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Datasheet for the decision of 27 June 2019

Case Number: T 1505/16 - 3.2.01

Application Number: 08721997.8

Publication Number: 2141045

IPC: B60N2/07

Language of the proceedings: EN

Title of invention:
SLIDE MECHANISM OF VEHICLE SEAT

Patent Proprietor:
Toyota Boshoku Kabushiki Kaisha
Aisin Seiki Kabushiki Kaisha

Opponent:
Adient Components Ltd. & Co. KG

Headword:

Relevant legal provisions:
EPC Art. 54(2), 54(1), 111(1), 108

Keyword:
Admissibility of appeal - (yes)
Public availability of prior use - (yes)
Novelty - (no)
Remittal to the department of first instance - (yes)

Decisions cited:
T 0148/07, T 0055/01

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 1505/16 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 27 June 2019

Appellant: (Opponent)	Adient Components Ltd. & Co. KG Hertelsbrunnenring 2 67657 Kaiserslautern (DE)
Representative:	Liedhegener, Ralf Adient Components Ltd. & Co. KG IP Operations Hertelsbrunnenring 2 67657 Kaiserslautern (DE)
Respondent: (Patent Proprietor 1)	Toyota Boshoku Kabushiki Kaisha 1-1, Toyoda-cho Kariya-shi, Aichi 448-8651 (JP)
Respondent: (Patent Proprietor 2)	Aisin Seiki Kabushiki Kaisha 1, Asahi-machi 2-chome, Kariya-shi, Aichi 448-8650 (JP)
Representative:	Winter, Brandl, Fürniss, Hübner, Röss, Kaiser, Polte - Partnerschaft mbB Patent- und Rechtsanwaltskanzlei Alois-Steinecker-Strasse 22 85354 Freising (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 22 April 2016 rejecting the opposition filed against European patent No. 2141045 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	G. Pricolo
Members:	C. Narcisi
	P. Guntz
	H. Geuss
	P. de Heij

Summary of Facts and Submissions

I. The opposition was rejected and the European patent No. 2 141 045 was maintained as granted by the decision of the Opposition Division posted on 22 April 2016. Against this decision an appeal was lodged by the Opponent in due form and in due time pursuant to Article 108 EPC.

II. Oral proceedings were held on 27 June 2019. The Appellant (Opponent) requested that the impugned decision be set aside and that the patent be revoked. The Respondent (Patentee) requested that the appeal be dismissed (i.e. that the patent be maintained as granted (main request)) or, alternatively, that the decision under appeal be set aside and that the patent be maintained in amended form according to auxiliary requests 1 to 4 (filed on 9 January 2017).

III. Claim 1 of the patent as granted reads as follows:
"A vehicle seat slide mechanism (4) that is capable of sliding the vehicle seat (1) with respect to a floor (F)
comprising:
an upper rail (10) attached to the vehicle seat (1) and extending in a sliding direction of the vehicle seat (1), wherein the upper rail (10) is constructed of a flat plate-shaped upper surface portion (11), flat plate-shaped right and left side surface portions (12R, 12L) that respectively extending vertically downwardly from both sides thereof, and right and left fin surface portions (13R, 13L) that are bent upwardly from their lower ends; and
a lower rail (20) attached to a floor (F) as a guide member slidably guiding the upper rail (10) and extending in a sliding direction of the upper rail

(10), wherein the lower rail (20) is constructed of a flat plate-shaped lower surface portion (21), flat plate-shaped right and left side surface portions (22R, 22L) that respectively extend upwardly from both sides thereof, flat plate-shaped upper surface portions (23R, 23L) that are bent horizontally inwardly from their upper ends, and flat plate-shaped right and left fold-back surface portions (24R, 24L) that respectively extend vertically downwardly from inner ends of the upper surface portions (23R, 23L),
wherein the upper rail (10) further has engagement surface portions (14F, 14F, 14R, 14R) each having a projected surface portion that is projected downwardly with respect to the sliding direction thereof, the engagement surface portions (14FF, 14F, 14R, 14R) being positioned at two portions that are spaced from each other in the sliding direction of the upper rail (10), wherein the lower rail (20) further has a detent surface portion (25, 25) having a projected surface portion that is projected upwardly with respect to the sliding direction of the upper rail (10), the detent surface portion (25) being formed between the engagement surface portions (14F, 14F, 14R, 14R) formed in the upper rail (10), wherein the detent surface portion (25) is arranged and constructed to be covered with the upper rail (10), and wherein when one of the engagement surface portions (14F, 14F, 14R, 14R) contacts the detent surface portion (25, 25) due to sliding of the upper rail (10), the vehicle seat (1) can be prevented from sliding, characterized in that:

