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**Datasheet for the decision  
of 14 July 2025**

**Case Number:** T 1573/23 - 3.2.05

**Application Number:** 17767887.7

**Publication Number:** 3509866

**IPC:** B42D25/36

**Language of the proceedings:** EN

**Title of invention:**

Security devices and methods of manufacture thereof

**Patent Proprietor:**

Hueck Folien Gesellschaft m.b.H.

**Opponent:**

Leonhard Kurz Stiftung & Co. KG

**Relevant legal provisions:**

EPC Art. 100(c), 123(2)

RPBA 2020 Art. 12(4)

**Keyword:**

Admittance of auxiliary request 2 (yes)

Added subject-matter (yes: all requests)

**Decisions cited:**

G 0010/91, T 0862/16



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Case Number: T 1573/23 - 3.2.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.05**  
**of 14 July 2025**

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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 17 July 2023  
revoking European patent No. 3509866 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** P. Lanz  
**Members:** O. Randl  
F. Blumer

## **Summary of Facts and Submissions**

- I. The patent proprietor filed an appeal against the revocation of European patent No. 3 509 866 ("the patent") by the opposition division.
- II. The opposition division was of the opinion that the ground for opposition under Article 100(c) EPC prejudiced the maintenance of the patent and that the sole auxiliary request did not comply with the requirements of Article 123(3) EPC.
- III. On 10 January 2025 the board issued a communication pursuant to Article 15(1) RPBA.
- IV. Oral proceedings before the board took place on 14 July 2025 by videoconference.
- V. The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), or that the decision under appeal be set aside and that the patent be maintained as amended on the basis of auxiliary request 1 decided upon in the decision under appeal or auxiliary request 2 filed with the statement of grounds of appeal.
- VI. The respondent (opponent) requested that the appeal be dismissed. The respondent also requested that auxiliary request 2 not be admitted into the appeal proceedings.
- VII. Independent claims 1 and 15 of the patent as granted read as follows (the feature references used by the opposition division are added in square brackets):

"1. **[A]** A method of producing a security device (1), comprising:

**[B]** providing a substrate (10) having a relief structure (20) in or on its surface, the relief structure being provided in a first region of the substrate, **[B1]** the relief structure in the first region having a first recess or a plurality of first recesses (21) in or on the surface of the substrate, the first recess or recesses being recessed with respect to one or more corresponding first land areas (22) of the first region in or on the surface of the substrate; and

**[C]** applying a coating of a colour-shifting structure (30,40,50) to the relief structure **[C1]** such that the coating of the colour-shifting structure is received in the first recess or recesses of the first region and on the one or more first land areas and characterised in that **[C2]** a thickness (t) of the coating of the colour-shifting structure in the first recess or recesses is greater than or less than a thickness of the coating of the colour-shifting structure on the one or more first land areas."

"15. **[A']** A security device (1) comprising:

**[B']** a substrate (10) having a relief structure (21) in or on its surface, the relief structure being in a first region of the substrate;

**[B1']** the relief structure in the first region having a first recess or a plurality of first recesses (21) in or on the surface of the substrate, the first recess or recesses being recessed with respect to one or more corresponding first land areas (22) in or on the surface of the substrate; and

**[C']** a coating of a colour-shifting structure (30,40,50) **[C1']** on the relief structure in the first recess or recesses and on the one or more first land

areas; characterised in that [**C2'**] a thickness (t) of the coating of the colour-shifting structure in the first recess or recesses is greater than or less than a thickness of the coating of the colour-shifting structure on the one or more first land areas."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request essentially in that the four occurrences of the words "coating of a/the colour-shifting structure" have been replaced with "colour-shifting coating structure".

Claim 15 of auxiliary request 1 differs from claim 15 of the main request essentially in that the three occurrences of the words "coating of a/the colour-shifting structure" have been replaced with "colour-shifting coating structure".

Auxiliary request 2 contains only one claim, which is identical to claim 15 of auxiliary request 1.

VIII. Terminology

For the sake of concision, the board uses the abbreviation CSS for "colour-shifting structure(s)".

