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**Datasheet for the decision
of 19 March 2025**

Case Number: T 1449 / 23 - 3.2.05

Application Number: 17817237.5

Publication Number: 3541631

IPC: B42D25/29

Language of the proceedings: EN

Title of invention:

Security document with positive and negative authentication
tilt images

Patent Proprietor:

IDEMEDIA The Netherlands B.V.

Opponent:

Giesecke+Devrient Mobile Security GmbH

Relevant legal provisions:

EPC Art. 54, 56, 100(a), 100(b), 111(1)

EPC R. 103(1)(a)

RPBA 2020 Art. 11, 12(4), 12(6)

Keyword:

Late-filed evidence - should have been submitted in first-instance proceedings (yes) - admitted (no)
Late-filed objection - should have been submitted in first-instance proceedings (yes) - admitted (no)
Grounds for opposition - insufficiency of disclosure (no) - lack of novelty (no) - lack of inventive step (no)
Appeal decision - remittal to the department of first instance (yes)
Reimbursement of appeal fee - (yes) - substantial procedural violation (yes)



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
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Case Number: T 1449/23 - 3.2.05

D E C I S I O N
of Technical Board of Appeal 3.2.05
of 19 March 2025

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted on 30 June 2023
rejecting the opposition filed against European
patent No. 3541631 pursuant to
Article 101(2) EPC.

Composition of the Board:

Chairman O. Randl
Members: M. Holz
M. Blasi

Summary of Facts and Submissions

I. The opponent (appellant) filed an appeal against the decision of the opposition division rejecting the opposition against European patent No. 3 541 631 (the patent).

With its statement of grounds of appeal, the appellant filed documents D1, D1a and D2 to D6, all of which had previously been filed in the proceedings before the opposition division (see point IV. below), and a new document D7:

D7: J.D. Kropotov, "Event-Related Potentials",
Functional Neuromarkers for Psychiatry,
2016, <https://www.sciencedirect.com/topics/biochemistry-genetics-and-molecular-biology/visual-stimulation>

II. The patent proprietor (respondent) filed a reply to the appellant's statement of grounds of appeal including claim sets of first, second and third auxiliary requests.

As requested, the parties were summoned to oral proceedings before the board, scheduled for 19 March 2025.

By letter dated 24 October 2024, the appellant filed further submissions.

In a communication under Article 15(1) RPBA issued on 31 October 2024, the board, *inter alia*, set out its preliminary opinion that:

- the ground for opposition under Article 100(b) EPC did not prejudice the maintenance of the patent
- the subject-matter of claim 1 was new in view of document D1 and involved an inventive step in view of this document in combination with the common general knowledge or document D2
- the board intended to remit the case to the opposition division for further prosecution
- the opposition division's failure to address numerous objections raised by the appellant during the opposition proceedings that had not been withdrawn was a substantial procedural violation that justified a reimbursement of the appeal fee under Rule 103(1)(a) EPC

Oral proceedings before the board were held on 19 March 2025.

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

The respondent requested that the appeal be dismissed. As an auxiliary measure, the respondent requested that the decision under appeal be set aside and the patent be maintained in amended form based on the claim set of one of the first, second or third auxiliary request filed with the reply to the appeal.

The respondent also requested that:

- document D7 and the objections of lack of sufficiency of disclosure raised in the statement of grounds of appeal which had not been raised in

the proceedings before the opposition division not be admitted in the appeal proceedings

- the objections of lack of inventive step in view of document D2, a combination of documents D3 and D4, a combination of documents D4 and D1, a combination of documents D5 and D6 or D5 and D4, a combination of documents D5 and D1 and a combination of documents D5 and D2 or D3 not be admitted in the appeal proceedings

IV. The following documents were filed during the opposition proceedings.

D1:	FR 2 996 164 A1
D1a:	Machine translation of document D1 into German
D2:	DE 11 2011 102 546 T5
D3:	DE 11 2011 102 475 T5
D4:	WO 2016/010415 A1
D5:	US 2011/0115211 A1
D6:	US 2014/0306441 A1

V. Claim 1 as granted reads as follows (the feature identification used by the board is indicated in square brackets).

"[M1] Security document (1) [M1.1] comprising an image layer (2) with in a first image area (3) an identification image (4) of a document holder [sic], comprising picture elements with predetermined brightness values on a positive brightness scale, and in a second image area (5) an authentication image (6) of the document holder [sic], corresponding with the first image (4), characterised in that [M1.2] the authentication image (6) comprises at least two images (7,8) situated below lenses (10) such that at a

first observation angle (α_1), a first authentication image (7) is visible and at a second observation angle (α_2), a second authentication image is visible (8), wherein [M1.3] the first authentication image (7) is a positive image corresponding with the first image (4) with picture elements having brightness values that correspond to the brightness values of the identification image and [M1.4] the second authentication (8) image is a negative image corresponding with the first image (4), with picture elements having brightness values that correspond to a reversed brightness scale that is obtained by making the brightest picture elements in the positive brightness scale appear darkest and making the darkest picture elements appear brightest, and [M1.5] wherein both the identification image (4) and the first authentication image (7) can be observed at a perpendicular viewing direction [M1.6] while the second authentication image (8) can be observed at a non-perpendicular viewing direction."