the engagement surface portions (14F, 14F, 14R, 14R) are respectively formed in lower surface portions of the flat plate-shaped right and left surface portions (12R, 12L) of the upper rail (10) so as to be projected

directly downwardly from the right and left surface portions (12R, 12L) of the upper rail (10), the detent surface portions (25, 25) are formed in the flat plate-shaped lower surface portion (21) of the lower rail (20) so as to project upwardly, and the engagement surface portions (114F, 14F, 14R, 14R) and the detent surface portions (25,25) are respectively formed at portions that are positioned vertically close to each other."

IV. The Appellant's arguments as far as relevant to the present decision may be summarized as follows:

The appealed decision erred when concluding that the seat slide mechanism designated as "Track 2000" was not publicly available according to the alleged public prior use. Evidence for said prior use consists of technical drawings D9 (D9.1 to D9.5), of catalogues D10 (D10.1 (in German), D10.2 (in English)), of delivery notes D11, D15 (D15.1-D15.15), and further of invoice D12 (Invoice bender carparts GmbH), of a VW Fox vehicle registration certificate D13, of pictures D14 of said VW Fox vehicle and its associated vehicle seat and of the actual vehicle seat D16 brought along by the appellant at the oral proceedings.
The Opposition Division decided that the standard of proof to be applied was "beyond reasonable doubt" (or "absolute conviction"), for it considered that due to the nature of said alleged prior use the Patentee did not have access to information concerning said prior use, all the evidence lying within the Opponent's sphere of control. It was laid out in detail in the statement of grounds of appeal, that in this respect the impugned decision erred, "balance of probabilities" being instead the adequate and appropriate standard of proof in the present case. This error directly led to

the erroneous conclusion that the prior use being publicly available was not sufficiently corroborated. Therefore, the statement of grounds of appeal sets out in detail why the grounds and reasons for the decision are mistaken and the decision has to be set aside. Thus, the appeal is admissible.

The adequate standard of proof in the present case is the "balance of probabilities" and applying said standard allows to conclude that the alleged prior use was public, as demonstrated in particular by D12, D13, D14 and D16 (jointly referred to and designated by the Appellant as second prior use), proving that the vehicle and the seat slide mechanism were on sale on the market and that the Patentee had obviously and evidently access to this evidence.
Moreover, the visual inspection of the actual vehicle seat D16 during oral proceedings, according to the decision of taking of evidence by the Board, proves (in conjunction with D12 to D13) that a seat slide mechanism as shown in D9 (apart from a few minor, irrelevant differences) was disclosed before the priority date (5 April 2007) of the contested patent and constitutes prior art.

The second prior use and the related arguments based on lack of novelty should be admitted into the appeal proceedings. No substantial differences to the technical drawings D9 emerged from the visual inspection of the seat D16, such that no further submissions were de facto added to the evidence D12, D13, D14, and D16, already admitted into the opposition proceedings by the Opposition Division.
The subject-matter of granted claim 1 (main request) lacks novelty over the second prior use as illustrated in particular by drawings D9.

Patentee's auxiliary requests 1 to 4 should not be admitted into the appeal proceedings, for they do not meet the requirements of Article 83 EPC, 84 EPC and Article 123(2), (3) EPC.

V. The Respondent's arguments may be summarized as follows:

The appeal is not admissible since the statement of grounds of appeal does not set out the reasons as to why the impugned decision is incorrect. In particular, the statement of grounds of appeal merely challenges the Opposition Division's view that the alleged prior use "Track 2000" does not form part of the state of the art, whilst not challenging the Opposition Division's conclusion that documents D1 to D8 do not anticipate the subject-matter of granted claim 1, which likewise involves an inventive step according to said decision. Moreover, the statement of grounds does not indicate why it was wrong to adopt the "balance of probabilities" criterion as standard of proof in relation to the issue of sufficient substantiation of the opposition and to apply the "beyond reasonable doubt" criterion as standard of proof in relation to the issue of public availability of the prior use.

