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**Datasheet for the decision
of 10 January 2023**

Case Number: T 2240/18 - 3.2.06

Application Number: 13169898.7

Publication Number: 2671463

IPC: A41D13/018, A41D13/05

Language of the proceedings: EN

Title of invention:

Garment adapted to be associated with an inflatable protection element

Patent Proprietor:

DAINESE S.p.A.

Opponent:

ALPINESTARS Spa

Headword:

Relevant legal provisions:

EPC Art. 56, 84

RPBA 2020 Art. 13(1)

Keyword:

Inventive step - main request (no) - auxiliary requests (no)
Amendment to appeal case - suitability of amendment to resolve
issues raised (no)

Decisions cited:

G 0001/99

Catchword:



Beschwerdekammern

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Case Number: T 2240/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 10 January 2023

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
10 July 2018 concerning maintenance of the
European Patent No. 2671463 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: T. Rosenblatt
J. Hoppe

Summary of Facts and Submissions

- I. The appellant (opponent) filed an appeal against the interlocutory decision of the opposition division, posted on 10 July 2018, in which the opposition division found that European patent No. 2 671 463 in an amended form met the requirements of the EPC.
- II. In reply to the statement of grounds of appeal, the respondent (patent proprietor) submitted *inter alia* nine further claim sets corresponding to auxiliary requests 1 to 9.
- III. In a communication of the Board of Appeal pursuant to Rule 100(2) EPC, the appellant was given a four months time period to file possible submissions in regard to the auxiliary requests 1 to 9.
- IV. The appellant replied to the Board's communication and commented on the nine auxiliary requests.
- V. By letter dated 11 March 2022, the respondent replied to the appellant's comments replacing all its previous requests with amended auxiliary requests 1 to 6.
- VI. The Board subsequently summoned the parties to oral proceedings. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA 2020), the Board informed the parties of its preliminary opinion on the case.
- VII. By letter dated 4 January 2023 the respondent's representative announced that the respondent would not attend and would not be represented at the oral

proceedings scheduled in person.

VIII. Oral proceedings before the Board were held in person on 10 January 2023 in the absence of the respondent.

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

X. The respondent had requested (in writing) that the appeal be dismissed (main request) or as an auxiliary measure that the patent be maintained in amended form based on one of auxiliary requests 1 to 6, filed with letter dated 11 March 2022.

XI. The following evidence was referred to by the appellant:

D1 : WO 02/019850 A1

D6 : US 2012/0073035 A1

XII. Independent claims 1 and 11 of the **main request** have the following wording:

"1. Under-garment (10, 110, 210) adapted to be associated with a garment (20),
said under-garment (10, 110, 210) including an inflatable protection element (12, 112, 212) or airbag, wherein the under-garment includes a pocket (25) adapted to be placed at the back of the user and a rigid plate shaped as a "hump" (26),
said pocket (25) receiving said rigid plate shaped as a "hump" (26), and
wherein said rigid plate shaped as a "hump" (26) houses a source of pressurized gas and an electronic unit for activating the inflatable element (12, 112)."

"11. Method for equipping a garment (20) with an inflatable protection element (12, 112, 212) or airbag, comprising the steps of

- a) associating said inflatable protection element (12, 112, 212) with an undergarment (10, 110, 210);
- b) associating said under-garment (10, 110, 210) provided with said inflatable protection element (12, 112, 212) with said garment (20),

wherein the under-garment (10, 110, 210) includes a pocket (25) arranged at the back of the user and a rigid plate shaped as a "hump" (26), said pocket (25) receiving said rigid plate shaped as a "hump" (26), and wherein said under-garment is connected to said garment by connecting first said pocket (25)."

Claim 1 of **auxiliary request 1** reads as follows:

"1. Under-garment (10, 110, 210) adapted to be associated with a garment (20), said under-garment (10, 110, 210) including an inflatable protection element (12, 112, 212) or airbag, wherein the under-garment includes a pocket (25) adapted to be placed at the back of the user and a rigid plate shaped as a "hump" (26), said pocket (25) receiving said rigid plate shaped as a "hump" (26), wherein said rigid plate shaped as a "hump" (26) is associated with a source of pressurized gas and an electronic unit for activating the inflatable element (12, 112) and wherein the under-garment includes a connecting portion (27) disposed around the pocket (25) and intended to be connected with a corresponding connecting portion of the garment (20)."