Claim 4 as granted reads as follows.

"Security document (1) according to any of claims 1-3, wherein the authentication images (7,8) are observable under different viewing angles (α_1, α_2) relative to a perpendicular viewing direction (17) that is perpendicular to the image area (5)."

Claim 5 as granted reads as follows.

"Security document (1) according to claim 4, in which the angles (α_1, α_2) of the first and second image (7,8) relative to the perpendicular viewing direction (17) are between $+10^\circ$ and $+20^\circ$, and -10° and -20°

respectively, the mutual difference between the angles (α_1 , α_2) being at least 1° , preferably at least 2° ."

Claim 6 as granted reads as follows.

"[M6] Method of providing a security document (1), comprising the steps of:

[M6.1] - providing an image layer (2) with an array of cylindrical lenses (10),

[M6.2] - providing an identification image (4) of a document holder in an image processing unit (18), the identification image having image elements with predetermined brightness values B_p on a positive brightness scale,

[M6.3] - providing in the image processing unit (18) a positive authentication image (7) of the document holder corresponding with the first image (4) with picture elements having brightness values that correspond to the brightness values of the identification image (4) and [M6.4] a negative authentication image (8) of the document holder corresponding with the first image, with picture elements having brightness values B_n that correspond to a reversed brightness scale in which the brightest picture elements in the positive brightness scale appear darkest and the darkest picture elements appear brightest, and [M6.5] laser engraving the first and second authentication images (7,8) through the cylindrical lenses (10) in the image layer (2) at different angles (α_1 , α_2) [M6.6] such that both the identification image (4) and the first authentication image (7) can be observed at a perpendicular viewing direction [M6.7] while the second authentication image (8) can be observed at a non-perpendicular viewing direction."

VI. The parties submitted the following.

(a) Patent as granted: ground for opposition under Article 100(b) EPC

(i) Appellant

The ground for opposition under Article 100(b) EPC prejudiced the maintenance of the patent as granted. The drawing reproduced on page 7 of the Reasons of the decision under appeal "should not be admissible" to determine the scope of the disclosure of the patent. The skilled person understood from claim 1 as granted that the first positive authentication image was only observable in a perpendicular viewing direction α_1 . However, claims 4 and 5 as granted set out that the angle α_1 had to deviate from a perpendicular direction. There was thus a contradiction between claim 1 on the one hand and claims 4 and 5 on the other hand. The patent did not disclose an embodiment in which the first positive authentication image was observable in the perpendicular viewing direction and at an angle α_1 relative to the perpendicular direction but not in directions between. Such angular visibility gaps could not be put into practice. There was a contradiction between claims 1 and 5 as granted. According to claim 1, the first authentication image 7 was visible in the perpendicular viewing direction. Accordingly, the first authentication angle α_1 , at which the first authentication image was visible relative to the perpendicular viewing direction, was zero (see Figure 3 of the patent). However, claim 5 explicitly excluded the angular range between $+10^\circ$ and -10° for both the first and the second angles α_1 , α_2 , meaning that angle α_1 could not be zero in any embodiment of claim 5. An interpretation of claim 5 as granted in

which the first authentication image was visible also at, for example, $+5^\circ$ would not be reasonable since, in this case, claims 4 and 5 as granted would not contain any additional limitations as compared to claim 1 as granted. However, if the claim interpretation submitted by the respondent was to be accepted, claim 1 as granted would be unclear.

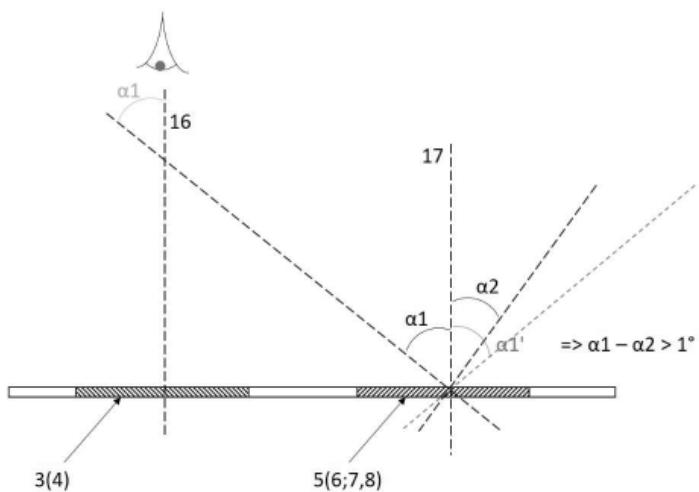
There was a contradiction between claim 1 as granted and Figure 3 of the patent regarding the name of the angle of the first positive authentication image 7. There was a further contradiction since the angle $\alpha 1$ according to paragraph [0034] of the patent as granted was smaller than the angle $\alpha 2$. At the same time, the angle $\alpha 2$ was zero because it corresponded to the perpendicular viewing direction (see paragraph [0033] of the patent as granted).

