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**Datasheet for the decision  
of 1 June 2021**

**Case Number:** T 1185/17 - 3.2.06

**Application Number:** 10169558.3

**Publication Number:** 2250984

**IPC:** A61F13/15, B32B3/30

**Language of the proceedings:** EN

**Title of invention:**

Feminine hygiene article with printed pattern and embossed pattern

**Patent Proprietor:**

The Procter & Gamble Company

**Opponents:**

Essity Hygiene and Health Aktiebolag  
Johnson & Johnson Consumer Inc.  
Kimberly-Clark Worldwide, Inc.

**Headword:**

**Relevant legal provisions:**

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

**Keyword:**

Amendments - added subject-matter (yes)  
Late-filed auxiliary requests - justification for late filing  
(no) - diverging versions of claims

**Decisions cited:**

**Catchword:**

See Reasons 3.3; auxiliary requests 7 to 10 not admitted into the proceedings due to a new lack of convergence caused by the filing of auxiliary requests 1 and 2, the latter not being taken into account under Article 13(2) RPBA 2020.



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**Case Number: T 1185/17 - 3.2.06**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 1 June 2021**

**Appellant:** The Procter & Gamble Company  
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**Decision under appeal:**      **Decision of the Opposition Division of the  
European Patent Office posted on 13 March 2017  
revoking European patent No. 2250984 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

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

## **Summary of Facts and Submissions**

- I. The appellant (patent proprietor) filed an appeal against the revocation of European Patent No. 2 250 984 by the opposition division.
- II. The appellant requested that the decision of the opposition division be set aside and the patent be maintained according to the main request or one of auxiliary requests 1 to 7.
- III. The respondents 1 to 3 (opponents 1 to 3 respectively) requested that the appeal be dismissed.
- IV. With letter dated 1 April 2019, the appellant filed new auxiliary requests 3-5, the previous auxiliary requests 3-7 being demoted to auxiliary requests 6 to 10.
- V. With letter dated 9 January 2020, the appellant filed a new auxiliary request 4, replacing the previous one.
- VI. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion on the various requests, including the indication that the subject-matter of claim 1 of auxiliary request 6 seemed to contravene Article 123(2) EPC.
- VII. With letter dated 7 April 2021, the appellant withdrew its main request and auxiliary requests 1 to 5, made auxiliary request 6 its new main request and filed new auxiliary requests 1 and 2.

VIII. Oral proceedings before the Board were held on 1 June 2021. No one was present on behalf of respondent 2 as announced with letter dated 17 May 2021.

IX. At the end of the oral proceedings, the requests were as follows:

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the main request of 7 April 2021 (previously the sixth auxiliary request of 1 April 2019 and the third auxiliary request filed with the statement of grounds of appeal), auxiliarily that the patent be maintained on the basis of one of the first and second auxiliary requests filed with letter dated 7 April 2021, or on the basis of one of auxiliary requests 7 to 10 of 1 April 2019.

The respondents (opponents 1 and 3) requested that the appeal be dismissed.

X. Claim 1 of the main request reads as follows:  
"A feminine hygiene article (10) comprising:  
i) a topsheet (16);  
ii) a backsheet (20); and  
iii) an absorbent core (18) situated between the topsheet (16) and the backsheet (20),  
wherein the absorbent core (18) defines a core area (24) on the surface of the topsheet (16) which is substantially smaller than the surface of the topsheet (16),  
wherein the article further comprises a printed pattern (12) which is printed on a layer (20) of the article (10) situated below the absorbent core (18),

wherein at least a portion of the printed pattern (12) is visible through at least a portion of the area of the topsheet (25) which is outside the core area (24), wherein the article further comprises an embossed pattern (14) which is at least partially embossed within the core area (24), and the embossed pattern (14) comprises a decorative element (140), wherein the embossed pattern (14) has a resolution of less than 0.75 mm."

Claim 1 of auxiliary request 1 builds on claim 1 of the main request, with the following feature appended: "wherein the printed pattern (12) has a resolution of less than 0.75 mm".

Claim 1 according to auxiliary request 2 differs from claim 1 according to auxiliary request 1 by defining that both the embossed pattern and the printed pattern have a resolution of between 0.35 mm and 0.6 mm.

Claim 1 of auxiliary request 7 differs from claim 1 of auxiliary request 2 in that the feature "wherein the printed pattern (12) has a resolution of between 0.35mm and 0.6mm" has been deleted.

