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**Datasheet for the decision  
of 9 September 2010**

**Case Number:** T 1495/09 - 3.2.01

**Application Number:** 04101715.3

**Publication Number:** 1495908

**IPC:** B60N 2/34

**Language of the proceedings:** EN

**Title of invention:**

A seating system and a passenger accommodation unit for a vehicle

**Patentee:**

Virgin Atlantic Airways Limited

**Opponent:**

Cathay Pacific Airways Ltd.  
AIRBUS SAS/AIRBUS OPERATION/AIRBUS OPERATIONS Ltd/AIRBUS  
OPERATIONS GmbH/AIRBUS OPERATIONS S.L.  
Premium Aircraft Interiors Group Limited/Premium Aircraft  
Interiors UK Limited

**Headword:**

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**Relevant legal provisions:**

EPC Art. 123(2)  
EPC R. 140

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

EPC Art. 100(a)(b)(c), 114(1), 125

**Keyword:**

"Amendments - Added matter (no)"

"Opposition grounds - extension of subject-matter - divisional application (no) - insufficiency of disclosure (no) - novelty (yes) - inventive step (yes)"

"Request for correction of grant decision under Rule 140 EPC (rejected)"

**Decisions cited:**

G 0001/91, G 0001/95, G 0008/95, T 0204/83, T 0156/84,  
T 0099/85, T 0127/85, T 0301/87, T 0550/88, T 0060/91,  
T 0428/95, T 0850/95, T 0336/96, T 0226/02, T 0268/02,  
T 1093/05, T 0079/07, J 0022/86

**Catchword:**

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Case Number: T 1495/09 - 3.2.01

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.01  
of 9 September 2010

**Appellant:**  
(Opponent 01)

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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
18 June 2009 concerning maintenance of the  
European patent No. 1495908 in amended form.

**Composition of the Board:**

**Chairman:** S. Crane  
**Members:** Y. Lemblé  
T. Karamanli

## Summary of Facts and Submissions

I. All parties, the patent proprietors (henceforth "Virgin"), opponents 01 (henceforth "Cathay"), opponents 02 (henceforth "Airbus") and opponents 03 (henceforth "Premium") appealed against the interlocutory decision of the Opposition Division dated 18 June 2009. In its decision the Opposition Division maintained the patent in amended form on the basis of the claims of the first auxiliary request then on file.

II. In the course of the oral proceedings held 9 September 2010 before the Board, Virgin withdrew all former requests and filed a new sole request and requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of this sole request.

Premium and Airbus requested that the decision under appeal be set aside and that the patent be revoked. This request had also been made in writing by Cathay, who informed the Board with letter dated 1 September 2010 that they would not be represented at the oral proceedings.

Premium further requested the correction of the decision to grant by deleting the designation of GB. This request had also been made by Cathay in writing.

III. Independent claims 1 and 2 of the sole request of the patent proprietors read as follows:

1. "A passenger seating system for an aircraft, comprising a plurality of seat units (40), each seat

unit defining only one notional longitudinal seat axis (C-C) and comprising a supporting structure (42) adapted for attaching the seat unit to a floor (30) of an aircraft (12) and means for forming or being configurable for forming a seat comprising a seat-pan (71) and a back-rest (72), wherein each seat unit further comprises a foot-rest (65) positioned forwardly of the seat, said seat units being arranged to form a column (29) defining a notional longitudinal column axis (B-B), in which column said seat-units are arranged side-by-side in longitudinally offset relation at an acute angle to the notional column axis (B-B), wherein at least some of the seat units are arranged to be disposed adjacent a sidewall (26,28) of the aircraft and face inwardly thereby to define between the rear of each seat and the sidewall a space (36) when the seat unit is configured as a seat, each seat unit further comprising means for forming or being configurable for forming a substantially flat bed (47,48,67,74,76), so that when the seat unit is formed into a bed a major proportion of the bed is disposed forwardly of the position that was occupied by the seat, wherein said seat forming means and said bed forming means comprise one or more movable passenger-bearing elements which are selectively configurable to form, in a seat mode, at least part of the seat for a passenger or, in a bed mode, at least part of said flat bed, and wherein the flat bed in the bed mode is disposed at substantially the same level above an aircraft floor (30) as the seat-pan (76) in the seat mode, and characterised in that the flat-bed extends into said rearward space (36) behind the seat, in that said acute angle is in the range 30 to 60°, in that a generally triangular passenger support element is disposed in said rearward

space (36) substantially coplanarly with said one or more movable elements when said movable elements are configured in the bed mode and is adapted to form part of said flat bed."