Finally, the Opposition Division's assessment that there was "no confirmation from anyone involved in the development, sale or subsequent use of the rails that D9.1-D9.5 depict the technical status according to which the rails were produced in 2002 and then without any changes still in 2007, rather than some previous or alternative design from which one or the other feature in the end was not taken up in the production process" is still valid and was not put into question by the

statement of grounds of appeal. Indeed, the offer of the testimony of Mr. Flick could not remedy this deficiency, for a witness cannot testify with regard to "the features which were relevant or the evaluation of patentability of the contested patent", this point being clearly a question of law and not a matter for a witness' testimony.

The standard of proof applied by the Opposition Division is correct, its reasoning duly taking into account that the seat slide mechanism "Track 2000" is a mass-produced consumer good and that the Opponent bears the burden of proof for the alleged prior use. The Appellant's argument that the vehicle's seat according to D12-D14 and D16 could have been inspected by the Patentee is incorrect, as was shown in the appealed decision, the chain of evidence presenting several gaps which are not closed by the submissions of the Appellant in the statement of grounds of appeal. Therefore it is likewise concluded that the alleged prior use (and in particular the second prior use) does not represent prior art.

The second prior use and the related arguments based on lack of novelty should not be admitted into the appeal proceedings, given its late filing and the inconsistencies resulting from the Appellant's submissions. The taking of evidence has rendered evident that the seat slide mechanism of the inspected vehicle's seat D16 considerably differs from the seat slide mechanism according to D9. Thus, new facts have emerged in relation to and as an essential part of said second prior use, differing substantially from the Appellant's previous submissions based on D12 to D14 and D16. Consequently it is also not clear on which seat slide mechanism and related prior use the

Appellant actually bases its arguments and which vehicles were allegedly provided with the seat slide mechanism "Track 2000". The second prior use according to D12, D13, D14 and D16 is moreover not confirmed or corroborated by any witness, considering that Mr. Flick did not testify before the Board and that his testimony anyway would not be sufficient or apt to support the Appellant's allegations, due to the mentioned (see above) unclear and vague statements involving the matter the witness was intended to give testimony upon.

The subject-matter of granted claim 1 (main request) is new over the seat slide mechanism according to the alleged prior use "Track 2000", for the features reading "and wherein when one of the engagement surface portions (14F, 14F, 14R, 14R) contacts the detent surface portion (25, 25) due to sliding of the upper rail (10), the vehicle seat (1) can be prevented from sliding" (designated as feature M11) and "the engagement surface portions (14F, 14F, 14R, 14R) are respectively formed in lower surface portions of the flat plate-shaped right and left surface portions (12R, 12L) of the upper rail (10) so as to be projected directly downwardly from the right and left surface portions (12R, 12L) of the upper rail (10)," (designated as feature M12) are not derivable from D9, D12 to D14 and D16.

Reasons for the Decision

1. The appeal is admissible. The Board considers that the arguments provided by the Appellant in the statement of grounds of appeal adequately challenge the reasoning of the appealed decision and explain why in the Appellant's view the decision is wrong (Rule 99(2)

EPC). The Appellant essentially contends that the Patentee and the public had access to the evidence of the prior use of said seat slide mechanism "Track 2000" (evidence D12 to D14 and D16 (designated as second prior use, see above), the "balance of probabilities" thus being the correct and proper standard of proof, as opposed to "absolute conviction", which was adopted by the Opposition Division. Moreover, the Appellant reasons that adopting the appropriate standard of proof leads to the conclusion that the alleged prior use was publicly available and that therefore the decision has to be set aside since, in particular, novelty of the subject-matter of claim 1 has to be examined in view of the seat slide mechanism "Track 2000" representing prior art.

The above reasons hold true irrespectively of whether or not the statement of grounds challenge the appealed decision in relation to the conclusion reached in respect of prior art D1 to D8 and regardless of the standard of proof applied by the Opposition Division for assessing the substantiation of the notice of opposition, since an incorrect assessment of the public availability of the second prior use alone would render the decision incorrect.

2. The Board follows the Appellant's view that in the present case the appropriate standard of proof is the "balance of probabilities", as the evidence for the alleged prior use did not lie exclusively within the Opponent's sphere of control. Indeed, the vehicle registration certificate D13 of a vehicle VW Fox having chassis number WVWZZZ5ZZ60024856 (dated of 27 June 2006, before the relevant priority date) and the photographs shown in D14 of said vehicle with its associated seat D16, and the invoice D12 issued by the

company “bender carparts GmbH”, proving the Appellant’s purchase of the vehicle seat D16, constitutes evidence that could have been procured by the Patentee as well, in particular to verify that VW Fox vehicles including said slide mechanism mounted therein were available on the market for sale to the public and to potential customers before the priority date of the contested patent.