Claim 1 of auxiliary request 8 differs from claim 1 of the main request in that the feature "wherein the embossed pattern (14) has a resolution of less than 0.75 mm" has been deleted and the feature "wherein the article has a thickness of less than 5mm" has been appended at the end of the claim.

Claim 1 of auxiliary request 9 differs from claim 1 of auxiliary request 8 in that "the article has a thickness in the range of 0.4 mm to 3 mm".

Claim 1 of auxiliary request 10 differs from claim 1 of auxiliary request 9 in that "the article has a thickness in the range of 0.6 mm to 2 mm".

XI. The arguments of the appellant relevant to this 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.

Paragraph [0024] of the published application provided direct and unambiguous disclosure of an embossed pattern having a resolution of less than 0.75 mm.

The last sentence of paragraph [0024] made clear for the skilled person reading the description that the printed pattern did not need to have the same specific resolution as the embossed pattern. Also paragraph [0038] explained that the printed and embossed patterns needed to correspond but not to have the same resolution.

*Auxiliary requests 1 and 2 - admittance*

Auxiliary requests 1 and 2 should be admitted into the proceedings.

By adding the feature that the printed pattern has a resolution of less than 0.75 mm, auxiliary request 1 directly addressed the objection under Article 123(2) EPC referenced at item 7.6 of the preliminary opinion, overcame the objection and was *prima facie* allowable. This objection had been raised by only one of the



opponents, so that it was not judged as being highly relevant by the appellant.

The number of opponents and objections did not allow the proprietor to address all the objections at once - it was more economical to do so after receiving the preliminary opinion of the Board.

*Auxiliary requests 7 to 10 - admittance*

Auxiliary requests 7 to 10 should be admitted into the proceedings.

Auxiliary requests 7 to 10 had already been divergent since the filing of the grounds of appeal, which was inevitable in order to establish all the necessary fallback positions. The lack of convergence therefore did not arise as a result of any amendment to the appellant's case.

XII. The arguments of the respondents relevant to this decision may be summarised as follows:

*Main request - Article 123(2) EPC*

The subject-matter of claim 1 was not directly and unambiguously disclosed in the application as originally filed.

Paragraph [0024] generally related to the embossing roll used in the specific thermal bonding technique described in paragraph [0023], rather than relating to the embossed article itself. Paragraph [0024] did refer to "embossed lines", but it did so only in the context of what the embossing roll might be capable of achieving. Paragraph [0024] therefore did not provide

the basis for a disclosure of a feminine hygiene article with the combination of features of claim 1 , i.e. with a resolution of the embossed pattern as defined in claim 1.

It was not clear from the claims whether the resolution of the pattern related to the spaces between printed (or embossed) lines and/or dots, if it related to the thickness of printed (or embossed) lines or dots themselves, or if it related to something else. It was acknowledged that paragraph [0024] referred to an embodiment in which the resolution was the "minimum thickness of a printed line", but claim 1 was not limited to this way of describing the feature or even limited to printed lines.

Further, paragraph [0038] of the application as filed disclosed that not only the resolution of (at least a portion of) the embossed pattern should be less than 0.75 mm or between 0.35 and 0.6 mm but also the one of (at least a portion of) the printed pattern.

*Auxiliary requests 1 and 2 - admittance*

Auxiliary requests 1 and 2 should not be admitted into the proceedings.

The objection under Article 123(2) EPC regarding the main request was introduced with the amendments made by appellant to the main request (which corresponds to auxiliary request 3 filed for the first time with the grounds of appeal), as the respondents had already noted in their replies to the appeal (see item 7.2.3 of the reply from respondent 2 or page 4, first complete paragraph, of the reply from respondent 3). Further, the appellant had already changed its case once with

letter dated 1 April 2019 in which it had filed more auxiliary requests and had not addressed these particular objections from the respondents.

