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**Datasheet for the decision
of 5 April 2024**

Case Number: T 0572/19 - 3.4.01

Application Number: 11709370.8

Publication Number: 2684187

IPC: G10K11/168, B60R13/08

Language of the proceedings: EN

Title of invention:

AUTOMOTIVE NOISE ATTENUATING TRIM PART

Patent Proprietor:

Autoneum Management AG

Opponents:

Faurecia Automotive Industrie
International Automotive Components Group GmbH

Headword:

Noise attenuation trim part / Autoneum Management AG

Relevant legal provisions:

EPC Art. 21(4)(b), 119, 125
EPC R. 103(1)(a), 113(1), 125, 140
RPBA 2020 Art. 8(3), 11, 12(2), 23
RPEBA Art. 18(2)

Keyword:

Signature requirement under Rule 113(1) EPC applies to written decision as a whole - (yes)

Missing signature is substantial procedural violation - (yes)

Remedy by retrospective signature on behalf, and written explanation - (no)

Reimbursement of appeal fee - (yes)

Decisions cited:

G 0001/97, J 0016/17, T 0390/86, T 0243/87, T 0212/88,

T 0225/96, T 1170/05, T 2076/11, T 0989/19, T 2348/19,

T 3071/19

Catchword:

1. The signature requirement under Rule 113(1) EPC applies to the written decision, including its substantiation (Reasons 4 to 8).

2. The purpose of the signature requirement under Rule 113(1) EPC is only achieved if there is an unbroken chain of manifest personal responsibility, taken by each member of the decision-making body who is assigned to the case, throughout the decision-making process, including for the written decision (Reasons 12).

3. The omission of a member's signature from the appealed decision was not retrospectively remedied by another member's signing on their behalf and providing a written explanation. In particular, this could not be seen as a correction under Rule 140 EPC. The omission was a substantial procedural violation, and the decision is invalid (Reasons 35 to 46).



Beschwerdekammern

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Case Number: T 0572/19 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 5 April 2024

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 17 December
2018 revoking European patent No. 2684187
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chair	P. Scriven
Members:	P. Fontenay
	C. Almberg
	B. Noll
	D. Rogers

Summary of Facts and Submissions

- I. The proprietor's appeal is of the Opposition Division's decision, issued in writing on 17 September 2018, to revoke the patent ("the appealed decision").

- II. By communication under Rule 100(2) EPC, the parties were informed of the Board's observation that EPO Form 2339, dated 10 December 2018 ("the original Form 2339"), bore the name, but not the signature, of the legally qualified member who had participated in the decision-making process. The Board's preliminary view was that this amounted to a substantial procedural violation, justifying remittal of the case and reimbursement of the appeal fee.

- III. The parties were given the opportunity of filing observations.

- IV. Opponent 1 informed the Board that they had requested the Opposition Division to correct the decision under Rule 140 EPC.

- V. By the Opposition Division's communication dated 26 June 2023 ("the correction decision"), to which an altered Form 2339 ("the post-signed Form 2339") and an explanatory note on EPO Form 2906 ("the Division's explanation") were annexed, the parties and the Board were informed that the missing signature had been corrected, under Rule 140 EPC, with the chair belatedly

signing the form on behalf of the legally qualified member. The missing signature was deemed to concern "a formal error being an obvious mistake", made when the paper file circulated between EPO sites. It was assured that the grounds attached to the appealed decision, when issued, had previously been circulated by email to all members of the Opposition Division; also the grounds thus reflected the opinion of all the members of the Opposition Division, including the legally qualified member, who had confirmed her agreement in an email at the time ("a confirmation email"). The legally qualified member left the EPO in 2019.

- VI. In a written response, the proprietor requested that the case be remitted to the Opposition Division for them to remedy the deficiency, and that the appeal fee be reimbursed. They argued that the missing signature was a procedural violation that could not be corrected as an error or obvious mistake under Rule 140 EPC.
- VII. In their written response, Opponent 1 requested that appeal proceedings be continued. They defended the Opposition Division's correction of the obvious mistake, including the chair's assurance that the legally qualified member had agreed with the content of the appealed decision.
- VIII. By letter dated 6 October 2023, Opponent 2 requested that the Board determine that the missing signature had been an obvious mistake that had now been corrected. They concurred with Opponent 1 that the legally qualified member had agreed with the content of the appealed decision, and stressed that the omission of

the signature was unintentional. In the alternative, they requested that the case be remitted to the Opposition Division "to heal the lack of signature ... without entering into the merits and the extent of the decision", relying on T 2348/19, Reasons 1.7 and 1.8.

