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**Datasheet for the decision  
of 9 September 2025**

**Case Number:** T 1873/23 - 3.2.04

**Application Number:** 17198061.8

**Publication Number:** 3292847

**IPC:** A61F13/532, A61F13/539

**Language of the proceedings:** EN

**Title of invention:**

ABSORBENT ARTICLE

**Patent Proprietor:**

Drylock Technologies NV

**Opponent:**

Ontex BV

**Relevant legal provisions:**

EPC Art. 100(c), 76(1)

**Keyword:**

Divisional application - subject-matter extends beyond content  
of earlier application (yes)

**Decisions cited:**

G 0002/10, T 2255/12, T 1269/06, T 3142/19, T 1255/18



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**Case Number: T 1873/23 - 3.2.04**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 9 September 2025**

**Appellant:** Drylock Technologies NV  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 10 October 2023  
revoking European patent No. 3292847 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** M. Hannam  
**Members:** M. Dorfstätter  
S. Ruhwinkel

## **Summary of Facts and Submissions**

- I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division revoking European Patent No. 3 292 847, which derives from a divisional application based on International application No. PCT/EP2011/005139 (from here on referred to as 'the earlier application'). The opposition division found that claim 1 as granted contained subject-matter extending beyond the content of the earlier application as filed.
- II. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted or, in the alternative, that the patent be maintained in amended form in accordance with one of the auxiliary requests 1 to 41 submitted with the statement of grounds of appeal (auxiliary requests 1-23 had already been filed before the Opposition Division).
- III. The respondent requested that the appeal be dismissed. They also requested that the case be remitted to the Opposition Division for further examination under Article 100(a) and (b) EPC if the Board were to conclude that the main request or any of the auxiliary requests 1 to 41 complied with the requirements of Articles 100(c), 76(1) and 123(2) EPC.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the ground for opposition under Article 100(c) EPC prejudiced maintenance of the patent as granted. It indicated further that the respective claim 1 of each

of the auxiliary requests submitted by the appellant seemed not to overcome the corresponding objections under Article 76(1) EPC.

- V. Oral proceedings were held before the Board on 9 September 2025 at the end of which the parties maintained their initial requests.
- VI. Claim 1 of the main request (with the feature annotation as used by the opposition division in its decision) reads as follows:

P1 "An absorbent article comprising a liquid pervious topsheet, a liquid impervious backsheet and a liquid absorbing absorbent structure (14) situated in between the liquid pervious topsheet and liquid impervious backsheet,

P2 wherein said absorbent article is a feminine hygiene garment, baby diaper, baby pants or adult incontinence garment;

P3 wherein said absorbent structure comprising a carrier layer (101), an auxiliary layer (102) and an absorbent polymer material (110) there between,

P4 the carrier layer (101) and auxiliary layer (102) being at least partially joined together by substantially permanent primary attachments (111) and substantially temporary secondary attachments (115) made up of substantially permanent primary attachment grids (113) and substantially temporary secondary attachment patterns, respectively, so as to form a sandwich-like composite structure containing patterned absorbent particulate polymer materials provided in at least some unattached

- regions between the carrier layer (101) and auxiliary layer (102) forming an absorbent polymer material area,
- P5 wherein a plurality of smaller-sized pockets made up by at least the substantially temporary secondary attachments (115) define spaces which immobilize the available dry volume absorbent polymer material,
- P6 the substantially temporary secondary attachment (115) being gradually releasable as a result of exposing the surrounding absorbent polymer material to liquid as to allow phased and controlled expansion from the plurality of smaller-sized pockets to fewer but bigger-sized unleashed compartments;
- P7 characterized in that the primary bonding grids (113) comprise a continuous disposition of lines aligned with the longitudinal axis of the absorbent structure, said lines being such that channels and ducts are created which help the fluid transport from the point of liquid contact to the rest of the absorbent structure (14) via mass flow;
- P8 wherein an absorbent material pattern formed in between the primary and secondary attachments is substantially continuously connected."

VII. Claim 1 of each of the auxiliary requests includes feature P8 as reproduced above for the main request. Since the present decision is based on this feature alone, the exact wording of claim 1 of auxiliary requests 1 to 41 is of no relevance and will not be reproduced.

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

The opposition division applied an overly strict and formalistic approach when assessing the compliance of the claims with Article 76(1) EPC. Only if an amendment presented the skilled person with new technical information would it not be allowable.

The combination of primary attachments, secondary attachments, and a continuously connected absorbent material pattern was derivable from the earlier application as filed, despite them not being depicted in each drawing. Figure 4 should be interpreted as including primary and secondary attachments. In a similar way, primary and secondary attachments were not indicated in each of the four drawings of Figure 10A, although they were necessarily present.

