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**Datasheet for the decision
of 8 December 2022**

Case Number: T 2907/18 - 3.2.06

Application Number: 10828107.2

Publication Number: 2496199

IPC: A61F13/496, A61F13/15,
A61F13/49

Language of the proceedings: EN

Title of invention:
DISPOSABLE WEARING ARTICLE

Patent Proprietor:
Unicharm Corporation

Opponent:
Essity Hygiene and Health Aktiebolag

Headword:

Relevant legal provisions:
EPC Art. 54, 84, 100(a), 111(1)
RPBA 2020 Art. 13(1), 11

Keyword:

Novelty - main request (no)

Remittal - (no)

Claims - clarity - auxiliary requests (no)

Amendment to appeal case - amendment gives rise to new objections (yes)

Decisions cited:

Catchword:



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Case Number: T 2907/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 8 December 2022

Appellant: Essity Hygiene and Health Aktiebolag
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 October 2018
rejecting the opposition filed against European
patent No. 2496199 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
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. 2 496 199. It requested that the decision under appeal be set aside and the patent be revoked. In addition to its objections against the patent as granted, the appellant also raised objections against the proprietor's auxiliary requests that had been filed in the opposition proceedings.
- II. In its letter of reply, the respondent (patent proprietor) requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the patent be maintained according to one of auxiliary requests 1 to 13. Except for auxiliary request 1, which corresponded to auxiliary request 2 filed in the opposition proceedings, all these auxiliary requests were submitted for the first time in the appeal proceedings. The respondent further requested that the case be remitted to the opposition division for further prosecution should its main request be found not allowable.
- III. The following document is relevant to the present decision:
- 01 EP-A-2 186 495
- IV. With letter of 23 September 2019 the appellant raised objections to the allowability of the auxiliary requests *inter alia* under Articles 84 and 123(2) EPC.

V. The Board issued a summons to oral proceedings including a communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 as granted, if novel, would lack an inventive step. It further indicated that no reason was apparent to exclude the auxiliary requests from the proceedings but that claim 1 of each of the auxiliary requests anyway appeared not to be clear (Article 84 EPC) and to contravene Article 123(2) EPC.

VI. With letter of 25 October 2022 the respondent filed additional auxiliary requests 1A to 13A.

VII. Oral proceedings were held before the Board on 8 December 2022, at the end of which the parties' requests were as follows:

The appellant requested that the decision under appeal be set aside and the European patent be revoked, and that the case not be remitted to the Opposition Division.

The respondent requested:

- that the appeal be dismissed (main request); and
- that the case be remitted to the Opposition Division if the patent as granted was found not to be allowable; and only as an auxiliary measure was it requested that the case be remitted to the opposition division for further prosecution of the auxiliary requests filed in the appeal proceedings or
- that the patent be maintained in amended form based on one of the auxiliary requests in the following order:
auxiliary requests 1, 1A, 2, 2A, 3, 3A, 4, 4A, 5, 5A, 6, 6A, 7, 7A, 8, 8A, 9, 9A, 10, 10A, 11, 11A, 12, 12A, 13, 13A,

whereby auxiliary requests 1 to 13 were filed with the reply to the appeal and auxiliary requests 1A to 13A were filed with letter dated 25 October 2022.

VIII. Claim 1 of the main request reads as follows (with paragraph annotation P1 to P10 included, as used by the opposition division in its decision):

P1: A disposable wearing article

P2: having a longitudinal direction Y, a transverse direction X orthogonal to said longitudinal direction, a skin-facing side, a non-skin facing side, a front waist region (13), a rear waist region (14), a crotch region (15) extending between said front and rear waist regions,

P3: and comprising elastic waist panels (11) defining said front and rear waist regions (13, 14), and

P4: a liquid-absorbent structure (12) attached to an inner surface of said elastic waist panels (11) to define said crotch region, wherein

