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Datasheet for the decision of 19 October 2023

Case Number: T 0538/21 - 3.2.06

Application Number: 16206993.4

Publication Number: 3342386

IPC: A61F13/532, A61F13/533, A61F13/15, A61F13/475

Language of the proceedings: EN

Title of invention:
ABSORBENT CORE, ARTICLES COMPRISING SAID CORE, AND METHODS OF MAKING

Patent Proprietor:
Ontex BV

Opponent:
Maiwald GmbH

Headword:

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

Keyword:
Novelty - (no)
Remittal - (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 0538/21 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 19 October 2023

Appellant: (Opponent)	Maiwald GmbH Elisenhof Elisenstr. 3 80335 München (DE)
Representative:	Maiwald GmbH Engineering Elisenhof Elisenstrasse 3 80335 München (DE)
Respondent: (Patent Proprietor)	Ontex BV Genthof 5 9255 Buggenhout (BE)
Representative:	Wall, Leythem Oxon IP B.V. Evert Van De Beekstraat 354 1118 CZ Schiphol (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 11 March 2021 rejecting the opposition filed against European patent No. 3342386 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	M. Hannam
Members:	M. Dorfstätter
	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 against European patent No. 3 342 386.

II. The appellant (opponent) requested that the decision under appeal be set aside and the European patent be revoked
or that the case be remitted to the opposition division if the Board were to find that
- claim 1 is novel over D1
- claim 1 is novel over D5
- if it were decisive whether claim 13 is inventive over D4+D1 or D4+D5.

III. The respondent (patent proprietor) requested that the appeal be dismissed (main request)
or as an auxiliary measure, that the case be remitted to the opposition division for further prosecution if the main request was not considered to be patentable
or that the patent be maintained in amended form based on one of auxiliary requests 1 to 5, filed with the reply
or based on auxiliary request 6, filed with letter dated 17 October 2023.

IV. The following documents are relevant for the present decision:

D1	US 2016/0206482 A1
D2	JP 2012-96079 A
D3	machine translation of D2
D5	WO 2016/114947 A1

V. The Board issued a summons to oral proceedings and a subsequent communication, in which it indicated *inter alia* that a point of discussion at the oral proceedings would be whether the subject-matter of claim 1 was novel over D2. It also indicated that it might consider remitting the case to the opposition division.

VI. At the end of the oral proceedings, the requests were as stated above.

VII. Claim 1 of the main request reads as follows:

"An absorbent core (101) comprising:
a front portion (122);
a back portion (124);
a crotch portion (126) position [sic] between the front portion (122) and the back portion (124); and
a longitudinal axis extending along the length of said core (101) and crossing said front, crotch and back portions (122, 126, 124), the absorbent core (101) having a width standing perpendicular to said length and a perimeter comprising at least two opposing ends (102, 103) and at least two opposing sides (104, 105) positioned between said ends (102, 103) characterized in that the absorbent core (101) comprises one or more substantially interconnected channels (106) extending through the crotch portion (126) along and substantially parallel to the longitudinal axis and further extending along at least a portion of said width of the core from one side of the core to the other, wherein the interconnected channel (106) is substantially free of three-dimensional absorbent material preferably said one or more substantially interconnected channels (126) being symmetric or asymmetric about the longitudinal axis, and wherein

each substantially interconnected channel (106) comprises:
a first channel portion (107) extending substantially along the longitudinal axis proximal to a first side (104) of the core (101);
a second channel portion (108) extending substantially along the longitudinal axis proximal to the second side (105) of the core (101); and
a single connecting channel portion (109) in fluid communication with said first and second channel portions (107, 108), and having a first distance (d_1) between the first channel portion (107) and the second channel portion (108), a second distance (d_2) between the first channel portion (107) and the second channel portion (108), wherein the first distance (d_1) is proximal to the front portion (102) of the core (101) and the second distance (d_2) is proximal to the back portion (103) of the absorbent core (101), and wherein the first distance (d_1) is greater than the second distance (d_2)."

VIII. Claim 1 of auxiliary request 1 reads as for the main request, but with the following feature appended:

"wherein the channels comprise a first nonwoven web bonded to a second nonwoven web by one or more adhesives."