There were additional concerns if the claim features were interpreted in a narrow sense, as the opposition division had done, i.e. that each of the respective images was solely visible in the respective viewing angle or viewing direction. If Figure 1 of the patent was printed out and held in hand as if performing an inspection and then the identification image 4 was focused on, the authentication image 6 would appear blurred somewhere in the viewer's peripheral vision. It was still visible, i.e. perceptible up to a minimum extent, but not observable. There was no possibility of observing both the identification image 4 and the first authentication image 7 at a perpendicular viewing direction simultaneously. The patent failed to disclose how both the identification image 4 and the first authentication image 7 could be observed at a perpendicular viewing direction as per feature M1.5. This issue was present in claims 1 and 6 and was

additionally confirmed in consideration of claims 4 and 5. Document D7 demonstrated the common understanding of the term "stimulus", which referred to a shortly remaining visual impression in the brain in the course of latencies of primary visual cortex activation.

(ii) Respondent

The ground for opposition under Article 100(b) EPC did not prejudice the maintenance of the patent as granted. The expression "a perpendicular viewing direction" cited in feature M1.5 was more general than the expression "a perpendicular viewing direction (17) that is perpendicular to the image area (5)" used in claim 4 as granted. The subject-matter of claims 4 and 5 could be implemented as illustrated in the following drawing (see also page 7 of the Reasons of the decision under appeal), as the skilled person would have done.



The perpendicular viewing direction cited in feature M1.5 was illustrated by line 16. Perpendicular viewing direction 17 was perpendicular to the image area 5 as defined in claim 4 as granted. The first authentication image 7 could be observed at a

perpendicular viewing direction 16 and, at the same time, under a viewing angle α_1 relative to the perpendicular viewing direction 17 that was perpendicular to the image area 5. This situation was similar to the one shown in Figure 3 of the patent. The appellant's submissions on a visibility gap were based on an incorrect understanding of the claimed invention. The admittance of the above drawing had not been contested by the appellant in the opposition proceedings. The drawing was an easy and concise way to summarise the teachings of the patent and should be considered by the board. An alleged lack of clarity of claim 1 as granted was not a ground for opposition.

The definition that the mutual difference between the angles α_1 , α_2 was at least 1° in claim 5 as granted, similar to in paragraph [0033] of the patent, aimed at defining an asymmetry of the two angles α_1 and α_2 with respect to the perpendicular direction of images 7, 8 to avoid producing a stereoscopic image. Thus, for example, if $|\alpha_1| = 10^\circ$, then $|\alpha_2|$ should be at least 11° . Writing " $\alpha_1 - \alpha_2 > 1^\circ$ " was just an easy and concise way to represent this feature on the drawing.

The appellant's objection that when Figure 1 of the patent was printed, there was no possibility of observing both the identification image 4 and the first authentication image 7 at a perpendicular viewing direction simultaneously had been submitted late and should not be admitted in the appeal proceedings.

(b) Patent as granted: ground for opposition under Article 100(a) in conjunction with Article 54 EPC

(i) Appellant

The subject-matter of claims 1 and 6 as granted was not new in view of document D1. Features M1.1 and M1.5 were implicitly disclosed in document D1. Page 1, lines 11 to 13, of document D1 disclosed that the security device was attached to a security document. A security document, such as a personal ID document, normally comprised an identification image. This was also disclosed on page 1, lines 28 to 31, of document D1. Such an image served the purpose of checking the identity of a person who presented the security document. Thus, an identification image always had to be clear and photorealistic and was therefore normally printed on such documents. To achieve this, it was not reasonable to superimpose another image or optical effect onto the identification image (see document D1, page 2, line 21) without reproducing the identification image alone in a different location. Nor was it reasonable to make the regular identification image visible only at a specific viewing angle corresponding to a specific viewing direction (see document D1, page 2, lines 17 to 23) or to manufacture such an image by laser engraving. Even if document D1 did not explicitly disclose that a third photograph that was an identification image was printed on the security document, this was inherent to the security document (i.e. a personal ID document) itself. The required regular identification image could not be considered to be one of the two superimposed images. It was also implicit that it was provided on the same page of a passport or the same side of the personal ID document as the security device disclosed in document D1 so that

both were visible at the same time. The same arguments and conclusions applied to claim 6 as granted.

(ii) Respondent

The subject-matter of claims 1 and 6 as granted was new in view of document D1. This document did not disclose features M1.1, M1.3, M1.4 and M1.5. It was not unambiguously derivable that the security device disclosed in document D1 was applied to a security document that additionally contained an identification image as defined in feature M1.1. Page 11, lines 25 to 32, of document D1 only referred to positive and negative images; not to an additional identification image. Page 1, lines 24 to 31, of document D1 disclosed that personal data should be included in security devices to protect it. This data should not be present in other places. Since feature M1.5 was defined with respect to the identification image and features M1.3 and M1.4 were defined with respect to the first image, which was the identification image, these features were not disclosed in document D1 either. The same arguments and conclusions applied to claim 6 as granted.

