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**Datasheet for the decision
of 7 July 2021**

Case Number: T 0978/16 - 3.2.03

Application Number: 07023238.4

Publication Number: 2065537

IPC: E04G21/32, E04H12/22

Language of the proceedings: EN

Title of invention:

A post holder

Patent Proprietor:

COMBISAFE INTERNATIONAL AB

Opponent:

PERI AG

Headword:

Relevant legal provisions:

RPBA 2020 Art. 13(2), 15a
EPC Art. 54(1), 69(1), 56, 84

Keyword:

Oral proceedings - Request not to hold oral proceedings as video conference

Claims - claim interpretation and extent of protection

Grounds for opposition - clarity in opposition appeal proceedings

Late-filed objection - circumstances of appeal case justify admittance (no)

Novelty - (yes)

Late-filed facts - circumstances of appeal case justify admittance (no)

Inventive step - (yes)

Decisions cited:

T 1808/06, T 1646/12, J 0014/19, T 0413/08, T 1449/05

Catchword:



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Case Number: T 0978/16 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 7 July 2021

Appellant: COMBISAFE INTERNATIONAL AB
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 24 March 2016
revoking European patent No. 2065537 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman G. Patton
Members: B. Goers
E. Kossonakou

Summary of Facts and Submissions

- I. European Patent No. 2 065 537 (hereafter: "the patent") relates to a post holder comprising a central and two opposite side support portions protruding from the central post reception portion.
- II. With its decision dated 24 March 2016 the opposition division revoked the patent. In particular, the main request (patent as granted) was considered to lack novelty pursuant to Article 54 EPC.
- III. This decision was appealed by the patent proprietor (hereafter: "appellant").
- IV. Oral proceedings before the Board were held on 7 July 2021 by videoconference using the Zoom platform pursuant to Article 15a RPBA 2020.
- V. At the end of the oral proceedings, the parties confirmed the following requests.

The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted or, alternatively, that the patent be maintained on the basis of one of the sets of claims filed as first to seventh auxiliary requests with the statement setting out the grounds of appeal.

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

- VI. The following evidence is relevant for the decision:

D0: Catalogue "Wemas Absperrtechnik";

D1: DE 32 10 497 C2;
D2: EP 968 345 B1;
D6: US 6,257,557 B1;
D7: Norm DIN EN 13374, 2004;
D8: US 6,038,829;
D15: Wikipedia article "Dreibein", post-published;
D16: DE 78 25 160 U1;
D17: Sworn affidavit ("Eidesstattliche Versicherung")
signed by Mr Henrichfreise, dated 20 August
2014.

VII. Claims

Claim 1 as granted reads (feature numbering in "[]" as suggested by the appellant):

*"[1.1] A post holder for holding a safety post,
[1.2] which post holder (200) comprises an elongate
post reception portion (202),
[1.3] an elongate central support portion (204),
protruding from said post reception portion
[1.4] and perpendicular to the post reception portion,
[1.5] and first and second elongate side support
portions (206, 208) protruding from said post reception
portion laterally of said central support portion
[1.6] and in opposite directions,
[1.7] wherein said central support portion comprises a
fastening seat (214), which is arranged to receive a
fastening member (404) for fastening of the post
holder,
[1.8] characterised in that each one of said support
portions comprises a support protrusion (207, 211),
which constitutes a fraction of the support portion at
and protrudes at a bottom side thereof, thereby forming
a lower most support surface of the support portion."*

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

(a) Construction of the features of claim 1

Article 69 EPC and its protocol are not to be applied in the opposition appeal proceedings. The discrepancy between the claims and the description with respect to the post holder of Figure 8 is merely a clarity issue and does not justify a broader interpretation of the scope. An interpretation of claim 1 on the basis of functional analogies as suggested by the respondent was therefore not correct. Figure 8 did not fall under the subject-matter of claim 1.

(b) Novelty

The subject-matter of claim 1 is novel over D1. The arbitrary subdivision of the base plate of the post holder of D1 by colouring in certain parts was not a clear and unambiguous disclosure of the projecting central and side support portions.

