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**Datasheet for the decision
of 20 May 2026**

Case Number: T 0095/24 - 3.2.04

Application Number: 14183772.4

Publication Number: 2992864

IPC: A61F13/475, A61F13/494,
A61F13/537

Language of the proceedings: EN

Title of invention:
Absorbent structure with edge barrier

Patent Proprietor:
Drylock Technologies N.V.

Opponent:
Ontex BV

Headword:

Relevant legal provisions:

RPBA 2020 Art. 12(3), 13(2), 12(6), 11
EPC Art. 100(a), 113(1), 111(1)
EPC R. 111(2), 103(1)(a)

Keyword:

Sufficiency of disclosure - main request (yes)

Novelty - main request (yes)

Amendment to case - D1 and D15 - exercise of discretion

Remittal to the department of first instance

Reimbursement of appeal fee - equitable by reason of a
substantial procedural violation (yes)

Remittal - fundamental deficiency in first instance
proceedings (yes)

Late-filed inventive step objections - should have been
submitted in first-instance proceedings (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 0095/24 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 20 May 2026

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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted/electronically transmitted on 22 November 2023 rejecting the opposition filed against European patent No. 2992864 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman W. Ungler
Members: P. Cipriano
J. Wright

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. 2 992 864.

The appellant requested that the decision under appeal be set aside and the patent be revoked. Furthermore it requested that the case be remitted to the opposition division for further prosecution and that the appeal fee be reimbursed due to a substantial procedural violation. Auxiliarily, the appellant requested remittal to the opposition division to: (i) continue the assessment of inventive step of the Main Request should it be found that the claims meet the requirements of novelty; or (ii) should it become necessary, to discuss the auxiliary requests.

- II. With its reply, the respondent (patent proprietor) requested that the appeal be dismissed, i.e. that the patent be maintained as granted, auxiliarily that the case be remitted to the opposition division for further prosecution, further auxiliarily that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 7 filed with the reply to the statement of grounds of appeal.

- III. The following documents are relevant to the present decision:

D1	US 2006/0020250 A1
D4	US 2014/0171898 A1
D5	US 5 868 725
D6	US 5 624 423
D7	US 2007/0287981 A1
D8	US 2004/0167486 A1

D10 US 2008/0312619 A1

D15 US 5 151 091

- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion.
- V. Oral proceedings were held on 20 May 2026. At the close of the proceedings the requests of the parties remained unchanged.
- VI. Claim 1 of the main request reads as follows (with the feature references as indicated on pages 3 and 4 of the contested decision):
- "a) An absorbent article comprising
 - b) a liquid pervious topsheet (18),
 - c) a liquid impervious backsheet (20), and
 - d) an essentially fluffless absorbent structure (14) positioned in between said backsheet and said topsheet,
 - f) said absorbent structure comprising a length along an x-axis, a width along a y-axis and a thickness along a z-axis,
 - g) whereby said absorbent structure comprises two laterally opposed side edges (8) extending substantially along the x-axis and a front edge (11) and a back edge (9) which extend substantially along the y-axis,
 - h) wherein the absorbent structure further comprises an edge barrier (6),
 - i1) said edge barrier being disposed along at least a part of at least one of the side edges,
 - i2) along at least a part of the front edge and/or along at least a part of the back edge
 - j) wherein the edge barrier (6) is substantially absorbent particulate polymer material (2) impermeable to prevent sideways leakage of absorbent particulate

polymer material from said absorbent structure, characterized in that

- k) the edge barrier (6) extends along the entire thickness of the absorbent structure and
- l) the edge barrier (6) is substantially liquid impermeable to prevent sideways leakage of fluid from said absorbent structure."

