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**Datasheet for the decision  
of 14 October 2011**

**Case Number:** T 1488/08 - 3.2.01

**Application Number:** 99203877.8

**Publication Number:** 1013545

**IPC:** B64D 11/06

**Language of the proceedings:** EN

**Title of invention:**

Airplane passenger privacy and support apparatus

**Patentee:**

The Boeing Company

**Opponents:**

AIRBUS SAS/AIRBUS OPERATIONS/AIRBUS OPERATIONS Ltd/AIRBUS  
OPERATIONS GmbH/AIRBUS OPERATIONS S.L.

**Headword:**

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**Relevant legal provisions (EPC 1973):**

EPC Art. 100(a), 100(c)

RPBA Art. 12(2), 13(1)

**Keyword:**

"Grounds of opposition substantiated in the notice of  
opposition but not relied upon in the grounds of appeal - not  
admitted"

"Inventive step (yes)"

**Decisions cited:**

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**Catchword:**

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Case Number: T 1488/08 - 3.2.01

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.01  
of 14 October 2011

**Appellants:**  
(Opponents)

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**Decision under appeal:** Decision of the Opposition Division of the European Patent Office posted 28 May 2008 rejecting the opposition filed against European patent No. 1013545 pursuant to Article 101(2) EPC.

**Composition of the Board:**

**Chairman:** G. Pricolo  
**Members:** Y. Lemblé  
D. T. Keeling

## Summary of Facts and Submissions

- I. The appeal is directed against the decision of the Opposition Division to reject the opposition against European patent No. 1 013 545.
- II. The patent was opposed under Article 100(a) and Article 100(c) EPC 1973. In its decision the Opposition Division held that the subject-matter of the patent as granted did not extend beyond the content of the application as originally filed and that it met the requirements of novelty and inventive step having regard, inter alia, to the following prior art documents:
- D2: EP-A-0 825 060,  
D3: GB-A-2 295 962,  
D4: EP-A-0 869 060.
- III. In their written statement setting out the grounds of appeal, the Appellants only invoked lack of inventive step under Article 100(a) EPC. The grounds of lack of novelty and of added subject-matter, which were not substantiated in the statement setting out the grounds of appeal, were invoked for the first time with letter of 11 August 2009.
- IV. In the oral proceedings held on 14 October 2011 the Appellants requested that the decision under appeal be set aside and the patent be revoked. The Respondents (Patent Proprietors) requested that the appeal be dismissed.

V. Claim 1 as granted reads:

"An airplane with a floor (12) having an aisle and at least one seat (14) located adjacent to the aisle, the seat comprising a seat cushion (22) and a seat back (24) that is moveable between an upright position and a reclined position, and a privacy and support apparatus, said privacy and support apparatus comprising a side wall (38,82);

characterized in that

the privacy and support apparatus further comprises a pedestal (40) fastened to the floor (12) of the airplane at a location behind the seat (14), the side wall (38,82) being connected to said pedestal (40); and in that the side wall (i) extends in a rearward direction adjacent to the aisle a sufficient distance that when the seat back (24) is moved in the reclined position causing a top edge (66) of the seat back (24) to be moved in a rearward direction a rearward edge (68) of the side wall (38,82) extends further rearward than said top edge (66) of the seat back (24) so as to provide privacy for a passenger reclining in the seat, and

in that the side wall (ii) extends upward a sufficient distance so that a top edge (64) of the side wall (38,82) is generally at least the same height as the top edge (66) of the seat back when the seat back is in the upright position so as to provide support for passengers moving about the cabin."

VI. The Appellants' submissions may be summarised as follows:

The grounds of added subject-matter and lack of novelty were sufficiently substantiated in the statement setting out the grounds of appeal by the reference to the first-instance submissions made in the introductory paragraph on the first page thereof. These submissions contained *inter alia* the objection that feature 1.3.1.2 of claim 1 ("when the seat back is moved to the reclined position, a top edge of the seat back is caused to be moved in a rearward direction") was not disclosed in the originally filed application documents and that the subject-matter of claim 1 as granted was not new over D2. According to the case law of the Boards of Appeal of the EPO, a reference to an earlier first-instance submission could be sufficient for considering the appeal to be admissible in the case the arguments presented at first instance adequately addressed the grounds underlying the contested decision (see e.g. T 509/07, point 1.3). Added subject-matter and lack of novelty were two of the main grounds on which the present opposition was based and were extensively discussed in the letters referred to in the statement setting out the grounds of appeal and in the minutes of the oral proceedings before the Opposition Division. These grounds should therefore be part of the appeal proceedings.