The lack of novelty objection based on the alleged public prior use supported solely by D17 should not be admitted into the appeal proceedings. Furthermore, the general statements in D17 did not provide sufficient information about what product was used, when it was sold and where it was displayed on construction sites open to the public, even when applying the balance of probabilities standard.

(c) Inventive step

To the knowledge of the appellant, the post holder of Figures 1a and 1b was not part of the prior art. It

therefore did not qualify as a starting point for the discussion of inventive step. Even if it were considered as the closest prior art, the subject-matter of claim 1 nevertheless involved an inventive step. The distinguishing features (1.5 and 1.8) of claim 1 over Figures 1a and 1b were interrelated and not obvious from the prior art documents or common general knowledge. D7 did not disclose an embodiment for the protection against side loads. D8 taught away from the use of support projections. While the suitability of a tripod for stable ground on uneven surface was acknowledged (D15), the use of a tripod was nevertheless not obvious in view of the protection against side loads. Patent documents D2 and D16 did not qualify as evidence of common technical knowledge. Further, D2 disclosed a four-point support without central and side support portions, and D16 did not intentionally protect against side loads.

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

(a) The holding of oral proceedings by videoconference.

Due to the complexity and importance of the case for the respondent, the holding of oral proceedings by videoconference was not a suitable format. Reference was made to the provisions in German law and the compatibility of the format with the German constitution. The Board should consider this in exercising its discretion under Article 15a(1) RPBA 2020.

(b) Construction of claim 1

In constructing the scope of claim 1, it had to be considered that, according to the description, Figure 8 was an embodiment of the invention. Therefore, the claims could not be interpreted solely in view of their geometric and structural understanding when assessing the patentability in view of the prior art; they had to be interpreted with respect to their functional understanding as well. In the present case this would be exceptionally possible by construing the subject matter of claim 1 in accordance with Article 69(1), second sentence, EPC.

(c) Novelty

The post holder of D1 was novelty-destroying for claim 1. It disclosed, in addition to the other features of claim 1, a base plate comprising a central and respective side support portions with support protrusions functionally equivalent to the embodiment of Figure 8 of the patent.

The public prior use of the post holder shown in the figures of D17 was sufficiently substantiated and was also novelty-destroying. The statements in D17 provided sufficient information with respect to where and when the public prior use occurred.

(d) Inventive step

The renunciation of the statement in the patent relating to Figures 1a and 1b showing a prior art post holder should not be admitted. It was provided late in the appeal proceedings. Its admittance would cause procedural problems and required postponement.

In view of the post holder of Figures 1a and 1b as the closest prior art, the subject-matter of claim 1 was obvious. The two distinguishing features were the laterally extending side support portions (feature 1.5) and the support protrusions (feature 1.8). These features were not interrelated. Feature 1.5 was made obvious from the common general knowledge represented by D7 or by the disclosure of D8. Feature 1.8 was common technical knowledge, as tripods were a common solution to the technical problem of providing a stable stand on an uneven surface. Evidence for this was provided by D15. The disclosures of D2 and D16 illustrated similar common general knowledge through their respective embodiments.

The subject-matter of claim 1 was also obvious in view of D8 as the closest prior art in combination with the common general knowledge. This new objection should be admitted due to its relevance.

(e) Adaptation of the description

The description of the patent in paragraphs [0020] and [0028] should be adapted to clarify that Figure 8 is not an embodiment of the invention. This amendment was important due to the relevance of the false statement for the determination of the extent of protection pursuant to Article 69 EPC in national court proceedings.