The wording of the independent method claim 10 of

auxiliary request 1 is the same as that of claim 11 of the main request.

Compared to claim 1 of auxiliary request 1, in claim 1 of **auxiliary request 2** the following feature is appended:

", and wherein the under-garment includes a first connection area (30) at the wrists, a second connection area (31) between the shoulders and elbows, and/or a third connection area for the thorax (32) between the chest and a side area of the pelvis".

The wording of the independent method claim 9 of **auxiliary request 2** is the same as that of claim 11 of the main request

In **auxiliary request 3**, the wording of claim 1 is identical to that of claim 1 of the main request. All method claims are deleted.

Claim 1 of **auxiliary request 4** is identical to claim 1 of auxiliary request 1 whereas again all method claims are deleted.

In **auxiliary request 5** the wording of claim 1 is identical to that of claim 11 of the main request. All product claims are deleted.

Compared to auxiliary request 5, in claim 1 of **auxiliary request 6** the following feature is appended:

"wherein after connecting the pocket (25), sleeves of said under-garment are connected to corresponding sleeves of the garment (20)"

XIII. The arguments of the appellant may be summarised as follows.

Main request

Claim 1 - Article 84 EPC

Claim 1 lacked clarity in regard to the term "houses". The opposed patent failed to provide any information about how the term "houses" should be interpreted.

Claim 1 - Article 56 EPC

In case it were considered that D1 did not disclose that:

- i) the rigid plate received in a back side pocket is shaped as a "hump";
- ii) the rigid plate shaped as a "hump" houses a source of pressurized gas and an electronic unit for activating the inflatable element,

D1 should be considered as the closest prior art.

The objective technical problem to be solved could be seen as reducing the risk that the source of pressurized gas and the electronic unit became damaged in case of an accident. The claimed solution was obvious in view of paragraph 37 of D6. D1 did not teach away from housing the electronic unit together with a source of pressurised gas under the hump-shaped plate. The skilled person would have understood that the display and the electronic control could be separated from each other so as to leave the display installed on the outer garment and to connect it by cables to the electronic control unit. A cabled connection between the components of the inflation means was anyway

foreseen in D1, see page 7, lines 25/26 and 32/33.

Claim 11 - Article 56 EPC

D1 also constituted the closest prior art to the subject-matter of claim 11. If it were considered that the claimed method differed from D1 by

- i) the rigid plate of the back protector being "shaped as a hump" and by the feature
- ii) "the undergarment is connected to said garment by connecting first said packet",

the two features did not provide a synergistic technical effect. They rather related to two partial objective problems.

The distinguishing feature i) did not provide any particular technical effect compared to the back protector known from D1 and represented merely an alternative to the shape known from D1. The use of a hump shaped rigid plate was not only trivial but it also belonged to common general knowledge and was disclosed for example in D6.

Similarly, no particular technical effect could be acknowledged for the second distinguishing feature. D1 disclosed a connection of the inner gilet with the outer jacket by zippers but did not specify where precisely the zippers were positioned. The claim covered the possibility that there was even only one connection area, which was located at the pocket. Connecting the two garments at that position did not provide any advantage. Even in case of a plurality of connecting areas being provided between the undergarment and the outer garment, no surprising effect could be obtained by connecting the areas provided at the back portion of the undergarment with corresponding

areas of the garment before connecting other areas (for example the area at the wrists). The partial objective technical problem was thus rather to provide an alternative way of connecting the two garments. Applying one of the possible solutions which were available to the skilled person did not require particular skills and hence did not involve an inventive step.