IX. The parties argued as follows:

**(a) Claim interpretation**

(i) Appellant

*Features C and C'*

When considered in isolation, the expression "coating of a CSS" can have several meanings, namely (a) a

coating consisting of a CSS, or (b) a colour-shifting coating structure, or (c) a coating of a CSS; however, when read in the context of the independent claims, it can only have the meaning of a coating consisting of a CSS or a colour-modifying structure. Interpretations (a) and (b) are equivalent in the present context. Interpretation (c), which corresponds to interpretation (i) of the opposition division, is incorrect because it disregards the grammatical and semantic structure of feature C. If the coating were applied to the CSS, then the feature would read "applying a coating to a CSS" instead of "applying a coating of a CSS". The coating is applied to the relief structure and not to a CSS. The sub-feature "of a CSS" expresses the nature of the coating. Only interpretations (a) or (b) are correct. According to the opposition division's interpretation (ii), the coating of the CSS is only a sub-layer (absorber, spacer, reflector) of this structure; however, feature C relates to the coating of a CSS as a whole and not to a single sub-layer of that structure. Interpretation (ii) is contrary to the literal meaning of feature C. With regard to claim 15, it is clear from the context of features C', C1' and C2' that the colour-shifting coating is applied as a whole to the relief structure and that the coating is the colour-shifting coating rather than an additional layer.

The interpretation according to which a coated CSS is applied to the relief structure (see the last paragraph of point 6.1 of the board's communication) is not one that the skilled person would have envisaged. When relief structures are coated with a CSS, the coating is never present in a form that would allow it to be coated. The colour-shifting structure is generated in the application process. For instance, a reflector is vapour-deposited, then a spacer is deposited in liquid

form and finally an absorber is vapour-deposited. There is nothing that could be coated before it is applied.

Page 33, lines 7 and 8, 10 to 15 or 26 to 31 of the application as filed establish a correspondence between a coating of a CSS and a colour-shifting coating.

The opposition division's assertion that the skilled person would not have considered paragraph [0008] of the patent when interpreting the claims is questionable. A patent can provide its own lexicon, and therefore the skilled person would always consider the description, also in the context of Article 123(2) EPC.

(ii) Respondent

It is clear from the construction and wording of the feature "coating of a/the CSS" that the proposed interpretations (a) and (b) are not correct. The words "of a/the" indicate that this is not a layer consisting of a CSS. There is no reason to believe that the coating refers to the CSS as a whole. A comparison of the original feature and features C1 and C1' demonstrates that their technical meaning differs. Page 33, lines 26 to 31 of the application as filed refers to "a coating of CSS" and not "a coating of a CSS".

**(b) Main request: added subject-matter**

(i) Appellant

*Features C and C'*

The amendment does not generate subject-matter extending beyond the content of the application as filed. A direct comparison of the original feature

"(applying) a colour-shifting coating structure to the relief structure" and the feature "(applying) a coating of a CSS to the relief structure" demonstrates that, in both cases, the relief structure is provided with a coating of a CSS. If the features under consideration are not read in isolation but in the context of the other features to which they relate, both formulations have the same technical meaning. On page 33, lines 26 to 31 of the original description, the expression "coating of CSS" is used as a synonym for "colour-shifting coating" to describe a coating of a colour-tilting structure. The absence of the indefinite "a" is not relevant because the description is intended for the skilled person rather than for a linguist.

The respondent's assertion that "coating" can refer to any layer is wrong. If any layer was meant, the word "layer" would have been used. A "coating" always covers an existing object.

In point 8 of the board's communication, it was argued that the amendment that led to paragraph [0008] of the patent as granted violated Article 123(2) EPC. This cannot be true, if only for logical reasons. If  $\alpha$  designates the feature "coating of a colour-shifting structure" and  $\beta$  designates the feature "colour-shifting coating structure", the description now specifies that  $\beta = \alpha$ . The replacement of  $\alpha$  with  $\beta$  in the claim then cannot violate Article 123(2) EPC because the combination of claim 1 as granted and paragraph [0008] as amended corresponds exactly to what was originally disclosed. The situation would be different if claim 1 still had feature  $\alpha$  because this feature could be given a different meaning. It seems questionable that it is at the board's discretion to raise the objection of its own motion. The appellant

expressly does not give its consent for the new objection to be introduced. Article 125 EPC mentions principles of procedural law generally recognised in the Contracting States. Because the board is comparable to an administrative court, it should apply the principle of party disposition (*Antragsgrundsatz*). The objection is not simply a new argument, but it invokes new facts, namely the wording of paragraph [0008].