2. "A passenger seating system for an aircraft, comprising a plurality of seat units (40), each seat unit defining only one notional longitudinal seat axis (C-C) and comprising a supporting structure (42) adapted for attaching the seat unit for a floor (30) of an aircraft (12) and means forming or being configurable for forming a seat comprising a seat-pan (71) and a back-rest (72), wherein each seat unit further comprises a foot-rest (65) positioned forwardly of the seat, said seat units being arranged to form a column defining a notional longitudinal column axis (B-B), in which column said seat-units are arranged side-by-side in longitudinally offset relation at an acute angle to the notional column axis, wherein at least some of said seat units are arranged to be disposed back-to-back with the seat units in another column so as to define a space (36) to the rear of adjacent seat backs when each seat unit is configured as a seat, each seat unit further comprising means forming or being configurable for forming a substantially flat bed (47,48,67,74,76), so that when the seat unit is formed into a bed a major proportion of the bed is disposed forwardly of the position that was occupied by the seat, wherein said seat forming means and said bed forming means comprise one or more movable passenger-bearing elements which are selectively configurable to form, in a seat mode, at least part of the seat for a passenger or, in a bed mode, at least part of said flat bed, and wherein the flat bed in the bed mode is disposed at

substantially the same level above an aircraft floor (30) as the seat-pan (76) in the seat mode, and characterised in that the flat-bed extends into said rearward space behind the seat, in that said acute angle is in the range 30 to 60°, and in that a generally triangular passenger support element is disposed in said rearward space (36) substantially complanarly with said one or more movable elements when said movable elements are configured in the bed mode and is adapted to form part of said bed."

IV. The arguments presented in support of the request to revoke the patent, insofar as they are relevant to this decision, can be summarized as follows:

(a) To the amendments

Premium, noting that the contested patent was based on the application EP-A-1 495 908 (D0) which had been filed as a divisional application to the parent application EP-A-1 417 113 published under the number WO-A-03/013903 (P0), contended that the amended patent contained added subject-matter with respect to the content of the parent application. The selective deletion in the patent specification of complete sections of the description of the earlier application P0, which all disclosed the essential feature that the surfaces/elements which formed the seat in the seat mode were not used in forming the bed in the bed mode (flip-over seats), had led to a generalisation of the teaching resulting in added matter. Further, in changing the wording of claim 44 of the parent application P0 "so that when the seat unit is formed into a bed a major proportion of which bed is disposed



forwardly of the position of the seat" into "so that... a major proportion of the bed is disposed forwardly of the position that was occupied by the seat" new matter was introduced. The new wording now included embodiments where the major proportion of the bed was formed entirely of parts which were also used for the seat. There was no implicit or explicit disclosure in the parent application P0 of a bed means which used the same surfaces as the seat means. Rather, it was an essential requirement of the invention disclosed in the parent application that the surface of the bed means comprised elements which were not used as part of the surfaces of the seat means. The above mentioned change in the wording included embodiments into the teaching of the amended claims which were in contradiction to obligatory features of the parent application. It introduced new information for which there was no clear and unambiguous teaching in the parent application.

Airbus objected to the expression "the flat-bed extends into said rearward space behind the seat" in the characterising part of the amended independent claims as representing added subject-matter when compared with the original expression of claim 44 in P0: "which bed extends rearwardly into said space to extend the flat-bed". The new wording now covered the possibility for the bed to be extended by an element of the seat. According to the original disclosure P0 however, an extension of the bed was only provided for by an additional sleeping element 47 in the rearward space, which was separate from and coplanar with the elements of the seat. The subject-matter of the claims had therefore been extended beyond the content of the parent application.

Both Premium and Airbus contested that the expression "each seat unit defining only one notional longitudinal seat axis" was derivable from the application D0 as filed or from the parent application P0 as filed.

(b) Sufficiency of disclosure

According to Premium, the amended claims were so broad that they covered passenger seating units which were not disclosed in the contested patent. The claimed subject-matter included embodiments where the major proportion of the bed was formed entirely of parts which were also used for the seat. In the contested patent there was, however, no disclosure of such bed means which used the same parts as the seat means. Thus, the amended patent did not disclose the alleged invention in a manner sufficiently clear and complete for it to be carried out over the whole ambit of the claims by the person skilled in the art (Article 100 b) EPC 1973).

Airbus and Cathay based an additional insufficiency objection on the interpretation of the conjunction "or" in the expressions "means for forming or being configurable for forming a seat" and "means for forming or being configurable for forming a substantially flat bed". On the assumption that the word "or" was an indication that the terms immediately before and after it were presented as alternatives, they submitted that the claims covered the following four combinations: a seat and a bed; a seat and a deployable bed; a deployable seat and a bed; a deployable seat and a deployable bed. Since the specific embodiments of the

patent were entirely related to the last one of these combinations only, the disclosure of the patent was insufficient over at least 75% of the scope of its claims.

Cathay's further objection relating to sufficiency of disclosure was that the requirement "a major proportion of the bed is disposed forwardly of the position that was occupied by the seat" was not fulfilled in the embodiments disclosed in the patent.

(c) Novelty

According to Premium, the subject-matter of claim 1 was anticipated by the disclosure E2 (GB-A-2 326 824). Referring to the fact that claim 1 had been delimited in the two-part form with respect to document E2, Premium contended that this prior art document not only disclosed the features of the preamble of claim 1 but also those of the characterising portion. Since it was perfectly clear from the content of E2 that the housing 41 shown in figures 14 to 16 of this document was part of the seat unit but not part of the seat, the claimed "rearward space behind the seat" was any part of a space between the rearmost part 42 of the seat, in the seat configuration of the seat unit, and the sidewall of the aircraft. In the lay-flat position of the seat shown in figure 16 of E2, a passenger support element in the form of a head-rest was disposed in "said rearward space" substantially coplanar with the other elements 42,43,44, when the latter were configured as a bed, to form part of said flat bed. The expression "generally triangular", when referring to the form of the support element, could not be seen in any way as

limiting. Moreover, figure 4 of document E2 showed a 30° acute angle between the "notional column axis" of the seat units and the "notional longitudinal seat axis" (see modified figure 4a filed with letter dated 9 April 2010).