## **Reasons for the Decision**

1. Main request - Article 123(2) EPC
  - 1.1 Leaving aside the question of admittance of the main request into the proceedings, the subject-matter of claim 1 does not fulfil the requirement of Article 123(2) EPC.
  - 1.2 Claim 1 of the main request was amended with regard to claim 1 as granted by the introduction of the following feature:

"wherein the embossed pattern (14) has a resolution of less than 0.75 mm."
  - 1.3 The appellant argued that paragraph [0024] of the published application provided a direct and unambiguous disclosure of an embossed pattern having a resolution of less than 0.75 mm since it gave a definition of the resolution of the embossed pattern on the feminine hygiene article and not simply on the embossing tool. It was implicit from claim 1 that the feminine hygiene article must have been produced using an embossing tool since it had an embossed pattern, and that this tool must have been capable of embossing with a resolution of less than 0.75 mm (since the article had an embossed pattern with this resolution).

The Board does not find this argument convincing. Whilst paragraph [0024] describes an embossed pattern of a feminine hygiene article, it also adds that such a pattern comprises "(relatively) thin *embossing features*" (plural) and that to achieve these "thin *embossing features*" an embossing tool should achieve high definition embossing capable of providing *embossed lines* with a minimum thickness of 0.75 mm, claim 1 does not define either embossing features or embossed lines having a minimum thickness but rather a pattern having a specific resolution.

Paragraph [0038], the only paragraph where a resolution of a pattern is described, on the other hand, describes a resolution of about 0.75 mm on "at least a portion" of "both printed and embossed patterns", which is achieved with high resolution printing and embossing capable of producing thin lines or other features having a thickness within the resolution range. Therefore, thin lines or other (embossed or printed) features having a thickness within the resolution range are required such that at least a portion of both printed and embossed patterns is considered as having a resolution of less than about 0.75 mm. However, claim 1 defines an embossed pattern resolution and does not define any specific resolution for a printed pattern.

- 1.4 The appellant argued that the last sentence of paragraph [0024] made clear for the skilled person reading the description that the printed pattern did not need to have the same specific resolution as the embossed pattern.

The Board does not concur. The use of the word "similarly" implies that when high resolution embossing with a resolution of less than about 0.75 mm is

employed, also printing with a high resolution (and not simply printing in general) should be used in order to provide the article with a generally feminine and delicate look.

- 1.5 The Board thus finds that neither paragraph [0024] nor paragraph [0038] disclose the combination of an embossed pattern (14) having a specific resolution of less than 0.75 mm together with a (merely) generic printed pattern. In the absence of any further source of disclosure by the appellant, the subject-matter of claim 1 of the main request does not fulfil the requirement of Article 123(2) EPC. The main request is thus not allowable.
2. Auxiliary requests 1 and 2 - exceptional circumstances
  - 2.1 Auxiliary requests 1 and 2 were filed with letter dated 7 April 2021, i.e. after notification of the summons to oral proceedings. As the parties were summoned in 2020, Article 13(2) RPBA 2020 is applicable according to Articles 24(1) and 25(1) RPBA 2020.
  - 2.2 Article 13(2) RPBA 2020 stipulates that any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
  - 2.3 The appellant argued that by adding the feature that the printed pattern has a resolution of less than 0.75 mm, auxiliary request 1 directly addressed the objection under Article 123(2) EPC referenced at item 7.6 of the preliminary opinion, overcame the objection and was *prima facie* allowable.

However, these arguments do not convince the Board, since these are criteria under the more general (but additionally applicable) Article 13(1) RPBA 2020 that apply to any amendment of the party's appeal case after it has filed its grounds of appeal and therefore cannot simultaneously be cogent reasons justifying exceptional circumstances for taking an amendment into account under Article 13(2) RPBA.

2.4 The appellant also argued that the objection under Article 123(2) EPC had only been raised by one of the opponents such that it was not immediately judged as highly relevant by the appellant until the Board had brought this up in its provisional opinion. Further, it argued that the number of opponents and objections did not allow the proprietor to address all the objections at once and that it was more economical to do so after receiving the preliminary opinion of the Board.

2.5 The Board does not find these arguments persuasive. The Board assesses the merits and relevance of each objection made by each party on the basis of the individual submissions supplied by each party, such that the number of parties that have raised each objection is irrelevant.

Objections under Article 123(2) EPC regarding the main request were introduced as a result of the amendments made by the appellant itself to the main request (which corresponds to auxiliary request 3 filed for the first time with the grounds of appeal) as the respondents already noted in their replies to the appeal (see item 7 of the reply from respondent 2 or page 4, first complete paragraph, of the reply from respondent 3). Further, the appellant had already changed its appeal

case twice (with letters dated 1 April 2019 and 9 January 2020) by the filing of more auxiliary requests. However, it never addressed any of the objections under Article 123(2) EPC from either one of respondents 2 or 3 nor did it mention that some objections had to be addressed at a later date (let alone give any reasons for such a view).