(c) Patent as granted: ground for opposition under Article 100(a) in conjunction with Article 56 EPC

(i) Appellant

The subject-matter of claims 1 and 6 as granted did not involve an inventive step in view of, *inter alia*, a combination of document D1 and the alleged common general knowledge or document D2. The objective technical problem was to simplify the security check. A comparison of the appearance of a document holder

only against the images comprised by the security device disclosed in document D1 might be difficult, in particular under certain viewing angles due to the superposition of the images. An arrangement of the images below lenses altered the appearance compared to an image displayed directly on a surface. To enable visual comparison of the appearance of the document holder/presenter with the personal ID document disclosed in document D1 upon inspection, the skilled person would have applied a natural identification image to the document disclosed in document D1 as a standard design measure. The mechanism of protecting the identification image in an ID document implemented an additional security device in the document that was resistant to falsification and could be compared to the identification image. The mechanism of protecting the identification image was not based on encrypting the image by transferring it to the security device as it was still intended to be visible for inspection. Document D1 disclosed the use of an identification image to provide the positive/negative tilt image. Paragraph [0019] of document D2 explicitly stated that the security document could be a personal ID document. Such documents always had a photograph to identify the presenter of the document. Additionally, the ID document of document D2 comprised the authentication area with the positive and negative images. These images could not fulfil the purpose of visually identifying the presenter of the document because a photorealistic image was required for that purpose. The interlaced positive and negative images could not fulfil this function due to a loss of visual information. Document D2 stated in paragraph [0075] that in a first range of viewing angles, a first picture 336 could be seen that essentially reflected the portrait 300 but which was not the same picture as

portrait 300 (as seen by comparing Figures 6 and 8 of document D2). The same reasoning applied to claim 6 as granted.

The further objections of lack of inventive step raised in the statement of grounds of appeal in view of the following combinations were maintained:

- document D1 and the alleged common general knowledge or document D2 against claim 6 as granted
- document D2 and the alleged common general knowledge against claim 1 as granted
- documents D3 and D4 against claims 1 and 6 as granted
- documents D4 and D1 against claims 1 and 6 as granted
- documents D5 and D6 against claims 1 and 6 as granted
- documents D5 and D1 against claims 1 and 6 as granted
- documents D5 and D4 against claim 6 as granted
- documents D5 and D2 against claim 1 as granted
- documents D5 and D3 against claim 1 as granted

(ii) Respondent

The subject-matter of claims 1 and 6 as granted involved an inventive step in view of a combination of document D1 and the alleged common general knowledge or document D2. The objective technical problem was how to allow a quick and easy check of the integrity/security of the document. Document D1 advised against providing an identification image in addition to an authentication image since this document was aimed at integrating the image into a security device for protection (see page 1, lines 24 to 31, of document D1). Document D2 did not disclose

features M1.1, M1.3, M1.4 and M1.5 and could not have prompted the skilled person to the claimed solution. The same reasoning applied to claim 6 as granted.

The other objections of lack of inventive step raised by the appellant should not be admitted in the appeal proceedings. The objections in the appellant's letter dated 17 January 2022 had been raised late and should therefore not be admitted. The appellant had not maintained its objections of lack of inventive step in view of a combination of document D1 with document D4 or D5 in the appeal proceedings. Point 20 of the minutes of the oral proceedings before the opposition division implied that the appellant had withdrawn all objections not discussed at the oral proceedings. If the appellant had wanted to maintain these objections, it should have referred to its written submissions, as it had done for the ground for opposition under Article 100(b) EPC in point 8 of the minutes. The third paragraph in point 2 of the appellant's letter dated 24 October 2024 confirmed that the other objections had not been maintained in the opposition proceedings.

Reasons for the Decision

1. Patent as granted: ground for opposition under Article 100(b) EPC
 - 1.1 In point 12 of the Reasons of the decision under appeal, the opposition division concluded that the ground for opposition under Article 100(b) EPC did not prejudice the maintenance of the patent as granted. The appellant contested this view.

1.2 A successful objection of insufficient disclosure presupposes that there are serious doubts, substantiated by verifiable facts (see also "Case Law of the Boards of Appeal of the European Patent Office", Tenth Edition, July 2022 (Case Law), II.C.9). In inter partes proceedings, the burden of proof initially lies with the opponent, which must establish, on the balance of probabilities, that the skilled person reading the patent, using common general knowledge, would have been unable to carry out the invention. If the opponent has discharged its burden of proof and conclusively established the facts, the patent proprietor then bears the burden of proving the alleged facts.

1.3 In point III.1.1 of the statement of grounds of appeal, the appellant submitted that the drawing reproduced on page 7 of the Reasons of the decision under appeal "should not be admissible" to determine the scope of the disclosure of the patent.

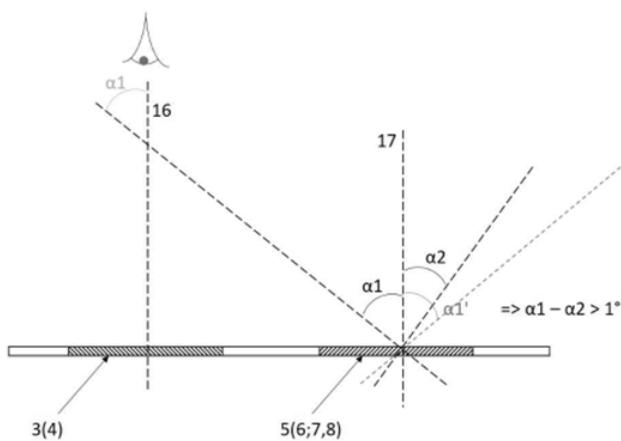
The drawing in question was filed by the respondent on page 2 of its letter dated 24 January 2023 and was considered in the decision under appeal for sufficiency of disclosure. It is not apparent why the appellant did not raise the above issue of whether the drawing could be taken into account in the proceedings before the opposition division. The board sees no legal basis for disregarding this drawing, which was taken into account in the decision under appeal, in the appeal proceedings.