In connection with a request for correction under Rule 140 EPC and the contention that the designation of the Contracting State GB was incorrect, Premium also objected to the novelty of all claims as filed for the Contracting State GB. Premium submitted that the earliest act which could be interpreted as a declaration of the patent proprietors that they sought a patent for GB was not the payment of designation fees, but the filing of separate claims for the Contracting State GB, which had been effected on 8 August 2006. Consequently, that date was the earliest date corresponding to the filing of a request for the grant of a patent which designated GB. Therefore, a different filing date had to be allocated for the claims for the Contracting State GB. On this basis, the application EP-A-1 495 908 (D0) published on 12 January 2005 and the parent application WO-A-03/013903 (P0) published on 20 February 2003 were novelty destroying prior art for the claims filed for that Contracting State.

(d) Inventive step

Premium's and Airbus' objection of lack of inventive step was based on the passenger seating system of document E2, which disclosed the features of the preamble of claim 1, as a starting point. Premium held that it was fully obvious for a skilled person who wanted to optimise the use of the floor area that the

choice of the acute angle in a herringbone layout was a simple compromise between the number of seats which could be provided over a given length of the cabin and the available aisle space for a given width of the cabin. For this simple compromise, the most obvious starting point for the person skilled in the art was to choose an angle of  $45^\circ$ . The patent proprietors had failed to show any technical effect associated with the choice of an acute angle in the claimed range and in the absence of such a technical effect, that feature appeared to be obvious. The "rearward space" behind the seat in E2 was substantially triangular and the head-rest, which constituted "a passenger support element" within the meaning of the claims, was disposed in this space when the unit was configured as a bed. In order to maximise the use of the available rearward space it was obvious to make this "passenger support element" also substantially triangular.

Airbus presented a similar argumentation. They referred to the triangular shape of the head-rest 10A,10B ("passenger support element") in figure 4 of document E7 (EP-A-1 211 176) and to the angle taken by the seat arrangement (see E7, column 4, line 2:  $54^\circ$ ) in support of their contention that the subject-matter of claim 1 was obviously derivable from a combined consideration of documents E2 and E7.

A further attack of Airbus on inventive step relied on the passenger seating system of the figures 1 to 6 of document E7 as a starting point. When compared to that seating arrangement, the seating system of claim 1 only differed through the fixed position of the seat with respect to the seat unit such that only one notional

longitudinal seat axis was defined. Accordingly, the seating system of claim 1 was nothing but a mere simplification with only one inward facing seat orientation instead of having a rotatable seat. Such a simplification, which exploited the latest developments in flight regulations (no obligation for the passengers to sit in the direction of landing/take-off of the aircraft), was however obvious to the person skilled in the art, because it reduced the complexity, the weight and the production costs of the seat unit.

- V. The arguments made in support of the request for correction of the decision to grant, as far as they are relevant to this decision, can be summarised as follows:

Premium and Cathay submitted that Virgin's request for grant dated 23 April 2004 contained a clear and unequivocal statement ("GB is expressly NOT designated") which excluded the designation of the Contracting State GB. The legal framework of the EPC (see in particular Article 79(1) EPC 1973) stipulated that a designation of a Contracting State can only be made with the request for grant at the date of filing of the application. The EPC did not allow the designation of a Contracting State to be added after that date. Since the patent was wrongly granted in respect of GB although that Contracting State had not been designated, the decision to grant contained an obvious mistake. Since the request for correction was made by the opponents during the course of the opposition proceedings, the EPO through the means of the Opposition Division and this Board had the authority and the duty to correct the decision to grant.

Rule 140 EPC stipulated that errors in decisions of the EPO could be corrected. However this provision did not say which body had the right to make the correction and who had the right to make such a request. Therefore said provision did not rule that only the Examining Division was empowered to correct its decision to grant. There was no basis in Rule 140 EPC which allowed the conclusion that the Opposition Division, also being a body of the EPO, was not empowered to correct the decision to grant issued by another body of the EPO, i.e. the Examining Division. The ruling of the Enlarged Board of Appeal in its decision G 8/95 did not apply in the present case since the facts of both cases differed. In the case underlying G 8/95, the applicant requested a correction of the decision to grant shortly after its dispatch and thus at a time when the Examining Division was the body of the EPO responsible for the case. In the present case, however, the request for correction was filed by the opponents during pending opposition proceedings and therefore at a time when the Opposition Division was the body of the EPO responsible for the present case. Therefore the Opposition Division was responsible to decide on the opponents' request. This was also in line with the principles of an opposition procedure since the Opposition Division did not only examine the grounds for opposition but also other requirements of the EPC, such as clarity of amended claims. Accordingly, the conclusion in the appealed decision, that only the Examining Division was empowered to take an appealable decision on the request for correction, was based on a narrow and incorrect interpretation of the relevant provision.

