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Datasheet for the decision of 8 January 2026

Case Number: T 0307/24 - 3.2.05

Application Number: 20155291.6

Publication Number: 3666950

IPC: D04H1/425, D04H1/4374, D04H1/495, D04H1/498

Language of the proceedings: EN

Title of invention:
Structured, dispersible nonwoven web comprised of entangled fibers

Patent Proprietor:
GPCP IP Holdings LLC

Opponent:
Andritz Küsters GmbH

Relevant legal provisions:
EPC Art. 100(a), 56, 111(1)
RPBA 2020 Art. 11, 12(2)

Keyword:
Grounds for opposition - lack of patentability (yes)
Inventive step - main request (no) - obvious alternative
Inventive step - starting point suitable (yes)

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It can be changed at any time and without notice

Decisions cited:
G 0002/21, G 0001/24, T 0967/97, T 0824/05, T 0021/08, T 1742/12, T 1179/16, T 0283/23, T 0428/23, T 0749/23

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Case Number: T 0307/24 - 3.2.05

D E C I S I O N
of Technical Board of Appeal 3.2.05
of 8 January 2026

Appellant: (Opponent)	Andritz Küsters GmbH Eduard-Küsters-Strasse 1 47805 Krefeld (DE)
Representative:	Kluin Patent Patentanwälte Kluin Debelius Weber PartG mbB Benrather Schlossallee 111 40597 Düsseldorf (DE)
Respondent: (Patent Proprietor)	GPCP IP Holdings LLC 133 Peachtree Street, N.E. Atlanta, Georgia 30303 (US)
Representative:	Grünecker Patent- und Rechtsanwälte PartG mbB Leopoldstraße 4 80802 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 22 December 2023 rejecting the opposition filed against European patent No. 3666950 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	P. Lanz
Members:	M. Dorfstätter
	J. Hoppe

Summary of Facts and Submissions

I. The opponent filed an appeal against the opposition division's decision to reject the opposition against European patent No. 3 666 950 (hereinafter: the patent).

II. In the decision under appeal, the opposition division concluded that the ground for opposition under Article 100(a) in conjunction with Article 56 EPC did not prejudice the maintenance of the patent as granted.

III. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

IV. The respondent (patent proprietor) requested
- that the appeal be dismissed, i.e. that the patent be maintained as granted (main request),
- or, as an auxiliary measure, that the case be remitted to the opposition division for further prosecution in view of the objections of lack of inventive step starting from other documents than D2 as closest prior art if the Board were to find these objections to be admissible,
- or that the case be remitted to the opposition division for further prosecution on the basis of auxiliary requests 1 to 4 submitted with the reply.

V. The following documents are relevant for the present decision.

D2 US 2008/0 233 382 A1
D6 US 6 753 063 B1

D8 WO 2013/171 343 A2

VI. In a communication pursuant to Article 15(1) RPBA, the parties were informed of the Board's provisional opinion. It indicated, *inter alia*, that the assessment of inventive step would depend on the outcome of the discussion at the oral proceedings of whether the distinguishing features in view of document D2 would be considered not to have a technical effect and could thus eventually be found to be arbitrary, or whether they had a technical effect and the objective technical problem could thus be formulated based on such an effect. The Board also indicated that the technical effect needed to be attributable to the distinguishing features and that the objective technical problem as yet to be defined needed to be solved by these features.

VII. Oral proceedings before the Board were held on 8 January 2026.

VIII. Claim 1 of the main request (patent as granted) reads as follows (with the feature-by-feature analysis substantially as introduced by the appellant, albeit in the language of the proceedings).

M1.1 "A water-dispersible
M1.2 nonwoven substrate comprising
M1.3 a structured web comprising
M1.4 entangled cellulosic fibers,
M1.5 the structured web having a first surface and a second surface, the first surface having substantially filled* protrusions
M1.6 extending outwardly from the first surface,
M1.7 *

M1.8 and the portions of the web between the protrusions defining connecting regions disposed between the protrusions;

M1.9 wherein the average fiber densities of the protrusions and connecting regions are substantially the same,

M1.10 and the second surface is substantially free of depressions."

