions (11) are unfolded, characterized in that
- i. the side portion (11) comprises a front side portion (15) and a back side portion (16), and
- j. the side portion (11) is folded such that the folded portion of the side portion is sandwiched between the front side portion (15) and the back side portion (16)."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in the added feature that:

"the pull-on garment (20) comprises an absorbent main body (38) and a belt (40), the absorbent main body (38) comprises waist panels (52, 54) and a crotch panel (56) between the waist panels (52, 54), the belt (40) comprises a central panel (80F, 80B) and side panels (82F, 82B) transversely outwardly extending from the central panel (80F, 80B), wherein the main portion (10) comprises the waist panels (52, 54), the crotch panel (56) and the central panel (80F, 80B), and the side portion (11) comprises the side panels (82F, 82B)".

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that the following feature has been added:

"the pull-on garment (20) being elasticated".

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

*Main request - Article 100(b) EPC*

The ground of opposition under Article 100(b) EPC prejudiced maintenance of the patent.

The patent failed to explain how the boundary of the main portion in feature (c) was determined with respect to the side portions, such that the location of this boundary was an arbitrary choice. Paragraphs [0010], [0013] and [0015] did not provide the skilled person with a teaching for establishing this boundary, and the location of the boundary was required in order to carry out feature (j) of the invention according to claim 1.

The patent also failed to teach how much the folded side portion should extend beyond the longitudinal side edge of the main portion, and thus beyond the longitudinal side edge of the absorbent main body, in order to position the folding line correctly in the manufacturing process to avoid deformation or squeezing of the absorbent main body or garment. To achieve this technical effect the location of the absorbent body had to be defined.

*Auxiliary request 1*

The amendments to claim 1 failed to *prima facie* overcome the objection under Article 100(b) EPC raised against the main request.

Claim 1 did not define what the main portion was and/or whether the absorbent main portion was only in the central main portion. More specifically, the use of the verb "to comprise" did not exclude that e.g. parts of the side panels belonged to the main portion. Further, it was not defined in the claim that the size and shape of the absorbent main body corresponded to the one of the main portion. Even in the specific rectangular shape of the example of Figure 2, these did not match.

*Auxiliary request 2 - admittance*

The amendments to claim 1 of auxiliary request 2 did not *prima facie* overcome the objection under Article 100(b) EPC raised against the main request.

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

*Main request - Article 100(b) EPC*

The ground of opposition under Article 100(b) EPC did not prejudice maintenance of the patent.

The opposition division's reasoning in items 1.3 to 1.6 of the impugned decision was agreed. The boundary of the main portion was not arbitrary.

A skilled person reading paragraph [0010] had no difficulty in establishing the boundary between the side portions and the main portion of a pull-on garment and recognized that the width of the crotch portion defined the width of the whole main portion, which extended into the front and back portion, as could also be seen in Figures 2 and 3 of the patent. The skilled person looking at Figure 2 understood that the non-dashed portion corresponded to the main portion. From paragraphs [0013] and [0015] of the patent it was clear that the boundary of the central panel of the belt extended above and in alignment with the boundary of the waist panels, i.e. also following the width of the crotch portion.

For garments having non-straight crotch regions the skilled person understood that the boundary of the main



portion was defined by extending or extrapolating the lines delimiting the crotch region.

The location of the boundary was anyway a question of clarity and not one of sufficiency of disclosure (see e.g. Case Law 8th Edition, II.C.7.2).

The location of the folding line was made clear by the claim itself, as it explained where the side portions are located after they have been folded by the folding line.

Paragraphs [0032] to [0035] of the description and Figures 14 and 17 provided sufficient instruction on how to carry out the invention, i.e. how to fold the side portion along a folding line disposed laterally outside the main portion such that the main portion was not folded. Even if a small part of the main portion were folded, this did not change the scope of the invention.

Reading the description with a mind willing to understand, the skilled person understood that the absorbent core would be located within the claimed garment's main body.

*Auxiliary request 1 - admittance*

The amendments to claim 1 *prima facie* overcame the objection under Article 100(b) EPC raised against the main request.

Claim 1 of auxiliary request 1 now defined a more specific main portion and side portions. The skilled person would now have understood that the main portion consisted of the waist panels, the crotch panel and the

central panel of the belt, the boundaries of which extended above and in alignment with the boundaries of the waist panels, and did not comprise other parts of the garment. Similarly, the side portions consisted of the side panels and did not comprise other parts of the garment.

## **Reasons for the Decision**

1. Main request - Article 100(b) EPC

1.1 Feature j of claim 1 defines that "the side portion (11) is folded such that the folded portion of the side portion is sandwiched between the front side portion (15) and the back side portion (16)".

In order for the skilled person to establish whether the side portion is sandwiched between the front side portion (15) and the back side portion (16), the skilled person needs to be able to establish the boundary between the main portion and the side portions in any folded configuration.

1.2 The respondent argued that a skilled person would have no difficulty in establishing the boundary between the side portions and the main portion of a pull-on garment. Paragraph [0010] of the patent established the boundary between the side portions and the main portion of a pull-on garment and explained that the width of the crotch portion defined the width of the main portion, which extended into the front and back portions as could also be seen in Figures 2 and 3 of the patent.

