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**Datasheet for the decision
of 5 October 2012**

Case Number: T 1994/11 - 3.2.01

Application Number: 08014301.9

Publication Number: 2025565

IPC: B60R 21/34

Language of the proceedings: EN

Title of invention:

Hood pop-up system

Applicant:

Nissan Motor Co., Ltd.

Headword:

-

Relevant legal provisions:

EPC Art. 109(1)
EPC R. 103(1)(a)
RPBA Art. 11

Keyword:

"Interlocutory revision"
"Decision re appeals - remittal (yes)"
"Reimbursement of appeal fee (no)"

Decisions cited:

-

Catchword:

T 0041/97



Case Number: T 1994/11 - 3.2.01

D E C I S I O N
of the Technical Board of Appeal 3.2.01
of 5 October 2012

Appellant: Nissan Motor Co., Ltd.
(Applicant) 2, Takara-cho
Kanagawa-ku
Yokohama-shi
Kanagawa 221-0023 (JP)

Representative: Grünecker, Kinkeldey
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 24 June 2011
refusing European patent application
No. 08014301.9 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: G. Pricolo
Members: Y. Lemblé
T. Karamanli

Summary of Facts and Submissions

- I. The appeal is directed against the decision posted 24 June 2011 refusing European patent application No. 08 014 301.9.

- II. In response to communications from the examining division the applicant had three opportunities to file amended claims, latterly on 19 January 2011. Considering the main and auxiliary requests filed on that date, the examining division in its decision found that claim 1 of both the main request and the auxiliary request was not new in the light of the prior art cited in the decision.

- III. Notice of appeal was received on 25 August 2011. In the notice of appeal the applicant requested that the decision under appeal be set aside and that a European patent be granted based on the set of application documents as originally filed, or auxiliary based on the set of claims according to the main request or the auxiliary request filed with letter of 19 January 2011.

- IV. By an order of 12 September 2011 the examining division found that the appeal was not to be rectified and that the case was to be referred without delay to the Boards of Appeal.

- V. With a letter of 24 October 2011 the appellant filed a statement setting out the grounds of appeal together with sets of claims according to a new main request and new auxiliary requests 1 and 2. The statement contained a reasoning in support of the patentability of the claimed subject-matter. The appellant requested that

the contested decision be set aside and that prosecution be continued on the basis of the most recently filed requests.

- VI. In a communication of the board of appeal dated 15 May 2012, the board informed the appellant that it considered that the issuance by the examining division of the order to refuse interlocutory revision before receipt of the statement of grounds of appeal amounted to a substantial procedural violation and that it intended therefore to remit the case to the department of the first instance.
- VII. In a letter of reply dated 29 June 2012, the appellant consented to the remittal of the case to the department of the first instance.

Reasons for the Decision

1. Article 108 EPC requires inter alia that a notice of appeal must be filed within two months after the date of notification of the decision and that a written statement setting out the grounds of appeal must be filed within four months after that date. In accordance with Article 109(1), first sentence, EPC if an examining division whose decision is contested considers the appeal to be admissible and well founded it shall rectify its decision. It is evident that receipt of the statement of grounds of appeal is a prerequisite for an examining division when applying the provisions of Article 109(1), first sentence, EPC to consider whether the appeal is well founded.

2. In the present case, the examining division issued the order to refuse interlocutory revision and to refer the case to the Boards of Appeal before any statement setting out the grounds of appeal was filed and before the expiry of the four month time limit for filing the statement of grounds.

By refusing interlocutory revision before the statement of grounds of appeal was filed together with amended claims according to a new main request and a new auxiliary request 1 and 2, the examining division could not have considered whether these amended claims overcame the reasons for refusal before ordering that the case be referred to the Boards of Appeal.
3. It is customary that an appealing party takes advantage of the two time limits provided for in Article 108 EPC, first and third sentences respectively, by firstly filing a notice of appeal and later filing the statement of grounds and it has the right to fully exhaust those time limits. It is incumbent on the examining division to wait until the filing of the full content of the statement of grounds or the expiry of the four month time limit, whichever comes first. In the present case the issuance of the order to refuse interlocutory revision before receipt of the statement of grounds deprived the appellant of the possibility of a fore-shortened appeal procedure provided by Article 109 EPC and amounts to a substantial procedural violation, see T 41/97, Reasons, point 5.
4. However, despite the presence of a substantial procedural violation the board considers that it would not be equitable to reimburse the appeal fee under Rule 103(1)(a) EPC. The established procedural violation

cannot have been causative in filing the appeal since it occurred after the notice of appeal had been filed.

5. In accordance with Article 11 RPBA (OJ EPO 2007, 536 to 547) if fundamental deficiencies are apparent in the first instance proceedings a case is to be remitted to the department of first instance unless special reasons present themselves for doing otherwise. In the board's view, no such special reasons are apparent and remittal is thus appropriate. Moreover, the appellant explicitly consented to the remittal to the department of the first instance (see point VII above).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:

A. Vottner

G. Pricolo