*In the appellant's feature-by-feature analysis the underlined part of feature M1.5, 'substantially filled', is referred to as a separate feature, M1.7.

IX. Claim 1 of each of auxiliary requests 1 to 4 defines further characteristics of the entangled cellulosic fibres introduced in feature M1.4. The precise wording of this is not relevant for the present decision and is thus not reproduced.

X. The appellant's submissions relevant for the decision may be summarised as follows.

Claim construction

Claim 1 did not exclude the presence of compressed sites.

Main request - inventive step

The subject-matter of claim 1 differed from document D2 only on account of features M1.7 and M1.9.

The subject-matter of claim 1 did not involve an inventive step. A technical effect could not be attributed to features M1.7 or M1.9, nor did the contested patent describe one. The objective technical

problem thus had to be reformulated. Based on its own considerations, and if there were a technical effect at all, the objective technical problem could be considered that of achieving a surface structure that did not deteriorate the tensile strength of the final product too much.

Documents D2 and D6 were not incompatible. In addition, adding compressed sites was not contradictory to the teaching of document D6. The combination of documents D2 and D6 thus led the skilled person to the claimed subject-matter.

Auxiliary requests - inventive step

Document D6 was equally to be considered a valid starting point in the assessment of inventive step. Starting from document D6 was a practicable way to arrive at the invention. The attack on this basis should thus have been examined by the opposition division.

XI. The respondent's submissions relevant for the decision may be summarised as follows.

Claim construction

Claim 1 excluded the presence of compressed sites. It was clear from the description which had to be taken into account when interpreting a claim that compressed sites were not intended. It was also clear from the overall context that the substrate according to claim 1 did not have compressed sites.

Main request - inventive step

The subject-matter of claim 1 differed from document D2 not only on account of features M1.7 and M1.9, but also on account of feature M1.4, since document D2 disclosed cellulosic fibres only as an alternative. Yet another difference was due to document D2 requiring the presence of compressed sites.

The subject-matter of claim 1 involved an inventive step. The patent indicated a technical effect that was achieved by providing a uniform density of the protrusions and connecting regions. The effect was mentioned in paragraph [0035] as being that of a high tensile strength of the structured web while its dispersibility in water was maintained. Further effects were mentioned in paragraph [0038].

Even if the objective technical problem were only to find an alternative there was no motivation for the skilled person to combine document D2 with document D6. The teaching of document D2 was incompatible with the teaching of document D6, and therefore the skilled person would not have arrived at the claimed invention even if they had tried to combine them. Furthermore, the teaching of D2 led away from applying feature M1.9. The skilled person thus would not have arrived at the claimed subject-matter.

Auxiliary requests - inventive step

Document D6 was not to be used as the closest prior art in the assessment of inventive step. This document had fewer features in common with the claimed invention and/or addressed different problems. It related to different uses and required significantly more

structural and functional modifications than document D2. Document D6 was thus unsuitable as a starting point for the discussion of inventive step.

Reasons for the Decision

1. *Main request - interpretation of feature M1.9*

1.1 Before assessing whether an inventive step would have been necessary for the skilled person to arrive at the claimed subject-matter, the claim needs to be interpreted. In the present case it is necessary to interpret feature M1.9, in particular whether it excludes the presence of "compressed sites" as set out in document D2.

1.2 Feature M1.9 reads

> "wherein the average fiber densities of the protrusions and connecting regions are substantially the same".

The Board interprets this as excluding the possibility that the protrusions are made by compressing the areas enclosing them (as would be the case if the protrusions were made by embossing, for example); however, provided that this condition is met, the wording of the claim does not generally exclude compressed regions being present anywhere else on the web.