1.4 In point 12 of the Reasons of the decision under appeal, the opposition division explained why it did not endorse the appellant's view that there was a contradiction between claim 1 and claim 4 or 5 as granted.

The appellant submitted that the skilled person would have understood claim 1 as granted such that the first positive authentication image was only observable in a perpendicular viewing direction α_1 . However, claims 4 and 5 as granted set out that the angle α_1 had to deviate from a perpendicular direction. There was thus a contradiction between claim 1 on the one hand and claims 4 and 5 on the other. The patent did not disclose an embodiment in which the first positive authentication image was observable in the perpendicular viewing direction and at an angle α_1 relative to the perpendicular direction but not in directions between. Such angular visibility gaps could not be put into practice. There was a contradiction between claims 1 and 5 as granted. According to claim 1, the first authentication image 7 was visible in the perpendicular viewing direction. Accordingly, the first authentication angle α_1 , at which the first authentication image was visible relative to the perpendicular viewing direction, was zero (see Figure 3 of the patent). However, claim 5 explicitly excluded the angular range between $+10^\circ$ and -10° for both the first and the second angles α_1 , α_2 , meaning that angle α_1 could not be zero in any embodiment of claim 5.

The wording of the claims should be given its broadest technically sensible meaning (see also Case Law, II.A.6.1). The skilled person tries, with synthetical propensity, i.e. building up rather than tearing down, to arrive at an interpretation of the claim which is technically sensible and takes into account the whole disclosure of the patent. The patent must be construed by a mind willing to understand, not a mind desirous of misunderstanding.

There is no contradiction between claim 1 on the one hand and claims 4 and 5 on the other hand. These claims can be understood in a consistent manner and without contradictions as set out by the respondent using the following drawing, which is also included on page 7 of the Reasons of the decision under appeal.



The perpendicular viewing direction cited in feature M1.5 is illustrated by line 16. Perpendicular viewing direction 17 is perpendicular to the image area 5 as defined in claim 4 as granted. The first authentication image 7 can be observed at a perpendicular viewing direction 16 and, at the same time, under a viewing angle α_1 relative to the perpendicular viewing direction 17 that is perpendicular to the image area 5. While the above drawing does not show the exact values of the angles specified in claim 5 as granted, it illustrates how the skilled person would have construed the claims in a consistent manner. Claims 1, 4 and 5 as granted can thus be interpreted without contradictions. Moreover, these claims do not require a visibility gap, so the appellant's submissions do not give rise to serious doubts concerning the skilled person's ability to carry out the claimed invention. The alleged lack of clarity

is not relevant since a lack of clarity is not a ground for opposition.

Incidentally, the appellant's submissions on an alleged angular visibility gap would not be convincing even assuming that feature M1.5 and claims 4 and 5 referred to the same perpendicular viewing direction. The appellant submitted that an interpretation of claim 5 as granted in which the first authentication image was visible also at, for example, $+5^\circ$ would not be reasonable since, in this case, claims 4 and 5 as granted would not contain any additional limitations as compared to claim 1 as granted.

However, claim 1 as granted leaves open whether the first authentication image is observable under viewing angles relative to a perpendicular viewing direction perpendicular to the image area between $+10^\circ$ and $+20^\circ$, while claim 5 explicitly specifies this feature. A claim interpretation in which there is no visibility gap would therefore not deprive claims 4 and 5 of technical limitations in addition to those implied by claim 1 as granted. An embodiment in which the first authentication image is observable at a perpendicular viewing direction and under viewing angles relative to a perpendicular viewing direction between $+10^\circ$ and $+20^\circ$ without any visibility gap would be encompassed by claims 1, 4 and 5 even if the claim interpretation suggested by the appellant was accepted. Consequently, even in this interpretation, these claims would not require a visibility gap.

- 1.5 The appellant also submitted that there was a contradiction between claim 1 as granted and Figure 3 of the patent regarding the name of the angle of the first positive authentication image 7. There was a

further contradiction since the angle $\alpha 1$ according to paragraph [0034] of the patent as granted was smaller than the angle $\alpha 2$. At the same time, this angle $\alpha 2$ was zero because it corresponded to the perpendicular viewing direction (see paragraph [0033] of the patent as granted).

As also set out by the opposition division, the view that the skilled person would be unable to perform the invention because of an inconsistency in reference signs cannot be accepted. Even assuming there was an inconsistency in the use of the reference numerals $\alpha 1$, $\alpha 2$ between claim 1 and the description of Figure 3 in paragraph [0033], which was disputed by the respondent, this in itself would not give rise to serious doubts that the skilled person using common general knowledge was able to carry out the claimed invention. The same holds true in view of the alleged inconsistency between paragraphs [0033] and [0034] of the patent.