Reasons for the Decision

Oral proceedings held by videoconference

1. Article 15a(1) RPBA 2020, which entered into force on 1 April 2021, provides the Board with the discretion to hold oral proceedings by videoconference on its own motion if it considers it appropriate.
- 1.1 The respondent objected to holding the oral proceedings by videoconference, arguing that the format was not suitable. The present case had a high importance for the respondent and presented a considerable level of complexity, since, *inter alia*, an alleged procedural violation had to be discussed and a request for remittal had to be decided upon (see page 3 of the statement of grounds of appeal). The respondent argued that such format should be considered by the Board only as the very last possibility (*ultima ratio*) and asked the Board to consider its arguments when exercising its discretion.
- 1.2 The Board decided in favour of a videoconference in view of the health risks and travel restrictions in relation to the COVID-19 pandemic and of the absence of convincing reasons rendering the case unsuitable for such a format. The importance of the case for a party is not sufficient to dictate the format of the hearing, firstly, because any and every case before a Board is deemed to be important enough to be heard properly and secondly, because the primary duty of the Board in charge of a case is to ensure that all parties involved can be guaranteed a fair hearing. It follows that the importance of a case is served once the right to be heard has been ensured for the parties. In this Board's

experience, an oral hearing by videoconference is fully equivalent to an in-person hearing as far as the quality of the exchange of arguments is concerned.

1.3 The same applies analogously to the issues to be considered in the course of the oral proceedings. The complexity of an argument is not a ground for presenting it only in writing or only orally; by the same token an issue cannot be so complex that its oral presentation is contingent upon the medium used or the environment in which it takes place. The Board therefore considered that this aspect did not prevent the oral proceedings from being held by videoconference either.

1.4 Finally, the reference by the respondent to German law and the German constitution was considered irrelevant to the present case, as that is not the applicable law.

1.5 At the oral proceedings before the Board the respondent no longer argued on this issue. At the end of the oral proceedings, it acknowledged that the format had not hampered the discussion and declared its satisfaction with the quality of the hearing.

Construction of claim 1 - applicability of Article 69 EPC

2. It was a matter of dispute between the parties whether the subject-matter of claim 1 should be construed to encompass the embodiment of Figure 8 or not. On this issue of claim interpretation, the Board does not share the respondent's view that for the purposes of assessing novelty in the present case the scope of claim 1 should exceptionally be construed in accordance with Article 69(1), second sentence, EPC and the Protocol on the interpretation of Article 69 EPC, such

that the post holder as shown in Figure 8 of the patent falls within it.

2.1 The respondent argued that the subject-matter of claim 1 has to be interpreted taking account of the fact that the post holder of Figure 8 is disclosed as an embodiment of the invention in the description of the patent (see paragraphs [0020] and [0028]). It concluded that, in view of this, the claim should exceptionally be construed differently. In particular, if the features "portion" and "protruding" of claim 1 could not be read on the post holder of Figure 8 applying a mere geometric and structural understanding ("*räumlich-strukturelles Verständnis*"), these features exceptionally have to be understood as scope limiting only with respect to their functional implications ("*technisch-funktionales Verständnis*").

2.2 The respondent specifically relied on decision T 1808/06 stating that it "*is only in situations where such removal [of inconsistencies between the claims and the description/drawings] is not possible for procedural reasons (e.g. no amendment possible of the granted version) that - purely as an auxiliary construction - Article 69(1) EPC can be invoked for the interpretation of the claimed subject-matter*" (see Reasons, point 2).

2.3 The Board considers that the claim language has to be interpreted in the context given in the claims and the description (see T 1646/12, point 2.1 of the Reasons). However, this does not allow the conclusion that in cases where the claim language is clear and unambiguous but inconsistent with the description, Article 69(1) EPC would provide a lever to arrive at a different interpretation of this claim language.

- 2.4 The Boards of appeal have frequently stated that the provisions of Article 69 EPC are primarily for use by judicial organs dealing with infringement cases (see Case Law of the Boards of Appeal, 9th edition, 2019, II.A.6.3.2). This is also confirmed in T 1808/06 where it is further asserted that, for the removal of inconsistencies, the only applicable provision is Article 84 EPC.
- 2.5 The technical features of the claim in question are not unclear or ambiguous with respect to their geometrical and structural scope. As it will be explained in the following, the skilled person recognises directly and unambiguously that Figure 8 is not encompassed by the subject-matter of claim 1. The inconsistencies between claim 1 and the description of Figure 8 in paragraphs [0020] and [0028] are only an issue of missing support in the description (Article 84 EPC) and not of the extent of the protection. As argued above, this inconsistency does not provide any basis for applying a different interpretation to claim 1. The Board's understanding of claim 1 is outlined in the following.
- 2.6 With respect to the interpretation of the features of claim 1 the opposition division decided that:
- based on the definition given in the Collins English Dictionary 1998, "portion" should be interpreted as meaning "a part of a whole" and does not need to be physically distinct from the rest of the whole; and
 - "protruding" had to be construed in accordance with the Collins English Dictionary as meaning "projecting, extending".