1.3 The respondent argued that any region that was not a protrusion was necessarily somewhere in between them and thus could be considered a connecting region in the sense of feature M1.8. It was clear from the overall disclosure in the patent, and in particular from Figure 1 and paragraph [0032], that the presence of

depressions was not intended. With reference to the decision of the Enlarged Board of Appeal in case G 1/24, it further argued that the description had to be taken into account for interpreting the claims when assessing the patentability of an invention. It was clear from the overall context that the substrate according to claim 1 did not have compressed sites.

1.4 The Board does not accept the respondent's conclusion. Any region that is not a protrusion can either lie somewhere between any two protrusions or, alternatively, outside the areas having protrusions; however, this does not imply that all these regions are necessarily to be regarded as "connecting regions" in the sense of feature M1.8. The wording of claim 1 does not exclude the presence of other regions of the substrate which are neither protrusions nor connecting regions.

Furthermore, and in line with the rulings set out in G 1/24, the Board has consulted the description when interpreting the features of claim 1, including feature M1.9; however, the fact that no mention of a feature is made in the claim or in the description does not exclude it from possibly being present in an embodiment falling within the ambit of the claim. This also applies to the possible presence of compressed sites (as set out in document D2) on the web of the contested patent. The web according to claim 1 can comprise compressed sites (e.g. regions with a different fibre density) at some locations and still fulfil the conditions that connecting regions are present at other locations and that the average fibre densities of the protrusions and connecting regions disposed between these protrusions are substantially the same. As stated above, the connecting regions may be regions separate

from the compressed sites as they do not necessarily cover the entire area outside the protrusions or between any two protrusions. It is further noted that the reference to an "average fibre density" in feature M1.9 does not specify that the fibre density at each single point on the web is the same. This is also in line with the description, which allows, for example, variations in fibre density from protrusion to protrusion (see paragraph [0028]).

1.5 The respondent's reference to the overall context of the contested patent and paragraph [0032] in particular cannot change the Board's understanding that claim 1 does not generally exclude the possibility that compressed sites may be present at some locations. Indeed, from the context of the explanation in paragraph [0032] that the protrusions are not created by embossing, it follows that the protrusions are formed by methods other than compressing the area directly enclosing them. This, however, does not provide any information relating to areas of the web which are not directly enclosing the protrusions.

1.6 Therefore, having consulted the description, despite it not mentioning compressed sites and despite it suggesting that the protrusions will not be formed by compressing parts of the web, there is no reason to consider claim 1 to generally exclude the presence of compressed sites at some locations on the web.

2. *Main request - Articles 100(a) and 56 EPC*

The subject-matter of claim 1 of the main request does not involve an inventive step in the sense of Article 56 EPC. The ground for opposition under Article 100(a) EPC thus prejudices the maintenance of the patent.

2.1 *Distinguishing features over D2*

The subject-matter of claim 1 differs from the nonwoven structure described in document D2 only on account of features M1.7 and M1.9.

2.1.1 In the contested decision the opposition division found that the two features M1.7 and M1.9 were not known from document D2. This was due to document D2 not explicitly disclosing

- whether the protrusions extending outwardly from the first surface were substantially filled, and
- whether the average fibre densities of the protrusions and connecting regions were substantially the same.

It was uncontested by the parties that these two features are not derivable from document D2, at least not directly and unambiguously.

With regard to feature M1.7, the respondent did not argue that it was associated with any technical effect or inventive merit, nor did the Board consider that any effect based on this feature was derivable from the contested patent. Whether the protrusions are substantially filled was thus considered arbitrary and was not taken into account in the assessment of inventive step.

2.1.2 In the written proceedings, the respondent argued that the subject-matter of claim 1 was further distinguished from document D2 because the presence of compressed sites was required in the nonwoven structure in document D2.

This argument must fail. As reasoned above, claim 1 does not generally exclude the presence of compressed sites anywhere on the web. The fact that the nonwoven structure in document D2 exhibits further features not mentioned in claim 1 of the contested patent does not establish a distinguishing feature of the claimed subject-matter over the nonwoven structure known from document D2.

2.1.3 Also in the written proceedings, the respondent argued that a further distinguishing feature of the subject-matter of claim 1 over document D2 was the presence of cellulosic fibres being required in feature M1.4.