VII. The parties' arguments relevant to the decision are discussed in detail in the Reasons for the Decision.

Reasons for the Decision

1. Main Request - Article 100(b) EPC

1.1 In items 2.2 to 2.4 of its preliminary written opinion, the Board stated the following:

"[2.2] The appellant argues that the skilled person, when reading claim 1, is lacking two crucial pieces of information to ensure the prevention of sideways leakage:

- 1) The skilled person must know how to properly arrange the edge barrier, and
- 2) which liquid impermeable material is suitable for this application.

[2.3] Regarding item 1), even if a barrier does not completely surround the absorbent structure, at least some level of leakage prevention is necessarily obtained by an edge barrier, as defined in claim 1. It appears to be clear for the skilled person that the bigger the barrier, the more leakage can be prevented.

[2.4] Regarding item 2), claim 1 defines that the "edge barrier (6) is substantially absorbent particulate polymer material (2) impermeable to prevent sideways leakage of absorbent particulate polymer material from said absorbent structure", i.e. the property that the material must be impermeable (at least to some extent) is already defined in claim 1.

This is also supported by the description of the edge barrier, from paragraph [0022] to paragraph [0029] of the published patent (which corresponds to paragraph [0113] of the description as filed, cited by the appellant), which describes the possibility of the edge barrier material being liquid impermeable.

The skilled person would therefore have no difficulty choosing a material from the list of types of materials that would be impermeable, at least to some extent. The selection of a suitable impermeable material would not pose an undue burden on the skilled person faced with the teaching of the patent."

1.2 In the oral proceedings the appellant did not make any further submissions and only stated that they maintained their arguments in writing. Absent any arguments indicating why the preliminary opinion is incorrect, the Board, after having reconsidered all the factual and legal aspects of the case, confirms its preliminary opinion herewith and finds the ground for opposition under Article 100(b) EPC does not prejudice the maintenance of the patent.

2. Main request - Article 100(a) EPC + 54 EPC

2.1 The appellant raised novelty objections using D4, D5, D6 and D7 in its grounds of appeal.

Document D4

- 2.2 The appellant argued that the embodiment of Figure 44 of D4 disclosed all the features of claim 1 in combination.

Regarding feature d), the appellant argued that while paragraph [0048] did recite that absorbent cores comprising airfelt were within scope of the disclosure, there was a clear preference for cellulose free cores in the whole teaching of D4 as they were presented first in a preferential level of disclosure and D4 contained multiple references to fluffless cores (e.g paragraphs [0049] and [0050]), whereas airfelt was merely mentioned as an additional single standalone example in paragraph [0048]. The fact that the Figures did not show any fibers was also a further indication that D4 disclosed preferentially fluffless cores.

The Board does not agree. Whilst it is true that only one of the examples cited by the appellant contains cellulose, neither the number of materials nor the order of the cited materials presents a pointer to the skilled person reading D4. Paragraph [0048] of D4 discloses several possibilities for the materials of the absorbent core "in an embodiment", i.e. the list of possibilities disclosed is not even exhaustive as there could be other embodiments comprising other materials.

All of the possibilities are thus equally possible such that a first selection is necessary to arrive at the combination of features of claim 1 comprising "an essentially fluffless absorbent structure", as defined in feature d).

2.3 Regarding features j) and l), the appellant argued that the first sentence of paragraph [0059] was not written in embodiment language and should be read in conjunction with the last sentence of the previous paragraph (paragraph [0058]). The appellant further argued that the skilled person understood from D4 that, in order to be liquid and absorbent material impermeable as defined in features j) and l), the raised barrier 101 had to "prevent" urine from leaking (see paragraph [0058]) and this entailed necessarily only the option that the barrier was a separate structure from the absorbent body as already shown in Figure 44. This possibility, on the other hand, meant that the raised barrier 101 could not be formed from the same materials as the absorbent body 100 (a possibility described in paragraph [0059]) and was necessarily configured to be impermeable to exudates (the other possibility described in paragraph [0059]). According to the appellant, there was therefore no further selection to be made.