P5: said rear waist region (14) comprises an inner sheet lying on said skin-facing side, an outer sheet lying on said non-skin-facing side, a rear waist main section (18) and a buttocks-covering section (19) lying below said rear waist main section (18),

P6: said buttocks-covering section (19) includes a plurality of buttocks-covering section elastic elements (32) arranged thereon to extend in said transverse direction at constant intervals in said longitudinal direction, and

P7: in said buttocks-covering section (19), said inner sheet and said outer sheet are bonded to each other by adhesive applied to peripheral surfaces of respective said buttocks-covering section elastic elements (32), and wherein

P8: said elastic waist panels (11) comprise a front

waist panel (16) defining said front waist region (13) and a rear waist panel (17) defining said rear waist region (14);

P9: said liquid-absorbent structure (12) is fixed to respective inner surfaces of said front waist panel (16) and said rear waist panel (17) by adhesive applied to a surface of said liquid-absorbent structure opposed to said inner surfaces, and

P10: of inner ends (17a) of said front and rear panels, at least a region of said liquid absorbent structure facing said inner end (17a) of said rear waist panel (17) is free from being coated with said adhesive.

Claim 1 of auxiliary request 1 reads as follows:

"A disposable diaper having a longitudinal direction (Y), a transverse direction (X) orthogonal to said longitudinal direction, a skin-facing side, a non-skin-facing side, a front waist region (13), a rear waist region (14), a crotch region (15) extending between said front and rear waist regions, and comprising elastic waist panels (11) defining said front and rear waist regions (13,14) and

a liquid-absorbent structure (12) attached to an inner surface of said elastic waist panels (11) to define said crotch region, wherein:

said rear waist region (14) comprises an inner sheet lying on said skin-facing side, an outer sheet lying on said non-skin-facing side, a rear waist main section (18) and a buttocks-covering section (19) lying below said rear waist main section (18);

said buttocks-covering section (19) includes a plurality of buttocks-covering section elastic elements (32) arranged thereon to extend in said transverse direction at constant intervals in said longitudinal direction, and

in said buttocks-covering section (19), said inner sheet and said outer sheet are bonded to each other by adhesive applied to peripheral surfaces of respective said buttocks-covering section elastic elements (32), and wherein:

said elastic waist panels (11) comprise a front waist panel (16) defining said front waist region (13) and a rear waist panel (17) defining said rear waist region (14);

wherein side edges (16c, 16d) of the front waist panel (16) are put flat together with and joined to side edges (17c, 17d) of the rear waist main section (18) at seam spots arranged intermittently in the longitudinal direction (Y);

wherein the rear waist panel (17) comprises a rear waist main section (18) adapted to face the wearer's rear waist and a buttocks-covering section (19) extending from the rear waist main section (18) toward the crotch region (15) and adapted to face the wearer's buttocks;

said liquid-absorbent structure (12) is fixed to respective inner surfaces of said front waist panel (16) and said rear waist panel (17) by adhesive applied to a surface of said liquid-absorbent structure opposed to said inner surfaces; and,

of inner ends (17a) of said front and rear panels, at least a region of said liquid-absorbent structure facing said inner end (17a) of said rear waist panel (17) is free from being coated with said adhesive."

Claim 1 of auxiliary request 1A reads as follows:

"A disposable diaper having a longitudinal direction (Y), a transverse direction (X) orthogonal to said longitudinal direction, a skin-facing side, a non-skin-

facing side, a front waist region (13), a rear waist region (14), a crotch region (15) extending between said front and rear waist regions, and comprising elastic waist panels (11) defining said front and rear waist regions (13,14) and a liquid-absorbent structure (12) attached to an inner surface of said elastic waist panels (11) to define said crotch region, wherein:

said rear waist region (14) comprises an inner sheet lying on said skin-facing side, an outer sheet lying on said non-skin-facing side, a rear waist main section (18) and a buttocks-covering section (19) lying below said rear waist main section (18);