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

Claim 1 of the main request was not novel over D2. The inner rear groove 52 of D2 established an interconnected channel that was comprised in the absorbent core, as the channel was to be interpreted as being the void, not the material surrounding it. The

inner rear groove 52 extended through the crotch portion of the absorbent core. Since D2 showed a sanitary napkin, the crotch portion extended over almost the entire length of the article. The inner rear groove was substantially free of three-dimensional absorbent material. This is what was depicted in the figures and there was no incentive to question it.

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

Claim 1 of the main request was novel over D2. The inner rear groove 52 of D2 could not be equated with an interconnected channel comprised in the absorbent core as defined in claim 1. Further, it did not extend through the crotch portion of the absorbent core, which was to be equated with the central portion "B" of D2. Nor was there an explicit or implicit disclosure that the inner rear groove 52 was substantially free of three-dimensional absorbent material. Furthermore, it followed from the nature of the manufacturing process that some absorbent material would be present in the grooves.

Reasons for the Decision

1. *Novelty*

The subject-matter of claim 1 of the main request lacks novelty over D2 (Article 54 EPC). The ground for opposition under Article 100(a) EPC is thus prejudicial to maintenance of the patent as granted.

1.1 D2 shows and describes a sanitary napkin comprising an absorbent core according to the preamble of claim 1 of the contested patent. It comprises an inner rear groove

(52) having a form fulfilling the requirements as set out in the characterising portion of claim 1. This was not contested by the parties.

The respondent, however, contested that D2 showed the following features of claim 1, that:

(i) the interconnected channels extend through the crotch portion; and

(ii) the interconnected channel is substantially free of three-dimensional absorbent material.

During the oral proceedings, the respondent also questioned whether the inner rear grooves 52 of D2 could be equated with the interconnected channels of the patent at all. It argued that the claim required channels in the absorbent core, whilst the inner rear grooves 52 of D2 were formed in the topsheet.

Leaving aside the question of whether this new argument was an amendment of the respondent's appeal case and should therefore not be taken into account by the Board under Article 13(2) RPBA 2020, it is, in its substance, not convincing.

1.2 Following the appellant's interpretation of a "channel" as being the void between channel walls, the Board considers the empty space between two opposing wall sections of the topsheet 2 in D2 as constituting a channel in the sense of claim 1. This channel, i.e. the void, is situated within the absorbent core 4. In other words, the absorbent core 4 of D2 comprises this channel.

The respondent's argument that the inner rear grooves 52 were formed in the topsheet 2 and therefore not in the absorbent core is not accepted. Figure 3 of D2 would certainly be understood by the skilled person as directly and unambiguously disclosing the absorber 4 having the groove 52 formed in it. The presence of a further layer on top of the absorbent core (such as the topsheet 2 in D2) does not change the spatial relationship of the inner rear groove 52 with respect to the absorbent core 4. The Board thus finds the absorbent core 4 of D2 to comprise one or more substantially interconnected channels 52.

1.3 The respondent argued that the inner rear groove 52 of D2 did not extend through the crotch portion. It equated the central portion "B", as depicted in Figure 2 of D2, with the crotch portion of the contested patent, as this central portion "B" was described at several junctures of D2 to contact, in use, the excretion region of the wearer, a definition corresponding to the one in the contested patent which described that the middle portion was the area where repeated fluid surge typically occurred. The inner rear groove 52 of D2 was however positioned in the rear portion "C". It further argued that, absent any explicit disclosure of a crotch portion in D2, there had to be at least an implicit disclosure of a crotch portion in D2, meaning that there had to be no alternative understanding possible. That the inner rear grooves 52 extended through the crotch portion was therefore not derivable from D2, at least not directly, clearly and unmistakably.

This is however not convincing. Even if the excretion region of the wearer is, in use, located in the central portion "B", the crotch region is not limited to this

location. The terminology "crotch region" has a particular meaning in the field of absorbent articles. It refers to the region between the legs of the wearer, as indeed also indicated in paragraph [0032] of the patent. D2 describes a sanitary napkin which will in use, due to its smaller size compared to the diapers depicted in the contested patent, come to lie almost entirely between the wearer's legs i.e. in the crotch region. A person skilled in the art will understand this from the nature and type of article depicted in D2 without the need of an explicit disclosure. They will understand this directly, clearly and unmistakably without the need for an explicit explanation. The Board thus concurs with the appellant that the crotch region of D2 can reasonably extend significantly beyond the portion "B", even over the majority of the article as depicted on page 24 of the appellant's grounds of appeal, leaving only rather short front and back portions. Therefore the entire inner rear groove 52 depicted in Figure 2 of D2 can be reasonably interpreted as being located in the crotch portion of the absorbent core.

