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**Datasheet for the decision
of 5 June 2026**

Case Number: T 0536/25 - 3.2.01

Application Number: 13848638.6

Publication Number: 2913257

IPC: B62K5/08, B62K25/08

Language of the proceedings: EN

Title of invention:

SUSPENSION DEVICE

Applicant:

Yamaha Hatsudoki Kabushiki Kaisha
KYB Corporation

Headword:

Relevant legal provisions:

EPC Art. 113(1), 11

EPC R. 103(1)

Keyword:

Substantial procedural violation - reimbursement of appeal fee
(yes)

Right to be heard - violation (yes)

Decisions cited:

T 1753/21

Catchword:

The right to be heard is violated where, following a remittal on account of a substantial procedural violation resulting from the failure to substantiate the sole ground underlying the decision refusing the application, the examining division immediately issues a further decision substantiating that ground without first affording the applicant an opportunity to present comments.



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Case Number: T 0536/25 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 5 June 2026

Appellant: Yamaha Hatsudoki Kabushiki Kaisha
(Applicant 1) 2500 Shingai
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Appellant: KYB Corporation
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Representative: Grünecker Patent- und Rechtsanwälte
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted/electronically
transmitted on 25 November 2024 refusing
European patent application No. 13848638.6
pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: V. Vinci
S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The appeal was filed by the appellant (applicant) against the decision of the Examining Division refusing the European patent application in suit.

In decision T 1753/21, issued in the same composition, the Board set aside the Examining Division's decision of 26 May 2021 refusing the European patent application in suit under Article 97(2) EPC on the ground that the Main Request and the Auxiliary Request 1 contravened Article 123(2) EPC. The Board remitted the case to the department of first instance for further prosecution, finding that the proceedings before the Examining Division had been affected by a substantial procedural violation under Article 113(1) EPC.

- II. Following remittal, the Examining Division immediately refused the application pursuant to Article 97(2) EPC for non compliance with the requirements of Article 123(2) EPC (Main Request and Auxiliary Request 1).

- III. The appellant (applicant) requested that the decision under appeal be set aside and that the case be remitted to the Examining Division for further prosecution on the ground that a substantial procedural violation had occurred. As an auxiliary measure, it requested that an European patent be granted on the basis of the Main Request or, alternatively, on the basis of one of Auxiliary Requests 1 to 6, all filed with the statement setting out the grounds of appeal.

Reasons for the Decision

Substantial Procedural Violation

Right to be heard - Article 113(1) EPC

1. With their statement of grounds of appeal, the appellant submitted that the contested decision was based on objections of unallowable intermediate generalisation under Article 123(2) EPC which had not previously been communicated by the Examining Division. In particular, the appellant argued that the reasoning set out in the decision under appeal identified for the first time a number of features of the preferred embodiment as originally disclosed forming the base for the amendments which, in the Examining Division's view, had to be incorporated into claim 1 in order to meet the requirements of Article 123(2) EPC. Therefore, the appellant had no opportunity to comment on the reasons on which the refusal was based before the decision was issued. The appellant argued that these circumstances amounted to a substantial procedural violation and put forward that its right to be heard under Article 113(1) EPC had thereby been infringed.
- 1.1 The Board agrees with the arguments of the appellant for the following reasons:

In decision T 1753/21, the Board in the same composition held that the Examining Division's decision of 26 May 2021 refusing the patent application in suit was not adequately reasoned with respect to the sole ground for refusal, namely non-compliance with Article 123(2) EPC. The Board concluded that this deficiency amounted to a substantial procedural violation. In particular, the Board found that the decision failed to

identify the features of the specific embodiments disclosed in the application as filed which, in the Examining Division's view, were inextricably linked to the features incorporated into claim 1 and whose omission resulted in the alleged unallowable intermediate generalisation.

1.2 In the decision under appeal, issued without any preceding communication under Article 94(3) EPC, the Examining Division supplemented its reasoning by identifying those features of the specific embodiment of the description which it considered to be inextricably linked to the features added to claim 1 and whose omission was regarded as giving rise to the objection under Article 123(2) EPC. The Examining Division further explained that no further communication under Article 94(3) EPC was due because the applicant had already sufficient opportunities to comment on the objections which were communicated in the communication dated 6 May 2016. The Examining Division also considered that a balance had to be struck between the applicant's interest in obtaining a legally valid patent and the EPO's interest in bringing the examination proceedings to an efficient conclusion.

1.3 The Board is not persuaded by these arguments.

In point 1.3 of the reasons of the decision T 1753/21, the Board had already stated that the missing information could not be derived by the applicant either from the minutes of the oral proceedings or from any of the communications issued by the Examining Division before the first refusal decision. It follows that the first occasion on which the appellant was informed of the features considered by the Examining Division to have been omitted in claim 1 in an

unallowable manner, and of the reasons why their omission was regarded as contravening Article 123(2) EPC, was the decision under appeal itself. Consequently, the appellant was not given any opportunity to comment on these objections before the decision refusing the application was issued. By issuing the refusal under Article 97(2) EPC directly, i.e. without first communicating the objections and the reasoning on which they were based, the Examining Division deprived the appellant of the legitimate opportunity to present comment and counter-arguments in response thereto before an unfavourable decision was issued. The appellant's right to be heard under Article 113(1) EPC was therefore infringed. The Board further notes that considerations of procedural efficiency cannot justify depriving a party of its fundamental procedural right to comment on the grounds and evidence on which a decision adversely affecting it is based. The EPO's interest in bringing the proceedings to a close in an efficient manner cannot take precedence over the party's right to be heard.

1.4 In conclusion, these deficiencies in the proceedings before the Examining Division as presented above and leading to the decision under appeal amount to a substantial procedural violation justifying the remittal of the case to the first instance for further prosecution pursuant to Article 11 EPC and the reimbursement of the appeal fee pursuant to Rule 103 (1) (a) EPC.

1.5 The Board also considers that the fact that the Examining Division, acting in the same composition, committed a further procedural violation after the case had already been remitted on account of a previous substantial procedural violation is liable to undermine

the appellant's confidence in the fairness of the proceedings before the EPO. Under these circumstances and in order to safeguard the appellant's legitimate expectation of fair and impartial proceedings, the Board considers that it would be appropriate that the case be remitted to the Examining Division in a different composition.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



M. Schalow

G. Pricolo

Decision electronically authenticated