Should the Board not be willing to admit the above-mentioned objections in the appeal proceedings on the basis of the statement setting out the grounds of appeal, so should it do so in application of Article 13(1) RPBA. The objection of added subject-

matter made in the letter dated 11 August 2009 was known to the other party from the beginning of the opposition proceedings and could not therefore be considered as a complex and surprising matter. In the same way, the need for procedural economy was another good reason for doing so. The amendment made in claim 1 during examination significantly contributed to justifying inventive step. There would be no necessity to deal with inventive step if the Board came to the conclusion that the claimed subject-matter extended beyond the content of the application as originally filed.

Concerning the question of inventive step, the nearest prior art was to be seen in document D2. This document was particularly relevant since it described an airplane with a seat and a privacy and support apparatus (see figures 1-2) having the most relevant technical features in common with the subject-matter of claim 1. The seat of D2 comprised namely a seat cushion 18 and a seat back 20 that was moveable between an upright position and a reclined position. The privacy and support apparatus comprised a side wall 42 and a pedestal (rear portion 34 of trolley 30) at a location behind the seat, the side wall being connected to said pedestal (see figure 2). Column 3, lines 19 to 29 of D2 proposed to secure the side wall 42 in the rearward position during flight. In that position, the side wall 42 extended in a rearward direction a sufficient distance that, when the seat back 20 was moved in the reclined position causing a top edge of the seat back to be moved in a rearward direction, a rearward edge of the side wall 42 extended further rearward than said top edge of the seat back so as to provide privacy for

a passenger reclining in the seat. There was no doubt that the apparatus of D2 was conceived for the same purpose and aimed at the same objective as the claimed one. Although the main purpose of this apparatus was to provide a passenger with enhanced privacy when in the sleeping position (D2: column 1, lines 10-15), it also provided passengers with support when moving about the cabin. The reason for this was simply that D2 disclosed the last feature of claim 1, namely that the side wall 42 extended upward a sufficient distance so that a top edge of the side wall was generally at least the same height as the top edge of the seat back 20 when the seat back was in the upright position (see figure 1 of D2).

The subject-matter of claim 1 therefore only differed from that of D2 by the feature that the sidewall was fastened to the floor of the airplane in the rearward position.

Owing to the fact that D2 proposed in column 3, lines 19 to 29 to secure the side wall 42 in the rearward position during flight, there was no inventive step involved in choosing the floor of the airplane for that purpose. Using the floor for securing the partition wall 42 was the most obvious possibility which would come to mind of the skilled person. It was well known in the art to use quick release mechanisms in recessed portions of the floor to fasten seats or similar components. A fastening of the partition wall 42 to the floor of the airplane was clearly necessary, for it had to remain secured in position during the various phases of the flight, for example in case of



turbulences, and it had to fulfil the safety regulations.

On the basis of the teaching of D2, the skilled person, aiming at fulfilling the regulations of the FAA in matters of support for the passenger (see paragraphs [0002] and [0003] of the patent specification), would even realise that he could implement the partition wall 42 of D2 in combination with a conventional seat by securing that partition wall to the floor in the rearward position and dispensing with its movement in the forward position.

Alternatively, a skilled person would come in an obvious manner to the subject-matter of granted claim 1 when starting from the first class seat and privacy arrangement of figure 4 of document D4. This figure showed under the reference sign 36 a part which fell under the definition of a pedestal as given by the Opposition Division in its decision (see page 5, first line: "an upright support of a machine of apparatus"). A shell 30 and a screen 32 were connected to this pedestal 36. When the Opposition Division was of the opinion that D4 did not disclose "any alternative that would permit the seat back to move in a rearward direction in order to provide a conventional passenger seat with the possibility to recline it fully", it did not take into account the fact there was no inventive step involved in realizing that the side wall formed by the shell 30 and the screen 32 would also fulfil its privacy and support functions when used with a conventional seat having a back 22 which moved in a rearward direction when the seat was brought in the reclined position. Thus the skilled person would arrive

in an obvious manner at a seat arrangement having all the features of claim 1 as granted.

VII. The arguments presented by the Respondents may be summarized as follows:

In accordance with the Rule of Procedure of the Boards of Appeal, the statement setting out the grounds of appeal shall contain a party's complete case. With their statement setting out the grounds of appeal the Appellants only relied on lack of inventive step. The generic reference to the submissions made during opposition proceedings did not constitute substantiated grounds of appeal in respect of added subject-matter and lack of novelty. Accordingly these latter grounds should not be admitted in the present appeal proceedings.

The subject-matter of claim 1 as granted was far from being obvious in the light of the teaching contained in document D2. This document could only be considered as representing the closest prior art with the benefit of hindsight.

Having regard to the seat arrangement of document D4 the subject-matter of claim 1 was not obvious to a person skilled in the art.

## **Reasons for the Decision**

1. The appeal is admissible.

2. Admissibility of the grounds of added subject-matter and lack of novelty

2.1 Article 12(2) RPBA stipulates that "The statement of grounds of appeal and the reply shall contain a party's complete case. They shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the facts, arguments and evidence relied on".