Auxiliary request 1 (n.b. this argument was submitted within the framework of the respondent's first auxiliary request filed with the reply to the statement of the appeal grounds)

To overcome the clarity objection raised against the term "houses" in the second "wherein"-clause of the main request, the term had been replaced with the expression "associated with". However, the term "associated with" would provide broader protection than the verb "house". The amendment would thus extend the protection conferred by the patent with respect to that of the main request, giving an unwarranted advantage to the proprietor. The exceptions to the principle of the prohibition of *reformatio in peius* set out in G 1/99 did not apply since the present case was completely different to the situation underlying that decision. According to G 1/99, an exception to the above-mentioned principle may **only** be made to meet an objection put forward during the appeal proceedings (emphasis by the appellant); in particular if the patent could not be maintained for reasons which were not raised at the first instance (see point 12 of the Reasons). In the present case, the clarity objection against the term "houses" was not raised for the first time in the appeal procedure but was made during the procedure before the opposition division. Such an

objection was expressly mentioned in the appealed decision, which found the main request allowable despite the arguments provided by the opponent concerning lack of clarity.

Auxiliary request 6

The additional feature added to claim 1 was merely a question of routine design for the skilled person, in particular when an under-garment needed to be joined to an outer garment. Such a feature also had no surprising technical effect.

- XIV. The arguments of the respondent (submitted in writing) may be summarised as follows.

Main request

Claim 1 - Article 84 EPC

The appellant appeared to consider the term "houses" not clear because of an explanation given by the opposition division. However, the terminology "to house" had a well-recognized technical meaning, being "to accommodate in a hollow space" as recited also in the decision. The contested patent did not provide any special meaning for the terminology "to house". Therefore, claim 1 was to be read giving the term "houses" its common technical meaning, available in any English dictionary, namely that the "hump" shaped plated provided a hollow space to accommodate a gas source and an electronic unit.

Claim 1 - Article 54 and 56 EPC

D1 did not disclose any hump-shaped plate, nor that the gas sources would be housed in the back protector. In D1 the electronic unit 5 was integrally associated with the jacket 3 (external garment), and not with the gilet 6; the electronic unit 5 was also positioned in a site accessible to the motorbiker's field of vision, i.e. in a front portion of the jacket, as shown in figure 1 of D1.

Moreover, D1 disclosed a gilet suited to being worn under a garment, whereas D6 disclosed a motorcycling suit, i.e. an external garment. D1 disclosed a back protector whereas D6 disclosed an aerodynamic hump. D6 thus disclosed a component (aerodynamic hump) for an external suit which was completely different with respect to the back protector for a gilet known from D1.

Contrary to the appellant's contention, the skilled person would not have had any reasonable motivation to consider the provision of a hump-shaped structure in place of the back protector of the gilet of D1 as an obvious solution. In fact, the person skilled in the art would have recognized that the hump-shaped plate would have been a bulky and cumbersome component for the gilet.

In addition, in D1 the electronic unit 5 was integrally associated with the jacket 3, and not with the gilet 6. Therefore, contrary to the claimed invention, both D1 and D6 disclosed respective electronic units associated with the respective external garment, and not housed in the hump-shaped plate of an undergarment.

Claim 11 - Article 56 EPC

The act of connecting the pocket first was not a single choice but just one of the possible many options available in order to equip a garment with an inflatable member. In fact, for example, the garment could be worn over the undergarment/inflatable member without any connections.

The appellant's argument that claim 11 covered an undergarment having only one connection area, which was located at the pocket 25, was a clarity attack against claim 11. Moreover, claim 11 recited in broader terms that when equipping the garment with an inflatable member, the undergarment provided with the inflatable member was connected to the garment by connecting the pocket first. Therefore, claim 11 recited that the pocket was the first element which was connected to the garment, regardless of any other portion of the undergarment.