Moreover, because of the principle of examination by the EPO of its own motion in accordance with Article 114(1) EPC, the EPO had the duty vis-à-vis the public not to grant or maintain patents which were not legally valid, irrelevant of how and when the EPO became aware of the circumstances being relevant for the legal validity of a patent (T 156/84). Consequently, the EPO, being aware of a legally invalid patent, would breach the principles laid down in Article 114(1) EPC and T 156/84, if the decision to grant were not corrected in opposition proceedings.

Also generally recognised principles of procedural law such as the principle of good faith and the principle of proportionality were applicable pursuant to Article 125 EPC 1973. The principle of good faith, which is also referred to as principle of protection of legitimate expectations, had to be applied by the EPO in respect to the applicant or patentee and to the public. Virgin were not entitled to any legitimate expectation that the EPO would grant or maintain a patent with the designation of the Contracting State GB since this designation was specifically excluded in the request for grant. Moreover, in a letter dated 22 November 2005, Virgin had informed the UK Patent Office that the Contracting State GB would not be designated in the European patent. Also the public, by means of file inspection, had been well aware of the fact that Virgin had specifically excluded the designation of the Contracting State GB. Accordingly, it was the public which had a legitimate expectation that the EPO would follow its own rules and procedures and act in accordance with the public statements of Virgin (both with regard to the EPO and to the UK



Property Office), and that the EPO would not grant or maintain a patent designating GB.

The principle of proportionality required that the EPO, when interpreting and applying procedural law, accounted for the legal and factual consequences of its acts. In the present case, by an administrative mistake, the EPO had incorrectly issued a decision to grant a patent designating GB, although Virgin had not requested such a patent. In view of the pending infringement proceedings in the UK, which were based on this GB designation, the legal and factual consequences of this administrative mistake were indeed severe. The Opposition Division based its decision not to correct the decision to grant on a narrow interpretation of the procedural stipulations of the EPC, which had no basis in the Articles or Rules of the EPC. In view of the severe legal and factual consequences of this administrative mistake, such a narrow interpretation to the disadvantage of the opponents and the public breached the principle of proportionality and was contrary to Article 125 EPC 1973.

VI. The arguments of Virgin, as far as they are relevant for the present decision, may be summarised as follows:

The subject-matter of the amended patent neither extended beyond the content of the application D0 as filed, nor beyond the content of the earlier parent application P0 as filed. Independent claims 1 and 2 of the present request were based on claim 44 of the parent application P0 and completed with supplementary features which came from the dependent claims of the granted patent.

The opposed patent disclosed the claimed invention in a manner sufficiently clear and complete for it to be carried out by the person skilled in the art.

The subject-matter of the claims as amended was novel and inventive over the prior art cited by the opponents. Premium did not provide any legal basis for their proposition that different designations in a single European patent might have different filing dates.

The request for correction under Rule 140 EPC of the decision to grant should be rejected, since only the Examining Division was competent to correct its decision to grant the present patent.

### **Reasons for the Decision**

1. The appeals are admissible.
2. Admissibility of the final, sole request filed by Virgin

In the course of the oral proceedings, the opponents Premium and Airbus called the admissibility of the present request into question.

Under Article 13(1) RPBA any amendment to the appellant's case after he has filed his grounds of appeal 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. Moreover, according to Article 13(3) RPBA, amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board cannot reasonably be expected to deal with without adjournment of the oral proceedings.

The independent claims 1 and 2 of the final, sole request submitted by Virgin during the oral proceedings differ from the corresponding claims of the fourth auxiliary request previously submitted with letter dated 12 April 2010 in two respects. The reference of the foot-rest being "separate from" the seat has been deleted from the respective preamble of the claims and the alternative "or trapezoidal" for the shape of the "passenger support element" has been deleted from the respective characterising clause. The first deletion was in response to an objection that this feature was not originally disclosed, the second deletion to limit the subject-matter claimed more precisely to the disclosed embodiment. Given the limited nature of these amendments and the fact that both were already presaged in the corresponding claims of the fifth auxiliary request also submitted with letter of 12 April 2010 (in those claims however the restriction of "only one" notional longitudinal seat axis had also been deleted, which Virgin wished to retain), the Board cannot see how they could present the opponents with any difficulties in dealing with them on the fly, as it were. Indeed, apart from objection on principle to the belated submission of the new request, the opponents did not try to argue that these amendments in any way discomfited them.

The other amendment to the claims of the final, sole request in comparison with the claims of the previous fourth auxiliary request consists in the deletion of the claims relating to seat units as such. The opponents had no objections to this deletion and clearly these can be none. Accordingly, the reasons for the deletion of these claims need not be gone into here.

The Board, exercising its discretion, therefore admitted and considered the new request.

3. Extended subject-matter (Article 100(c) EPC 1973 and Article 123(2) EPC)

3.1 Premium's objection in this respect was principally based on the contention that the claims contained added subject-matter with respect to the content of the parent application P0 because they did not comprise the essential feature of P0 that the surfaces/elements which formed the seat in the seat mode were not used in forming the bed in the bed mode ("flip-over feature").