This provision provides a cut-off point after which any further submission is *ipso facto* late and subjected to the discretionary power of the Board. The intended overall effect of this Article is to require the parties to present a complete case at the outset of the proceedings in order to provide the Board with an appeal file containing comprehensive submissions from each party and to prevent procedural tactical abuses.

In the particular circumstance of the present case, the statement of grounds of appeal, after a short introductory paragraph generally referring to earlier submissions made in the first-instance proceedings, contained under the main heading III "Stellungnahme zu der Entscheidung bezüglich der Einspruchsabteilung" only a substantiation in support of lack of inventive step. Specific objections under the grounds of added subject-matter and lack of novelty were not raised.

It is only with the letter dated 11 August 2009 after the reply of the Respondents that the Appellants, referring to the introductory paragraph of the grounds

of appeal, invoked the grounds of extension of subject-matter and lack of novelty.

It is established case law that a statement of grounds which merely generally refers to previous first-instance submissions cannot replace an explicit account of the legal and factual reasons. On the sole basis of the statement of grounds of appeal, the Board had no reason to examine the grounds of inadmissible extension of subject-matter and lack of novelty without making investigations of its own.

The new objections are therefore late-filed and their admissibility is a matter of discretion by the Board pursuant to Article 13(1) RPBA.

- 2.2 Article 13(1) RPBA states that "Any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy".

In the present case, the Appellants have not submitted any objective reasons justifying the filing of the grounds of added subject-matter and lack of novelty at a later stage than with the appeal (such as e.g. in direct response to new points raised by the Respondents in their reply). The attempt of the Appellants to re-introduce these grounds thus may only be regarded as a change of position determined by procedural tactics (so-called "salami" tactics). Already on this basis, the Board considered, in view of procedural economy,

that it should exercise its discretion not to admit the later-filed grounds of added subject-matter and lack of novelty. For the sake of completeness, the Board also considered whether these late-filed grounds would constitute, on a *prima facie* basis, a valid challenge to the patentability of the claimed subject-matter, and came to the conclusion that this was not the case. The objection of added subject-matter addressed in the letter dated 11 August 2009 was concerned with the feature of claim 1 "when the seat back is moved to the reclined position, a top edge of the seat back is caused to be moved in a rearward direction" (feature 1.3.1.2 of the features analysis filed with that letter). The submission of the Appellants in this respect focussed on the Opposition Division's assertion in the decision under appeal, according to which the application as originally filed discloses that "the backseat [i.e. seat back] describes the trajectory of an arch". However, claim 1 is not concerned with the trajectory of the seat back and therefore the Appellants' objection appears to be misconceived. This also applies to the further objection under Article 100(c) EPC 1973 raised with the letter dated 11 August 2009, which objection was not raised during opposition proceedings, contesting the change of the claimed subject-matter from "a privacy and support apparatus" to "an airplane". Indeed an airplane is undoubtedly disclosed in the application as filed. As regards the objection of lack of novelty over D2, it was based on an interpretation of claim 1 justified by the alleged added subject-matter (i.e. due to the added subject-matter, claim 1 would cover objects which were not disclosed in the application as filed, and such objects were known from D2). The objection of added

subject-matter being unfounded, on a *prima facie* basis, the same applies to the objection of lack of novelty.

The Board therefore exercised its discretion not to admit the late filed grounds of added subject-matter and lack of novelty for reasons of procedural economy.

3. Inventive step

3.1 As mentioned in paragraph [0007] of the European Patent Specification, claim 1 as granted has been delimited with respect to document D3. This document discloses an airplane in accordance with the preamble of claim 1 (see for example figures 14-15) with a floor 58 having an aisle and at least one seat 2 located adjacent to the aisle, the seat comprising a seat cushion 43 and a seat back 42 that is moveable between an upright position and a reclined position, and a with a privacy and support apparatus in the form of a fixed seat housing 41 which affords privacy for a passenger seating or reclining in the seat and provides support for other passengers walking in the aisles.

3.2 The features of the characterising part of the claim have to be understood within the context of the invention, taking into due account the objective contribution that the invention makes over the prior art in accordance with the patent specification. In the present case, the features of the characterising part can only be read that the pedestal is a piece which is separated from the seat and permanently fastened to the floor of the airplane at a location behind the seat, the latter being of a conventional construction with the seat back moving in a rearward direction when

adjusted in the reclined position. In combination with the features of the preamble of the claim they solve the problem of providing at constant regular intervals a reliable support for a passenger walking about the aisle of the airplane (see the sixty inches interval required by the regulations of the FAA as mentioned in paragraphs [0003] of the patent specification). At the same time the side wall defined by claim 1 must provide privacy for the passenger in the seat. This is clearly obtained by a rearward extension of the fixed side wall which is of such a lateral extent as to provide privacy for the passenger when he is reclining, with the seat back being in the rearward position, as well as when he is sitting, with the seat back adjusted in the upright position.