This is not accepted. As already indicated in the Board's communication under Article 15(1) RPBA (point 8, second paragraph), feature M1.4 is known from document D2. Just because paragraph [0050] of document D2 lists "cellulosic" as one of a few alternatives does not mean that claim 1, by requiring it, differs from document D2 on account of a further feature. In paragraph [0050] of document D2, cellulosic fibres are disclosed in the same way as the other alternatives listed in that paragraph. All these alternatives are thus to be considered equally disclosed. No further information is needed to arrive at "cellulosic" as specified in feature M1.4 of claim 1.

The respondent did not contest the Board's preliminary opinion on the disclosure of feature M1.4. The Board thus has no reason to deviate from its preliminary opinion, and hereby confirms it.

2.2 *The objective technical problem*

2.2.1 In the contested decision (see page 4, point 2.2 of the Reasons, second paragraph) the opposition division considered that the objective technical problem was identified in the contested patent and that it was "to improve the biodegradability of water-dispersible, patterned nonwoven substrates intended for making wipes".

The opposition division further found that the webs in document D2 comprised compressed sites which inherently had a higher average fibre density than the non-compressed regions between them, and that the skilled person would never have considered modifying the teaching of document D2 such that the average fibre densities in the compressed regions and in the non-compressed regions were substantially the same.

The opposition division then found that a skilled person would not have consulted document D6 to solve the objective technical problem, notably to improve biodegradability, and that they would not have incorporated the structure of the web disclosed in document D6 into the nonwoven substrate in document D2. This would only have been done with hindsight. Since document D6 did not mention the dispersibility in water or biodegradability, there was no incentive for the skilled person to combine documents D2 and D6.

2.2.2 In the assessment of inventive step, the Boards of Appeal have been using the problem-solution approach, in which the objective technical problem to be solved is formulated based on an effect that originates from the distinguishing feature(s). After having assessed the distinguishing feature(s), it is thus necessary to

establish any technical effect directly and causally related to this/these feature(s); see also the decision of the Enlarged Board of Appeal in case G 2/21, point 25 of the Reasons. In other words, the contribution over the prior art must come from the distinguishing feature(s). Only once such an effect has been established can the objective technical problem be formulated. The objective technical problem thus might be different from the problem identified in the application or patent. It rests with the patent proprietor to demonstrate that the purported advantages of the claimed invention have successfully been achieved (see also G 2/21, point 26 of the Reasons).

2.2.3 The appellant agreed with the opposition division's stance on the distinguishing features, but contested that any technical effect was achieved that could be attributed to them. In particular, it argued that the contested patent did not mention any effect that was achieved specifically by feature M1.9.

2.2.4 The respondent, however, submitted that the contested patent actually indicated a technical effect achieved by feature M1.9. It argued that paragraphs [0032] to [0035] indeed described the effect that a uniform density had on the wet tensile strength while maintaining the dispersibility in water. Dispersibility in the sense of the patent, and as defined in paragraph [0022], referred to both a macroscopic and a microscopic dispersibility, i.e. the ability of a material to readily break apart in water, whether by breaking into smaller pieces or by dissolving in the water. According to the respondent, in paragraphs [0032] to [0035] the uniform density as claimed in feature M1.9 was related to a positive influence on wet tensile strength and the dispersibility in water.

This is not accepted. Despite the patent indeed describing both macroscopic and microscopic dispersibility, the Board concludes that any such dispersibility is not described in the patent as being linked to the average fibre densities of the protrusions and the connecting regions being the same (feature M1.9). The only mention of the average fibre densities being the same is in the last sentence of paragraph [0032]. It reads as follows:

> *"Because the protrusions 120 and connecting regions 130 are formed by entangling the fibers on a perforated surface, the average fiber densities of the protrusions 120 and connecting regions 130 are substantially the same."*

This statement thus explains why the average fibre densities of the protrusions and of the connecting regions are the same, and not that this yields a particular effect.