A person skilled in the art who reads the parent application P0 will clearly recognise that different inventions having separate objects and independent solutions are disclosed therein. Apart from a first invention, which deals with a passenger accommodation unit and/or a seat assembly having the so-called "flip-over feature", P0 clearly discloses another invention relating to a seating system for a passenger vehicle (P0: page 9, lines 1-12). This seating system deals with the problem of optimising the use of space within a passenger cabin and of presenting a substantially uncrowded appearance (P0: page 5, lines 26-30). The

seating system is covered by independent claim 44 of P0, on which the independent claims 1 and 2 as amended are based.

Claim 44 of P0 is worded as follows:

" A seating system for a passenger vehicle, particularly an aircraft, comprising a plurality of seat units, each seat unit defining a notional longitudinal seat axis and comprising a supporting structure adapted for attaching the seat unit to a floor of a vehicle and means forming or being configurable for forming a seat comprising a seat-pan and a back-rest; characterised in that said seat units are arranged to form a column defining a notional longitudinal column axis, in which column said seat-units are arranged side-by side in longitudinally offset relation at an acute angle to a notional column axis, thereby defining a space to the rear of each seat, each seat unit further comprising means forming or being configurable for forming a substantially flat bed, a major proportion of which bed is disposed forwardly of the position of the seat, which bed extends rearwardly into said space to extend the flat-bed."

For the skilled person, it is clear from the content of P0 that the subject-matter of claim 44 provides a complete solution to the technical problem of optimising the use of space within an aircraft passenger cabin ("space problem").

The Board is unable to follow the contention that the "flip-over feature" was essential in connection with

that "space problem". P0 contains a clear indication that the seating system is not limited to the use of the seat assembly which is the subject-matter of the first invention (page 32, lines 28-29).

- 3.2 The Board cannot follow Premium's added subject-matter contention in connection with the change of the following wording of claim 44 of the parent application P0 "so that when the seat unit is formed into a bed a major proportion of which bed is disposed forwardly of the position of the seat" into "so that... bed a major proportion of the bed is disposed forwardly of the position that was occupied by the seat".

In the Board's view, the new formulation only amounts to a clarification of the original wording without introducing new matter. When the seat unit is formed into a bed, what was meant by the original wording "forwardly of the position of the seat" was not clear, since the seat as such is no longer present in this configuration of the seat unit. The new wording simply clarifies that when the seat unit is formed into a bed, the fictitious "position of the seat" is that which was occupied by the seat when the seat unit was configured as a seat. There is, however, no geometrical difference between these two positions.

As to the aspect of this objection relative to the lack of disclosure in the parent application of an embodiment where the major proportion of the bed was formed entirely of parts which were also used for the seat, an embodiment which was allegedly introduced by the new wording, there is nothing in the parent application which suggests that the invention covered

by claim 44 is dependent upon the use of parts for forming the bed which are different from the parts forming the seat. On the contrary, the figures 19 and 20A to 20 C of P0 show for example that the components 628, 622 and 624 forming the seat (Fig. 20A) are also used for forming the bed (Fig. 20C).

3.3 The Board does not share Airbus' view that the wording of the characterising part of claim 1 as granted ("...the flat-bed extends rearwardly into said space behind the seat") introduced added-matter. If the present wording can be understood in the way alleged, the same would be true of the original wording of claim 44 of the earlier application P0. Moreover, considering that the independent claims 1 and 2 have now been completed by the further limitation that "a generally triangular passenger support element is disposed in said rearward space (36) substantially coplanarly with said one or more movable elements when said movable elements are configured in the bed mode and is adapted to form part of said bed" (see claims 50 and 51 of P0), Airbus' objection has been overtaken by events.

3.4 According to the passage of page 1, lines 12 to 15 of the parent application P0, the passenger seat "comprises a back-rest and a seat-pan that are supported off the floor... by means of a suitable supporting structure that is anchored.. in the floor. The seat defines a notional longitudinal seat axis, as viewed from the perspective of a passenger using the seat". When this passage is read in conjunction with the passage of page 29, lines 16 to 20 and the figures 1 and 1A of P0, which refers to a specific value for the acute angle between the notional seat

axis and the notional column axis, it is implicit that there is only one notional longitudinal seat axis C-C for each seat unit. Identical corresponding passages ([0002] and [0043]) are found in the application D0. The Board concludes that the expression "each seat unit defining only one notional longitudinal seat axis" is unambiguously derivable from the parent application P0 and the original application D0.

4. Sufficiency of disclosure (Article 100(b) EPC 1973)
  - 4.1 Concerning the insufficiency objection that the claims are formulated in such a broad way that the skilled person is not able to carry out the invention over the whole ambit defined thereby, the Board has come to the conclusion that this objection is not justified. The Board reached that conclusion for reasons similar to those relative to the objection of added-matter treated in the points 3.1 and 3.2 above. The considerations made by the Board in this respect equally apply to the question of sufficiency of disclosure.
  - 4.2 As regards the meaning of the word "or" in relation to the insufficiency objection of Cathay and Airbus, the Board takes the view that this objection relies on an incorrect interpretation of the claims. The claimed seat units cannot be in the seat mode and the bed mode at the same time. The wording chosen clearly expresses the alternate modes of use and is not intended to cover structures which do not exist and are not disclosed. When the unit is configured as a seat the means which form the seat do indeed "form a seat" but when configured as a bed they are "configurable as a seat". Similarly, when the unit is configured as a bed the



means which form the bed do indeed "form a bed" but when configured as a seat they are "configurable for forming a bed". It follows that the wording objected to in the claim exactly represents the disclosure and the Board cannot see a possibility for a successful insufficiency objection in this respect.