- 1.6 In point III.1.3 of the statement of grounds of appeal, the appellant set out "additional arguments" on sufficiency of disclosure, referring to document D7. The appellant submitted that there were additional concerns if the claim features were interpreted in a narrow sense, as the opposition division had done, i.e. that each of the respective images was solely visible in the respective viewing angle or viewing direction. If Figure 1 of the patent was printed out and held in hand as if performing an inspection and then the identification image 4 was focused on, the authentication image 6 would appear blurred somewhere in the viewer's peripheral vision. It was still visible, which meant perceptible up to a minimum extent, but not observable. There was no possibility of observing both the identification image 4 and the first

authentication image 7 at a perpendicular viewing direction simultaneously. The patent failed to disclose how both the identification image 4 and the first authentication image 7 could be observed at a perpendicular viewing direction in terms of feature M1.5. This issue was present in claims 1 and 6 and was additionally confirmed in consideration of claims 4 and 5.

The respondent set out that this objection was submitted late and should not be admitted in the appeal proceedings.

It is uncontested that the above objection was not raised in the proceedings before the opposition division. The appellant submitted that the considerations set out in this regard in the statement of grounds of appeal were in line with the arguments against claims 4 and 5. However, this does not mean that the above objection was raised in the opposition proceedings.

Raising this objection first on appeal is an amendment of the appellant's case within the meaning of Article 12(4) RPBA. In accordance with Article 12(6), second sentence, RPBA, the board does not admit requests, facts, objections or evidence which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal unless the circumstances of the appeal case justify their admittance. Since the above objection is raised against the claims of the patent as granted, it could and should have been raised in the opposition proceedings. No reasons justifying its admittance have been submitted. In so far as the appellant refers to a "narrow" claim interpretation

adopted by the opposition division in the decision under appeal, it is uncontested that the opposition division did not adopt a surprising claim interpretation that could not have been expected in view of, for example, the respondent's submissions in its reply to the notice of opposition or the claim interpretation set out on page 5, penultimate paragraph, of the opposition division's preliminary opinion annexed to the summons to oral proceedings issued on 4 July 2022.

The board therefore decided not to admit this objection in the appeal proceedings under Article 12(2) and (4) RPBA. As document D7 is therefore of no relevance to the issues in hand, the board decided not to admit it in the proceedings.

1.7 The ground for opposition under Article 100(b) EPC does not prejudice the maintenance of the patent as granted.

2. Patent as granted: ground for opposition under Article 100(a) in conjunction with Article 54 EPC

2.1 The appellant submitted that the subject-matter of claims 1 and 6 as granted was not new in view of document D1.

In the decision under appeal, the opposition division concluded that the subject-matter of claim 1 as granted was new in view of document D1 since this document did not disclose features M1.1 and M1.5 (see point 15 of the Reasons).

2.2 Regarding feature M1.1, the opposition division took the view that document D1 did not disclose an

identification image. Page 1, line 24, to page 2, line 27, of document D1 disclosed that a security document included data on the holder and that this data could be a name or a photograph (see page 1, line 31). It was explained that this data needed to be protected (see page 1, line 32) and was therefore incorporated in a security device. Page 1, line 36, to page 3, line 3, of document D1 set out the details of the security device, namely the production of two images under a lenticular array. This passage confirmed that there was a photograph on the security device. However, this photograph was included in the security device in the form of two images under a lenticular array. This view was confirmed by page 11, line 25 to 30, of document D1.

The appellant contested this view and submitted that page 1, lines 11 to 13, of document D1 disclosed that the security device was attached to a security document. A security document, such as a personal ID document, normally comprised an identification image, which was also disclosed on page 1, line 31, of document D1. Such an identification image was for checking the identity of the person who presented the security document. In other words, the identification image was visually compared to the appearance of the person who presented the security document at the time of inspection. Thus, an identification image always had to be clear and photorealistic and was therefore normally printed on such documents. To achieve the function of an identification image, it was not reasonable to superimpose another image or optical effect onto the identification image (see document D1, page 2, line 21) without reproducing the identification image alone in a different location. Nor was it reasonable to make the regular identification image

visible only at a specific viewing angle corresponding to a specific viewing direction (see document D1, page 2, lines 17 to 23) or to manufacture such a regular identification image by laser engraving. Even if document D1 did not explicitly disclose that a third photograph that was an identification image was printed on the security document, this was inherent to the security document (i.e. a personal ID document) itself. The required regular identification image could not be considered to be one of the two superimposed images.

The appellant thus set out that feature M1.1 was not disclosed explicitly, but implicitly in document D1. However, an alleged disclosure can only be considered implicit if it is immediately apparent to the skilled person that nothing other than the alleged implicit feature forms part of the subject-matter disclosed (see also Case Law, I.C.4.3).

The conclusion that nothing other than a reproduction of the identification image in addition to the positive and negative images would form part of the security document disclosed in document D1 is unwarranted.

Page 1, lines 28 to 31, of document D1 discloses that identity documents bearing an identity photograph are known. However, document D1 does not disclose that a security device having positive/negative images is applied to an identity document that, additionally, bears a photograph. It is technically possible and not excluded by document D1 that the identity photograph typically provided on an identity document is replaced by the positive/negative image disclosed in document D1. This view is unaffected by the considerations that adding a photograph at another location of the security document may have certain

advantages as compared to the exclusive use of the positive/negative image disclosed in document D1.