The Board does not find these arguments convincing. Nothing in paragraph [0010] or in any other part of the patent teaches the skilled person that the width of the main portion is the width of the crotch portion as a general rule. Paragraph [0010] simply discloses that the main portion "comprises" a front main portion, a back main portion and a crotch main portion therebetween, in addition to a side portion extending outwardly from this main portion. Nothing is disclosed regarding the size or shape of any of these portions. The use of the verb "to comprise" also means that no limits to the size of the main portion are set, since it does not exclude the possibility of the main portion including further portions beyond the ones explicitly mentioned in paragraph [0010]. Paragraph [0010] therefore does not constitute a definition for the main portion.

Whilst the Board can concur with the respondent that Figure 3 can be understood to disclose a main portion having the width of the crotch portion, this Figure is schematic and, in addition, it shows a crotch portion having straight edges. The Board finds that Figure 3 alone does not allow the skilled person to infer that the width of the main portion is determined by the width of the crotch portion as a *rule* for all possible configurations within the scope of claim 1.

- 1.2.1 The respondent also argued that the skilled person looking at Figure 2 would have understood that the non-dashed portion corresponded to the main portion and that (from paragraphs [0013] and [0015]) it was clear that the boundaries of the central panel of the belt extended above and in alignment with the boundaries of the waist panels, i.e. also following the width of the crotch portion edges.

The Board does not find these arguments convincing either. Figure 2 as well as the corresponding paragraphs [0013] and [0015] disclose a diaper 20 made of several panels. As explained in paragraph [0015], the main portion comprises the waist panels 52 and 54 of the main body and the central panel 80F, 80B of the belt. First, in an analogous way to paragraph [0010], the use of the verb "comprise" in paragraphs [0013] and [0015] does not exclude that the main portion includes further panels. Second, the central panels 80B, 80F depicted in Figure 2 are in a region comprising long dashes above and below the non-dashed portion, thus contrary to the argument of the respondent, the main portion in Figure 2 is bigger than the non-dashed portion since it also comprises the central panels 80F, 80B, which lie outside thereof.

Paragraph [0013] then states that side panels 82F and 82B are contiguous with the central panel 80F, 80B and extend transversely outwardly thereof. The skilled person looking at Figure 2 will thus understand that the long-dashed region does not correspond to the central panels 80F, and 80B, since it extends all the way to the side edges of the side portions such that the boundary between the central panels 80F, 80B and the side panels 82F and 82B is simply not apparent. It is then impossible to know in Figure 2 where the boundary between the central portion and the side portion lies, at least in the region of the central panels 80F, 80B.

The respondent's argument that the boundaries of the central panel extended above and in alignment with the boundaries of the waist panels does not convince the Board, as this appears to be speculation; no such

disclosure can be found anywhere in the patent, either explicitly or implicitly. Even if the presence of such limits were to be recognised in some way from the Figures, such would seemingly only hold true for the very specific configuration of the type of diaper shown, which specifically has a crotch portion with straight edges (see e.g. Figures 2 and 3 of the patent).

- 1.2.2 The respondent further argued that for garments having non-straight crotch regions the skilled person would understand that the boundary of the main portion was defined by extending the lines delimiting the crotch region.

However, the patent does not disclose to the skilled person any such extension, how such an extension should be carried out or where the limits of the crotch portion should be in garment configurations not having a crotch portion with straight longitudinally extending edges (e.g. in one having curved crotch portion edges). A skilled person would not be able to determine how these lines should then be extended to set the boundary of the main portion (should they for example be extrapolated so as to follow the curvature in some way or should they perhaps be straight and extend longitudinally from some particular point?). The patent therefore fails to sufficiently clearly and completely disclose how the boundaries between the main portion and each of the side portions are to be established, such that the location of this boundary constitutes an arbitrary choice for the skilled person for any configuration other than the specific type shown in Figure 3, i.e. for other configurations falling within the whole range claimed.

1.2.3 Establishing the boundary between the main portion and the skilled person is therefore arbitrary. The respondent agreed with item 1.5 of the decision under appeal and argued that paragraphs [0032] to [0035] and Figures 14 and 17 explained to the skilled person how to fold the side portion. However, regardless of whether paragraphs [0032] to [0035] and Figures 14 and 17 describe how to fold the side portions or not, without being able to establish a boundary between the main portion and the side portion, it is then impossible to establish the relationship with the location of the folding line and thus to carry out feature j) of claim 1.

1.3 The respondent also agreed with item 1.3 of the decision under appeal and argued that the question of knowing whether the skilled person worked within the scope of the claim or not was a clarity issue and not one of sufficiency of disclosure (see e.g. Case Law 8th Edition, II.C.7.2) and that the skilled person with a mind willing to understand would not consider the appellant's suggestions and would consider, for example, that an absorbent core would only be located within the claimed garment's main portion. According to the respondent, the location of the folding line was made clear by the claim itself, as it explained where the side portions are located after they have been folded by the folding line.