- IX. All parties requested oral proceedings before the Board, as a fallback position.
- X. In a preliminary opinion accompanying a summons to oral proceedings, the Board suggested that the legally qualified member's responsibility for the written decision was not manifest. The Board cited and endorsed the long-standing jurisprudence under which a missing signature constituted a substantial procedural violation (e.g. J 16/17). The Board also tended to view it as an uncorrectable legal error (G 1/97, *Requête en vue d'une révision/ETA*, OJ EPO 2000, 322, Reasons 2(c)). As a result, the Board envisaged setting aside the appealed decision, remitting the case, and reimbursing the appeal fee.
- XI. In reply, Opponent 1 made the auxiliary request that, if the appeal proceedings were not continued, any remittal be strictly limited to the fixing of the missing signature. They argued essentially as follows. The missing signature was not a substantial procedural violation. The facts of the present case differed from those of the cases invoked in the preliminary opinion. Here, there was no risk of arbitrariness or abuse. The legally qualified member participated in the deliberation, and was present when the decision was announced; and she had agreed to the appealed decision,

as confirmed by the Division's explanation. As there was no legal possibility of dissenting, she would have had no choice but to sign, even if she were in doubt. The missing signature was merely due to an erroneous scan, i.e. a simple administrative error that was correctable as an obvious mistake. There was no time limit for a correction under Rule 140 EPC.

- XII. Opponent 2 indicated that they would not participate in the oral proceedings, and did not comment on the substance of the preliminary opinion.
- XIII. The proprietor and Opponent 1 were represented at the oral proceedings before the Board.
- XIV. During oral proceedings, the proprietor argued essentially as follows.

The signature requirement, under Rule 113(1) EPC, applied to the written decision as a whole, not just the outcome as announced at oral proceedings. The legally qualified member's presence at the hearing did not mean she took responsibility for the subsequent written decision. It cannot be excluded that she never saw it, or that she meant to propose some amendment.

The Boards of Appeal have repeatedly stressed that a missing signature was not a clerical error, but a substantial procedural violation (J 16/17, T 2348/19, *Missing signatures/QUALCOMM*, etc.). The question, in the present case, was whether the deficiency could be corrected.

The missing signature was an uncorrectable legal error (G 1/97), not a linguistic or transcriptional error or an obvious mistake within the meaning of Rule 140 EPC. This provision was not applicable, certainly not after the occurrence of a substantial procedural violation.

The EPO's practice of another member signing a decision on behalf of a member who was prevented from doing so themselves was only applicable before the written decision was issued. There was no legal basis for doing it retroactively.

The decision in T 212/88, *Theta-1/BP*, OJ EPO 1992, 28, was more than 30 years old and rather isolated. The facts at issue were also quite different from the present case: the deficiency was not a missing signature, but an erroneous indication of names.

XV. During oral proceedings, Opponent 1 argued essentially as follows.

The signature requirement under Rule 113(1) EPC related to the decision as announced at oral proceedings, i.e. the outcome. The grounds were given later. After the announcement that the patent was revoked, it was a one-way street anyway, including for the legally qualified member, who could do nothing but sign the written decision.

In the present case, the legally qualified member did agree to the grounds, as objectively and clearly shown by the Division's explanation, a confirmation email, and the post-signed Form 2339. It was a legitimate expectation that such statements by EPO officials were not to be doubted: neither the parties nor the public

would have envisaged questioning their contents. As the chain of manifest personal responsibility of the legally qualified member was thus unbroken throughout the decision-making process, there had been no substantial procedural violation.

As explained by the chair of the Opposition Division, the missing signature was caused by EPO form 2339 being erroneously scanned into the electronic file, because the Opposition Division was split between EPO sites. This clerical error was an obvious mistake within the meaning of Rule 140 EPC, not an uncorrectable legal error (cf. G 1/97). The mistake had been lawfully corrected with the post-signed Form 2339, together with the Division's explanation. Thus, the appealed decision was valid.

The present circumstances were not ones that had been subject to a decision before. However, it had been explicitly acknowledged, in the decisions T 212/88 (Reasons 1, 4th paragraph) and T 225/96 (Reasons 2, 8th paragraph), that a missing signature in a written decision was correctable, with retrospective effect, as an obvious mistake. In T 225/96, signatures were missing because what was issued was merely the first examiner's draft, which the other members had not seen; those different circumstances explained why that deficiency was treated as a procedural violation and not corrected (Reasons 2, 5th to 7th paragraphs).