The respondent's understanding of paragraph [0008] is flawed. It is self-evident to the skilled person that the expression in brackets explains the expression "coating of a colour-shifting structure".

*Feature C2: "such"*

The objection is linguistic and unrelated to what the skilled person would have understood. During examination, the term "such" was replaced with "characterised in" in feature C2. The opposition division concluded that the amended claim covers undisclosed embodiments in which the thickness of the colour-shifting coating is no longer the result of its application; however, it follows from features C and C1 that the colour-shifting coating is applied to the relief structure, both to the raised areas and in the recesses. The coating is achieved by its application. Its thickness according to feature C2 is a direct result of the application (see also the original claim 36; cf. claim 15 as granted). It is not apparent how the varying thickness of the coating could be technically achieved other than by applying the coating. Claims are to be interpreted in a technically meaningful way and with the intention of understanding them. The skilled person would not consider interpretations that make no technical sense. It was not demonstrated that the layer thickness of the

colour-shifting coating could be anything other than a result of the application of the colour-shifting layer. The amendment does not change the literal sense of claim 1 as filed. It only adapts the claim to become a two-part version. The arguments under point 2.2 of the decision under appeal are objections of lack of clarity rather than objections under Article 123(2) EPC.

It should be noted that the words "characterised in that" in claim 1 are preceded by the conjunction "and". Consequently, feature C2 is connected to features C and C1. Subliminally (*unterschwellig*), feature C2 is perceived as a process feature, but even if feature C2 expressed a mere result, it would have to be the result of the application step. It is unrealistic to consider that the skilled person would have envisaged reducing the applied layer by abrasion (*Abschleifen*).

(ii) Respondent

*Features C and C'*

The amendment from "colour-shifting coating structure" to "coating of a/the CSS" modifies the technical meaning of the claim. In the application as filed, a colour-shifting (coating) structure designates a structure consisting of several layers (reflector, absorber and optical spacer) causing a colour-shifting effect (page 1, lines 18 to 25; page 9, lines 13 to 21). The expression "colour-shifting coating structure" has the meaning of a coating structure generating a colour-shifting effect. The expression "a coating of a/the CSS" has the meaning of a layer (coating) of the CSS itself or of an additional layer applied to it. The reference to page 33 of the application as filed is not helpful because the expression used in this passage is

"coating of CSS" and not "coating of a CSS". The assertion that the coating may be the CSS itself is not reasonable in view of the wording of feature C ("... a coating of a CSS ..."). In the English language, "coating" (*Beschichtung*) can designate a mere layer (*Schicht*). Contrary to the original disclosure, it is not the CSS that has a varying layer thickness, but one of the layers of this structure. Therefore, the subject-matter of independent claims 1 and 15 of the patent includes undisclosed embodiments.

Paragraph [0008] of the patent must be read in light of the overall disclosure of the patent. It does not equate the expressions "coating of a CSS" and "colour-shifting coating structure", if only because the content of the brackets "(referred to as a "colour-shifting coating structure")" refers to the expression that immediately precedes it ("a CSS") rather than to "a coating of a CSS".

*Feature C2: "such"*

In claim 1 as filed, the feature corresponding to feature C2 is formulated in such a way that the different layer thickness is a consequence of the application step according to feature C. The different layer thickness is caused by the application of the layer (and not e.g. by a subsequent treatment). This is missing from claim 1 as granted. The insertion of the words "and characterised in that" has separated feature C2 from the preceding features. If the connection were to be maintained, the wording should have been "and characterised in that the coating is applied such that a thickness ...". Thus, the amendment does not meet the requirements of Article 123(2) EPC, and therefore the

ground for opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted.