The Board is not persuaded by this argument. As also apparent from item 1.1 above, the question is whether the patent in suit provides sufficient information to enable the skilled person, when taking into account common general knowledge, to establish the boundary between the main portion and the side portions in any folded configuration and is thus not related to an

ambiguity in the scope of the claim. Merely because the claim defines that the side portions extend from the main portion (feature c of the claim), this does not make it sufficiently disclosed where the boundaries of the main portion (and consequently the folding line) are located. The Board cannot recognize any contradiction to the passages of the Case Law Book cited by the respondent and finds that the objection is indeed an objection to the lack of sufficiency of disclosure in accordance with Article 100(b) EPC.

As to the location of the absorbent core (which is anyway not a feature of claim 1 of the main request), the contour of the absorbent main body and its possible relationship with the boundary of the main portion is not described in the patent such that the skilled person cannot simply infer that any edge of an absorbent main body corresponds to an edge of the main portion. Paragraphs [0012], [0015] and [0016] of the patent disclose respectively that the absorbent main body 38 and the main portion 10 both comprise the front waist panel 52, the back waist panel 54 and the crotch panel 56. Thus, it is not excluded that both also include further panels or components (e.g. the main body also comprises a topsheet, a backsheet and may comprise barrier leg cuffs), such that a specific relationship between the edges of any absorbent core that might be present and of the main portion is not disclosed.

- 1.4 The respondent agreed with item 1.4 of the decision. This item related to the opponent's objection that the patent also failed to teach how much the folded side portion should extend beyond the longitudinal side edge of the main portion, and thus beyond the longitudinal side edge of the absorbent main body, in order to

position the folding line correctly in the manufacturing process to avoid deformation or squeezing of the absorbent main body or garment.

This argument however does not seem to be relevant under Article 100(b) EPC since the claim does not define an absorbent main body (see item 1.3 above) or the effect of avoiding deformation or squeezing of the absorbent main body or garment.

1.5 At least for the reasons stated above, the ground of opposition pursuant to Article 100(b) EPC is therefore prejudicial to maintenance of the patent as granted, such that the main request is not allowable.

2. Auxiliary requests 1 and 2 - admittance

2.1 Claim 1 of auxiliary request 1 reads as per claim 1 of the main request with the following features added to the claim:

"the pull-on garment (20) comprises an absorbent main body (38) and a belt (40), the absorbent main body (38) comprises waist panels (52, 54) and a crotch panel (56) between the waist panels (52, 54), the belt (40) comprises a central panel (80F, 80B) and side panels (82F, 82B) transversely outwardly extending from the central panel (80F, 80B), wherein the main portion (10) comprises the waist panels (52, 54), the crotch panel (56) and the central panel (80F, 80B), and the side portion (11) comprises the side panels (82F, 82B)"

2.2 Auxiliary request 1 was filed with letter dated 24 February 2020 in an amendment to the party's appeal case.



2.3 Article 13(1) RPBA 2020 stipulates that any amendment to a party's appeal case may be admitted only at the Board's discretion. This discretion is to be exercised in view of, *inter alia*, the current state of the proceedings, whether the amendment is detrimental to procedural economy, 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.

2.4 The respondent argued that the amendments to claim 1 *prima facie* overcame the objection under Article 100(b) EPC raised against the main request. According to the respondent, claim 1 of auxiliary request 1 defined a more specific main portion and side portions. The skilled person allegedly now understood that the main portion consisted of the waist panels, the crotch panel and the central panel of the belt, whose boundaries extended above and in alignment with the boundaries of the waist panels, and did not comprise other parts of the garment. Similarly, the side portions consisted of the side panels and no other parts of the garment.

The Board is not persuaded by these arguments. As pointed out above in item 1.1.1 in regard to paragraphs [0013] and [0015] of the patent, the use of the verb "comprise" in the added feature "the main portion (10) comprises the waist panels (52, 54), the crotch panel (56) and the central panel (80F, 80B)" does not exclude that the main portion includes further panels, i.e. it is not excluded that the main portion comprises panels in addition to the waist panels, the crotch panel and the central panel.

Further, the Board notes that the shape of the absorbent main body added to claim 1 is also not further defined in the claim nor described in the patent such that the skilled person has no reason to infer that any edge of the absorbent main body corresponds to an edge of the main portion.

2.5 Claim 1 of auxiliary request 1 therefore fails to *prima facie* overcome the objections found to be prejudicial with respect to claim 1 of the main request and its subject-matter fails to fulfil, at least *prima facie*, the requirements of Article 83 EPC.

2.6 Claim 1 of auxiliary request 2 reads as per claim 1 of auxiliary request 1 with the added feature that the pull-on garment(20) is elasticated.

2.7 The respondent did not argue that this amendment overcame the objection under Articles 83 and 100(b) EPC discussed above and the Board also sees no reason to find otherwise.

2.8 In view of the above, the Board exercised its discretion under Article 13(1) RPBA 2020 not to admit auxiliary requests 1 and 2 into the proceedings. In the absence of any request which meets the requirements of the EPC, the patent has to be revoked.

## **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