These arguments are not found persuasive. The Board agrees that paragraph [0059] of D4 relates, among others, to the embodiment of Figure 44. However, the first sentence of paragraph [0059] of D4 teaches two options for forming the raised barrier: either formed with a portion of the absorbent body or as a separate structure. If, for the option that the raised barrier is formed together with a portion of the absorbent structure, it appears to be necessary that they are both of the same material, the same does not appear to be necessary for the option that they are separate structures (e.g. the embodiment of Figure 44).

The Board does not see why the second sentence in paragraph [0059] should only apply to the option that

the raised barrier is formed with at least a portion of the absorbent body. The expression "In an embodiment" would not be recognized by the skilled person as erroneous and does not exclude the possibility that, even if the raised barrier is a separate entity from the absorbent body, they could be made of the same materials, since this option makes technical sense. Neither does the expression "In an embodiment" refer unambiguously only to the first option of the previous sentence, nor does the expression "in other embodiments" in the next sentence appear to refer only to the second option.

- 2.3.1 The appellant also made the point that the expression "formed of the same materials as", used in paragraph [0059], did not refer to types of materials used, but to the actual fibers forming the layers and that the use of this expression in paragraph [0085] also supported this interpretation.

The Board does not agree. The expression used in paragraphs [0059] and [0085] is not the same. When referring to the possibility of the raised barrier 101 being a single component together with the acquisition layers 109 or the absorbent core 111, paragraph [0085] refers to raised barrier 101 being "formed [...] from one or more of the acquisition layers 109, portions of the absorbent core 111", i.e. there is no reference to the materials as in the expression of paragraph [0059]. Paragraph [0085] only refers to materials in the option barrier materials 107, i.e. the option that the raised barrier is a separate component from the acquisition layers 109 and the absorbent core 111. Paragraph [0085] would therefore not lead the reader to exclude any of the possibilities in paragraph [0059] for the option

that the raised barrier is a separate component from the acquisition layers 109 and the absorbent core 111.

A second selection is therefore necessary to arrive at the combination of features of claim 1 comprising an edge barrier substantially absorbent particulate polymer material impermeable and substantially liquid impermeable, as defined in features j) and l).

- 2.4 D4 does not directly and unambiguously disclose all the features of claim 1 in combination. The subject-matter of claim 1 is novel over D4.

Document D5

- 2.5 The appellant argued that a skilled reader would interpret the passage of the claim "said edge barrier being disposed along at least a part of at least one of the side edges, along at least a part of the front edge and/or along at least a part of the back edge" as requiring only one of the three listed options, i.e. it was sufficient for the edge barrier to be disposed along one of the side edges, the front edge or the back edge. Therefore, features i1) and i2) together posed only a single requirement. This interpretation was also supported by paragraph [0009] and claims 5 and 16 of the patent publication. Following this interpretation, the liquid barrier 35/strip 38 in Figure 6 and described in column 11, lines 43-52, corresponded to an edge barrier that met the conditions of features i1) and i2), since it was formed along the back of the transverse edge 9.

- 2.5.1 The Board does not agree with this interpretation. The Board notes that, unlike the two ideas presented in feature i2, there is no "or" clause or "and/or" clause

between feature i1 (barrier along at least one side edge) and the first part of i2 (barrier along front edge). Rather, these are presented in the form of a list separated by a comma. With this in mind, the Board holds that the skilled person understands feature i1 (barrier along side edge) to be a mandatory feature of the claimed absorbent article, rather than an optional feature as the appellant has argued. The edge barrier defined in claim 1 thus needs to be disposed along (at least a part of) one of the side edges.

2.5.2 Paragraph [0009] as well as claims 5 and 16 of the patent publication do not contradict this interpretation of the claim wording. Paragraph [0009] and independent claim 16 describe/define an edge barrier along at least one of the edges of the absorbent structure. The edge barrier of independent claim 16 is therefore defined in a broader way than the one of claim 1, as supported by paragraph [0009]. There is no requirement for the edge barrier in both claims to be defined in the same level of specificity and there is no passage in the patent specification stating that the wording of claim 1 should be interpreted in this manner.