It is possible to modify the thickness once the coating has been applied, not so much by abrasion but by solvent vaporisation or thermal processing, for instance.

**(c) Auxiliary request 1**

(i) Appellant

The opposition division was wrong to consider that Article 69 EPC is not applicable when examining whether the requirements of Article 123(3) EPC are met. In paragraph [0008] of the patent, it is explicitly stated that "a coating of a CSS" is to be understood as a "colour-shifting coating structure" and that these terms are synonyms in the present context. In the light of the description, it is apparent to the skilled person that the amended claims cover exactly the same subject-matter as the claims as granted and that the amendment does not extend the protection conferred. It merely replaces one expression with another equivalent expression. Therefore, auxiliary request 1 meets the requirements of Article 123(3) EPC.

Claim 1 of auxiliary request 1 restores the wording of claim 1 as originally filed. Consequently, there can be no violation of Article 123(2) EPC. The objection to paragraph [0008] of the patent was raised for the first time in the board's communication and was not raised by either the opposition division or the opponents, and is therefore not the subject of the contested decision. It should be rejected.

(ii) Respondent

The subject-matter of auxiliary request 1 does not meet the requirements of Article 123(3) EPC. The features "a coating of a CSS" and "coating of the CSS" have a different technical meaning. Replacing one with the other results in a change in the technical meaning of the independent claims. The question of the extent to which Article 69 EPC is applicable does not arise. The interpretation of the original claims must be based on the content of the application as filed, whereas the subject-matter of auxiliary request 1 is based on the amended claims and the corresponding description. If the expression "a colour-shifting coating structure" is interpreted such that it refers to the entire CSS comprising the absorber, spacer and reflector layers, Article 123(2) EPC is violated because of the different meaning of the corresponding features of auxiliary request 1 and the main request. Moreover, the objections raised to feature C2 are not dispelled by the amendments made in auxiliary request 1.

The board's comment on paragraph [0008] of the patent does not constitute a new objection, if only because an objection under Article 123(2) EPC had already been raised to auxiliary request 1 by the respondent. The appellant's interpretation of this paragraph is flawed, as pointed out in the context of the main request.

**(d) Auxiliary request 2: admittance**

(i) Respondent

Auxiliary request 2 should not be admitted into the appeal proceedings. It was not examined in the first-instance proceedings and it is not *prima facie* suitable

for overcoming the objections to auxiliary request 1. The patent proprietor's statement of grounds of appeal does not set out how auxiliary request 2 overcomes the objections to the main request and auxiliary request 1.

(ii) Appellant

The request is admissible. The patent proprietor only discovered in the Reasons for the decision under appeal that the opposition division had changed its opinion with regard to the replacement of "such that" with "characterised in that". Auxiliary request 2 was therefore filed on the earliest possible date.

**(e) Auxiliary request 2: added subject-matter**

(i) Respondent

In view of the board's conclusion that there are two possible interpretations, the skilled person might adopt either one of them. They would not have considered that both are being protected. For the skilled person adopting the view that the coating can be any layer, the scope of protection is shifted because, all of a sudden, different subject-matter is being protected. Article 123(3) EPC expresses the principle that the public must be able to rely on the fact that the scope of protection cannot be extended.

Regarding Article 123(2) EPC, the decisive question is how paragraph [0008] of the patent is interpreted. Several aspects have to be taken into account:

- The notion of a "coating of a CSS" is not disclosed in the application as filed.

- Paragraph [0008] introduces a feature that was not disclosed in the application as filed and can be interpreted in several ways.
- It is not clear what the words "referred to as" in paragraph [0008] are actually referring to.
- If the appellant's interpretation is correct, a new definition has been introduced. It can be understood in such a way that the scope of protection is extended. If the respondent's interpretation is adopted, paragraph [0008] adds to the technical teaching of the patent.
- When conformity with Article 123(2) EPC is examined, the relevant criterion is "direct and unambiguous disclosure".

(ii) Appellant

The objections under Article 123(2) EPC are unfounded because claim 1 is identical to the original claim 36.