- 4.3 The last objection of insufficiency of disclosure relates to the expression "a major proportion of the bed is disposed..." (emphasis added by the Board). Cathay argue that this expression can normally only be understood as meaning more than 50% and point to the fact that this requirement is not met in the embodiments disclosed in the patent. Virgin on the other hand say that "major proportion" should be understood as meaning a substantial and significant part. Cathay counter that if the intended meaning is simply "quite a lot" as put forward by Virgin the requirement is so obscure that the skilled person would not know whether he was working within the ambit of the claims or not, so that to this extent at least there was an insufficient disclosure of the claimed invention.

Modern idiomatic usage of the term "a major proportion" is wholly consistent with the view put forward by Virgin. This term was already present in the parent application, see claim 44 of P0 as quoted above, and it would have been illogical for Virgin to have imposed a limitation on the claim which was inconsistent with the preferred embodiments. In relation to those embodiments remaining in the present patent specification the proportion of the bed disposed forwardly of the position of the seat depends essentially on the length of the foot-rest (which is now an obligatory element of

the claimed subject-matter) and the spacing of the foot-rest from the front edge of the seat-pan. The skilled person does have some design freedom here but it is apparent that for practical and ergonomic reasons these factors will always lead to a substantial and significant part of the bed being disposed forwardly of where the seat had been.

5. Novelty (Articles 100(a), 54(1) EPC 1973)

5.1 Premium submitted that claim 1 was anticipated by document E2. The Board disagree. Even is it assumed, as contended by Premium, that the housing 41 shown in figures 14-16 of E2 was part of the seat unit but not part of the seat, the rearward portion of the headrest which lies within the "rearward space behind the seat" cannot be defined as "a generally triangular passenger support element". Moreover, since the mentioned drawings of E2 are schematic, they will not be used by the skilled person to measure the precise value of an angle which, according to Premium, corresponds exactly to the lower limit of the claimed range of 30° to 60°. In agreement with the case law (see decision T 204/83, OJ EPO 1985, 310: "Dimensions obtained merely by measuring a diagrammatic representation in a document do not form part of the disclosure"), the Board judges that the alleged value of 30° is not directly and unambiguously disclosed in document E2.

5.2 Premium also objected to the novelty of all claims for the Contracting State GB in view of D0 and P0. This objection was based on the argument that the time rank corresponding to the filing of a request for the grant of a patent which designated GB was the date of filing

of separate claims for the Contracting State GB, which had been effected on 8 August 2006. In Premium's view, the Board had the competence to re-allocate the filing date for the Contracting State GB.

The contested patent is based on a European divisional application. In accordance with Article 76(1), second sentence EPC 1973, a duly filed divisional application is accorded the same filing date as the parent application. In opposition proceedings it can be examined whether the subject-matter of the European patent goes beyond the content of the earlier application as originally filed (Article 100(c) EPC 1973). If this is the case, the patent has to be revoked (Article 101(2), first sentence EPC). However, there is no provision in the EPC which could serve as a legal basis for allocating a new filing date to the contested patent in opposition proceedings or opposition appeal proceedings. Hence the Board has no competence for re-allocating the filing date of the claims for the Contracting State GB.

- 5.3 The Board concludes that the subject-matter of the claims is new.
  
- 6. Inventive step (Articles 100(a), 56 EPC 1973)
  - 6.1 Virgin have conceded (see point 125 of their letter dated 24 February 2010) that the independent claims of the present request are only entitled to the PCT filing date of the parent application P0 (9 August 2002). The Board notes that document E7 which is published on 5 June 2002 is therefore a prior art according to Article 54 (2) EPC 1973.

- 6.2 In the Board's view, the closest state of the art document is shown in document E2, in respect to which claim 1 has been delimited in the two-part form.
- 6.3 As mentioned in the characterising part of the claim, an important feature which distinguishes the claimed seating system over that known from E2 is the disposition of a generally triangular passenger support element in the rearward space defined in the preamble of the claim, said triangular element being adapted to form part of the bed.
- 6.4 The technical effect that the distinguishing features achieve over the prior art is to provide a flat bed surface which is longer than in the prior art and which can comfortably accommodate passengers of great height on a bed surface having a length up to 2.13 metres (see paragraph [0027] of the patent specification).
- 6.5 The problem solved by the invention was therefore to optimise the available space in an aircraft cabin.
- 6.6 Contrary to Premium's contention, the Board considers that the expression "generally triangular", when referring to the form of the support element, is of significance in the context of the present invention. The generally triangular form of the support element is clearly connected to the triangular or trapezoidal geometry of the rearward space (see paragraphs [0025] of the patent specification), that geometrical form of the rearward space being itself clearly the consequence of the herringbone arrangement of the seat units, as defined in the preamble of the claim.