Claim 5, which is dependent on claim 1, also does not contradict the interpretation of claim 1 given above. It simply defines more specifically that the edge barrier must be disposed along at least part of *both* side edges, and not just one side edge as in claim 1.

2.5.3 The embodiment of Figure 6 of D5 does not disclose an edge disposed along (at least a part of) one of the side edges of the absorbent core 3 as required by the wording of claim 1. This is not shown in Figure 6 nor described in the corresponding paragraph in column 11, lines 43-52.

- 2.6 It follows that D5 does not disclose feature i1) of claim 1. The subject-matter of claim 1 is therefore, novel over D5.

Document D6

- 2.7 The appellant argued that the embodiment of Figure 3 of D6 disclosed all the features of claim 1 in combination.

- 2.8 According to the appellant, the third layer 34 corresponded to an absorbent structure as defined in feature k) of claim 1, since it was thinner than the barrier 20 shown in Figure 3. In addition, while column 4, line 54, to column 5, line 52, disclosed several different materials for the various layers of the absorbent core, the skilled person would have understood that the third (and lowest) layer 34 of the absorbent core 18 having a density gradient, not only had a higher density than the protuberance 30 and the second layer 32 but also could not be made of cellulose or wood pulp, since these materials would not render the third layer 34 wet stable. It could only be made of meltblown propylene as disclosed in column 5, lines 47-48. The subsequent reference to "other materials" only applied to the second layer 32. Feature d) was therefore implicitly disclosed in D6.

The Board agrees that the third layer 34 is an absorbent structure comprised in the absorbent article. The wording of claim 1 does not exclude that the absorbent article might comprise further absorbent structures. As seen in Figure 3 of D6, the barrier 20 extends along the entire thickness of the absorbent structure 24 such that feature j) is disclosed in D6.

However, the third layer 34 disclosed in D6 is not necessarily essentially fluffless as defined in feature d). The paragraph in column 5, lines 39-52, states that it is desirable for both the second and third absorbent layers to be wet stable, i.e. the references to materials are not exclusively applicable to the third layer 34 but also to the second layer 32 and this paragraph must be read in conjunction with the previous paragraphs in columns 4 and 5. The reference to "one or more of the absorbent materials " in column 5, lines 50 and 51 also attests to this, since column 5, lines 39-52, only discloses one single material and further materials are only disclosed in the passages before. D6 also does not teach that cellulose fibers render the material more prone to clumping than other materials. In addition, the last sentence of the paragraph in column 5, lines 39-52, discloses the possibility of combining materials and thus the benefits of the individual materials disclosed before. The skilled person would therefore not necessarily exclude any material from the materials disclosed in column 4, line 54, to column 5, line 52, which includes *inter alia* cellulose and wood pulp fiber materials.

A first selection is therefore necessary to arrive at a fluffless absorbent structure as defined in feature d) in combination with the other features of claim 1.

- 2.9 Regarding features j) and l), the appellant argued that D6, column 11, lines 28-42, taught that the materials used for the barrier 20 (which corresponded to the edge barrier defined in claim 1) should be impermeable polymeric foams. D2, column 2, lines 21-23, also taught the skilled person that the barrier 20 was necessarily liquid impermeable. The material of the barrier 20 was therefore necessarily absorbent particulate polymer

material impermeable and liquid impermeable as defined in features j) and l), respectively.