As far as Article 123(3) EPC is concerned, the skilled person would exclude one of the two allegedly possible interpretations, namely that the CSS itself is coated. Should the skilled person consider that several alternatives are possible, the skilled person would have considered that all of them are encompassed in the scope of protection. The skilled person would have considered the description for defining the scope of protection and would have understood that paragraph [0008] explains that the patent as granted and auxiliary request 2 involve equivalent or synonymous elements. The interpretation of paragraph [0008] is not decisive. If the expressions "colour-shifting coating structures" and "coating of a CSS" designate the same thing, there is no problem under Article 123(2) EPC because it is made clear that the expression "colour-

shifting coating structure" does not introduce anything new: no further meaning is added. There is just a new name for the colour-shifting coating structure. The technical content remains unchanged. The same holds true when the respondent's interpretation is adopted. Moreover, the way in which the reference in paragraph [0008] of the patent is interpreted is without consequence because both interpretations lead to the same result. The amendment was made to avert an objection of lack of clarity; it has no bearing on Article 123(2) EPC.

### **Reasons for the Decision**

1. Interpretation of the claims - feature C

Feature C requires a coating of a CSS to be applied to the relief structure.

The concept of a CSS as such is well known to the skilled person, who is aware that such structures typically consist of an absorber layer and a reflector layer, these layers being separated by an optical spacer layer; see also paragraph [0003] of the patent.

In claim 1 as originally filed the equivalent of feature C read as follows: "applying a colour-shifting coating structure to the relief structure". This language clearly expresses the facts that

- (a) a coating is applied to the relief structure,
- (b) this coating is structured, and
- (c) the coating is of the colour-shifting kind.

This feature was amended to overcome a novelty objection based on some prior art disclosing an

embossed holographic structure coated with a colour-shifting ink (see the applicant's letter dated 16 October 2019).

In feature C as it now stands, the coating of a CSS is applied to the relief structure. Taken literally, this conveys that

- (a) there is a CSS
- (b) the CSS is coated, and
- (c) its coating is applied to the relief structure.

However, it is not easy to understand how something can be a coating of the CSS and applied to the relief structure at the same time.

Feature C1 is of no help insofar as it only explains what "applied to" means, namely that the coating of the CSS is received both in recesses and on land areas of the relief structure. Feature C2 is not helpful for the interpretation of feature C either; it only compares the thickness of the coating in the recesses and on the land areas.

Several interpretations of feature C were proposed.

- The respondent argued that the expression "coating of a CSS" could refer to any of the layers making up the CSS. The board finds this interpretation far-fetched because it is not clear why any one of the layers of the CSS should be referred to as a "coating" of the CSS, i.e. something that seems to be distinct from the CSS and covering it.
- In point 2.2.4 of the decision under appeal, the opposition division pointed out that the expression could also refer to some additional layer coating the CSS. The appellant's argument that this cannot be true because CSS are created by successive

deposition steps has not convinced the board; for instance, the CSS could be generated and coated on a carrier before it is applied to the relief structure. That said, this interpretation has to face the difficulty that it is not clear how a layer that coats the CSS can be applied to the relief structure unless the CSS as a whole is somehow applied to the relief structure.

- The appellant argues that "coating of a CSS" is to be understood as something akin to "coating *consisting of* a CSS" or "coating *in the form of* a CSS". The weakness of this interpretation is that the actual wording is an odd way of stating this, considering that it would have been easy to draft the feature in a more straightforward way. Considering the file history, this interpretation may correspond to the applicant's intention at the time of the amendment, but it is doubtful that the amendment succeeded in conveying the intention.

The second paragraph on page 33 of the application as filed provides no help in interpreting the expression "coating of a colour-shifting structure" because it invariably refers to "coating(s) of colour-shifting structure" (line 27). The omission of the indefinite article considerably alters the meaning of the expression. The expression used on page 33 undoubtedly conveys the idea that the coating *consists of* a CSS. In view of the wording, the skilled person would not have thought that it was the CSS that was coated.