said buttocks-covering section (19) includes a plurality of buttocks-covering section elastic elements (32) arranged thereon to extend in said transverse direction at constant intervals in said longitudinal direction; and

in said buttocks-covering section (19), said inner sheet and said outer sheet are bonded to each other by adhesive applied to peripheral surfaces of respective said buttocks-covering section elastic elements (32), and wherein:

said elastic waist panels (11) comprise a front waist panel (16) defining said front waist region (13) and a rear waist panel (17) defining said rear waist region (14);

wherein side edges (16c, 16d) of the front waist panel (16) are put flat together with and joined to side edges (17c, 17d) of the rear waist main section (18) at seam spots arranged intermittently in the longitudinal direction (Y) whereupon a waist-opening (22) and a pair of leg-opening (23) are formed;

wherein the rear waist panel (17) has a generally rectangular shape which is relatively long in the

transverse direction (X) and contoured by an inner end (17a) extending in the transverse direction (X) to intersect the liquid absorbent structure (12), an outer end (17b) spaced from and opposed to the inner end (17a) in the longitudinal direction (Y) and extending in the transverse direction (X) and side edges (17c, 17d) extending between the inner and outer ends (17a, 17b) in the longitudinal direction (Y) and spaced from and opposed to each other in the transverse direction (X),

wherein the rear waist panel (17) comprises said rear waist main section (18) adapted to face the wearer's rear waist and said buttocks-covering section (19) extending from the rear waist main section (18) toward the crotch region (15) and adapted to face the wearer's buttocks;

said liquid-absorbent structure (12) is fixed to respective inner surfaces of said front waist panel (16) and said rear waist panel (17) by adhesive applied to a surface of said liquid-absorbent structure opposed to said inner surfaces; and,

of inner ends (17a) of said front and rear panels, at least a region of said liquid-absorbent structure facing said inner end (17a) of said rear waist panel (17) is free from being coated with said adhesive."

A separate recitation of claim 1 of each of auxiliary requests 2 to 13 and 2A to 13A is unnecessary for the present decision taken.

IX. The appellant's arguments relevant to the present decision may be summarised as follows:

Main request

The subject-matter of claim 1 lacked novelty as O1 disclosed all the features of granted claim 1. Page 9,

lines 38 to 39 of O1 unambiguously disclosed the rear waist region covering at least part of the buttocks, such that feature P5 was known. As regards feature P7, page 18, lines 20 to 21 of O1 disclosed the waist elastic member being bonded to the inner and outer sheets by adhesive. Since feature P7 should not be interpreted as a product defined by its method of manufacture, this was known from this portion of O1. Feature P10 was also known from O1 since Fig. 3 and Fig. 17 disclosed the same embodiment of the invention, only concentrating on separate aspects of that particular embodiment.

Remittal

There was no justification for remitting the case without first examining the objections to the auxiliary requests filed in the appeal proceedings under Articles 84 and 123 EPC. Procedural economy demanded at least such an examination.

Auxiliary requests 1 to 13

Claim 1 of each auxiliary request lacked inter alia clarity due to a dual recitation of both 'a rear waist main section' and 'a buttocks-covering section'. The claim not only failed to make grammatical sense but it was unclear whether the dual recitation of the same wording related to the same feature or indeed a different, further feature.

Auxiliary requests 1A to 13A

Regarding auxiliary request 1A, the introduced expression 'relatively long' in relation to the transverse direction of the rectangular shape of the rear waist panel was unclear. It was not defined in claim 1 relatively to what the comparison was being made, such that the skilled person would be unable to

clearly ascertain that for which protection was sought. This defect applied to each of auxiliary requests 2A to 13A as well.

- X. The respondent's arguments relevant to the present decision may be summarised as follows:

Main request

The subject-matter of claim 1 was novel. Features P5, P7 and P10 were not known from O1.