The Board does not agree. Whilst column 11, lines 28-42, discloses that preferred materials for forming the barrier are hydrophobic liquid impermeable polymer foams, the following paragraph in column 11 discloses that the barrier can also be hydrophilic and made of a hydrophilic material such as compressed cellulosic sponge. Such a hydrophilic layer would also "impede" the flow of body fluid as described in column 2, lines 28-42, even if only by simply adding a further barrier before reaching the perimeter of the sanitary napkin, and would therefore not be automatically excluded. Both the hydrophobic and the hydrophilic material would be absorbent particulate polymer material impermeable as defined in feature j). However, an hydrophilic material would not be (at least necessarily) liquid impermeable) as defined in feature l). Even if D6 discloses that hydrophobic liquid impermeable polymer foams are "desirable", the teaching of D6 also encompasses hydrophilic layers such that no direct and unambiguous disclosure of an absorbent particulate polymer material impermeable and liquid impermeable material for a barrier is disclosed in combination with the other features of claim 1.

A second selection is therefore necessary to arrive at a liquid impermeable material for the edge barrier as defined in feature l) in combination with the other features of claim 1.

2.10 The subject-matter of claim 1 is thus novel over D6.

Document D7

- 2.11 The appellant argued that the embodiment of Figure 2a of D7 disclosed all the features of claim 1 in combination.
- 2.12 According to the appellant, the garment body 50 in Figure 2A of D7 (which corresponds to the backsheet defined in claim 1) was necessarily liquid impervious, as defined in feature c), because the central zone 32 of the containment member 26 immediately above it was not. The appellant reasoned that the core was formed using vacuum suction such that the central area 32 of sheet 26 must be air permeable, in order for the material of the core 28 above to be immobilized during manufacturing/wrapping. If the central zone 32 was air permeable, this affected liquid permeability, as explained in paragraph [0064]. The garment body 50 was therefore necessarily liquid impermeable in order to guarantee that there was no leaking to the outside of the absorbent article.

This argument is not convincing for the Board. Whilst paragraph [0064] does mention the difficulty of having materials with air permeable and liquid impermeable at the same time, paragraph [0065] states that this duality is possible.

Since paragraph [0064] of D7 is full of optional features ("may", "desirable") and paragraph [0065] discloses that it is possible that a material may be air permeable and liquid impermeable at the same time, the central zone 32 does not necessarily have to be air and liquid permeable. Whilst the embodiments of paragraphs [0067] and [0085] do comprise a central zone 32 made of a porous material, it is not unambiguous from the whole teaching of D7 that the central zone 32 of the sheet 26 is always liquid impermeable. As the respondent pointed out, paragraph [0046] even discloses

explicitly the possibility of the garment body 50 being liquid permeable and not having a "containment function".

A first selection of a suitable material for the garment body 50 from the ones disclosed in D7 would therefore be necessary to arrive at a liquid impervious backsheet defined in feature c) in combination with the other features of claim 1.

- 2.13 The appellant also argued that feature d) was directly and unambiguously disclosed. According to the appellant, paragraphs [0003] and [0004] directed the skilled person at the time of filing to use SAP, a fluffless material, as a material for the absorbent core. This was also taught by paragraph [0057] which stated that the absorbent core should use no or only minimal amounts of fibrous material.

This argument is not found to be persuasive by the Board. Contrary to the appellant's assertions, paragraph [0057] does not further develop the teaching of paragraph [0055] with the help of paragraphs [0003] and [0004] to point the skilled person into using SAP and away from fibrous material. The example of paragraph [0057] is only one example ("Another suitable core construction") from the possible constructions/ materials listed in the paragraphs [0055] to [0057], in which materials such as wood pulp and cellulosic fibers are disclosed as being "suitable".

A second selection from the materials listed in the paragraphs [0055] to [0057] is therefore necessary to arrive at a fluffless absorbent structure as defined in feature d) in combination with the other features of claim 1.

2.14 The subject-matter of claim 1 is therefore novel over D7.

3. Admittance of the novelty objection against claim 16 using D7

3.1 During the oral proceedings, the appellant raised a novelty objection against independent claim 16 using D7.

3.2 The appellant argued that the objection was not raised for the first time and had already been made during the opposition proceedings, on page 29, item 3.15 of its notice of opposition. The appellant added that the objection had also been maintained in the appeal proceedings on page 2, section 3 of the appellant's grounds of appeal.