Further, a skilled reader would understand that the presence of both primary and secondary attachments was preferred. There was thus a strong pointer to read them as also being included in the embodiment shown in the left-hand drawing of Figure 4.

Due to the positive effects of the capillary flow described on page 55 of the earlier application as filed, a skilled reader understood that it was also preferred to provide a substantially continuously connected absorbent material pattern.

The assessment of the requirements of Article 123(2) EPC should be done from the standpoint of the skilled person.

Subject-matter of a claim only extended beyond the content of an application as filed, if additional technically relevant information had been added.

The lack of a clear pointer to a particular combination of features did not necessarily mean that this combination was not derivable from the application.

It was not decisive whether a particular combination of features had to be derived by a selection from two lists to decide upon extension of subject-matter.

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

The opposition division did not apply an overly strict and formalistic approach when assessing the compliance of the claims with Article 76(1) EPC. The application described different embodiments and aspects, but primary attachments, secondary attachments, and a continuously connected absorbent material pattern were never described in combination. They were even incompatible with each other.

The left-hand drawing of Figure 4 did not show primary attachments. Nor were they implicitly present.

Even if the combination of both primary and secondary attachments were preferred, no preference could be derived from the earlier application as filed that this was to be understood in combination with an absorbent material pattern that was substantially continuously connected. On the contrary, the description actually mentioned a preference for individual clusters of absorbent material.

## **Reasons for the Decision**

### **1.       Main request - Article 100 (c) EPC**

The subject-matter of claim 1 of the main request extends beyond the content of the earlier application as filed. There is no direct and unambiguous disclosure of the combination of features set out in feature P8, i.e. the presence of primary attachments, secondary attachments and an absorbent material pattern that is substantially continuously connected. The ground for opposition under Article 100(c) EPC thus prejudices maintenance of the patent.

- 1.1       The appellant's argument that the opposition division had applied an overly strict and formalistic approach when assessing the compliance of the claims with Article 76(1) EPC (and implicitly with Article 100(c) EPC for the main request) is not accepted. According to the long-standing established case law with respect to the 'gold standard' (see decision of the Enlarged Board of Appeal G2/10, reasons 4.3) "any amendment to the parts of a European patent application or of a European patent relating to the disclosure (the description, claims and drawings) is subject to the mandatory prohibition on extension laid down in Article 123(2) EPC and can therefore, irrespective of the context of the amendment made, only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed...".

This means, and this was also argued by the appellant, that an amendment is not allowable if it presents the skilled person with new technical information. The



appellant however alleged that no new technical information was given by the combination of a continuously connected absorbent material pattern with both primary and secondary attachments, as this was derivable for a skilled person from the earlier application, notably from page 50, lines 25-28 in combination with Figure 4. The Board does not accept this for the reasons set out below.

- 1.2 It was uncontested that a substantially continuously connected absorbent material pattern was only mentioned once in the earlier application (on page 50, lines 26/27) and only depicted in a single drawing (the left-hand drawing of Figure 4). It was also uncontested that the left-hand drawing of figure 4 did not unambiguously show primary attachments.

In the contested decision (reasons 2.3.2), the opposition division put the passage on page 50 (referring to the continually connected absorbent material pattern) into context with a statement on page 39, first paragraph, according to which primary attachments were preferred but not mandatory. From this it concluded that the embodiment depicted in the left-hand drawing of Figure 4 did not necessarily include primary attachments because of them being merely optional.

In its statement of grounds of appeal, the appellant argued that the statement on page 39 did not even refer to Figure 4 and that, therefore, a skilled reader would understand that, in the embodiments of Figure 4, primary attachments were preferred, despite them not being identified by a reference numeral.

As already stated in the Board's communication (see item 2.1), in whatever way the passage on page 39 is interpreted, this does not alter what a skilled person directly and unambiguously derives from the left-hand drawing of Figure 4, which does not depict primary attachments. This is irrespective of whether the primary attachments are described as preferred or optional on page 39 (and also whether this statement even refers to the drawings of Figure 4). What is decisive is that the description makes no mention of them necessarily being present.

- 1.3 The appellant's further argument that also in Figure 10A, primary and secondary attachments were not indicated in each of the four drawings although they were certainly present, and therefore Figure 4 should be interpreted correspondingly, i.e. as including primary and secondary attachments, is not accepted. With respect to Figures 10A and 10B, the description at page 55 explicitly mentions primary and secondary attachments (the latter being intact in Figure 10A and released in Figure 10B). The lack of designation of primary or secondary attachments in the different drawings of Figure 10A is thus compensated by an explicit statement in the description. With respect to the drawings of Figure 4, however, a statement in the description as to whether primary and secondary attachments are present is entirely missing. As also argued by the appellant, the statement in the first paragraph of page 39 does not refer to Figure 4, and in the only paragraph citing Figures 4 and 5 (i.e. the last paragraph of page 50) no mention is made of the type of attachments.