The effect of dispersibility in water is mentioned in the subsequent paragraph [0033], which reads as follows:

> *"In another aspect, the nonwoven substrate described herein is water dispersible. Whether the nonwoven substrate is water-dispersible depends on the type of fibers, fiber lengths, basis weights, selected proportions, hydroentangling parameters, and other factors ..."*

The water dispersibility is thus explicitly related to "another aspect", and therefore the Board considers that the explanations in paragraph [0033] are not directly connected to what is stated in the preceding paragraph [0032]; however, even if it were accepted

that there might be some sort of link, this is not described. Paragraph [0033] lists several potential parameters which may determine whether the resulting nonwoven substrate is water dispersible. Whether the average fibre densities are the same in the protrusions and connecting regions is not one of them.

2.2.5 The respondent referred in particular to paragraph [0035], the beginning of which reads as follows:

> *"Despite the wet tensile strength, the nonwoven substrate can be water dispersible, or substantially disperse into smaller pieces and individual fibers in a relatively short time under immersion and mild agitation in water ..."*

The wet tensile strength mentioned in this paragraph is a reference to the last sentence of the preceding paragraph, which reads as follows:

> *"The nonwoven substrate can have sufficient wet tensile strength for use as a pre-moistened tissue or wet wipe."*

The respondent argued that the wording introduced by "despite" meant that it would normally have been expected that a nonwoven substrate having high wet tensile strength would not come apart easily and thus it would not be water dispersible. The substrate described in the patent is, however, and this is despite having sufficient wet tensile strength.

Again in paragraph [0035], however, the Board is unable to find a link between the effect of water dispersibility and the average fibre densities being the same in the protrusions and connecting regions. Again, other reasons are given for the dispersibility

of the nonwoven substrate in the subsequent sentence, which reads as follows:

"Because the nonwoven substrate includes individualized plant-based fibers, natural cellulosic fibers, pulp-based fibers regenerated cellulosic fibers, or any combination thereof, that can readily biodegrade, the nonwoven substrate can disperse in a septic tank or sanitary system, which prevents the tissue or wipe from clogging up sewage lines and screens at sewage treatment plants."

Therefore, it is the fibre type that is linked to the biodegradability and dispersibility of the nonwoven substrate. Again, the average fibre densities of the protrusions and the connecting regions are not even mentioned, let alone the fact that they should be the same.

2.2.6 Therefore, the Board cannot derive from the contested patent that any effect of biodegradability or water dispersibility as alleged by the respondent was achieved by feature M1.9. The skilled person would not have considered such an effect, linked to feature M1.9, to be encompassed by the technical teaching and embodied by the same originally disclosed invention. It thus cannot be relied upon in the assessment of inventive step (see G 2/21, point 2 of the Order).

2.2.7 The respondent further argued that other advantages were achieved by the claimed invention. These were set out in paragraph [0038] of the patent.

Paragraph [0038] reads as follows:

"Another advantage of the disclosed nonwoven substrates comprising structured webs of fibers is that the three-dimensional (3D) surface topography

or texture increases the bulk, z-direction resilience, aesthetics, and wiping efficiency compared to flat substrates. Generally, consumers prefer surface texture and bulk over flat substrates. A multi-ply approach, also disclosed herein, can provide additional bulk, texture, more pronounced 3D embossing, and additional z-direction resilience, particularly if the plies are laminated with the projections face-to-face (structured surface-to-structured surface). In another aspect, the plies are combined with the projections facing away from one another. Yet, in another aspect, the plies are combined with the projections facing the same direction. The plies can be adhered to one another with or without adhesive."

The Board is unable to relate any of the advantages mentioned in this paragraph to feature M1.9. Instead, it is clearly derivable from this paragraph that the surface texture and pronounced bulk are achieved by the 3D surface topography and because the nonwoven substrate comprises several plies.

2.2.8 As an alternative line of argument, and based on its own considerations, the appellant indicated that it could imagine that feature M1.9 achieved a surface structure that did not deteriorate the tensile strength of the final product too much. If an effect could be considered at all, it was this effect that could form the basis for formulating the objective technical problem.