It is noted that this interpretation does not contradict the respondent's understanding that the excretion region of the wearer is, in use, located in the central portion "B" of D2. With the crotch portion extending beyond the central portion both to the front and to the rear, the excretion region will be located at the same time in the central portion "B" and in the crotch portion.

The Board also follows the appellant's argument, that the division of the sanitary napkin of D2 into a front portion "A", a central portion "B" and a rear portion "C" has been made to refer to the sections which are

folded together when the article is packaged as shown in Figure 7 of D2.

The Board thus concludes that the claimed crotch portion is not limited to the central portion "B" in D2 and that the inner rear groove 52 (constituting substantially interconnected channels in the sense of claim 1) extends through the crotch portion.

1.4 During the oral proceedings, the respondent also argued that there was no clear and unmistakable teaching in D2 of a fluid communication within the inner rear grooves 52. It referred to paragraph [0024] in which it was described that fluid was temporarily stopped and moved to the absorber. It was thus not clear beyond any reasonable doubt that there was fluid communication in the interconnecting portion as required by claim 1 of the contested patent.

Again leaving aside the question as to whether this was a new argument and whether it should not be taken into account by the Board under Article 13(2) RPBA 2020, this is also not convincing. The paragraph referred to by the respondent describes fluid movement in a direction perpendicular to the inner rear groove 52. There can be no reasonable doubt that a groove, such as the inner groove 52 of D2, allows fluid communication in the longitudinal direction of the open structure. The function of stopping fluid movement perpendicular to the extension of the inner rear groove is not detrimental for fluid communication along its length.

1.5 The respondent further argued that it was not derivable from D2 that the inner rear groove 52 was substantially free of three-dimensional absorbent material. There was neither an explicit disclosure for the absence of

absorbent material in the groove, nor was the threshold met for an implicit disclosure.

This is not accepted. In D2, the inner rear grooves 52 are formed by embossing the laminate comprising the backsheet 3, the absorbent core 4 and the topsheet 2. The absorbent material of the absorbent core is thus sandwiched between the backsheet and the topsheet such that no absorbent material would be expected to escape this enclosure as a result of the embossing process and find itself in the grooves of the article. Additionally, the inner rear grooves 52 are open structures which, in use, come into close contact with the wearer. When looking at Figure 3 of D2, a skilled person would not expect that any material was present within the open space of the inner rear grooves 52, as any such material would be likely to get lost during or even before use of the article. Furthermore, it would be hardly acceptable for any user to have loose material on the top surface of the sanitary napkin. The Board thus concludes that, even though there is no explicit statement in D2 for the absence of absorbent material in the inner rear grooves 52, there is also no reason to doubt that these grooves are empty spaces as depicted in Figure 3.

1.6 In a further line of argument, the respondent argued that compressed absorbent material was present underneath the void space of the inner rear grooves 52. This material was part of the channel, which in turn was thus not free of absorbent material.

This is not convincing. As explained above, the Board considers the void as being the channel, and not any part underneath it. Therefore, any compressed material lies outside the inner rear groove 52.

1.7 In yet a further line of argument, the respondent argued that absorbent material was inevitably present in the inner rear grooves due to the way the sanitary napkin was manufactured. Firstly, there was absorber present when joining the laminate of the backsheet, the absorbent core and the topsheet, during which process some absorbent material would find its way into the grooves. Secondly, if the inner rear grooves 52 were made by embossing, which was as such not entirely clear from D2, this would inevitably result in the presence of some absorbent material in the grooves. This followed from the technical nature of embossing and was also described in paragraph [0150] of the contested patent.