As regards feature P5, in O1 the rear waist region did not cover the wearer's buttocks since the rear waist region extended only between the connected seams in the circumferential direction, and this waist portion of the diaper did not have a buttocks-covering element or function. In the technical field of absorbent articles, solely the area extending downwardly from the side seams would be considered to be a buttocks-covering section, which was notably absent from O1. As could also be seen in Fig. 10, it would be impossible for the rear waist region to cover the lower portion of the wearer's buttocks. Feature P5 was thus not known from O1.

Regarding feature P7, this was to be understood as a product-by-process feature as the opposition division had concluded, the resultant physical features in the article being that the inner and outer sheets were bonded using adhesive on the elastic elements, as depicted in Fig. 9 of the patent. The elastic elements provided the means of supplying adhesive, not for connecting the elastic elements and sheets. Since P7 was formulated as a 'product-by-process' feature, this limited the product to one in which the adhesive was locally constrained to the vicinity of the elastic elements, as illustrated in Fig. 9. No such limitation was known from O1, these elastic members 18 being

bonded to at least one of the inner and outer sheets 14, 15 using adhesive (see page 8, lines 25 to 32). Feature P7 was thus not known from O1. As regards feature P10, this was disclosed in O1 solely in the third aspect of the invention (see Fig. 17) and thus in a separate embodiment from the remaining features of claim 1 known from the first aspect. Since, to deprive the subject-matter of a claim of novelty, the claimed features must be directly and unambiguously disclosed in a single embodiment of a prior art document, this was not achieved by O1. That the first and third aspects were distinct was clear due to these using different reference signs. Additionally, the introductory part of the description of O1 (see [0012] to [0032]) indicated a plurality of different embodiments which further supported the view that the first and third aspects were indeed different embodiments. Feature P10 was thus also not known from O1.

Remittal

If the main request was not allowable, the case should be remitted without consideration by the Board of the admissibility of the auxiliary requests. With the Board having turned-over the opposition division's finding of P7 being a product by process feature, special circumstances prevailed for a remittal. This would ensure consideration of the auxiliary requests by two instances.

Auxiliary requests 1 to 13

Claim 1 of auxiliary request 1 was clear. The failure to use either 'the' or 'said' when further defining the rear waist main section was not such a severe deficiency. The skilled person would realise that the same feature was being referred to, not least due to

common reference signs being used.

The same considerations applied to the further auxiliary requests 2 to 13.

Auxiliary requests 1A to 13A

Claim 1 of auxiliary request 1A was clear. The expression 'relatively long' was used with reference to the rectangular panel and thus implied that the longitudinal dimension of the panel was greater than its transverse dimension. Reading the added feature as a whole removed any suggestion of clarity being lacking.

Reasons for the Decision

1. Main request

Novelty with respect to O1

1.1 The Board finds, and both parties accepted, that O1 discloses the following features of claim 1:

A disposable wearing article (feature P1; see paragraph [0001])

having a longitudinal direction (Y), a transverse direction (X) orthogonal to said longitudinal direction, a skin-facing side, a non-skin facing side, a front waist region (1), a rear waist region (2), a crotch region (3) extending between said front and rear waist regions (feature P2; see e.g. Fig. 3), and comprising elastic waist panels (1, 2) defining said front and rear waist regions (1, 2; feature P3; see paragraph [0044]), and a liquid-absorbent structure (21, 22, 23; see paragraph [0047]) attached to an inner surface of said elastic

waist panels (1, 2) to define said crotch region (3; feature P4; see paragraph [0048], wherein said rear waist region (1) comprises an inner sheet (16) lying on said skin-facing side (paragraph [0041], first sentence), an outer sheet (17) lying on said non-skin-facing side, and a rear waist main section (Fig. 3, upper portion of rear waist region 2; first part of feature P5), a buttocks-covering section (7) includes a plurality of buttocks-covering section elastic elements (18) arranged thereon to extend in said transverse direction at constant intervals in said longitudinal direction (see Fig. 3; feature P6), and wherein said elastic waist panels (1, 2) comprise a front waist panel (1) defining said front waist region (1) and a rear waist panel (2) defining said rear waist region (2; feature P8); said liquid-absorbent structure (5) is fixed to respective inner surfaces (14, 16) of said front waist panel (1) and said rear waist panel (2) by adhesive applied to a surface of said liquid-absorbent structure opposed to said inner surfaces (see second and third sentences of paragraph [0048]; feature P9).