XVI. The parties final requests were as follows:

The proprietor requested that the decision under appeal be set aside and that the case be remitted to the

Opposition Division for further prosecution in the sense that the case be decided anew.

Opponent 1 requested that

- the Board determine that there had been an obvious mistake according to Rule 140 EPC in that the signature of the legally qualified member was missing from the appealed decision, and
- the Board determine that this obvious mistake had now been corrected within the meaning of Rule 140 EPC, and that said decision was valid, and, should the Board refuse the above requests,
- the case be remitted to the Opposition Division explicitly to remedy the formal deficiency pursuant to Rule 113(1) EPC, that is to heal the lack of signature of the legally qualified member in the appealed decision, without entering into the merits and the extent of the decision.

Opponent 2 had made, in writing, the same requests as Opponent 1, as set out above.

Reasons for the Decision

Object of proceedings

1. The primary object of these proceedings is to review the appealed decision (Article 12(2) RPBA). However, since the intervening correction decision purports retroactively to alter the appealed decision by affixing the missing signature (cf. CLBA, III.L.4), the correction decision is brought into the ambit of the review.

Substantial procedural violation as working hypothesis

2. According to the Boards' long-standing jurisprudence, when a decision is taken and announced during oral proceedings, the omission of the signature of one of the members, who took part in the collegiate decision-making process, from the written decision, constitutes a substantial procedural violation. It renders the decision invalid (see, for example, J 16/17, Catchword, Reasons 2.3 and 2.6; T 989/19, *Fehlende Unterschrift auf Entscheidungs-Formblatt*, Headnote, Reasons 3).
3. This appears immediately to conclude the case. However, such a conclusion is challenged by the intervening correction decision and the opponents' requests and arguments. Therefore, it should, at this stage, rather be regarded as a working hypothesis, or a starting point for a somewhat broader discussion.

Scope of signature requirement - Rule 113(1) EPC

4. The parties disagree on the scope of the signature requirement, and its applicability to the present case.
5. Rule 113(1) EPC reads:

Any decisions, summonses, notices and communications from the European Patent Office shall be signed by, and state the name of, the employee responsible.

6. The disagreement lies in whether the term "decisions" means simply the outcome of the proceedings (e.g. "The patent is revoked"), which is what Opponent 1 argues,

or extends to the substantiation in the written decision, which is the proprietor's view.

7. The Boards' jurisprudence indicates that the written decision, including the substantiation, is the object of the signature requirement (emphasis added):

Eine schriftliche Entscheidung, die die Gründe einer zuvor in der mündlichen Verhandlung verkündeten Entscheidung über den Einspruch gegen ein europäisches Patent wiedergibt, ist von den Mitgliedern der Einspruchsabteilung, die am Zustandekommen der mündlich verkündeten Entscheidung beteiligt waren, - und nur von diesen - zu unterzeichnen (T 2076/11, Reasons 1, second sentence).

In essence, this reads: a written decision setting out the reasons for a decision announced in oral proceedings must be signed by, and only by, the members involved in reaching the orally pronounced decision.

The name and the signature serve to identify the decision's authors and express that they unconditionally assume responsibility for its content (J 16/17, Catchword).

Similarly with respect to a decision in writing setting out reasons for the oral decision, the parties and the public should be able to see from the written decision that it has been made by the examiners who were appointed to the particular Opposition

Division responsible for that oral decision, and, ... to be legally valid, it must have been written on behalf of and represent the views of the members who were appointed ..., and it must bear signatures which indicate this (T 390/86, Reasons 7, 5th and 6th paragraphs).

8. There is, then, no doubt that the signature requirement under Rule 113(1) EPC applies to the written decision, including the substantiation, and not only to the outcome that might be announced during oral proceedings.

Purpose of signature requirement - Rule 113(1) EPC

9. The jurisprudence of the Boards has emphasised that the signature requirement is not a mere formality but an essential step in the decision-making process, and that it aims at preventing arbitrariness and abuse, and at ensuring the possibility of verifying that it was indeed the competent body that took the decision (see J 16/17, Catchword; T 989/19, Reasons 3; T 2348/19, Reasons 1.2).
10. It has also been stressed that the power of the EPO to examine and decide an opposition "must at all times be exercised personally" by the appointed examiners, and "be seen to be exercised personally, both by the parties and by the public" (see T 390/86, Reasons 7, 3rd and 4th paragraphs).
11. The present Board agrees with this view.