The Board essentially agrees with these definitions, but also accepts the appellant's submission that when construing the meaning of the claim features:

- a "central portion" must be central in relation to the post holder as a whole;
- a "side portion" must be to the side in relation to the post holder as a whole.

Also, a portion which is "protruding" must protrude, project or extend from something, i.e. in the context of the claim the post reception portion.

2.7 The post holders shown in the figures of the patent have a post reception portion indicated with reference numbers 202 (Figures 2 and 3) and 802 (Figure 8). In any of these figures side support portions protruding from the post reception portion are disclosed (Figures 2 and 3: portions 206/208 with support protrusions 207; Figure 8: portions 806/808 including the corner portions including the support protrusions 807/809). In Figures 2 and 3, a central support portion (204) also protrudes from the post reception portion. This is not the case for Figure 8. The central support portion can only be considered as parts (810) and (812) connected by a nose portion (811) including a support protrusion. These parts protrude from the side support portions and not from the post reception portion.

2.8 The portions actually providing the support in the post holder of Figure 8 are the corner portions (807, 809) which join the elongate side support portions (806, 808) extending laterally from the post reception portion (802) and the side walls (810, 812) extending to the nose portion (811). As a consequence, the elongate central support portion does not protrude from

the post reception portion (802) as required by feature 1.3, since it is formed by two side walls (810, 812) extending to a nose portion (811) from two opposite side support portions (806, 808) which extend laterally from the post reception portion (802).

- 2.9 To conclude, the inconsistency between claim 1 and the description of Figure 8 in paragraphs [0020] and [0028] is therefore an issue under Article 84 EPC. This does not affect the understanding of the subject-matter of claim 1 which clearly and unambiguously does not encompass a post holder as displayed in Figure 8. Hence, as already mentioned above, Article 69(1) EPC and the conclusions in T 1646/12 do not apply to the present case.

Request for adaptation of the description

3. The respondent requested that the description of the patent be amended to reflect that the post holder of Figure 8 does not fall within the scope of claim 1.
- 3.1 Generally - in order to meet the requirement of Article 84 EPC that the claims have to be supported by the description - the adaptation of the description to amended claims must be performed carefully in order to avoid inconsistencies between the claims and the description which could render the scope of the claims unclear. Reference to embodiments no longer covered by amended claims must be deleted, unless these embodiments can reasonably be considered to be useful for highlighting specific aspects of the amended subject-matter. In such a case, the fact that an embodiment is not covered by the claims must be prominently stated.

3.2 It is stated in paragraphs [0020] and [0028] of the patent that Figure 8 is an embodiment of the invention. Since, as outlined above, the post holder of Figure 8 does not fall within the scope of claim 1, as also confirmed by the appellant, these statements are incorrect and do not support the claims as required by Article 84 EPC.

3.3 However, Article 84 EPC is not a ground for opposition. As a consequence of Rule 80 EPC the patent as granted may not be amended under this provision. Furthermore, according to G 1/10, Rule 140 EPC is not available to correct the text of a patent, and so a correction of the main request (patent as granted) under this legal provision is also inadmissible. Accordingly, the amendment made to clarify that the embodiment of Figure 8 does not fall under the scope of claim 1 has no legal basis in the EPC.