This is also not accepted. The Board cannot see how embossing will potentially, and less so necessarily, lead to the presence of absorbent material within the embossed channels 52. These channels are embossed into the laminate with the topsheet already present. The topsheet thus acts as a barrier preventing any transfer of absorbent material onto the top surface of the sanitary napkin and therefore also preventing such transfer into the grooves 52. That the topsheet is a barrier for the absorbent is implicit from its function. As already explained above, a user of the sanitary napkin would not accept loose particles on the surface of the topsheet.

That embossing inevitably leads to the presence of some absorbent material in the channels is also not taught in paragraph [0150] of the contested patent, at least not in the interpretation followed by the Board. Paragraph [0150] describes the process of making an absorbent core according to claim 13 as granted, in

which a 3D insert in a mould is used to create the channels. This process is explained to be effective in creating channels substantially free of three-dimensional absorbent material. It is compared to processes using embossing on the one hand, and to material removal processes on the other hand.

The relevant sentence is as follows:

> "Such process has been found effective in creating channels substantially free of three-dimensional absorbent material **compared to processes using embossing** (i.e. creating channels of highly dense/ packed three-dimensional absorbent material) **or material removal processes** that comprise removing three-dimensional absorbent material from a pre-formed core structure which inevitably results in the presence of some three-dimensional absorbent material that may affect effective/uniform fluid distribution upon saturation thereof" (emphases by the Board).

The process claimed in claim 13 is thus compared in its effectiveness in creating channels that are substantially free of three-dimensional absorbent material, with two other processes, embossing on the one hand and material removal processes on the other hand. The disadvantage of processes using embossing is mentioned in brackets. In the case of embossing this is a highly dense/packed three-dimensional absorbent material. The mentioned disadvantage of material removal processes, i.e. the presence of three-dimensional absorbent material in the channel and thus a somewhat deteriorated fluid distribution once this material is saturated with liquid, can be understood to be due to the necessity that removing the material is

performed directly on the absorbent core with the consequence that some of this 'removed' loose material may remain in the formed channels. Such a presence of three dimensional absorbent material in the channels is however not disclosed to be related to the process of embossing, nor can it technically be understood to result from the embossing process.

With this understanding of paragraph [0150], the Board sees no hint therein that processes using embossing would potentially, and less so necessarily, result in the presence of some three-dimensional absorbent material in the channels so formed.

1.8 The Board thus concludes that the inner rear groove 52 of D2 constitutes an interconnected channel which is substantially free of three-dimensional absorbent material.

1.9 Therefore, D2 shows all features of claim 1 in combination. The subject matter of claim 1 is therefore not novel (Article 54 EPC) and Article 100(a) EPC prejudices maintenance of the patent as granted.

The main request is thus not allowable.

2. *Remittal*

The respondent/patent proprietor requested remittal if the Board were to find that the main request was not allowable. As reasoned above, the Board has found that this is the case. At the end of the oral proceedings, the appellant/opponent also agreed on remitting the case to the opposition division.

The opposition division did not decide upon any of the auxiliary requests, including auxiliary request 1, which was on file already during the opposition proceedings, and which was attacked by the opponent on the basis of Articles 84, 54 and 56 EPC, including an inventive step attack starting from D2. Furthermore, not all attacks against the main request were dealt with by the opposition division in the contested decision, including the objection of lack of inventive step of the subject-matter of claim 1 when using D1/D5 as the starting point.

During the entire proceedings, these attacks were not withdrawn by the appellant/opponent. It is thus to be expected that similar attacks against claim 1 of the auxiliary requests would have to be discussed and decided upon for the first time by the Board. It is, however, the primary object of appeal proceedings to review the decision taken by the first instance (see Article 12(2) RPBA 2020) and not to examine, for the first time, attacks already presented with the notice of opposition.

Additionally, and as argued by the respondent, the interpretation of both claim 1 and D2 by the Board substantially differs from the one taken by the opposition division in the contested decision. This will make it necessary for the parties to reconsider their arguments and requests.

The Board thus considers the present situation as constituting special reasons under Article 11 RPBA 2020 and avails itself of its power under Article 111(1) EPC to remit the case to the opposition division for further prosecution, including examination of any outstanding attacks of the appellant/opponent that were

raised and maintained during any part of the opposition proceedings, even if presented only in writing.

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:

C. Spira M. Hannam

Decision electronically authenticated