12. The purpose of the signature requirement under Rule 113(1) EPC is only achieved if there is an unbroken chain of manifest personal responsibility, taken by each member of the decision-making body who is assigned to the case, throughout the decision-making process, including for the written decision.
13. The requirement that all members sign is, in part, there to protect a minority of members of a decision-making body from possible wrongdoing by a majority. If the majority were able, without any boundaries, to substitute their declaration for the signatures of the minority, there would be no such protection. Rather, the signatures of the minority are required to show its acknowledgement that the written decision, including the substantiation, correctly reflects the collegiate decision.
14. The ability of parties and the public alike to place their trust in the integrity of the EPO's decision-making processes is a fundamental interest, the protection of which is crucial to the EPO's overall credibility as an international public authority.

Deficiency, remedies to consider

15. It already follows from the scope of "decisions" that the absence of the legally qualified member's signature from the original Form 2339 contravenes Rule 113(1) EPC ("the deficiency").
16. Nothing in this is altered by the legally qualified member's participation in the oral proceedings, including at the announcement of the decision to revoke the patent, i.e. events that preceded the issuance of

the appealed decision (cf. minutes; the annex, page 1; EPO Form 2331, page 2).

17. The cases presented by the opponents mean that three potential remedies must be addressed.

A) Application of what may be called "the pragmatic approach", according to which another member signs on behalf of one who is not in a position to sign, and provides a written explanation (cf. T 1170/05, Reasons 2.4; T 2076/11, Reasons 3; T 2348/19, Reasons 1.3).

B) Recognition of a possibility for the Opposition Division, after remittal, to heal the deficiency without entering into the merits and extent of the appealed decision (cf. Opponent 2's letter of 6 October 2023, point 4, pages 4 and 5);

C) Correction of the appealed decision under Rule 140 EPC (cf. T 212/88, Reasons 1, 4th paragraph).

Application of the pragmatic approach - potential remedy A

18. It is not always possible for all members who took part in a decision that has been announced during oral proceedings to sign the written decision, which might be issued weeks or months later. This might be due to death, illness, or resignation, for example. The EPO has developed a pragmatic approach for such situations.

19. According to this approach, another member of the same body, who was also present at the oral proceedings, may sign on behalf of the member who is unable to do so, when the written decision is to be issued. A written explanation must also be provided (see T 2076/11, Reasons 3; T 2348/19, Reasons 1.3; T 989/19, Reasons 5; T 1170/05, Reasons 2.4; T 243/87, Reasons 4).
20. However, there are two reasons not to apply the pragmatic approach in this case.
21. Firstly, the legally qualified member was not unable to sign the appealed decision at the time it was issued. The facts of the present case are thus entirely different from the situations that have warranted the application of the pragmatic approach.
22. Secondly, the pragmatic approach is based on the provision of a signature on behalf of the member who was prevented from signing, and a written explanation that precede the issuance of the written decision. The Board sees no basis for giving such signatures and explanations retroactive effect. On the contrary, that would clash with the purpose of the signature requirement (see paragraphs 9. to 14., above).
23. Thus, approach A does not provide a remedy.

Healing after remittal - potential remedy B

24. The opponents assert that the deficiency can be healed by the Opposition Division, after remittal, without the Division entering into the merits and extent of the appealed decision. In their written submission, Opponent 2 specifically relied on the decision in

T 2348/19, Reasons 1.7 and 1.8, as a basis for such a remedy.

25. The Board, however, reads that decision, and in particular paragraphs 1.7 and 1.8 of the Reasons, quite differently, especially in light of its Order.
26. The Board in T 2348/19 examined whether the pragmatic approach had been applied (see Reasons 1.2 to 1.4).
27. Throughout that decision (see, in particular, points IV and VI, Reasons 1.3, 1.4 and 1.6 including the highlighting, and the Catchword), the relevant problem was the omission of a written explanation, rather than of a signature by one member on another's behalf.
28. Based on this substantial procedural violation, the Board in T 2348/19 set aside the appealed decision, remitted the case to the Opposition Division for further prosecution, and reimbursed the appeal fee.
29. The present Board understands, from Reasons 1.7, that the Opposition Division's decision indeed ceased to have legal effect when its setting aside was announced by the Board. From Reasons 1.8, it is to be understood that "without entering into the merits of the case" is not directed at the Opposition Division but applies to the Board itself, which found justification for an immediate remittal of the case. There is nothing in the decision to suggest that the Opposition Division was prevented from examining the merits of the case.
30. On the contrary, by the interlocutory decision of 13 June 2022, the Opposition Division found that the patent could be maintained in amended form, after having re-examined the case on its merits; and the same

Board, in a different composition, later revoked the patent by decision of 23 January 2024 in case T 1996/22.