Page 11, lines 25 to 31, of document D1 discloses that if the image is an identity photograph of the bearer of the identity document protected by the security device, during the same personalisation step which can be carried out by the issuer, the photograph can be taken, then engraved positively at a first angle to form the first image and inverted to obtain a negative image, and engraved to form the second image. This, however, does not imply that the identity photograph is provided on the security document in addition to the first and second images.

2.3 Document D1 does not disclose feature M1.5 because it does not disclose an identification image as set out in feature M1.1. Document D1 also fails to disclose features M1.3 and M1.4 since this document does not disclose a (first) identification image (see feature M1.1). Consequently, the subject-matter of claim 1 as granted is new in view of this document. As agreed to by the parties, the same conclusions apply to claim 6 as granted.

3. Patent as granted: ground for opposition under Article 100(a) in conjunction with Article 56 EPC

In point 16 of the decision under appeal, the opposition division concluded that the subject-matter of claim 1 as granted involved an inventive step in view of a combination of document D1 with document D2, D4, D5 or the common general knowledge.

In the statement of grounds of appeal, the appellant, *inter alia*, submitted that the subject-matter of claims 1 and 6 as granted did not involve an inventive step in view of a combination of document D1 and the common general knowledge (see pages 28 and 29 of the statement of grounds of appeal) or a combination of documents D1 and D2 (see pages 34 to 36 of the statement of grounds of appeal). No reference was made to a combination of document D1 with document D4 or D5.

- 3.1 Combination of document D1 and the alleged common general knowledge or document D2
 - 3.1.1 The appellant submitted that the objective technical problem was to simplify the security check. A comparison of the appearance of a document holder only against the images comprised by the security device disclosed in document D1 might be difficult, in particular under certain viewing angles due to superposition of the images. Also, an arrangement of the images below lenses altered the appearance compared to an image displayed directly on a surface. To enable visual comparison of the appearance of the document holder/presenter with the personal ID document disclosed in document D1 upon inspection, the skilled person would have applied a natural identification image to the document disclosed in document D1 as a standard design measure.

On page 12 of the Reasons of the decision under appeal, the opposition division set out that page 1, line 24, to page 2, line 27, of document D1 disclosed that a security document included data on the holder such as a name or a photograph. Document D1 thus taught that whatever personal information was incorporated in the security document had to be protected in the way

disclosed by document D1. Therefore, this document would have led the skilled person away from having an "unprotected" image on the security document.

The appellant disagreed. The mechanism of protecting the identification image in an ID document implemented an additional security device in the document that was resistant to falsification and could be compared to the identification image. The mechanism of protecting the identification image was not based on encrypting the image by transferring it to the security device as it was still intended to be visible for inspection.

The respondent submitted that the objective technical problem was how to allow a quick and easy check of the integrity/security of the document. Document D1 advised against providing an identification image in addition to an authentication image since this document was aimed at integrating the image into a security device for protection.

Page 1, lines 24 and 25, of document D1 discloses that one element of a secure document that needs particular protection is the personalised part. To protect this personalised part, according to page 1, lines 32 to 36, of document D1, it is known to include it, in whole or in part, in a security device, so that the personalised part benefits from the resistance to falsification specific to the security device.

However, if the same personalised information is additionally provided as a photograph, it could more easily be extracted and then used to falsify the identity document. This view is unaffected by the appellant's submission that document D1 discloses the

use of an identification image to provide the positive/negative images of the security device.

The alleged technical drawback that the positive image can only be seen under certain viewing angles is therefore a measure of protecting the photograph of the bearer. Moreover, the appellant has not convincingly demonstrated that providing the image under a lens array as disclosed in document D1 would necessarily prevent or hinder authentication of the security document.

3.1.2 In the decision under appeal, the opposition division concluded that document D2 did not disclose features M1.1 and M1.5 and could therefore not have prompted the skilled person to arrive at the subject-matter of claim 1 as granted.

The appellant submitted that paragraph [0019] of document D2 explicitly stated that the security document may be a personal ID document. Personal identification documents always had a photograph to identify the presenter of the document. Additionally, the ID document of document D2 comprised the authentication area with the positive and negative images. These images could not fulfil the purpose of visually identifying the presenter of the document because a photorealistic image was required for that purpose. The interlaced positive and negative images could not fulfil this function due to the loss of visual information. Document D2 stated in paragraph [0075] that in a first range of viewing angles a first picture 336 could be seen that essentially reflected the portrait 300 but which was not the same picture as portrait 300 (as seen by comparing Figures 6 and 8 of document D2).

Paragraph [0075] of document D2 discloses that the first image 336 essentially reproduces the portrait 300. The appellant's view that the interlaced positive and negative images disclosed in document D2 could not fulfil this function due to the loss of visual information is not supported by document D2. Nor has the appellant convincingly shown that the skilled person would have understood that an additional photograph had to be provided on the security document disclosed in document D2.

Document D2 does not disclose an identification image in a first image area in addition to an authentication image in a second image area as defined in feature M1.1. It could not have prompted the skilled person to include this feature in the security device disclosed in document D1.

