

In T.222/85 (OJ 1988, 128) the board noted that the contents of a "communication" never constituted a "decision". This distinction was important, because only a "decision" could be the subject of an appeal - see Art.106(1) EPC 1973. In the case at issue the communication only represented a preliminary view, on an ex parte basis, and was not binding upon the department of the EPO which sent it. In contrast, the contents of a "decision" were always final and binding in relation to the department of the EPO which issued it, and could only be challenged by way of appeal.

In T.999/93 the annex to the minutes of the oral proceedings had been sent, but not the decision itself. The annex – although containing reasons – did not validly fulfil the function of a decision in writing since it did not bear any name or signature. If a decision of a particular division is to be legally valid, it must have been written on behalf of and represent the views of the members who were appointed to that division to decide the issues forming the subject of the decision, and it must bear signatures which indicate this (see T.390/86, OJ 1989, 30).

In J.14/07 the board held that the communication refusing the request for reimbursement of 50% of the examination fee constituted a decision within the meaning of Art.106(1) EPC 1973. The mere indication of the name of the formalities officer without any signature, but which had been replaced by a seal, complied with the requirements of the then current R.70(2), first sentence EPC 1973 because the communication was produced by using a computer. The formalities officer was also competent to decide on the request for reimbursement of the fee; see R.9(2) EPC 1973 in conjunction with the notice from the Vice-President of Directorate-General 2 of the European Patent Office dated 28 April 1999 concerning the entrustment to non-examining staff of certain duties normally the responsibility of the examining or opposition divisions, OJ 1999, 504. See now Decisions of the President of the European Patent Office dated 12 December 2013 (OJ 2014_A6, OJ 2015_A104 and OJ 2020_A80) and communication of the EPO (OJ 2014_A32).

3.1.1 Cases involving two decisions

In T.830/03 the opposition division had issued a second written decision intended to supersede a first written decision already sent. The board noted that the need for legal certainty required a presumption of validity in favour of a written decision which was notified to the parties by an opposition division in accordance with the formal requirements of the EPC 1973, in particular R.68 to R.70 EPC 1973 (R.111 to 113 EPC). Once the decision was pronounced and the (first) written decision, in the case at issue, notified to the parties, the opposition division was bound by it even if it considered its decision not to "have any legal effect" (see T.371/92, OJ 1995, 324). The decision could be set aside only by the second instance on the condition that an allowable appeal was filed under Art.106 EPC 1973 (see also T.1093/05). With the filing of the first notice of appeal, the power to deal with the issues involved in this case passed from the department of first instance to the appeal instance (devolutive effect of the appeal). All actions carried out by the opposition division after the notification of the (first) decision, and a fortiori after the filing of the first appeal, were ultra vires and thus had no legal effect.