Auxiliary requests 1, 2 and 4

The exceptions to the prohibition of *reformatio in peius* were not limited to the specific situation from which G 1/99 arose. As extensively noted in the case law, exceptions to this principle were a matter of equity in order to protect the non-appealing proprietor against procedural discrimination in circumstances where that prohibition would impair the legitimate defence of its patent. The equity approach covered both the case of an error of judgment by the opposition division - i.e. wherein the same objections raised in first instance by the opponent/appellant against the patent as subsequently maintained by the opposition

division were subsequently regarded as convincing by the Board of Appeal - as well as the case of any change of the factual and/or legal basis on which limitations had been made by the proprietor prior to the appeal. By interpreting the case as restricted only to this second case, the proprietor would be prevented by the prohibition of *reformatio in peius* from adequately defending its patent. Such considerations are relevant also in view of the fact, noted in G 1/99, that not allowing a "necessary and appropriate" defence creates a procedural imbalance between the opponent (who, if succumbing in the appeal, can still challenge validity of the patent before national courts) and the proprietor (who, if the patent is revoked in appeal, has no further procedural way to recover the situation). The amended feature in claim 1, i.e. the replacement of the term "houses" by the expression "is associated with", met the three conditions set out in G 1/99 and was thus admissible. The same arguments applied to the second and fourth auxiliary requests which included the same amendments.

Auxiliary request 3

The third auxiliary request corresponded to the main request without method claims. All arguments presented for the main request applied equally.

Auxiliary request 5

The fifth auxiliary request corresponded to the main request without product (under-garment and garment) claims. All arguments presented for the main request applied equally.

Auxiliary request 6

The added features of claim 1 provided the additional advantage of a temporal sequence of steps for centering and connecting the undergarment with respect to the garment.

Reasons for the Decision

Main request - claim 1 - clarity

1. Claim 1 meets the clarity requirement of Article 84 EPC. As was already indicated in the Board's communication pursuant to Article 15(1) RPBA 2020, the skilled person understands the term "houses" in the context of the other features defined in claim 1. The appellant did not submit any further comments on the Board's preliminary opinion which is consequently confirmed herewith.

Main request - claim 1 - inventive step

2. The subject-matter of claim 1 does not involve an inventive step (Article 56 EPC).
 - 2.1 It is not contested that the gilet (6) disclosed in D1 may be considered to represent the closest prior art to the subject-matter of claim 1. This known gilet, constituting an under-garment within the meaning of claim 1, may be joined by zippers (see page 4, lines 32 to 34) to an outer jacket (3), i.e. a garment as recited in claim 1. The gilet (6) is provided with inflatable protection elements or pockets (12). Sources of pressurised gas (1) for inflating the inflatable

pockets are also provided. They may be fastened to a back protector (16,18,19), which back protector comprises *inter alia* rigid plates (16,19). The protector is arranged in an inner central pocket (15) at the back of the gilet. An electronic unit is associated with the (outer) jacket and connected by a connecting circuit to the gas sources and their solenoid valves arranged in the gilet (see also page 4, line 32 to page 5, line 25 of D1).

2.2 The Board agrees with the respondent that the following features of claim 1 are not disclosed in D1:

- (i) a rigid plate shaped as a "hump", and
- (ii) said rigid plate shaped as a "hump" houses a source of pressurized gas and an electronic unit for activating the inflatable element.

2.3 Based on these distinguishing features i) and ii), an objective technical problem could be seen in reducing the risk that the source of pressurized gas and the electronic unit can be damaged in case of an accident.

2.4 A solution to that problem is known from paragraph 37 of D6. D6 discloses a garment, in particular a motorcycle racing suit, equipped with an inflatable protective device. An aerodynamic hump is inserted in a pocket at the upper back region. Paragraph 37 explicitly mentions housing the gas source, called inflation means in D6, under the hump. As can be seen from Figure 4 of the D6 an electronic controller 9, used to activate the gas source for the inflation of the protective device, is arranged at the same location as the gas source 10 relative to the hump 12. The Board considers that a skilled person would have understood that both components are to be placed under the hump

and would both, as a consequence, be protected from damage during impact. The Board considers that it would thus have been obvious for the skilled person to apply the teaching of D6 in a gilet or under-garment known from D1 to arrive at the subject-matter of claim 1 without involving an inventive step.

- 2.5 The respondent considered a rigid hump-shaped structure in place of the back protector bulky and cumbersome; the opposition division considered it a non-attractive design requiring a corresponding adaptation in the garment, which would be contrary to an obvious implementation in a gilet known from D1.