This argument does not persuade the Board. The Board finds that the brief general statement "As a precautionary measure, Opponent hereby submits and maintains all his arguments and reasoning raised in the opposition proceedings" on page 2 of the grounds of appeal does not provide enough legal or factual substantiation for the novelty objection on claim 16. This statement did not allow the Board to determine on which part of their opposition case they wanted to rely on, as there was no single reference to independent claim 16 in the appellant's grounds of appeal. Thus, the Board finds that this reference is not sufficient to meet the substantiation requirements of Article 12(3) RPBA.

3.3 The appellant further argued that, even if this objection were considered to have been first made in

the oral proceedings before the Board and to be an amendment to the appellant's appeal case, there were exceptional circumstances under Article 13(2) RPBA for justifying admitting it at this late stage of the proceedings. The opposition division had not dealt with the novelty objection in its decision and the discussion during the oral proceedings before the opposition division had been more concentrated on D5. In addition, the interpretation of features i1) and i2) of claim 1 had changed.

The Board does not agree that there are exceptional circumstances. First, independent claim 16 does not comprise the same features as claim 1 and features i1) and i2) of claim 1 are also not present such that any interpretation issues in claim 1 do not necessarily apply to claim 16. Second, the Board fails to see how the absence of reasoning in the decision might have prevented the appellant from making the objection already in its grounds of appeal. The same applies to the fact that the opposition may have concentrated the discussion more on D5. None of these reasons constitute exceptional circumstances justifying raising the objection only during the oral proceedings before the Board.

- 3.4 In the absence of exceptional circumstances, the Board did not take the novelty objection against claim 16 into account pursuant to Article 13(2) RPBA.
- 4. Admittance of documents D15 and D1 into the proceedings
- 4.1 The respondent argued that the opposition division had wrongly exercised its discretion in admitting document D15 into the proceedings, since it considered D15 *prima facie* relevant, admitted it into the proceedings but

ultimately found D15 to be no more relevant than the prior art documents already on file.

- 4.1.1 The Board does not agree and finds that it should only overrule the way in which the opposition division exercised its discretion in admitting D15 if the Board concludes that the opposition division did so based on the wrong principles, failed to consider the right principles or did so in an arbitrary or unreasonable way, thereby exceeding the proper limits of its discretion.

On pages 10 and 11 of the contested decision, the opposition division expressed its view that D15 *prima facie* related to the subject-matter of the contested patent and was relevant for the assessment of inventive step of claim 1 of the main request. Although the opposition division ultimately did not consider D15 more relevant than other starting points on file (D4 and D5), the Board finds that the *prima facie* relevance criterion was correctly applied in a reasonable way. It is irrelevant if the *prima facie* assessment diverges from the final substantive assessment, since this a possible and natural consequence of its *prima facie* nature.

- 4.1.2 There was thus no error in the use of discretion by the opposition division and the Board therefore did not overturn the decision of the opposition to admit D15 into the proceedings (Article 12(6) RPBA).

- 4.2 Regarding D1, the opposition division did not admit it into the proceedings on the basis that it had not been commented on at all. The respondent agreed and argued that D1 was only used after expiry of the period for

filing the opposition and that it had not been sufficiently substantiated.

The Board does not agree. As the appellant argued, D1 was commented upon in item 1.1 of its letter dated 31 July 2023 and was used to justify several inventive step objections against claim 1, such as starting from D15 in combination with D1 (see page 8, second paragraph, and page 10, fifth and sixth complete paragraphs, of letter dated 31 July 2023). The objections using D1 were therefore late filed but sufficiently substantiated.