1.2 The Board finds that the following features of claim 1 are also known from O1:

P5 (second part) - the rear waist region comprises a buttocks-covering section;

P7 - said buttocks-covering section, said inner sheet and said outer sheet are bonded to each other by adhesive applied to peripheral surfaces of respective said buttocks-covering section elastic elements; and

P10 - at least a region of said liquid absorbent structure facing said inner end of said rear waist

panel is free from being coated with said adhesive.

- 1.3 Regarding feature P5, lines 38 to 39 on page 9 of O1 disclose 'the buttock to be covered with the rear waist region 2', such that at least a portion of the rear waist region is disclosed as covering the buttocks. Feature P5 of claim 1 notably fails to define the entire buttocks as being covered by the rear waist region, a partial covering of the buttocks anticipating the claimed feature.
 - 1.3.1 The respondent's contention that the rear waist region did not cover the wearer's buttocks since the rear waist region extended only between the connected seams in the circumferential direction, and this waist portion of the diaper did not have a buttocks-covering element or function, is not accepted. The above reference to page 9 of O1 unambiguously discloses 'the buttock to be covered with the rear waist region 2' such that, in addition to a function as the waist enveloping region of the diaper, the rear waist region also covers at least a portion of the buttocks.
 - 1.3.2 The respondent's argument that the technical field of absorbent articles solely considered the area extending downwardly from the side seams to be a buttocks-covering section is mere conjecture. It is accepted that such a downwardly extending area may indeed usually have a buttocks covering function, yet that does not prohibit the waist portion as additionally covering a portion of the buttocks, which is indeed disclosed to be the case in O1.
 - 1.3.3 The respondent's reference to Fig. 10 of O1, indicating that it would be impossible for the rear waist region to cover the lower portion of the wearer's buttocks is

irrelevant to feature P5. This does not require the lower portion, and hence the entirety, of the wearer's buttocks to be covered by the rear waist region, rather solely a 'buttocks covering section' is defined. This is unambiguously disclosed on page 9 of O1 as indicated above.

1.4 As regards feature P7, this is also known from O1, (see page 8, lines 30 to 32 in relation to Fig. 1), particularly the option of the elastic members being bonded to both the inner and outer sheets, as well as from page 18, lines 20 to 21 in relation to Fig. 17. Feature P7 notably does not exclude the adhesive extending beyond the immediate vicinity of the elastic elements such that the general application of adhesive to at least one of the inner and outer sheets 14, 15 of O1 anticipates feature P7.

1.4.1 The respondent's argument that feature P7 was to be seen as a product-by-process feature is not accepted. A product-by-process feature is normally seen as defining a product in terms of a process by which it can be manufactured, which is however not how feature P7 is drafted. The definition of the adhesive being 'applied' to peripheral surfaces of the elastic elements does not define a process of manufacture, rather it defines, in the product itself, where the adhesive is applied in order that the inner and outer sheets are bonded. Thus, a prior art product which has an inner and outer sheet sandwiching elastic elements on which adhesive is present anticipates the claimed feature. O1 discloses just such a product.