In addition, according to established case law of the Boards of appeal (see for example T 184/07, T 55/01) the “balance of probabilities” standard of proof is usually applied to evaluate an alleged prior use relating to mass-produced consumer products (such as the case in point), given that for these products it is generally almost impossible to provide all links in the chain of evidence for a single sold product. In such cases this is unnecessary if e.g. due to the high quantity of products which were produced and delivered to a customer and due to the specific circumstances of the case it can be concluded that with a very high degree of probability these products were publicly available before the relevant priority date.

3. At the oral proceedings the Board decided pursuant to Article 117(f) EPC and Rule 117 EPC to take evidence by visual inspection of the vehicle’s seat D16, to determine whether the seat slide mechanism of seat D16 was manufactured in accordance with technical drawings D9. The taking of evidence was performed during oral proceedings before the Board (see minutes of the oral proceedings) and it yielded the result (as set out in detail in the minutes of the oral proceedings) that the seat slide mechanism of the seat D16 according to the second prior use (based on D12 to D14, D16) is identical with the seat slide mechanism illustrated in

technical drawings D9, except that D16 includes four additional features (see minutes of the oral proceedings) which evidently do not affect or alter the above mentioned identical features. This result was not contested by the parties. The Respondent concluded, contrary to the Appellant, that the seat slide mechanism of seat D16 and the seat slide mechanism of D9 represented two different technical products.

4. The Board concluded that on the basis of D12 to D14 and D16 (second prior use) a seat slide mechanism according to D16 and moreover having all of the features depicted in D9 was made publicly available before the relevant priority date of the contested patent.

In particular, the Board considered that on the "balance of probabilities" it cannot be doubted that the inspected seat D16 was already installed at the time when said VW Fox vehicle was registered (according to registration certificate D13) and that in the meantime it had not been replaced. Indeed, the need to replace a vehicle seat arises only very rarely and usually only in connection with major accidents, which is not the case here (and was not discussed or contested by the Patentee or the Opposition Division). The label on the seat (see photographs in D14) clearly indicates the production date (30.01.2006) and it would be extremely unlikely for this label to be attached to the seat by some error or incidentally.
Finally the replacement of the vehicle's seat with a seat of a different type is extremely unlikely as well (due to the requirements and regulations implied by the vehicle's registration certificate) and even more so the replacement of just the slide mechanism. On the contrary, it seems much more probable that the seat is still the original one and contains the same seat slide

mechanism as installed into the car before 27 June 2006.

Therefore, contrary to the view taken in the appealed decision, the Board decided that said second prior use had been public before the priority date of the patent and that the seat slide mechanism being part of seat D16 (including the entirety of the features shown in D9) constituted prior art (Article 54(2) EPC).

5. The Appellant's submissions and the line of argument (based on lack of novelty) relating to the second prior use are admissible (Article 13(1) RPBA).

First, the Board notes that evidence D12 to D14 and D16 forming the basis of said second prior use was filed in opposition proceedings and was admitted by the Opposition Division, albeit deciding that a taking of evidence (by visual inspection of said seat D16) was not necessary, considering that it could anyway not change its judgement that the evidence for proving public availability was altogether not sufficient.

Second, the Appellant reiterated its detailed submissions based on D12 to D14 and D16 in the statement of grounds of appeal and in its reply (dated of 30 August 2017) to the Respondent's observations (on the statement of grounds of appeal). In the statement of grounds of appeal the Appellant clearly stated that "in respect of the features relevant to patentability all the seat rails "Track 2000" produced and delivered in the years between 2002 and 2008 have the exact features shown in drawings D9.1 to D9.5" (see statement of grounds of appeal, page 4, second paragraph). Further, in said reply the Appellant stressed that "the second prior use specifically relates to the sale of

said VW Fox vehicle including the seat with seat sliding mechanism according D14 and D16" (see letter, point 8.4).

Consequently, the only new facts emerging during oral proceedings relate to the taking of evidence establishing that seat slide mechanism D16 according to the second prior use based on D12 to D14 (and D16) does not merely include all the structural features of D9 but also a few minor additional features.

However, this was not surprising since the Appellant (see above) merely asserted that identity between the seat slide mechanism illustrated in D9 and D16 was only given to the extent that all features relevant with regard to patentability were identical. This obviously does not exclude minor differences, the other features, being the large majority and determining the principal and essential functions of the seat slide mechanism, remaining the same. In summary, said minor differences are not even touched upon in the discussion of patentability, are totally irrelevant and can be neglected in said discussion.