- 4.2.1 The Board thus finds that the opposition division did not use its discretion in a reasonable way and overturns its decision. The Board uses its discretion under Article 12(6) RPBA to admit D1 into the proceedings. D1 is thus admitted into the proceedings.
- 5. The request of the opponent for remittal to the opposition division
 - 5.1 The inventive step objections starting from D10 in combination with D15 and starting from D15 in combination with common practice and/or with reference to D1, D8 and D10, found on pages 12 and 13 of the grounds of appeal, were originally raised in the letters dated 7 February 2022 and 31 July 2023.
 - 5.2 As can be seen in the fourth paragraph of page 5 of the minutes of the oral proceedings, the opponent expressly maintained its inventive step objections submitted in the written procedure. In addition, D15 was admitted into the proceedings (see page 11 of the contested decision and page 7 of the minutes).

5.3 However, the contested decision did not address any other inventive step objection besides those discussed during the oral proceedings (D4+D8 and D5+D8). On page 11 of its decision, the opposition division concluded that the remaining documents did not appear to be suitable springboards and did not take these objections into account for the decision.

5.4 The respondent argued that the decision was not deficient, firstly because it mentioned on page 11 that documents other than D4 or D5 had more missing features, and secondly because the appellant had stated during the oral proceedings that they did not wish to comment on other objections.

The Board, however, does not agree. The decision states, on page 11, last complete paragraph, that the other documents (presumably other than D4 and D5) lack many features. However, according to the appellant's arguments in the last complete paragraph on page 9 of its letter dated 31 July 2023, D15 differs from the subject-matter of claim 1 also only in feature d). The contested decision does not explain why this argument is incorrect and why D15 lacks further features as stated in the decision.

The appellant is also not required to make oral submissions on all their objections during the oral proceedings. The Board finds that the explicit statement in the oral proceedings that they maintained the inventive step objections as submitted in the written procedure leaves no doubt about the fact that these were maintained.

5.5 In summary, the decision does not address the inventive step objections starting from D10 in combination with

D15, nor those starting from D15 in combination with common practice and/or with reference to D1, D8 and D10. These objections were admissibly raised and maintained in the opposition proceedings leading to the decision under appeal and form part of the appellant's appeal case.

- 5.6 Therefore, the Board finds that the decision of the opposition division is insufficiently reasoned and does not fulfil the requirements of Rule 111(2) EPC because these objections were omitted.

Such an omission affected the appellant's right to be heard (Article 113 (1) EPC), as the opposition division did not consider all of the appellant's admissible objections regarding inventive step. According to the established case law, the obligation to provide adequate reasoning in a decision in accordance with Rule 111(2) EPC is closely linked to the principle of the right to be heard under Article 113 EPC. A failure to do so is to be considered a substantial procedural violation justifying the reimbursement of the fee for appeal (see Case Law of the Boards of Appeal of the EPO, 11th edn., 2025, V.A.11.6.9). The Board sees no reason to deviate from the case law in the present case and the respondent has not provided any either.

Thus, the provisions of Article 113(1) and Rule 111 (2) EPC have not been complied with. The opposition proceedings are therefore tainted by substantial procedural deficiencies.

- 5.7 The appellant requested that the case be remitted to the opposition division for discussion of inventive step due to the substantial procedural violation in

failing to reach a reasoned decision on the inventive step objections starting from D10 and D15.

- 5.8 According to Article 111(1) EPC the Board may exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution. It is thus at the Board's discretion whether it examines and decides on the case or whether it remits the case to the department of first instance.

Furthermore, according to Article 11 RPBA 2020, the Board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so. As a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.

- 5.8.1 The procedural defects set out above in paragraph 5.1 to 5.6 amounting *inter alia* to a violation of the appellant's right to be heard (Article 113(1) EPC) and constitute a fundamental deficiency within the meaning of Article 11 RPBA 2020, justifying a remittal to the opposition division.

- 5.9 The Board thus decided to remit the case to the opposition division.

6. Reimbursement of the appeal fee

- 6.1 According to Rule 103(1)(a) EPC, "the appeal fee shall be reimbursed in full ... where the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation".