3.4 Therefore, the respondent's request to adapt the description is not allowable.

Main request - novelty

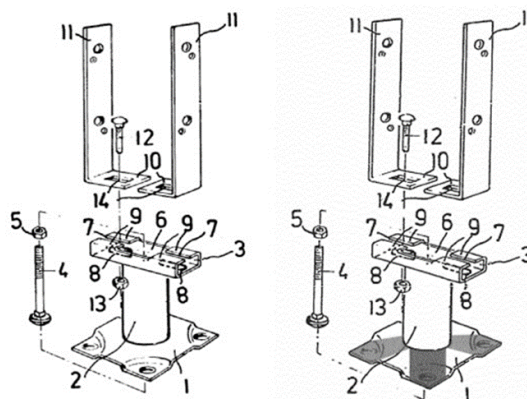
4. The Board does not agree with the conclusion of the opposition division that the subject-matter of granted claim 1 lacks novelty in view of D1 (appealed decision, point II.14).

4.1 The post reception portion of the device disclosed in D1 comprises two L-shaped elements (11) which are adjustably held by a transverse member (3), see Figures 1 and 2. As such, even though it does not come into contact with the post, it can further be argued that the transverse member is part of the post reception portion of the device since it enables the gap between

the two L-shaped elements to be adjusted to the size of the post to be received. Without the transverse member to maintain their position, the L-shaped elements cannot hold the post.

- 4.2 However, the supporting element (2) plays no role in the reception of the post. Its function is to support the post reception elements. Consequently, D1 does not disclose that a central support portion perpendicular to the post reception portion (features 1.3 and 1.4) and lateral opposite side support portions (features 1.5 and 1.6) protrude from the post reception portion. This is mechanically significant, since in D1 the post is held at a distance above the base plate which will affect the transmission of the various forces applied to the post through to the base plate.
- 4.3 But even if the supporting element (2) were considered to be part of the post reception portion, D1 does not directly and unambiguously disclose first and second elongate side support portions protruding from the post reception portion laterally of that central support portion and in opposite directions (features 1.5 and 1.6). Instead, the supporting element (2) in D1 is placed centrally to a rectangular or square base plate (1).
- 4.4 The Board shares the view of the appellant that each portion is not simply any portion that can be arbitrarily coloured in a larger physical entity such as the rectangular/square base plate. This was argued by the respondent using a coloured version of Figure 1 of D1 as illustrated below. Here, Figure 1 of D1 is shown on the left, and the same figure as coloured in by the respondent with a middle centre portion and two

lateral side portions is shown on the right (see e.g. notice of opposition, page 5).



4.5 Whilst not necessarily being physically distinct, each portion must be one that the skilled person can directly and unambiguously identify in relation to the object as a whole. If a "portion" can only be identified by virtue of being coloured in rather than by reference to visible characteristics of its relationship to the whole, then there must be doubts as to whether such a "portion" is directly and unambiguously derivable from the prior art disclosure as there is no objective basis for comparison. Therefore, the Board disagrees with the approach of the respondent and opposition division to virtually subdivide the base plate (1) into the different portions mentioned in claim 1. Consequently, at least features 1.5 and 1.6 are not directly and unambiguously identifiable in D1.

Non-admittance of late-filed novelty objection relating to alleged public prior use based on D17 and D0

5. The respondent raised an objection of lack of novelty based on an alleged prior use during the oral proceedings before the Board for the first time within the appeal proceedings.

- 5.1 This objection is only based on evidence D17, an affidavit ("*Eidesstattliche Versicherung*") of Mr Henrichfreise (D17), and on a brochure of Wemas Absperrtechnik (D0). The objection was previously raised during the opposition proceedings and addressed in the appealed decision in form of an *obiter dictum* (point II.24). However, in the reply to the appeal, a reference to D17 was made only in the context of a request to correct the minutes of the oral proceedings before the opposition division (reply to the appeal, point A) and the prior art status of D17 (point B and page 4: "*Angeblich fehlerhafte eidesstattliche Versicherung (D17)*"). In the further written submissions, D17 and D0 were not mentioned, nor was the issue of novelty addressed. It is therefore considered an amendment of the respondent's appeal case within the meaning of Article 13(1) and 13(2) RPBA 2020 (see J 14/19, point 1.4).
- 5.2 Under Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings is, in principle, not to be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
- 5.3 The respondent did not provide any reasons, let alone cogent ones, as to why the circumstances for the late submission of this objection could be considered exceptional within the meaning of Article 13(2) RPBA 2020. The Board does not see any such reasons either.
- 5.4 In view of the above, the Board did not admit the late-filed novelty objection based on D17 and D0 into the appeal proceedings.