Moreover, the same concerns as set out above for document D1 on the protection of the personal data apply to the combination of documents D1 and D2.

- 3.1.3 The subject-matter of claim 1 as granted therefore involves an inventive step in view of a combination of document D1 with the alleged common general knowledge or document D2. The same applies, mutatis mutandis, for the same reasons to claim 6 as granted.

- 3.2 Further objections of lack of inventive step raised by the appellant on appeal

In addition to the above objections considered in the decision under appeal, in the statement of grounds of appeal, the appellant raised further objections of lack

of inventive step in view of the following combinations:

- document D1 and the alleged common general knowledge or document D2 against claim 6 as granted
- document D2 and the alleged common general knowledge against claim 1 as granted
- documents D3 and D4 against claims 1 and 6 as granted
- documents D4 and D1 against claims 1 and 6 as granted
- documents D5 and D6 against claims 1 and 6 as granted
- documents D5 and D1 against claims 1 and 6 as granted
- documents D5 and D4 against claim 6 as granted
- documents D5 and D2 against claim 1 as granted
- documents D5 and D3 against claim 1 as granted

These objections were not considered in the decision under appeal. The respondent requested that these objections not be admitted in the appeal proceedings.

In point VI. of the notice of opposition, the appellant raised objections of lack of inventive step in view of the following combinations:

- document D2 and the alleged common general knowledge against claim 1 as granted
- documents D1 and D2 against claim 6 as granted
- documents D3 and D4 against claims 1 and 6 as granted
- documents D5 and D6 against claims 1 and 6 as granted

In its letter dated 17 January 2022, the appellant additionally raised objections of lack of inventive step in view of the following combinations:

- document D2 and the alleged common general knowledge against claim 6 as granted
- documents D2 and D1 against claims 1 and 6 as granted
- documents D4 and D3 against claims 1 and 6 as granted
- documents D4 and D1 against claims 1 and 6 as granted
- documents D5 and D1 against claims 1 and 6 as granted
- documents D5 and D2 against claim 1 as granted
- documents D5 and D3 against claim 1 as granted

It is uncontested that no objection of lack of inventive step in view of a combination of documents D5 and D4 against claim 6 as granted was raised in the opposition proceedings.

The above objections raised by the appellant in the opposition proceedings were not withdrawn at a later stage. The fact that the appellant did not wish to discuss any further combinations of documents at the oral proceedings before the opposition division (see point 20 of the minutes of the oral proceedings) in itself does not imply that the above objections that had been previously raised in the written proceedings were withdrawn. Nor can this be inferred from the fact that point 20 of the minutes does not state that the appellant referred to its written submissions. Nor does the third paragraph in point 2 of the appellant's letter dated 24 October 2024 indicate that the above objections had not been maintained in the opposition proceedings.

Even assuming that the objections raised in the appellant's letter dated 17 January 2022 had been filed

late, as submitted by the respondent, this does not entail that they could be disregarded. Pursuant to Article 114(2) EPC, the opposition division may disregard facts or evidence which are not submitted in due time by the parties concerned. This means that while the opposition division had discretion over whether to admit objections which were submitted late, it could not disregard them. However, it is not apparent from the file that it decided on the admittance of these objections. Moreover, the objections raised in the notice of opposition also had to be decided upon in the opposition proceedings.

4. Remittal and reimbursement of the appeal fee

For the reasons set out above, the ground for opposition under Article 100(b) EPC does not prejudice the maintenance of the patent as granted, and the subject-matter of claims 1 and 6 as granted is new in view of document D1 and involves an inventive step in view of a combination of this document and the common general knowledge or document D2.

Of the inventive-step objections raised on appeal, some had been raised in opposition proceedings, had not been withdrawn in opposition proceedings and were not considered by the opposition division in the contested decision. However, the opposition division was obliged to decide upon all objections that had been raised by the appellant in the opposition proceedings that had not been withdrawn before it decided to reject the opposition. The fact that not all the objections raised by the appellants in the opposition proceedings were decided upon by the opposition division constitutes a

procedural deficiency.

At least some of these objections have been maintained on appeal within the meaning of Article 12(4) RPBA. As it cannot be excluded that the decision terminating the opposition proceedings would have been different had these objections been decided upon by the opposition division, the decision under appeal relating to the rejection of the opposition is to be set aside.

As the appeal is allowable in this regard, the board has, pursuant to Article 111(1), second sentence, EPC discretion over whether to remit the case to the opposition division for further prosecution. Under Article 11 RPBA, the board does not remit a case to the department whose decision was appealed for further prosecution unless special reasons present themselves.

In view of the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (see also Article 12(2) RPBA) and in view of Article 11, second sentence, RPBA, in accordance with which the presence of a fundamental deficiency constitutes such special reasons, the board decides to remit the case to the opposition division for further prosecution.

Moreover, as the appeal is allowed, reimbursement of the appeal fee in full is equitable by reason of the opposition division's failure to address the above objections in the decision under appeal, this constituting a substantial procedural violation within the meaning of Rule 103(1) (a) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. Reimbursement of the appeal fee in full is ordered.

The Registrar:

N. Schneider

The Chairman:

O. Randl



Decision electronically authenticated