This speculative effect, even if it is possibly linked to feature M1.9, cannot be considered to be encompassed by the technical teaching and embodied by the same originally disclosed invention. It thus cannot be

relied upon in the assessment of inventive step (see G 2/21, point 2 of the Order).

2.2.9 The same is true for the effects that the respondent cited from the patent. The skilled person would not link any of them to feature M1.9, and therefore the formulation of the objective technical problem in the assessment of inventive step cannot be based on them.

2.2.10 With no technical effect being attributable to feature M1.9, the Board can only conclude that this feature has no technical effect that could be considered in the assessment of inventive step. As was also argued by the respondent in an alternative line of argument, in such a case, a less ambitious objective technical problem should be formulated. When following this approach for the sake of argument, in the present case, this could be considered that of finding an alternative average fibre distribution, or, since the average fibre distribution in document D2 is unknown, even just that of finding a suitable average fibre distribution.

2.3 *Obviousness*

The Board concluded that it would have been obvious for the skilled person to implement the nonwoven structure from document D2 in which the average fibre densities of the protrusions and connecting regions are substantially the same, thereby arriving at a nonwoven substrate according to claim 1.

2.3.1 The respondent argued that, even with the objective technical problem merely being that of finding an alternative, the skilled person was not motivated to combine document D2 with the teaching of document D6. Starting from document D2, the skilled person thus

would not have arrived at the subject-matter of claim 1 without hindsight.

This is not accepted for the following reasons. With the objective technical problem being that of finding an alternative, there is no need for a particular motivation in the prior art that goes beyond the mere description of such an alternative. In line with the case law of the Boards of Appeal, when the objective technical problem is to find an alternative, the skilled person would take into account any alternative known in the underlying technical field without a special incentive or motivation being required (see e.g. T 749/23, point 63 of the Reasons; or T 1179/16, point 3.4.4 of the Reasons). When searching for suitable average densities of the "molded elements" (the protrusions) and the flat regions in the vicinity of the "molded elements" (the connecting regions) in document D2, the skilled person would find the respective information given in document D6, which explicitly describes that the raised fibrous regions (corresponding to the "molded elements" in document D2 and the protrusions in the patent) have a density which is substantially the same as the density of the base surface (corresponding to the flat regions in the vicinity of the "molded elements" in document D2 and to the connecting regions in the patent). In view of this information the skilled person would have used substantially the same average fibre density for the "molded elements" and the flat regions in the vicinity of the "molded elements" in document D2, thereby arriving at the subject-matter of claim 1 without exercising inventive skill.

2.3.2 The respondent also argued that even if the skilled person had considered document D6, they would not have

combined it with document D2 because the teaching of documents D2 and D6 was incompatible. Instead, the teaching of document D2 led away from feature M1.9.

This is not accepted either. Instead, the respondent's argument is based on the false presumption that, in order to arrive at the claimed subject-matter, the skilled person needed to make a nonwoven substrate that is totally free of compressed sites. As reasoned above, the Board concluded that claim 1 does not generally exclude the presence of compressed sites at some locations on the web. When combining the teaching of documents D2 and D6, the skilled person thus would have maintained the compressed sites in document D2 and would have only made the "molded elements" with the same average fibre density as the flat parts in their immediate vicinity (the "connecting regions" in the nomenclature of the contested patent). Whilst processes for creating the protrusions based on embossing leading to different densities of the protrusions and the connecting regions are excluded by feature M1.9 of claim 1, this restriction does not apply to the entire nonwoven substrate, i.e. regions that are neither protrusions nor connecting regions.