With the above conditions having been met and the appellant having requested reimbursement, the appeal fee is to be reimbursed.

- 7. Admittance of the inventive step objections starting from D4 to D8 in appeal proceedings.
- 7.1 The appellant raised inventive step objections starting from D4, D5, D6, D7 (on page 11, item 3.c.i, of the grounds of appeal) as well as D8 (on page 12, item 3.c.ii, of its grounds of appeal).
- 7.2 The appellant argued that these objections had already been raised during the opposition proceedings in section 2.9 on page 19 of the notice of opposition, and page 7, section 1.7 of its letter of 31 July 2023, and at the oral proceedings as stated in the minutes page 5 that it maintained all its inventive step objections. The appellant also argued that the inventive step objections starting from D4 and D5 had been discussed during the oral proceedings and were set out in the contested decision and so they could not be said to have been raised for the first time in the appeal proceedings.
- 7.2.1 These arguments are not persuasive. Section 2.9 on page 19 of the notice of opposition does not raise inventive step objections, it simply suggests possible conditions under which documents D3, D4, D5, D6 or D7 could possibly be used to assess inventive step. Section 1.7 of the letter of 31 July 2023 also does not present any inventive step objection but simply states that D4, D5 and D6 (among others) are better starting points than D3.

7.2.2 The Board notes that inventive step objections starting from D4, D5 and D8 were put forward with the letter dated 31 July 2023 and during the oral proceedings before the opposition division, but that these inventive step objections do not correspond to the ones mentioned above in paragraph 7.1. The inventive step objections based on D4 and D5 in appeal do not concern combinations with D8, which had been raised before and are discussed in the contested decision. They are thus new objections raised for the first time in the appeal proceedings.

Likewise, the inventive step objection raised in the appeal based on D8 is in combination with D15, rather than D11, which had been previously raised. Therefore, D8 in combination with D15 is also a new inventive step objection that was raised for the first time in the appeal proceedings.

7.2.3 The reference in the minutes of the oral proceedings to "inventive step attacks as submitted in the written procedure" does not therefore refer to the objections mentioned above in item 7.1, as these were never raised in the opposition proceedings.

7.2.4 The inventive step objections starting from D4, D5, D6, D7 (on page 11, item 3.c.i, of its grounds of appeal) as well as D8 (on page 12, item 3.c.ii, of its grounds of appeal) were therefore made for the first time in the appeal proceedings.

7.3 Under Article 12(6) RPBA, the Board "shall not admit [...], objections [...] which should have been submitted [...] in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance".

7.4 The appellant also argued that the inventive step objections starting from D6, D7 and D8 were not raised during the opposition proceedings because, during those proceedings, the appellant had maintained that the documents were novelty destroying and had not wanted to present contradictory lines of argument.

This argument is not persuasive. Whilst the Board could agree that this logic might justify not raising these objections pre-emptively in the notice of opposition, both the preliminary opinion and the later conclusion of the opposition division in the oral proceedings were that claim 1 was novel over D3 to D7. The Board therefore finds that the appellant had ample opportunity to raise inventive step objections starting from these documents during the opposition proceedings. The Board could not find any novelty objection over D8 in the opposition proceedings but this document was already used for other inventive step objections during the opposition proceedings. Therefore, there is no reason as to why the inventive step objection starting from D8 in combination with D15 could not also have been made during the opposition proceedings.

7.5 The appellant did not argue that there were circumstances of the appeal case justifying the admittance of these objections. Nor could the Board identify any such circumstances.

7.6 The objections raised in the appeal proceedings starting from D4 to D8 mentioned above in paragraph 7.1 were therefore not admitted into the appeal proceedings, since they should have been submitted already during the opposition proceedings leading to the decision under appeal.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the opposition division for further prosecution.

The appeal fee is reimbursed.

The Registrar:

The Chairman:



G. Magouliotis

W. Ungler

Decision electronically authenticated