- 1.4 Based on this lack of differentiation of the type of attachments, the appellant then argued that the

attachments mentioned in the last paragraph of page 50 referred to both types, i.e. primary and secondary alike. This is not convincing.

The last paragraph of page 50 is only concerned with the absorbent material pattern "formed in between the attachments". It may thus indeed refer to any type of attachments, without however disclosing the presence of both types, i.e. primary and secondary. Indeed in lines 25 to 28 of page 50 no importance is placed on which kind of attachments the list of possible absorbent material patterns are arranged. No information can thus be gathered from the lack of distinction at this juncture.

1.5 Hence, it cannot be concluded that a skilled person would derive an implicit presence of primary attachments from the left-hand drawing of Figure 4.

1.6 During the oral proceedings, the appellant argued that there was a pointer towards the claimed combination of features in feature P8. It referred to page 55, lines 13 to 17 of the earlier application as filed, reading as follows:

*"It has been found that, that [sic] continuous disposition of these lines [note: referring to the lines of the bonding pattern] throughout the absorbent structure 14 creates additional channels and ducts which help the fluid transport from the point of liquid contact to the rest of the absorbent structure via mass flow allowing better and more spread out immediate liquid management via capillary flow locally."*

It further argued that a skilled person reading this would understand that the capillary flow was different from the flow through the channels and that it was

enhanced when the absorbent material was laid out in a continuously connected pattern. This constituted a pointer towards a continuously connected absorbent material pattern and was thus a clear preference therefor.

This is not accepted. The reference to "capillary flow locally" cannot make up for the lack of any mention of the type of absorbent material pattern in the embodiment shown in Figures 10A and 10B. The entire paragraph is silent in this respect and exclusively deals with the pattern of the bonding grids forming primary and secondary attachments. A skilled reader would thus not get any information from this paragraph as to how the absorbent material is laid out on the absorbent article shown in Figures 10A and 10B. They would only know from the last paragraph on page 50 that several possibilities exist and that clusters of absorbent material, surrounded by areas where substantially no absorbent material is present, are preferred (as opposed to a continuously connected pattern).

- 1.7 The appellant further argued that this statement did not exclude a pattern in which the absorbent material was substantially continuously connected. This is not convincing either. Firstly, not being excluded cannot be equated with a direct and unambiguous disclosure. And secondly, the Board considers the wording "clusters of absorbent material, surrounded by areas where substantially no absorbent material is present" as necessarily indicating a lack of absorbent material around the entirety of the clusters, this thus being a clear reference to a pattern in which the absorbent material is not continuously connected.

- 1.8 Therefore, the Board concludes that a skilled person would not derive from the earlier application as filed that a continuously connected absorbent material pattern is preferred over a pattern comprising distinguished separate clusters. On the contrary, it is the latter that is explicitly stated in the last paragraph of page 50 as to be preferably used.

There is thus no pointer towards the combination of features in feature P8.

- 1.9 With this combination not being implicit and not being described as preferred, whether the individual features of feature P8 are incompatible with each other or with other features, as argued by the respondent, is irrelevant. What is decisive to arrive at a decision is that a skilled reader would be unable to directly and unambiguously derive the information to actually combine them from the earlier application as filed.

- 1.10 During the oral proceedings before the Board, the appellant cited decision T2255/12 (seemingly referring to reasons 1.1.3) and argued that the assessment of the requirements of Article 123(2) EPC (and thus also of Article 76(1) EPC) should be done from the standpoint of the skilled person. This helped to avoid an overly formalistic approach in which more emphasis was given to the literal content of the original application than the technical information that it conveyed.

The Board considers itself fully aligned with the findings in case T2255/12. There, the deciding board accepted the four substances to which the claim was limited as being the favourites over other substances from a list of more than twenty in the application as filed. In the present case, however, the Board finds no

indication that the combination of primary attachments, secondary attachments, and a substantially continuously connected absorbent material pattern was preferred, and even less so being 'favourite'. Whilst the combination of primary and secondary attachments as such is indeed declared as being 'very much preferred' (earlier application, page 39, lines 9/10), a similar statement with regard to the substantially continuously connected absorbent material pattern is entirely missing. On the contrary, in the earlier application on page 50, lines 28-32, and thus immediately following the single mention of the substantially continuously connected absorbent material pattern, it is stated that *"[p]referably the absorbent material regions consists [sic] of several clusters of absorbent material 110, surrounded by areas where substantially no absorbent material 110 is present,..."* As already stated above, the Board understands this as indicating a clear preference of isolated clusters of absorbent material, as opposed to a continuously connected pattern.