- 3.3 In their contention that the subject-matter of the granted claim lacked an inventive step the Appellants considered document D2 as the nearest prior art. This was contested by the Respondents.

The boards of appeal of the EPO have developed criteria for identifying the closest prior art. Indeed, the determination of the closest prior art is an objective and not a subjective exercise. In selecting the closest prior art, the first consideration is that it must be directed to the same purpose or effect as the invention (T 606/89). In the present case, document D2 exclusively deals with the problem of privacy (column 1, lines 10-15) and there is no mention in D2 that the partition wall 42, that the Appellants equate with the privacy and support apparatus of the claim, could have any support function. In the same way as a movable and reclining seat back is unable to offer adequate support

for a passenger walking about the cabin (see column 1, lines 29-34 of the patent specification), the movable partition wall 42 of D2 is, *a priori* and because of its ability to move, not adapted for providing support for a passenger moving in the aisle. As the partition of D2 is movable, it cannot act as a reliable support in accordance with the FAA regulations mentioned in paragraph [0003] of the patent specification. This is clearly exemplified by the spacing between the partitions in the configuration shown in figure 4 of D2, which clearly does not fulfil the requirements referring to the regular intervals (sixty inches).

The Board is therefore of the opinion that D2 is not a prior art the person skilled in the art would contemplate as suitable when seeking an apparatus for providing privacy and support for passengers.

- 3.4 Moreover, as concerns the problem of providing privacy, it can be noted that the claimed solution differs from that of document D2 in that rather than being obtained by a movable side wall as in D2, privacy in the reclined position is obtained by the rearward extension of a permanently fixed side wall.
- 3.5 In a first line of argumentation in support of their contention that the subject-matter of the granted claim lacked an inventive step the Appellants started from the apparatus shown in figure 2 of D2 and argued that the passage of the description in column 3, lines 19-25 of D2 would convey the skilled person to fasten the trolley 30 with its vertical partition 42 to the floor.



This argumentation does not convince the Board. The passage mentioned by the Appellants suggests that the partition may be secured in the rearward position during the flight. In the same sentence, however, D2 states that the partition should be moved to the forward position for take-off and landing. This is confirmed by the passage of column 3, lines 11-16 of D2 according to which the partition wall requires to be brought to the forward position for take-off and landing. Safety considerations would suggest that the partition should be secured not only in the rearward and the forward position but also in any intermediate position, since airlines cannot afford unexpected movements of the partition during the flight. Since the answer to the question how the partition could be fastened is to be given in this context, the choice of the floor to secure the trolley in multiple positions does not only appear costly and complex but even void of technical sense. In fact, this would require the provision of a dedicated mechanism, partly in the floor and partly in the partition, for fastening the partition to the floor, when much simpler solutions not requiring any modification of the floor are immediately evident. The skilled person would rather consider that any securing could take place within the channel 24 under the base member 12 of the passenger seat 10 (see figures 1-2 of D2). The skilled person may also contemplate a motorised displacement of the trolley by a self-locking driving mechanism, the trolley being held captive within the seat.

- 3.6 In an alternative line of argumentation which starts from D2, the Appellants contended that the skilled person would realise that he could combine the

partition wall 42 of D2 with a conventional seat and simply secure the partition wall to the floor in its rearward position, thus dispensing with any movement in the forward position.

In this argumentation the Appellants formulated the problem to be solved in terms of being able to use the partition of D2 also for conventional passenger seats. This formulation appears to be inspired by hindsight because it directly runs against the central teaching of D2 which is precisely to mount the partition wall for linear movement between the forward and the rearward position (see claim 1 of D2). Furthermore, under the assumption that the trolley 30 of D2 would be fastened to the floor in its rearward position, it can be noted that privacy would not be provided by the partition 42 for a passenger sitting in the upright position of the seat and it is doubtful whether such an arrangement would meet the above-mentioned FAA regulations.

- 3.7 The Appellants presented a last line of argumentation which starts from D4 as prior art. The evident weakness of this argumentation is that it relies on the assumption that the bucket 36 (see figures 3-4 and column 7, lines 24 of D4) is a pedestal within the meaning of the claims. The Board shares the opinion of the Opposition Division and of the Respondents that the bucket 36 is a part of the seat and therefore cannot be a pedestal which is fastened to the floor of the airplane at a location behind the seat, a part which is clearly separate from the seat. Thus, also this reasoning of the Appellants must fail.

3.8 The Board concludes from the above considerations that the subject-matter of claim 1 as granted involves an inventive step (Article 56 EPC).

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar

The Chairman

A. Vottner

G. Pricolo