6.7 In E2, the rearward space behind the seat is used to accommodate a counter-top 30 to one side of the adjacent seating unit (page 12, lines 1-5) and optionally a cupboard or other storage space (page 12, lines 11-18). This disposition was apparently chosen in order to avoid that, when the seat unit is configured to form a flat bed, the seatback protrudes into the accommodation space of the passenger behind (page 1, lines 12-16). Moreover, in view of the fact that it is the part of the seatback 42 on which the passenger's head rests which forms the rearward end of the bed in the bed configuration of this seat unit (page 13, lines 10-13 in connection with figure 11), it does not make much sense in terms of space optimisation to extend this end of the bed by a generally triangular passenger support element. Even if the teaching of document E7 is taken into consideration (see Airbus objection), it cannot alter this conclusion. Premium's argument is essentially based on hindsight consideration of what the skilled person would do once he had decided to allocate the space between the housing 41 of the seat unit and the wall of the aircraft to the passenger of that seat unit and not the passenger of the adjacent seat unit as is the case in document E2. But it was the taking of that decision which constitutes the core of the claimed invention and there is no precedent for it in the state of the art.

Therefore, in the Board's judgement, it was not obvious to modify the passenger seating system of document E2 in the claimed manner.

6.8 Airbus' attempts to demonstrate lack of inventive step start from the passenger seating system of document E7. The basic idea of this passenger seating system is to maintain the seats in a forward facing position for take-off and landing and to rotate the seats after take-off in a range between 50° and 60°, so as to form an inward facing herringbone and to allow the seat to recline to form a bed in this position (see claim 1 of E7). Thus, as acknowledged by Airbus, the seat arrangement shown in document E7 does not disclose the feature that each seat unit defines only one notional longitudinal seat axis.

The Board was not convinced by Airbus' argumentation that it would have been obvious to dispense with the swivelling arrangement. E7 mentions at least one good reason for adopting the swivel feature: the substantially forward-facing orientation ensures that the inertial forces or acceleration forces that may arise during take-off and landing are not uncomfortable for the passengers (see column 3, lines 40-46). It is also apparent to the skilled reader that the whole seat disposition disclosed in E7 is specially adapted for use with swivelling seats. There is, for example, a reduced pitch between the seats. This measure, although imposing an upright position of the seatback in the forward-facing orientation, minimises the loss of cabin seat space (see column 3, lines 27-35). In view of the relatively short flying phases needed for take-off and landing in transatlantic flights, it is the swivelling of the seats which renders this disposition advantageous. It is also the swivel feature that imposes an enlarged width for the aisle in order for the seats to be able to rotate to the bed configuration

(column 3, line 48 to column 4, line 9). This is inherently contrary to the problem of space saving.

Therefore, in the Board's view, the seating system of document E7 is not one the skilled person would start from if he wanted to optimise space in an aircraft's cabin having fixed seats and it is only with hindsight that he would adopt the fixed seat axis corresponding to the bed configuration of figure 4 of E7.

6.8.1 Independent claim 2 differs from independent claim 1 in that the seats are arranged back to back with the seat units in another column, so that the space into which the flat bed extends is to the rear of adjacent seat backs from respective columns. The above conclusion equally applies by analogy to the seats of this seating system. Independent claim 2 was not subject to any specific attack on inventive step from the side of the opponents. The Board therefore concludes that the subject-matter of the independent claims 1 and 2 involves an inventive step (Article 56 EPC 1973).

7. Request for correction of the decision to grant under Rule 140 EPC

Premium and Cathay requested the Board to correct the decision to grant under Rule 140 EPC by deleting the designation of the Contracting State GB since in their view, said designation contained an obvious mistake.

Premium and Cathay assert that it lies within the competence of the Opposition Division to correct the Examining division's decision to grant a patent pursuant to Rule 140 EPC (identical with former Rule 89

EPC 1973). However, the present Board agrees with Virgin and believes that only the Examining Division is entitled to correct its own decision.

Rule 140 EPC reads as follows: "In decisions of the European Patent Office, only linguistic errors, errors of transcription and obvious mistakes may be corrected."

The Board agrees with Premium and Cathay that Rule 140 EPC does not specify the competence to correct errors in a decision. The Board also notes that there is no other provision in the EPC specifying the competence for such a correction decision. Therefore, an interpretation of Rule 140 EPC is necessary on this issue. The case law of the Enlarged Board of Appeal and the Boards of Appeal has dealt with the question of which EPO department of first instance is competent to correct the decision for grant. In its decision G 8/95 (OJ EPO 1996, 481) the Enlarged Board of Appeal held: "The competence to correct errors in a decision under Rule 89 EPC [1973] lies with the body which has given the decision. Hence, in the examination procedure the Examining Division has to decide on a request to correct errors in the decision to grant." (Reasons 3.4). In the decision T 850/95 (OJ EPO 1996, 455) leading to the referral, the facts indeed differed from those of the present case since the request for correction was submitted prior to the mention of the grant of the patent and therefore prior to the date on which the decision to grant took effect according to Article 97(4) EPC 1973. Consequently, no opposition proceedings were pending at the time when the request for correction was filed. However, according to the case law of the Boards