The Board also concluded that the teaching of document D2 does not lead away from the claimed solution, as argued by the respondent. Indeed, and as put forward by the respondent, document D2 explains that *"[c]ompressed sites may provide for the ability of the substrate to break apart when flushed"* (paragraph [0004]) and that *"the plurality of compressed sites may form a line of weakness"* (paragraph [0007]); however, this does not mean that the skilled person would have been deterred from using substantially the same average fibre densities for the protrusions (i.e. the "molded

elements" in document D2) and the flat portions in their vicinity (i.e. the "connecting regions") as set out in feature M1.9. As reasoned above with respect to claim interpretation, there is no reason to consider claim 1 to generally exclude the presence of compressed sites at some locations on the web.

The Board is thus satisfied that the teaching of document D2 does not lead away from applying the teaching of document D6 to the nonwoven structure in document D2.

2.3.3 The Board thus concluded that the skilled person would have applied the teaching of document D6 to the nonwoven structure of document D2, thereby also implementing feature M1.9 and thus arriving at the subject-matter of claim 1 as granted without an inventive step being involved.

2.4 Article 100(a) EPC in conjunction with Article 56 EPC thus prejudices the maintenance of the patent as granted. The main request is not allowable.

2.5 Since the Board has arrived at this conclusion based solely on the appellant's objection with document D2 as the starting point, it is not necessary to deal with the other inventive-step attacks against the main request, notably with documents D6 or D8 as alternative starting points.

3. *Auxiliary requests*

3.1 *Inventive-step objections starting from D6*

In the present appeal proceedings, and based on Article 56 EPC, the appellant only raised objections

against claim 1 of the auxiliary requests with document D6 as the starting point.

The opposition division did not take a decision on the auxiliary requests at all, as it had already considered the main request to be allowable; however, in the context of the main request, it decided that document D2 was the only prior-art document to be used as a starting point in the assessment of inventive step (see decision, page 6, last paragraph). The opposition division thus did not deal with the opponent's (now appellant's) attack with document D6 or D8 as the starting point, not even with respect to the main request.

Therefore, before a decision was taken as to whether the case should be remitted to the opposition division for further prosecution, it was appropriate for the Board to decide whether at least one of document D6 or D8 was a valid starting point in the assessment of inventive step of the subject-matter claimed in the respondent's auxiliary requests. The Board has limited its assessment to document D6.

3.2 *Selecting the "closest prior art"*

The Board considers the opposition division to have made a conceptual error when, in the context of the main request, it categorically ruled out any starting points other than document D2 because this document seemingly had more features in common with claim 1 of the patent, or had a purpose that came closer to the claimed subject-matter than other documents.

It is well established in the case law of the Boards of Appeal, based on the wording of Article 56 EPC, that if

inventive step is to be acknowledged, the claimed subject-matter must be inventive starting from any starting point in the prior art (see also T 749/23, point 46 of the Reasons).

Furthermore, as also set out in its communication according to Article 15(1) RPBA (see point 9), in line with established case law, the Board considers that, if the skilled person has a choice of several workable routes, i.e. routes starting from different documents, which might lead to the invention, the rationale of the problem-solution approach requires that the invention be assessed relative to all these possible routes, before an inventive step can be acknowledged (see also T 2591/22, point 2.2 of the Reasons).

3.3 *The concept of a "suitable starting point"*

3.3.1 In its statement of grounds of appeal, the appellant cited several decisions by the Boards of Appeal with respect to the principles for selecting the closest prior art. In its reply, the respondent presented several arguments as to how, following the problem-solution approach, the closest prior art was to be selected. Citing the corresponding passage in decision T 1742/12, the respondent argued that some prior art might be so remote from the claimed invention, in terms of intended purpose or otherwise, that it could be argued that the skilled person could not conceivably have modified it so as to arrive at the claimed invention. Such prior art might be referred to as "unsuitable".

The cited statement can be found in point 9 of the Reasons for the Decision in case T 1742/12; however, this does not imply that document D6 was an

"unsuitable" starting point, nor does it mean that only a document with the most features in common with, or relating to the same purpose as, the claimed invention may be used as the starting point. On the contrary, such a conclusion was not drawn in T 1742/12 either. It is noted that the sentence following that cited reads as follows:

> *"However, in the board's judgment, this does not prohibit the consideration of an inventive step assessment starting from a piece of prior art with a different purpose."*

Furthermore, and as argued by the appellant, the deciding board in T 1742/12 endorsed the findings of T 967/97 and T 21/08, notably that an inventive step must be present over any feasible starting point (see T 1742/12, point 8 of the Reasons).