Prior art status of the post holder of Figures 1a and 1b

- 5.5 The post holder shown in Figures 1a and 1b has been indicated as prior art in the patent since the filing date (see paragraph [0018] of the A-publication). In the notice of opposition (point 1.3) and in the reply to the appeal (page 4), the respondent raised objections under Article 56 EPC based on these figures as starting point. By letter of 4 June 2021 (point 8.a), the appellant indicated for the first time that Figures 1a and 1b were not prior art to its knowledge. During the oral proceedings, the appellant explicitly resiled from the statement of prior art concerning the post holder of Figures 1a and 1b. This statement is considered an amendment of the appellant's appeal case within the meaning of Article 13(2) RPBA 2020.
- 5.6 The appellant's assertion that it had already provided a statement renouncing Figures 1a and 1b as prior art during the oral proceedings before the opposition division is not reflected in the minutes of those proceedings. It is not plausible either, since inventive step objections were not discussed during those oral proceedings.
- 5.7 According to established case law (Case Law of the Boards of Appeal, 9th edition, 2019, I.C.2.7), a prior art acknowledged in a patent application can no longer be relied upon as a starting point when the patent proprietor explicitly resiles from that acknowledgement. In T 413/08 (Reasons, point 2) it was argued that this can be done at any point in time *"which does not give rise to any procedural problems"*. In T 1449/05 (Reasons, points 2.7 to 2.9) it was argued that the submission of a statement of renunciation

("resilement") only at a very late stage in the appeal procedure can cause such procedural problems, since it deprives the other party of the possibility of searching for a corresponding published document disclosing this prior art. The Board agrees with the respondent's argument that such problems arise in the present case, since there was not sufficient time to react, and postponement of the case has to be considered if Figures 1a and 1b would no longer be considered as prior art.

- 5.8 Given all these circumstances and the absence of any exceptional circumstances referred to by the appellant, the Board does not accept the late renouncement of Figures 1a and 1b as prior art. Consequently, the post holder displayed in Figures 1a and 1b is regarded to represent prior art and qualifies as a starting point for the assessment of inventive step.

Main request - inventive step

6. The Board does not agree with the respondent that the subject-matter of granted claim 1 lacks inventive step in view of Figures 1a and 1b as the closest prior art
- 6.1 It is consented by the parties that Figures 1a and 1b of the patent disclose a post holder with all the features of claim 1 except for:
- (a) the oppositely extending side support portions (features 1.5/ 1.6) and
 - (b) the support protrusions (feature 1.8).

It is further undisputed that the post holder of Figures 1a and 1b is a suitable starting point.

- 6.2 It was a matter of dispute between the parties whether the two distinguishing features (a) and (b) address partial technical problems or a common technical problem. The argument of the respondent was that the problem related to (a) and stated in paragraph [0010] is generally the protection against side loads. This was unrelated to the problem associated with (b) and stated in paragraph [0011], which is to ensure that the post holder is stable on an uneven surface.
- 6.3 The Board does not agree with this view. Both paragraphs [0010] and [0011] target a "*triangular three point support*", which is only achievable with both features (a) and (b) in combination. This is also reflected in all the embodiments of the patent. Both distinguishing features are therefore interrelated and address a common technical problem. Furthermore they have to be considered in the context of feature 1.7 (fastening seat). The combination with the fastening seat provides a possibility to press the support protrusions to the ground by means of a fastening member.
- 6.4 The Board considers that the objective technical problem is to ensure that the post holder stands steady and is not rickety when placed on an uneven base surface, even when being subjected to side loads (paragraph [0011] of the patent).
- 6.5 The teaching of D7 does not render features (a) and (b) obvious. While it is generally stated under point 6.3.2 that a protection against side loads should be foreseen, no specific measures to achieve this are suggested in D7. The appellant is correct in that the skilled person could consider various solutions including the provision of a wider central base or