1.4.2 The respondent's reference to Fig. 9 of the patent in order to interpret feature P7 is indeed one possible embodiment of this feature, however this is not

limiting for the scope of the claim, which must be given its broadest, technically reasonable interpretation. The extensive application of adhesive over one or both of the inner and outer sheets in order to bond the elastic members, as disclosed on page 18, lines 20 to 21 of O1, also results in adhesive having been applied to peripheral surfaces of the elastic elements in order to bond the inner and outer sheets, thus anticipating feature P7 of claim 1. Contrary to the respondent's argument, this feature fails to define any localised restriction of the adhesive to solely the elastic elements.

1.4.3 The respondent's further contention that feature P7 was to be understood as the elastic elements providing the means of supplying adhesive, as depicted in Fig. 9, but not for connecting the elastic elements and sheets, is not accepted. As stated above, Fig. 9 is not limiting on the breadth of claim 1. Even if it were to be understood to clearly depict the inner and outer sheets being bonded directly to each other by the adhesive contacting the elastic elements, this is not the specificity with which feature P7 is defined. Rather it is far broader, and covers the extensive, general application of adhesive in order to bond the elastic members and inner/outer sheets, as disclosed in O1.

1.5 As for feature P10, this is also known from O1. The first and third aspects of the invention, disclosed in paragraphs [0039] to [0064] and [0108] to [0128] respectively, are both part of the same (i.e. the first) embodiment of the invention of O1. Consequently, feature P10, disclosed in the first two lines of paragraph [0119] in relation to Fig. 17 and the third aspect of the invention, is part of the same embodiment as that of the first aspect of the invention, which

discloses features P1 to P9.

- 1.5.1 The respondent argued that, in order to deprive the subject-matter of a claim of novelty, the claimed features must be directly and unambiguously disclosed together in combination (e.g. in a single embodiment) of a prior art document. The first and third aspects of the invention disclosed in O1 are found however to be one and the same embodiment. Both aspects are explicitly disclosed as relating to the first embodiment. This can be seen for example in paragraph [0037] of O1 which states 'Fig. 3 is a plan view of the diaper shown in Fig. 1' and 'Fig. 17 is a plan view of the diaper shown in Fig. 1'. It is thus evident that the same diaper is disclosed in both Fig. 3 and Fig. 17, merely different details (aspects) of the same embodiment being described. The different reference signs used in the two figures for the same physical features of the diaper do not question this finding, the overall disclosure in O1 of the first and third aspects clearly relating to the same first embodiment.

- 1.5.2 The respondent's reference to the introductory part of the description of O1 (see paragraphs [0012] to [0032]) as indicating a plurality of different embodiments being disclosed in the document is not accepted as negating the first and third aspects relating to a single embodiment or giving rise to any ambiguity. The detailed description, beginning at paragraph [0039] explicitly states 'Figs. 1 through 3 illustrates a disposable diaper as a first embodiment of the absorbent article according to the present invention' (sic) and paragraph [0108] similarly states 'Figs. 16 through 20 illustrate a first embodiment of the absorbent article according to the present invention'. This explicit indication that Figures 3 and

17 belong to the same, first embodiment of the invention is seen to be decisive for the question in hand. When asked to identify any feature in either 'aspect' which was not entirely congruous between the aspects, the respondent was not able to identify any such feature. The Board hence concludes that feature P10 is known from the first embodiment of O1.

1.6 Features P5, P7 and P10 are thus also known from the same embodiment of O1, such that the subject-matter of claim 1 lacks novelty over O1.

1.7 Therefore the ground for opposition under Article 100(a) EPC in conjunction with Article 54 EPC prejudices maintenance of the patent as granted. The main request is consequently not allowable.

2. *Remittal, Article 111(1) EPC, Article 11 RPBA 2020*

2.1 The respondent requested that the case be remitted to the opposition division without consideration by the Board of the admissibility or allowability of any of the auxiliary requests. In the respondent's opinion this was justified due to the Board having overturned the opposition division's finding that feature P7 of claim 1 was to be understood as a product-by-process feature.

2.2 According to Article 11 RPBA 2020 a Board shall only remit the case if special reasons apply. In addition remittal of a case to the opposition division for further prosecution under Article 111(1) EPC, if at all appropriate, is usually done on the basis of a specific request, the claims of which have at least been found to meet the requirements of Article 84 and 123 EPC. This not only serves procedural efficiency, but also

ensures that the Board's order for further prosecution is based on specific requests (which however does not exclude that other requests might be admitted during the subsequent opposition proceedings).

- 2.3 The respondent's argument at oral proceedings that exceptional circumstances prevailed in the present case, which made a departure from the usual procedure governing remittal appropriate, is not accepted. The different interpretation was not raised for the first time by the Board, but rather also by the appellant who was confronted with the product-by-process interpretation of the opposition division for the first time at oral proceedings before the opposition division. The consequence of the Board finding that feature P7 was clearly not a product-by-process feature is merely that claim 1 is interpreted to have a broader scope than that seen by the opposition division. As found in point 1.4.2 above, feature P7 does not exclude an extensive application of adhesive over one or both of the inner and outer sheets in order to bond the elastic members, this having been excluded by the opposition division's interpretation of feature P7 being a product-by-process feature. Such a broader interpretation of a feature, however, is not in general seen as an exceptional circumstance justifying a departure from established practice of remitting as case only on the basis of a request found to meet at least Articles 84 and 123 EPC. Indeed, parties to appeal proceedings regularly disagree on the scope of various features in a claim when considering novelty or inventive step.

- 2.4 The respondent's further argument that the Board's conclusion represented a complete reversal of the reasons on which the decision was based and that the

three Examiners in the opposition division were technical specialists in that particular technical area such that these should be tasked with the new situation based on the Board's finding, is also not accepted as a reason for remittal. The opponent had consistently argued during opposition proceedings that feature P7 was known from O1 and it was solely the opposition division which had concluded the feature should be understood as a product-by-process feature. The opponent had continued to argue against such construction on appeal. Again, the fact that a Board (and in this case one which regularly deals with such subject-matter) should disagree with the conclusions made by an opposition division is not a rare case. Also, the issue in question is not related to a particular technical consideration but is related to interpretation of claim language, where the opposition division erred. The resulting difference did in itself not require any new technical considerations to be made apart from the arguments already made in writing by the appellant. The respondent has furthermore had ample opportunity to put its case to the Board and the Board has not prevented the appellant from filing requests to deal with the opponent's continued attack on the same basis as made during opposition proceedings regarding feature P7. That the Board ultimately concluded that the appellant's claim construction of P7 was correct can also not be considered a special circumstance justifying remittal.

- 2.5 It is additionally noted that the Board's finding of feature P7 not being a product-by-process feature is unrelated to the clarity issues under consideration in the auxiliary requests on file. This therefore also presents no special reasons according to Article 11 RPBA 2020 preventing the Board from assessing at least

the requirements of Articles 84 and 123(2) EPC in respect of the admittance of the auxiliary requests. Consequently the Board decided not to remit the case to the opposition division at this stage of the proceedings. Instead, the Board found it appropriate to consider first whether the clarity requirement of Article 84 EPC was met.

3. *Auxiliary request 1*

- 3.1 The Board sees no reason to exclude auxiliary request 1 from the proceedings under Article 12(4) RPBA 2007 as it corresponds to auxiliary request 2 filed during the opposition proceedings.

Article 84 EPC

- 3.2 Claim 1 lacks clarity. The indefinite article 'a' is used in two separate recitations of each of 'a rear main waist section' and 'a buttocks covering section'. It is thus unclear whether these two recitations of each relate to the same feature or an entirely separate feature.
- 3.3 The respondent's contention of failure to use either 'the' or 'said' when further defining the rear waist main section not being such a severe deficiency is not accepted. Whilst it may be a simple objection to overcome, that is not the measure of the severity of the lack of clarity. The individual recitation of 'a rear waist main section' twice in claim 1 results in it being unclear to the skilled reader whether a single or two rear waist main sections are defined. The same conclusion applies to the double recitation of 'a buttocks covering section'.

3.4 The respondent's argument that the skilled person would realise that the same feature was being referred to, not least due to common reference signs being used is also not accepted. Reference signs in claims are non-limiting and so cannot be used to assist in the interpretation of a claim. In addition, the second recitation of the 'rear waist main section' in claim 1 defined 'a rear waist main section adapted to face the wearer's rear waist'. With the first recitation of the rear waist main section not having such a limitation, the skilled person could reasonably interpret each rear waist main section in the claim as being different features.

3.5 Claim 1 thus lacks clarity contrary to Article 84 EPC. Auxiliary request 1 is thus not allowable.

4. *Auxiliary request 1A*

Admittance

4.1 According to Article 13(1) RPBA 2020, any amendment to a party's appeal case after it has filed its grounds of appeal or reply is subject to the party's justification for its amendment and may be admitted only at the discretion of the Board. Such discretion shall be exercised in view of, in the case of an amendment to a patent, any such amendment not giving rise to new objections.

4.2 Auxiliary request 1A was an amendment to the respondent's appeal case, the claim having been amended in regard to several aspects thereof. Having been filed with letter dated 25 October 2022 (i.e. after filing of its complete case in reply to the appeal), Article

13(1) RPBA 2020 applies.

- 4.3 Claim 1 of auxiliary request 1A introduced the wording 'wherein the rear waist panel (17) has a generally rectangular shape which is relatively long in the transverse direction (X)'. The term 'relatively long' lacks clarity as it is unclear how this is to be interpreted. No indication is provided as to any relationship to another feature of which the transverse dimension is to be 'relatively long'. This could for example be relative to the longitudinal dimension of the rear waist panel or even to the transverse dimension of the front waist panel. This imprecise wording thus results in claim 1 lacking clarity.
- 4.4 The respondent's contention that, in view of the dimension being defined for a rectangular panel, the intention of the expression 'relatively long' was clear is not accepted. The respondent provided one interpretation of the claim (i.e. that the longer side of the rectangle was being defined), but this is not the sole reasonable interpretation. Indeed, as indicated in point 4.3 above, a reasonable interpretation is also that the dimension is 'relatively long' when compared to the front waist panel. The intended scope of claim 1 is thus ambiguous. It is further noted that even the description does not help to resolve this ambiguity with paragraph [0012] of the application as filed reflecting the 'relatively long' wording, paragraph [0011], however, simply stating the dimension to be 'long' in the transverse direction.
- 4.5 The respondent's argument that reading the added feature as a whole removed any suggestion of clarity being lacking is also not accepted. The expression

'relatively long' is *per se* unclear as regards what limitation is intended, the different interpretations of "in relation to what" the comparison is intended, further exacerbating the problem.

4.6 Claim 1 thus lacks clarity contrary to Article 84 EPC. Consequently the Board exercised its discretion under Article 13(1) RPBA 2020 not to admit auxiliary request 1A into the proceedings.

5. *Auxiliary requests 2 to 13*

To the Board's preliminary opinion at oral proceedings that the respective claim 1 of auxiliary requests 2 to 13 seemingly suffered from the same lack of clarity as claim 1 of auxiliary request 1 due to the presence of the same wording, the respondent offered no counter-argument. The Board thus finds auxiliary requests 2 to 13 to also not be allowable due to a lack of clarity (Article 84 EPC).

6. *Auxiliary requests 2A to 13A*

To the Board's preliminary opinion at oral proceedings that claim 1 of each of auxiliary requests 2A to 13A lacked clarity for the same reasons as claim 1 of auxiliary request 1A, the respondent also provided no counter-argument. The Board thus exercised its discretion under Article 13(1) RPBA 2020 also not to admit auxiliary requests 2A to 13A.

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:



L. Gabor

M. Harrison

Decision electronically authenticated