As also stated in its preliminary opinion, the Board finds these considerations unconvincing since they are directed merely to the appearance of the undergarment or to the necessity of corresponding modifications of the outer garment (which is not even a feature of claim 1). Such merely aesthetic considerations would not dissuade a skilled person from applying the features from D6 to the under-garment of D1 to solve the stated objective technical problem. The respondent did not submit any further comment on this aspect so that the Board has no reason to change its opinion which is hereby confirmed.

The respondent did not provide any other technical reason why an aerodynamic hump foreseen for an external suit as known from D6 would be so different from a back protector as known from D1 that the skilled person would not have any reasonable motivation to consider the provision of the hump shaped structure in D1 in order to solve the objective technical problem.

2.6 As had been further argued by the respondent, D1 discloses having the control unit located on the outer garment in order to have it accessible to the field of vision of the person wearing the garment, thus allegedly leading away from the claimed solution. However, the Board follows the argument submitted by the appellant during the oral proceedings: D1 discloses on page 7, lines 25/26 and 32/33, that the electronic unit arranged in the outer jacket is connected by cables or fiberoptics to the solenoid valves of the gas sources arranged in the gilet. If the skilled person intends to maintain the display on the outer jacket, so that it remains visible, the necessary further modification of separating the electronic controller and its display comes within the customary practice of a skilled person, not least since a cabled connection between components in the gilet and components in the outer jacket is already explicitly foreseen in D1.

Main request - claim 11 - inventive step

3. The subject-matter of claim 11 does also not involve an inventive step (Article 56 EPC).

3.1 D1 can also be considered to represent an appropriate starting point for the assessment of inventive step of claim 11.

3.2 It is common ground between the parties that the method disclosed in D1 does not disclose the final method step defined by the last feature of claim 11, i.e. "said under-garment (D1: gilet 6) is connected to said garment (D1: jacket 3) by connecting first said pocket (i.e. the pocket receiving the back protector according to D1, see page 7, line 17)".

From the above item 2.2, it is clear that a rigid plate 'shaped as a "hump"' represents a further distinction between the subject-matter of claim 11 and the closest prior art method of D1.

- 3.3 As also indicated in the Board's written preliminary opinion, it is not apparent that the two distinguishing features contribute to the solution of a single technical problem. They rather solve partial technical problems, thus requiring the formulation of two objective technical partial problems.
- 3.4 In reply to the Board's preliminary opinion, raising the above question in regard to the partial objective problems to be solved, the respondent did not submit any further comment.
- 3.5 Regarding the distinguishing feature 'rigid plate shaped as a "hump"', this shape of the rigid plate as such does not serve any apparent technical purpose, as argued by the appellant during the oral proceedings before the Board. Indeed, in contrast to claim 1, the independent method claim 11 does not define, for example, that the rigid plate shaped as a "hump" should house other components.

This distinguishing feature can therefore only be seen to represent a mere alternative shape to the shape of the rigid plates (19) of the back protector of the gilet according to D1. Rigid plates shaped as a "hump" were generally known, D6 discloses an example. Absent any technical effect achieved over the whole scope of the claim, this feature is merely arbitrary and does not involve an inventive step.

3.6 Regarding the second distinguishing feature, i.e. the connection of the under-garment (gilet 6 in D1) to the outer garment (jacket 3 in D1) first at the pocket (15 in D1) which receives said rigid plate shaped as a "hump", it is noted that the gilet according to D1 is joined to the inner wall of the outer jacket by zippers (see the paragraph bridging pages 4 and 5). Details regarding the position, extension etc., of the zippers are not disclosed.

The extension or shape of the connection between under-garment and garment is also not defined in claim 11. The claim only implies that some connection must be possible at the pocket area. However, the connection could be confined to a small area or to a short extension. The potential advantages disclosed in paragraph 29 of the patent in suit (upon which the appellant had originally relied in its written submissions) are not reflected by corresponding features in claim 11. For example, it is not defined that the connection extends around the entire pocket or that the rigid plate shaped as a "hump" would be relatively heavy relative to the under-garment, since no materials are mentioned in claim 11. Moreover, claim 11 covers also embodiments in which there could be only a single connection means between the under-garment and the garment. As also acknowledged by the respondent in its reply to the appeal grounds, the outer garment could be worn over the under-garment without any connection at all. But even under the assumption that the under-garment and the garment were indeed equipped with several corresponding connection means at different locations, no particular technical effect from a connection established first at the pocket is derivable.