sufficiently dimensioned central bolts for the post holder of Figures 1a and 1b in order to protect against side loads. The issue of uneven surfaces is not even addressed in D7. The provision of side support portions with support protrusions is therefore not made obvious from D7 without taking an *ex post facto* view. This also applies to the provision of the support protrusions according to feature (b).

- 6.6 The distinguishing features are also not made obvious when considering D8 in combination with common general knowledge either.
 - 6.6.1 The Board agrees with the respondent that D8 teaches the skilled person to consider side support portions according to feature (a) for the post holder of Figures 1a and 1b (see column 5, lines 52 to 55: "*ample lateral stabilization by the bars*"). Feature (a) is thus made obvious to the skilled person by the teaching of D8. However, nothing in D8 hints at feature (b).
 - 6.6.2 It is agreed by the Board that the use of a tripod as a stable support on uneven surfaces is a generally known practice and therefore part of the common general knowledge (see e.g. post-published Wikipedia excerpt D15). However, this common general knowledge would not be considered by the skilled person for the post holder of Figures 1a and 1b if modified with side support portions based on the teaching of D8.
 - 6.6.3 In Figure 1 of D8 each of the central support portion (3) and the opposite side support portions (2, 4) are fixed stable to the ground by means of bolts (7, 8, 9). This embodiment provides an alternative solution to the objective technical problem, different from the claimed

one. Therefore, no further support protrusions are necessary for a stable fixation to an uneven surface.

6.6.4 According to the other embodiments (Figures 2 and 6), the post holder is fixed using sleeves secured over the ends of the support portions. The appellant is correct in that this even leads the skilled person away from using support protrusions on the portions receiving the sleeves.

6.7 The teachings of D2 and D16 do not influence the discussion of inventive step. As patent documents they do not qualify as evidence for common general knowledge of support protrusions for posts. Furthermore, they do not provide any pointer for the skilled person towards feature 1.8.

6.7.1 D16 discloses a high jump post rested on a tripod having support protrusions. The high jump support post of D16 is neither supposed to be fixed to the ground nor is it intended to protect against side loads. Consequently, it does not provide a fixation means according to feature 1.7 of claim 1. Thus, it would not be considered by the skilled person for modifying a post holder according to Figures 1a and 1b.

6.7.2 D2 discloses in Figures 5 and 6 support protrusions 160 for a support plate of a post holder. The four protrusions provided below the support plate (162) of the support neither qualify as a support on uneven ground (see D15, no stable support guaranteed for a four-point support), nor is the effect of defined support points mentioned in paragraph [0008] of D2 ("*definierte Auflagepunkte*") specific enough in view of the objective technical problem.

Non-admittance of late-filed Article 56 EPC objection

7. During the oral proceedings, the respondent raised a further objection of lack of inventive step based on D8 as a starting point. This late-submitted objection is also considered an amendment of the respondent's appeal case.

7.1 D8 is cited in the patent as the closest prior art on which also the two-part form as defined in Rule 43(1) EPC is based. Nonetheless, no objection of lack of inventive step was submitted based on D8 as the starting point during the opposition procedure or in the reply to the appeal. During the oral proceedings before the Board, the respondent raised this objection for the first time. This was done despite the fact, that the post holder of Figures 1a and 1b of the patent - on which the respondent's other inventive step attack was based - was considered a valid starting point.

7.2 The respondent did not provide any exceptional circumstances let alone cogent reasons which would justify the late amendment as required by Article 13(2) RPBA 2020, and the Board does not see any either. Therefore, the objection under Article 56 EPC based on D8 as a starting point was not admitted into the appeal proceedings.

8. In conclusion, the appeal is allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



C. Spira

G. Patton

Decision electronically authenticated