3.3.2 With reference to T 824/05, the respondent further argued that a document was a "suitable" starting point if it was concerned with a similar use and required minimal structural and functional modifications.

This statement, seemingly based on the finding in point 5.2.1 of the Reasons of T 824/05, cannot, however, be used to conclude that, *a contrario*, a document not fulfilling the latter conditions is necessarily "unsuitable" for being used as a springboard in the assessment of inventive step. In a situation in which several starting points are feasible, each of these must, as a matter of principle, be examined as to whether the skilled person would have arrived at the claimed invention when starting from them.

3.3.3 From the considerations above it follows that there is not necessarily a need to discuss which document is

"closer" or "closest" to the invention; the only requirement is that the document in question is a suitable starting point. The Board considers this to be the case (at least) for document D6.

In its reply to the appellant's statement of grounds of appeal, and to demonstrate that document D6 is an unsuitable starting point, the respondent argued that document D6 had fewer features in common with the present invention and/or addressed different problems.

None of these arguments is, however, decisive for the question of whether a document is a suitable starting point for the assessment of inventive step in principle. These arguments are based on the false basis that suitability as a starting point was a relative standard; however, in order to be considered suitable, one document does not need to be more suitable than another document. In other words, if it turns out that a second piece of prior art comes even closer to an invention than a first piece of prior art, this alone does not render the first piece of prior art unsuitable.

It may also be the case that later, in subsequent revocation proceedings, further prior art having even more features in common with the claimed invention than the prior art hitherto considered closest is submitted to the court. This alone, however, would not render any prior art used in the earlier proceedings before the European Patent Office (including the prior art considered "closest") unsuitable as a starting point for the assessment of inventive step.

Whether a piece of prior art is suitable for being used as a springboard thus instead depends on whether it

would generally have been of interest to the skilled person, in particular in view of the features or purpose it has in common with the claimed invention, and whether it would have been technically realistic for them to modify its disclosure in such a way as to arrive at the claimed invention. The Board cannot see any technical obstacle to modifying the disclosure of document D6, which relates to disposable wipes, to make it fall within the ambit of claim 1, notwithstanding the question of whether or not such a modification would have been obvious to the skilled person.

In fact, and as a matter of course, following the problem-solution approach, the question of whether such modification is obvious is to be answered separately from the initial question of whether a piece of prior art is a suitable starting point. If an inventive step is to be acknowledged in *inter-partes* proceedings, it may be necessary to apply the problem-solution approach several times, each time using a different piece of prior art cited by the opponent as a starting point and considered suitable by the deciding body.

3.4 It follows from the above that document D6 is a suitable starting point for assessing the inventive step of the subject-matter claimed in the respondent's auxiliary requests.

4. *Remittal*

In the decision under appeal, the opposition division did not decide on the respondent's auxiliary requests. This was not necessary since the opposition division concluded that none of the grounds for opposition raised by the appellant prejudiced the maintenance of the patent as granted.

Furthermore, the opposition division did not deal with the inventive-step attacks starting from document D6 (or D8), at least not any further than to rule them out as a starting point. If the Board were to deal with the auxiliary requests, the Board would be the first to consider the subject-matter claimed in them, but it would also be the first to fully consider the inventive-step attack with document D6 as the starting point. Moreover, the suitability of further starting points (e.g. D8) might also need to be discussed.

Therefore, in view of the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (Article 12(2) RPBA), the Board considers that special reasons present themselves within the meaning of Article 11 RPBA for remitting the case to the opposition division in accordance with Article 111(1) EPC for further prosecution.

Since both parties have requested, or agreed to, a remittal of the case to the opposition division for further prosecution, the Board concedes to the request for remittal.

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