- 1.11 The appellant further cited decision T1269/06 (seemingly referring to reasons 2) to underline that, in order to find that the claimed subject-matter extends beyond the content of the earlier application as filed, additional technically relevant information had to be added. According to this decision, such finding cannot merely be based on terminology that is not present in the application as filed, nor can it be based on a purely semantic analysis of the passages objected to.

The Board also agrees with these findings. In the present case, the Board's conclusion that the combination of primary attachments, secondary attachments, and a substantial continuously connected

absorbent material pattern extends beyond the content of the earlier application as filed is not based on the terminology or a semantic analysis of the features. It is based on the lack of a direct disclosure of such combination and also the lack of a clear indication that the combination of these features (i.e. all of these features) is preferred. Furthermore, and in contrast to case T1269/06, the respondent (as the party having raised the objection) has determined and addressed, clearly and explicitly, what it considered the added technical information.

- 1.12 With reference to the decision in case T3142/19, the appellant argued that the lack of a clear pointer to a particular combination of features did not necessarily mean that this combination was not derivable from the application. It argued that, in the present case, the three features in question did not involve any complexity and a skilled person would derive their combination from the passage on page 50 in combination with the left-hand drawing of Figure 4.

The Board does not agree with this line of argument. In the case underlying T3142/19 all contested features were described as optional, to which the deciding board referred to as a "forest of optional features". It accepted that, if the description did not indicate that some combination of features was desirable, this did not automatically mean that the combination was not derivable by the skilled person (reasons 6.2). It remarked, however, that "in a forest of optional features, a singled-out individual combination may not be clearly and unambiguously derivable by the skilled person" and explained that "[w]hether this [was] indeed the case depend[ed], however, on the specifics of the case, e.g. on the level of complexity caused by the

optional features" (reasons 6.5). The level of complexity is however only one example of potential indications that may be considered when deciding whether the claimed subject-matter extends beyond the content of the (earlier) application as filed. In full alignment with the findings of the deciding board in case T3142/19, this Board has based its considerations "on the specifics of the case". As laid out above, the Board finds that there is no indication in the earlier application as filed that the combination of both primary and secondary attachments (which as such indeed is preferred) is derivable for a skilled person in further combination with a substantially continuously connected absorbent material pattern (which is, as such and according to the interpretation of the Board, an explicitly stated less preferred option as opposed to a pattern comprising individual and thus separate clusters of absorbent material).

- 1.13 The appellant further referred to the decision in case T1255/18 and argued that it was not decisive whether a particular combination of features had to be derived by a selection from two lists to decide upon extension of subject-matter (seemingly referring to reasons 3.2 of that decision). Instead, the question to be asked was whether there was new technical information added by the claimed combination of features.

It should be remarked that the deciding board in the case underlying T1255/18 eventually concluded that the claimed subject-matter in that case did not meet the requirement of Article 76(1) EPC. It reasoned its finding by stating that "[t]he mere fact that each of the features of claim 1 of the main request would as such, i.e. when read in isolation, be disclosed in the earlier application as filed [was] not sufficient to



conclude that the skilled person would implicitly derive the presently claimed combination of features directly and unambiguously from the application as filed, using common general knowledge." The deciding board further explained that "[i]n this context 'implicitly' mean[t] that the skilled person would have found a disclosure for said combination of features as objectively and necessarily implied by the explicit content of the application as originally filed as a whole" (reasons 3.1).

Applied to the present case, the Board concludes that, taking into consideration the whole content of the earlier application as filed, the presence of a substantially continuously connected absorbent material pattern is not implicit. It is thus not necessarily present in the embodiment as depicted in the left-hand drawing of Figure 4. Since it is not even preferred (see reasoning above), the Board comes to the same conclusion as the deciding board in case T1255/18, i.e. that the combination of features set out in feature P8, i.e. the presence of primary attachments, secondary attachments and an absorbent material pattern that is substantially continuously connected, is not directly and unambiguously derivable from the earlier application as filed.

1.14 The main request is thus not allowable.

2. Auxiliary requests 1-41 - Article 76(1) EPC

Contrary to the requirement of Article 76(1) EPC, the subject-matter of claim 1 of any of auxiliary requests 1-41 extends beyond the content of the earlier application as filed.

2.1 Claim 1 of each of the auxiliary requests contains the same feature P8 as the main request. The conclusions arrived at above for the main request are thus necessarily the same in view of these requests. This was also not contested by the appellant.

2.2 None of the auxiliary requests is thus allowable.

## Order

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

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

M. Hannam

Decision electronically authenticated