Paragraph [0008] of the patent cannot eliminate the ambiguity because its disclosure is unclear. The parties did not agree on whether the expression in parentheses "(referred to as a "colour-shifting coating structure")" actually referred to the expression

"colour-shifting structure" or to "a coating of a colour-shifting structure". From a technical point of view, neither possibility can be ruled out.

To sum up, two of the proposed interpretations of feature C are possible and technically meaningful. The feature can be understood to express the fact that the relief structure is coated with a CSS, or it can mean that a coated CSS is applied to the relief structure such that the latter is in contact with the coating of the CSS. The wording of claim 1 allows both understandings.

2. Main request: amendments (Article 100(c) EPC)

As can be seen from point 2.2 of the decision under appeal, the opposition division reached the conclusion that the ground for opposition under Article 100(c) EPC prejudiced the maintenance of the patent as granted.

2.1 Feature C

2.1.1 The feature corresponding to feature C in the original claim 1 read as follows: "applying a colour-shifting coating structure to the relief structure". The question arises of whether the amendment to "applying a coating of a colour-shifting structure to the relief structure" in the patent as granted violates the requirements of Article 123(2) EPC.

2.1.2 Based on its interpretation of feature C (see point 1. above), the board concluded that it does. The reason is that the feature as it now stands can be understood to mean that a coated CSS is applied to the relief structure, which has no basis in the content of the application as filed.

2.1.3 Even if the appellant's interpretation of paragraph [0008] were to be followed, the board notes that this paragraph itself was amended (underlining and struck-through portions indicate added and deleted portions, respectively, with respect to page 2, lines 12 to 23 of the application as filed):

*[0008] In accordance with a first aspect of the present invention, there is provided a method of producing a security device, comprising: providing a substrate having a relief structure in or on its surface, the relief structure being provided in a first region of the substrate, the relief structure in the first region having a first recess or a plurality of first recesses in or on the surface of the substrate, the first recess or recesses being recessed with respect to one or more corresponding first land areas of the first region in or on the surface of the substrate; and applying a coating of a colour-shifting ~~coating~~ structure (referred to as a "colour-shifting coating structure") to the relief structure such that it is received in the first recess or recesses of the first region and on the one or more first land areas and such that a thickness of the coating of the colour-shifting ~~coating~~ structure in the first recess or recesses is greater than or less than a thickness of the coating of the colour-shifting ~~coating~~ structure on the one or more first land areas.*

It is apparent that the original passage did not establish the equivalence between the expressions "coating of a colour-shifting structure" and "colour shifting coating structure" because it only uses the latter. Although the description of the patent may be

used in the interpretation of the claims as granted, the original description is decisive when examining the ground for opposition under Article 100(c) EPC.

2.1.4 In this context, the appellant pointed out that neither the parties nor the opposition division had referred to the amendment underlying paragraph [0008] of the patent, and that by introducing this matter, the board would violate the principle of party disposition. The board disagrees. When examining the ground for opposition under Article 100(c) EPC, the board needs to examine the original application and cannot disregard amendments to the description if they have a bearing on the subject-matter of the patent, regardless of whether these amendments were invoked by the opponent or the opposition division. This is not objectionable as long as the parties are heard on this issue and can respond to the new situation if necessary. Incidentally, the board agrees with decision T 862/16, point 8.3.1 of the Reasons, that the RPBA cannot restrict a board's power conferred by Articles 111(1) and 114(1) EPC to raise new objections of its own motion. Since the board did not introduce any new grounds for opposition, the limitation laid down by the Enlarged Board of Appeal in its decision G 10/91 is not relevant.

## 2.2 Feature C2

In claim 1 as originally filed, feature C2 was introduced by the words "such that", whereas in claim 1 as granted, the words "characterised in that" precede it.

As can be seen from points 2.2.12 and 2.2.13 of the decision under appeal, the opposition found that this amendment violated Article 123(2) EPC.

The opposition division's reasoning can be summarised as follows: according to the original wording, the specified thickness is the result of the application of a coating of a CSS, while claim 1 as granted does not establish a link between features C and C2. Therefore, the variation in thickness can be obtained in a different manner; however, the application as filed does not disclose any alternative way of obtaining the claimed thickness variation.