31. Hence, the Board in T 2348/19 assessed whether the pragmatic approach had been applied, but found it had not, as the signing by one member on another's behalf was not accompanied by a written explanation.
32. The opponents' interpretation of T 2348/19 cannot support their assertion in this regard: the decision in T 2348/19 is not a basis for the Opposition Division, after remittal, healing the deficiency without entering into the merits and extent of the appealed decision.
33. Indeed, to the Board's knowledge, there is no case in which an Opposition Division has remedied a missing signature, without entering into the merits of the appealed decision.
34. Remedy B is thus also not helpful to the opponents.

Correction under Rule 140 EPC - remedy C

35. Rule 140 EPC reads:

*In decisions of the European Patent Office,
only linguistic errors, errors of
transcription and obvious mistakes may be
corrected.*

36. No one has argued that the missing signature is a "linguistic error" or an "error of transcription", and the Board is confident that it does not fall into

either of these categories. This leaves "obvious mistake" as the only remaining possibility.

37. The Board has no reason to doubt that the Division's explanation is correct, and does not believe that there was any wrongdoing on the part of the signing majority. Rather, the omitted signature is to be regarded as a mistake. The question is whether the mistake was an obvious one.
38. To answer it, the perception of the outside world must be considered, as set out above, in respect of the purpose of the signature requirement.
39. The parties and the public were at a loss, for more than four years (until the issuance of the correction decision) as to the exact reason for the missing signature, and they were left to speculate as to whether the legally qualified member had forgotten to sign the written decision, or decided not to, or had not seen the draft at all, or maybe not its last version, or had not signed for some other reason. To these observers, the agreement of the legally qualified member to the written decision was not obvious.
40. The fact that the EPC does not provide for dissenting opinions in decisions by Opposition Divisions (cf. Article 18(2) Rules of Procedure of the Enlarged Board of Appeal) does not oblige a particular member to sign any text placed before them. If that were so, the signature could never have the force of making manifest a personal exercise of responsibility (see point 12., above).

41. Opponent 1 also argues that it was a "legitimate expectation" that statements by an EPO official, such as the Division's explanation, were not to be doubted, and that neither the parties nor the public would have envisaged questioning their contents.
42. This argument is flawed. The principle of protection of legitimate expectations applies when the Office has provided incorrect information, on which the recipient has, in good faith, relied. In the present case, the opponents argue that the Opposition Division's explanation is correct. Their invocation of legitimate expectations is, therefore, misconceived, and unhelpful to them on the obviousness of the mistake.
43. Thus, the Board is of the view that, while issuing a decision without the legally qualified member's signature was a mistake, it was not an obvious one within the meaning of Rule 140 EPC.
44. Because of this, it does not matter whether the deficiency was "clerical" in nature or a "simple administrative error", or that Rule 140 EPC lacks a time limit, or that correction was accepted in T 212/88 (without, however, discussion on the purpose of the signature requirement), and in T 225/96 (however, in an *obiter dictum*).
45. It follows that the appealed decision has not been corrected under Rule 140 EPC by the post-signed Form 2339 and the Division's explanation.
46. Remedy C is thus not helpful to the opponents either.

Substantial procedural violation as fact

47. Since none of the potential remedies for the deficiency is applicable, the chain of manifest personal responsibility is broken, the missing signature is a substantial procedural violation, and the appealed decision is invalid.

48. Thus, the appealed decision must be set aside, and the case remitted to the Opposition Division for further prosecution (Article 11 RPBA). The Opposition Division will have to issue a new decision on the merits of the case. This means that the appeal is allowable. Despite the fact that there is no causal link between the appeal and the substantive procedural violation, which the Board discovered during the appeal proceedings, reimbursement of the appeal fee is equitable as no substantial progress has been made in the appeal since it was filed (Rule 103(1)(a) EPC; T 3071/19, Reasons 11 and 12).

Order

For these reasons it is decided that:

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

The Registrar:

The Chair:



D. Meyfarth

P. Scriven

Decision electronically authenticated