In relation to the circumstances or acts (i.e. how and in which way the prior use took place) of the second prior use, implying the sale of said VW Fox vehicle including the seat with the seat slide mechanism "Track 2000", no further facts or evidence were put forward during oral proceedings.

From the above reasons it ensues that the late filed new facts of the second prior use do not imply complex discussions and that the Respondent and the Board could be expected to be able to deal with these issues during oral proceedings, duly taking into account the need for

procedural economy and the current state of the proceedings.

The testimony of Mr. Flick was not deemed necessary by the Board, for the available facts and evidence already convinced the Board that on the basis of the "balance of probabilities" the second prior use was publicly available and that the seat slide mechanism D16 was identical in all essential and relevant aspects with the seat slide mechanism illustrated in D9. Therefore the seat slide mechanism "Track 2000" (including all the features illustrated in D9) constitutes prior art.

6. The subject-matter of granted claim 1 (main request) is not new (Article 54(1) EPC) over the seat slide mechanism according to the second prior use, as the contentious features M11 and M12 (see above) cannot contribute to distinguish this subject-matter from over said prior art.
In relation to feature M12 the Respondent contends that it is not visible from drawings D9, in particular D9.5, that the engagement surface portions, formed in the lower surface portions of the flat plate-shaped right and left surface portions of the upper rail, are "projected directly downwardly from the right and left surface portions", as required by said feature. The Respondent contends that said wording necessarily implies said engagement surface portions being projected vertically downward, which is not shown in figure D9.5. The Respondent considers that this is confirmed by the use of the wording "so as to project upwardly" in feature M13 of claim 1, describing the opposite situation wherein the detent surface portions are not required to project vertically upward.

The Board does not share this view for several reasons. First, the meaning of the term "projected directly downwardly" is unclear and vague, for "directly" is usually interpreted as meaning without changing direction (i.e. without turns or curves) or with nothing in between (i.e. without interposed objects). Thus, the feature being unclear, it cannot contribute to novelty or inventive step. Drawings D9.1 and D9.5 anyway show that the engagement surface portion 14R extends at least partly in one direction and that no obstacles are interposed in the downward direction. Moreover, even on the assumption that "directly" is construed as meaning "almost or substantially" vertical, this feature is anyway shown in D9.5, wherein at least a portion of said engagement surface portions is directed almost vertically downward.
As to feature M11 it is clear from drawing D9.1 (upper drawing) in conjunction with drawing D9.5 that the seat will be prevented from sliding when the engagement surface portions 14R come into contact with the detent surface portion 25. Hence, feature M11 is likewise anticipated by the known seat slide mechanism.
The remaining features being undisputedly likewise known from the seat sliding mechanism according to said second prior use, it can be inferred that the subject-matter of claim 1 lacks novelty.

7. The request for reimbursement of the appeal fee was withdrawn.

8. The Respondent's auxiliary requests 1 to 4 were admitted into the appeal proceedings, for they were filed with the reply to the statement of grounds of appeal, thus forming the basis of the Respondent's case (Article 12(1), (2) RPBA), and moreover they are identical with auxiliary requests 1 to 4 filed in

opposition proceedings in response to the Opponent's objections and to the preliminary opinion of the Opposition Division, before the oral proceedings. Therefore, these auxiliary requests are not late filed and are to be admitted into the proceedings, irrespective of any potential issues which may prima facie arise in view of the requirements of Articles 84 EPC and Article 123 (2), (3) EPC.

9. The Board decided to remit the case to the first instance department for further prosecution (Article 111(1) EPC). It was considered that this was necessary and appropriate, given that taking into consideration the second prior use as the state of the art provides a completely new basis for assessing novelty and inventive step of the claimed subject-matter of the auxiliary requests. Moreover, the auxiliary requests were not discussed by the parties in appeal proceedings in view of this prior art, and similarly the issues of clarity (Article 84 EPC) and extended subject-matter or extended scope of protection (Article 123(2), (3) EPC) were not discussed.

10. The decision of the Opposition Division to refuse the request for file exclusion (point 2 of the Reasons) has not been appealed and, thus, remains unaffected by this decision.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside insofar as the opposition has been rejected.

2. The case is remitted to the department of first instance for further decision with regard to the auxiliary requests.

The Registrar: The Chairman:

A. Vottner G. Pricolo

Decision electronically authenticated