Feature C1 describes the intended outcome of the step of applying a coating of a CSS to the relief structure according to feature C. The application has to be carried out such that both recesses and land areas receive the coating. Feature C2 is a requirement concerning the thicknesses of the coating in the recess(es) and on the land area(s). It is introduced by the marker of the characterising feature of the claimed method. In other words, the characteristic feature of the claimed method is that the thicknesses of the coating are as described in feature C2.

In claim 1 of the application as filed, both features C1 and C2 indicate how the coating is applied, namely such that conditions C1 and C2 are implemented. The skilled person would have understood that the expressions "such that ..." and "... and such that ..." are parallel to each other and refer to two independent conditions to be fulfilled by the application step. The amendment has removed this parallelism by severing the connection between features C2 and C. Feature C2 has become a condition to be fulfilled by the method as a whole rather than by application step C. This has no basis in the application as filed.

Therefore, the amendment has generated subject-matter extending beyond the content of the application as filed, thereby infringing Article 123(2) EPC.

### 2.3 Conclusion regarding the main request

As the ground for opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted, the appellant's main request must be dismissed.

### 3. Auxiliary request 1

Claim 1 of auxiliary request 1 differs from claim 1 of the main request essentially in that the four occurrences of the words "coating of a/the colour-shifting structure" have been replaced with "colour-shifting coating structure".

This amendment is not suitable for overcoming the objection against feature C2 retained against claim 1 of the main request. Therefore, auxiliary request 1 does not comply with Article 123(2) EPC, and so it is not possible to maintain the patent on the basis of this request. It follows that auxiliary request 1 must be dismissed.

### 4. Auxiliary request 2

Auxiliary request 2 does not contain any process claims. Claim 1 of auxiliary request 2 differs from claim 15 of the main request essentially in that the three occurrences of the words "coating of a/the colour-shifting structure" have been replaced with "colour-shifting coating structure". It is thus identical to claim 1 of auxiliary request 1.

#### 4.1 Admittance

- 4.1.1 Auxiliary request 2 was filed for the first time at the outset of the appeal proceedings. Its admission is at the discretion of the board under Article 12(4) RPBA.

The appellant presented the request as a response to the opposition division changing its mind regarding the second objection under Article 100(c) EPC (see point 2.2 above). The appellant was only informed of this change of mind by the opposition division's reasons for the decision under appeal given in writing.

- 4.1.2 The request constitutes a response to the opposition division changing its mind during the oral proceedings. It does not raise new questions, shift the factual or legal framework of the proceedings or require the subject-matter of the proceedings to be completely re-assessed. Therefore, the board admitted the request.

#### 4.2 Compliance with Article 123(2) EPC

Claim 1 of auxiliary request 2 is identical to claim 36 of the application as filed, with two exceptions: the word "wherein" has been replaced with "characterised in that" and reference signs have been inserted. Neither of these changes has a bearing on the technical subject-matter of the claim.

It was argued that this finding involves auxiliary request 2 necessarily complying with the requirements of Article 123(2) EPC.

This argument fails to take into account that the description is not the same as the description of the application as filed. In particular, page 2, lines 12

to 23 of the application as filed was amended to become paragraph [0008] of the patent. The exact amendments have been highlighted in point 2.1.3 above.

In particular, amending the description has a bearing on the interpretation of the expression "colour-shifting coating structure" that is used in claim 1. As pointed out above, depending on the interpretation of the amended passage of the description, the expression is assimilated either to "colour-shifting structure" or to "coating of a colour-shifting structure". Regardless of the exact interpretation chosen, this assimilation constitutes technical teaching that is not found in the application as filed. Consequently, the amendment cannot be said to comply with the requirement of Article 123(2) EPC.

It follows that it is not possible to maintain the patent on the basis of auxiliary request 2.

This request must therefore be dismissed.

## 5. Conclusion

As none of the appellant's requests is allowable, the appeal must be dismissed.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



T. Buschek

P. Lanz

Decision electronically authenticated