The appellant's further argument that the number of opponents and the numerous objections did not allow each and every objection to be dealt with, is also not accepted. The number of opponents is only three and the objections under Article 123(2) EPC do not appear particularly numerous. When considering the third auxiliary request filed with the grounds of appeal and the replies thereto, the appellant can thus reasonably be expected to assess whether amendment was required or not. In the present case it also noted that when filing the third auxiliary request, the appellant merely filed a cursory statement as to the purpose of the request, without giving any basis from where the amendment was taken. Instead, in the reply of 1 April 2019, in regard to auxiliary request 3 and the objections raised against it, the appellant merely renumbered the requests.

- 2.6 The Board therefore does not see why the objections under Article 123(2) EPC could not reasonably already have been addressed far earlier and cannot recognize any exceptional circumstance as required under Article 13(2) RPBA 2020 which could justify the amendment to the appellant's appeal case.
- 2.7 Accordingly, the Board exercised its discretion under Article 13(2) RPBA 2020 not to take the auxiliary requests 1 and 2 into account.

3. Auxiliary requests 7 to 10 - admittance

3.1 Auxiliary requests 7 to 10 were filed with the grounds of appeal as auxiliary requests 4 to 7. The sequence of the auxiliary requests has been changed during the course of the appeal proceedings due to the introduction of auxiliary requests 3 to 5, this involving a material change in focus of the claimed invention and thus resulted in an amendment of the appeal case, which the Board and the respondents had to deal with.

3.2 The Board had already alerted the appellant in its preliminary opinion (see point 7.5) to the issue that the filing of auxiliary request 5 had the effect of changing its complete case, particularly in respect of all lower ranking requests. Nonetheless, the appellant subsequently withdrew the main request as well as auxiliary requests 1 to 5, promoted auxiliary request 6 to be the main request and filed new auxiliary requests 1 and 2.

The selected sequence of the auxiliary requests leads to an evident broadening and different lack of convergency in the requests, i.e. the amended sequence does not develop and increasingly limit the subject-matter of the independent claim of the main request in the same direction and/or in the direction of a single approach as would be required for reasons of procedural economy.

The features relating to the resolution of the printed pattern, which are present in claim 1 of the auxiliary requests 1 and 2, are not present in claim 1 of any of the lower ranking auxiliary requests 7 to 10 filed with



the grounds of appeal, which concentrate on the resolution of the embossed pattern or on the thickness of the article. This has the effect of the Board and parties having to consider subject-matter different than that included in the higher ranking main and amended auxiliary requests 1 and 2. Such a change made after a party has presented its complete case does not meet the requirement for procedural economy as set out in Article 13(1) RPBA 2020.

- 3.3 The appellant argued that auxiliary requests 7 to 10 had already been divergent since the filing of the grounds of appeal, which was inevitable in order to establish all the necessary fallback positions. The lack of convergence did not arise from any amendment to the case.

Whilst it is true that auxiliary requests 8 to 10 (corresponding to auxiliary request 5 to 7 filed with the grounds of appeal) also did not converge with the then auxiliary request 7 (i.e. auxiliary request 4 filed with the grounds of appeal), auxiliary request 7 was previously convergent with auxiliary request 6 (now the main request). However, the introduction of amended auxiliary requests 1 and 2, in between auxiliary requests 6 and 7 (as filed with the grounds of appeal), created a further lack of convergence since auxiliary request 7 was not convergent with amended auxiliary request 2. The appellant's amendments to its appeal case, albeit ultimately not taken into account by the Board after discussion thereof with regard to Article 13(2) RPBA 2020, had nevertheless resulted in a new lack of convergence of the entire set of requests following auxiliary request 2 that was specifically caused by the filing of new auxiliary requests 1 and 2.

3.4 Accordingly, the Board exercised its discretion under Article 13(1) RPBA 2020 not to admit the auxiliary requests 7 to 10 into the proceedings.

3.5 In the absence of any request in the proceedings on the basis of which the patent can be maintained, the impugned decision cannot be set aside and the appeal must be dismissed.

## Order

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

The appeal is dismissed.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated