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**Datasheet for the decision  
of 14 June 2023**

**Case Number:** T 0001/21 - 3.2.05

**Application Number:** 11752245.8

**Publication Number:** 2613927

**IPC:** B29C44/22, A47C27/00,  
A47C27/15, A47C31/00,  
B29C70/64, C08J9/28, C08J9/40,  
B29L31/00, B29K105/04

**Language of the proceedings:** EN

**Title of invention:**  
Functionalized latex based foam

**Patent Proprietor:**  
Latexco NV

**Opponent:**  
Artilat NV

**Relevant legal provisions:**  
RPBA 2020 Art. 11, 12(2), 12(4), 12(8)  
EPC Art. 100(c), 111(1), 113(1), 116(1)

**Keyword:**

Decision in writing - cancellation of oral proceedings (yes)  
Main request underlying impugned decision - no discretion not  
to admit  
Grounds for opposition - added subject-matter (no)  
Remittal (yes)



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Case Number: T 0001/21 - 3.2.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.05**  
**of 14 June 2023**

**Appellant:**  
(Patent Proprietor)

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**Representative:**

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**Respondent:**

(Opponent)

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**Representative:**

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 26 October 2020  
revoking European patent No. 2613927 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman**

P. Lanz

**Members:**

T. Vermeulen

A. Bacchin

## **Summary of Facts and Submissions**

- I. The appeal lies from the decision of the opposition division to revoke European patent No. 2 613 927.
- II. The opposition had been filed against the patent as a whole on the basis of the grounds for opposition under Article 100(a) together with Article 56 EPC (lack of inventive step), and under Article 100 (c) EPC.
- III. In the decision under appeal, the opposition division came to the conclusion that the ground for opposition under Article 100(c) EPC prejudiced the maintenance of the patent because the subject-matter of claim 1 as granted extended beyond the content of the application as originally filed.
- IV. A summons to oral proceedings was issued on 31 May 2022.
- V. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal in the 2020 version (RPBA 2020) issued on 7 December 2022, the parties were informed of the board's provisional opinion that the ground for opposition under Article 100(c) EPC did not prejudice the maintenance of the patent as granted so that, should this opinion be confirmed at the oral proceedings, a remittal of the case to the opposition division pursuant to Article 111(1), second sentence, EPC would be likely.
- VI. By letter dated 23 December 2022 the appellant (patent proprietor) informed the Board that it had decided not to attend the oral proceedings, but that it did

"maintain its arguments made in previous communications".

- VII. By letter dated 18 January 2023 the respondent (opponent) informed the board that it would not attend the oral proceedings.
- VIII. On 20 January 2023 the parties were informed that the oral proceedings appointed for 25 January 2023 had been cancelled.
- IX. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted (main request) or, alternatively, that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the claims of one of a first and a second auxiliary request both filed with the statement of grounds of appeal.

The respondent (opponent) requested that the appeal be dismissed.

- X. Claim 1 as granted has the following wording (the feature numbering used by the appellant appears in square brackets):

"1. [**a**] A single continuous product of latex foam with a continuous foam structure comprising [**b**] a first layer of latex foam and [**c**] a second and/or subsequent layer of latex foam [**d**] wherein said first layer comprises latex foam impregnated with an additive, [**e**] the impregnation comprising applying the additive to the first layer of latex foam in the form of a solution, emulsion or dispersion and [**f**] whereby the first layer has a thickness of 0,01 to 9 mm, [**g**]

wherein the additive is in the form of a particle and [h] wherein the first layer comprises 0,1 to 1000 g/m<sup>2</sup> of said particle, and [i] whereby the core, defined as a part of the continuous product of latex foam at a distance of 9 mm of an outer surface of said foam when measured perpendicularly to the outer surface, is free of said additive."

XI. The appellant essentially argued as follows.

*Main request - ground for opposition under Article 100(c) EPC*

The reasoning set out in point 8 of the reasons for the decision under appeal was not agreed with. The basis for concluding that feature **d** violated Article 123(2) EPC was that the application as filed did not directly and unambiguously specify that the first layer could comprise a further latex foam not being impregnated with an additive. While this reasoning might be correct when taking feature **d** on its own, it was believed that when taking claim 1 as granted as a whole, and especially in view of the combination of features **b** to **h**, it was unambiguously clear that the first layer of latex foam was defined as a latex foam impregnated with an additive as specified in claims 1 and 2 and on page 4, sixth and seventh paragraphs of the description of the application as filed. It was noted that feature **h** even provided the load of the particle in the latex foam and that impregnation implicitly implied that the particle was spread throughout the first layer of latex foam. From the above, the appellant strongly believed that claim 1 as granted did not encompass subject-matter extending beyond the application as filed and hence met the requirements of Article 123(2) EPC.

XII. The respondent essentially argued as follows.

*Admittance of the appellant's requests*

The main request and first and second auxiliary requests submitted with the statement of grounds of appeal were inadmissible on the basis of the Decision of the Administrative Council of 26 June 2019 approving the RPBA 2020, especially Articles 12 and 13. The Rules of Procedure should be followed in a strict way. In Article 12 RPBA 2020 the basis of appeal proceedings was stated. According to Article 12(2) RPBA 2020 a party's appeal case should be directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based, since the primary object of the appeal proceedings was to review the decision under appeal in a judicial manner. On 28 October 2019 the opposition division requested the appellant to file its observations in reply to the notice of opposition. The time limit was 4 months from the date of the notification. However, the appellant did not take any action. By letter dated 27 August 2020 the respondent asked the EPO about the actual status of the file. The appellant was correctly informed about this letter. Again, the appellant did not file any observations. The opposition division then issued its decision to revoke the patent. From the above facts it was clear that the appellant did not take any action in the opposition proceedings. The appeal proceedings before the EPO could not be seen as a repetition of the opposition proceedings. In the statement of grounds of appeal the appellant failed to identify each amendment and provide reasons for submitting it. Nor did it indicate the basis for the amendments in the application as filed or provide reasons why the amendments overcame the objections raised. The

appellant did not provide any argument why the requests, facts, objections or evidence should be taken into account. Moreover, there were no exceptional circumstances which were justified with cogent reasons by the party concerned. Thus, the board was requested not to admit the requests, facts, and objections because they should have been submitted in the opposition proceedings leading to the decision under appeal.

*Main request - ground for opposition under Article 100(c) EPC*

It was clear that the appellant's main request did not meet the requirements of the EPC since the subject-matter of the main claim extended beyond the content of the application as filed (Article 100(c) EPC). This was in line with the arguments provided by the opposition division in the decision under appeal.

## **Reasons for the Decision**

### 1. Decision in written proceedings

In reply to the summons to oral proceedings and the board's communication under Article 15(1) RPBA 2020, both the appellant and the respondent informed the board that they would not be attending the oral proceedings. No arguments on the merits of the case were submitted in reply to the communication. In view of the above declarations, both parties expressed the clear intention only to rely on their written case. Since the parties had requested oral proceedings on an auxiliary basis only and the board did not consider holding oral proceedings to be expedient or necessary under Article 116(1) EPC, the oral proceedings were

cancelled. As the case at hand is ready for decision, and the requirements of Articles 113(1) and 116(1) EPC are complied with, the board issues the decision in written proceedings pursuant to Article 12(8) RPBA 2020. Accordingly, the decision is based solely on the parties' written submissions, as assessed in the board's communication under Article 15(1) RPBA 2020, and on grounds and evidence on which the parties have had an opportunity to present their comments.

2. Admittance of the appellant's main request

2.1 In its reply to the statement of grounds of appeal, the respondent submitted the following:

"These Main Request, First Auxiliary Request and a Second Auxiliary Request are inadmissible on basis of the Decision of the Administrative Council of 26 June 2019 approving the revised version of the Rules of Procedure of the Boards of Appeal, especially Art 12 and 13" (cf. page 1, paragraph 3 of the letter dated 7 July 2021).

The respondent justified its objection against admitting appellant's requests with a lack of action on the part of the appellant during the proceedings before the opposition division. The respondent further argued that the appellant "failed to identify each amendment and provide reasons for submitting it" and "failed to indicate the basis for the amendment in the application as filed and provide reasons why the amendment overcomes the objections raised" (cf. antepenultimate and penultimate paragraphs of page 2 of the reply to the statement of grounds of appeal). Against this background, the respondent then formulated following request:

"Thus, the Board is requested not to admit the requests, facts, and objections because they should have been submitted in the Opposition proceedings leading to the decision under appeal" (see page 2, last paragraph of the reply to the statement of grounds of appeal; a similar request can be found on page 3, last paragraph of the same letter).

In its letter dated 14 March 2022, the respondent cited the provisions of Article 12(2) RPBA 2020 and submitted that the appellant "did not provide any argument why the requests, facts, objections or evidence should be taken into account" and that "there are no exceptional circumstance [sic] which have been justified with cogent reason [sic] by the party concerned".

2.2 In the present case the statement of grounds of appeal was filed after 1 January 2020. Pursuant to Article 24(1) RPBA 2020 and Article 25 RPBA 2020, the provisions of RPBA 2020 therefore apply, without exception, to the present appeal.

According to Article 12(2) RPBA 2020, a party's appeal case shall be directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based. Pursuant to Article 12(4), first sentence, RPBA 2020, any part of a party's appeal case which does not meet the requirements in paragraph 2, i.e. which is not directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based, is regarded as an amendment, unless the party demonstrates that it was admissibly raised and maintained in the proceedings leading to the decision under appeal. Any such

amendment may be admitted only at the discretion of the board (Article 12(4), second sentence, RPBA 2020).

2.3 The appellant's main request is that the patent be maintained as granted. It underlies the decision under appeal and is therefore inherently part of the appellant's appeal case under Article 12(2) RPBA 2020. It is not an "amendment" in the sense of Article 12(4), first sentence, RPBA 2020 so that the board does not have a discretion to hold inadmissible the main request.

3. Main request - ground for opposition under Article 100(c) EPC

3.1 In the decision under appeal, the opposition division concluded that the wording of feature **d** encompassed subject-matter which extends beyond the content of the application as filed. In particular, the opposition division held that the use of the term "comprising" led to combinations, within the first layer, of latex foam impregnated with an additive, on the one hand, with a further latex foam not impregnated with an additive or even with a further type of foam material, on the other hand (cf. points 8.1 and 8.4 of the reasons for the decision under appeal).

3.2 The appellant argued that, taking claim 1 as granted as a whole, it was unambiguously clear that the first layer was defined as a latex foam impregnated with an additive as was specified in claims 1 and 2 and in the sixth and seventh paragraphs on page 4 of the application as filed. The appellant referred to feature **h** and submitted that impregnation implied that the particles were spread throughout the first layer of latex foam.

- 3.3 The respondent did not file any arguments on the (lack of) basis for the amendments, but instead referred to the decision under appeal and submitted its notice of opposition in annex to the reply to the statement of grounds of appeal.
- 3.4 In the board's view, the opposition division's conclusion was based on the premise that the amendment of feature **d** replaced the first layer of latex foam with a first layer comprising latex foam impregnated with an additive. However, feature **b** of claim 1 as granted still requires that the first layer is "of latex foam". This speaks against the argument that the first layer of the granted product includes other (non-latex) foams.
- 3.5 Also the argument that the term "comprising" has introduced embodiments in which latex foam of the first layer is not impregnated with an additive, is not persuasive. In the board's understanding, bearing in mind that the first layer is "of latex foam", feature **d** has to be read in the sense that the first layer comprises latex foam and this latex foam is impregnated with an additive. The board further observes that, throughout the application as filed, the impregnating step is disclosed in conjunction with a solution, emulsion or dispersion, see f.ex. paragraph 2 on page 1, the top and bottom paragraphs on page 5, paragraph 2 on page 13, paragraphs 1, 4 and 5 on page 14, but also original claims 1, 4, 12 and 14. The additive is thus applied together with a carrier or diluent, which can be volatile or not, see paragraph 2 on page 13. A further aspect of the original disclosure is that the impregnation is not necessarily limited to a single additive; other additives may be applied at the same

time, see paragraphs 1 and 2 on page 13 ("a mixture of", "one or more additive"), and paragraph 2 on pages 16 and 20 ("additional additives may be incorporated"). The impregnated latex foam layer 1 of the application as filed thus comprises a latex foam, it comprises one or more additives and it comprises (at least the residuals of) a carrier or a diluent. Against this background, the board has difficulties to see how the term "comprising" in feature **d** of claim 1 as granted can introduce subject-matter which extends beyond the content of the application as filed.

3.6 In view of the above, the board concludes that the opposition division erred in its finding that the ground for opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted.

4. Remittal

5. Under Article 111(1), second sentence, EPC the board may either decide on the appeal or remit the case to the department which was responsible for the decision appealed. The appropriateness of remittal to the department of first instance is a matter for decision by the board, which assesses each case on its merits. Even if there is no absolute right to have every issue decided upon by two instances (cf. Article 11, first sentence, RPBA 2020, which requires special reasons for remitting a case), it has to be emphasized that it is the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (cf. Article 12(2) RPBA 2020).

6. In point 7.1 of the board's communication according to Article 15(1) RPBA 2020, the parties were informed that, should the board's provisional opinion that the

ground for opposition under Article 100(c) EPC did not prejudice the maintenance of the patent as granted be confirmed at the oral proceedings, a remittal of the case to the opposition division pursuant to Article 111(1), second sentence, EPC would be likely.

7. In reply to the board's communication, the parties informed the board that they would not attend the oral proceedings originally scheduled in accordance with their auxiliary requests. No further arguments on the merits of the case or objections against a possible remittal were presented.
8. In point 9.1 of the reasons, the decision under appeal mentions a set of inventive step objections against the patentability of the claimed subject-matter, without however addressing them in detail. Furthermore, the board notes that the respondent has not presented any arguments before the board in support of the ground for opposition under Article 100(a) EPC.
9. In view of the above considerations, the board is convinced that special reasons within the meaning of Article 11, first sentence, RPBA 2020 apply in the present case and that it is appropriate to remit the case to the opposition division for further prosecution, in accordance with Article 111(1), second sentence, EPC.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



N. Schneider

P. Lanz

Decision electronically authenticated