The Board therefore cannot see how the entire under-garment could be protected from undesired movement with respect to the outer jacket, or how the connection could be more correct than the connection in D1 (see also point 4.3 of the Board's communication under Article 15(1) RPBA 2020 in this regard), nor that the process of connection could be improved.

The Board therefore concludes that this distinguishing feature only provides an alternative way of connecting the under-garment and the outer garment to that in D1, as argued by the appellant during the oral proceedings before the Board.

Absent any particular or unexpected technical effect which would be achieved over the whole scope of the claim, also this feature constitutes simply an arbitrary choice of connecting the two parts at some location, and consequently does not result in the subject-matter of claim 11 involving an inventive step.

Auxiliary requests 1 to 6

4. Auxiliary requests 1 to 6 were filed after the respondent's reply to the grounds of appeal and may be admitted only at the discretion of the Board pursuant to Article 13(1) RPBA 2020.
5. In claim 1 of auxiliary requests 1, 2 and 4 the term "houses" was replaced by the expression "is associated with", which would broaden the scope of the respective claim 1 and therefore would put the sole appellant-opponent in a worse situation than if it had not appealed.

5.1 The amendment was submitted in order to reply to the appellant's clarity objection against the term "houses". The respondent considered that this amendment should be allowable in view of the conditions set out in the decision of the Enlarged Board of Appeal G 1/99 (OJ 2001, 381), regarding exceptions to the prohibition of *reformatio in peius*.

5.2 Although the Board does not share the appellant's view that applicability of the principles developed in G 1/99 would only be limited to cases in which an objection was put forward for the first time during the appeal proceedings, the respondent's view is equally not convincing. In its preliminary opinion, the Board opined in regard to the conclusions reached by the Enlarged Board of Appeal in G 1/99 that such an amendment could only be allowed if it was necessary and appropriate, i.e. (in this case) if the patent would otherwise have to be revoked for lack of clarity of the term "houses", and that in view of the Board's preliminary opinion, the amendment would not appear necessary to avoid revocation of the patent.

The respondent did not reply to the preliminary opinion.

During the oral proceedings, the Board confirmed that claim 1 met the clarity requirement (see above item 1.) of Article 84 EPC. Consequently the amendment to claim 1 of auxiliary requests 1, 2 and 4 is neither necessary nor appropriate and its introduction would thus be contrary to the prohibition of *reformatio in peius* for the reasons stated above in point 5.

5.3 The Board consequently exercised its discretion pursuant to Article 13(1) RPBA 2020 not to admit

auxiliary requests 1, 2 and 4 into the proceedings.

6. Irrespective of the question of admittance of auxiliary requests 3 and 5 into the proceedings, claim 1 of auxiliary request 3 is identical to claim 1 of the main request and claim 1 of auxiliary request 5 is identical to claim 11 of the main request. The subject-matter of the respective independent claim 1 of each request thus lacks an inventive step for the same reasons as set out above for the main request (see items 2. and 3.).
7. Irrespective of the question of admittance of auxiliary request 6 into the proceedings, the subject-matter of its claim 1 does not involve an inventive step (Article 56 EPC).

No particular technical effect can be acknowledged as being achieved by the (temporal) sequence of connecting actions defined by the added feature "wherein after connecting the pocket, sleeves of said under-garment are connected to corresponding sleeves of the garment" in combination with the other features of claim 1. The claim does not define any details of the additional connections, for example with respect to their location, extension etc. The feature is merely a question of routine design for the skilled person faced with the task of providing appropriate connection between an under-garment and an outer garment, as also argued by the appellant.

8. Absent any set of claims complying with the requirements of the EPC, the patent has to be revoked (Article 101(3)(b) EPC).

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