of Appeal, the Examining Division has the competence to correct its own decision to grant also in situations where the request for correction was submitted after the initiation of opposition proceedings (T 226/02 and T 268/02, both decisions not published in the OJ EPO). In both decisions the Board referred to G 8/95 (loc. cit.) and held that the competence to correct errors in a grant decision lied with the Examining Division which had taken that decision. In T 226/02, where the Opposition Division had corrected the grant decision pursuant to Rule 89 EPC 1973, the Board came to the conclusion that "the Opposition Division acted *ultra vires* in taking a decision under Rule 89 EPC [1973] to correct a decision of the Examining Division" (Reasons 5.1). In decision T 79/07 (not published in the OJ EPO) the Board acknowledged the Examining Division's competence for correcting the grant decision even after the Opposition Division had revoked the patent by a decision which was the subject of the appeal proceedings. In the Board's view the reason for acknowledging the Examining Division's exclusive competence to decide on a request for correction of the grant decision could be seen in the requirement developed by case law that the correction of a decision is admissible only if the text of the decision is manifestly other than intended by the department concerned. Hence there is an obvious mistake in a grant decision within the meaning of Rule 140 EPC, if the text given for grant is not and obviously cannot be what the Examining Division actually intended, and the text erroneously indicated can be replaced by that on which the Examining Division actually wanted to base its decision (see T 850/95, loc. cit., Reasons 3. and T 1093/05, Reasons 7.).

Premium argue that, in accordance with Article 114(1) EPC 1973, the Opposition Division had to correct the grant decision since, as stated in decision T 156/84 (OJ EPO 1988, 372), it had the duty vis-à-vis the public not to grant or maintain patents which were not legally valid, irrelevant of how and when the EPO became aware of the circumstances being relevant for the legal validity of a patent. The Board, however, does not agree with this argument. The principle of examination by the EPO of its own motion as set out in Article 114(1) EPC 1973 applies in all proceedings before the EPO. However, this principle cannot justify acting *ultra vires* and it therefore only applies to the extent to which the EPO department acts within its competence. This finding is also in line with decision T 156/84 (loc. cit.). The Board of Appeal concluded there that for establishing whether a granted patent can be maintained the Opposition Division was obliged to examine the relevance of cited state of the art even if it was introduced after expiry of the opposition period because the principle of examination by the EPO of its own motion (Article 114(1) EPC 1973) took precedence over the possibility to disregard late-filed facts or evidence (Article 114(2) EPC 1973). Decision T 156/84 (loc. cit.) concerned the question of how the Opposition Division had to deal with late-filed evidence which was filed in support of the ground for opposition under Article 100(a) EPC 1973. However, there is no indication in decision T 156/84 (loc. cit.) that Article 114(1) EPC 1973 could establish any competence. Consequently, neither Article 114(1) EPC 1973 nor decision T 156/84 (loc. cit.) provides a basis

for a competence of the Opposition Division for correcting the grant decision.

Lastly, the Board turns to the argument that the principle of good faith and the principle of proportionality, which were applicable pursuant to Article 125 EPC 1973 in proceedings before the EPO, would establish a competence of the Opposition Division for correcting the grant decision. The purpose of Article 125 EPC 1973 is to fill any gaps that may occur in the application of the procedural provisions of the EPC. However, the Board considers that these principles also do not establish a competence of the Opposition Division to correct the grant decision for the following reasons.

According to Article 19(1) EPC 1973 the Opposition Divisions are responsible for the examination of oppositions against any European patent. The substantive examination of the opposition is prescribed in Article 101 EPC. If the opposition is admissible, the Opposition Division examines whether at least one ground for opposition laid down in Article 100 EPC 1973 prejudices the maintenance of the European patent (Article 101(1) EPC).

Article 100 EPC 1973 lays down the exclusive grounds for opposition being limited to and essentially the same as some grounds for revocation under national law (Article 138(1)(a)-(c) EPC 1973). The function of this provision is to provide, within the framework of the EPC, a limited number of legal bases, i.e. a limited number of objections on which an opposition can be based (G 1/95, OJ EPO 1996, 615, Reasons, point 4.1).

An incorrect designation of a Contracting State is not one of the grounds for opposition under Article 100 EPC 1973. This has also not been disputed by Premium and Cathay. It is established Board of Appeal case law that further grounds which would lead to a refusal of a European patent application in the examination proceedings cannot be successfully presented in opposition proceedings (see for example G 1/91, OJ EPO 1992, 253; J 22/86, OJ EPO 1987, 280, Reasons, point 18; T 99/85, OJ EPO 1987, 413, Reasons, point 4; T 127/85, OJ EPO 1989, 271; T 301/87, OJ EPO 1990, 335, Reasons, point 3.3 and 3.4; T 550/88, OJ EPO 1992, 117, Reasons, point 4; T 428/95, not published in the OJ EPO, Reasons, point 4.2). In view of this established case law and the relevant EPC provision, the Board considers that the opposition procedure is not designed to remedy all possible deficiencies of the granting procedure or of a granted patent. For example, an objection on the basis that the granted patent claims are not concise and clear cannot be considered by the Opposition Division (see for example T 336/96, not published in the EPO). Also defects and errors of a purely formal character in the granting procedure cannot lead to a revocation of the patent in opposition proceedings since such defects are properly regarded as cured by the act of grant (J 22/86, loc. cit., Reasons 18.). Hence the scope of opposition proceedings is limited as regards the grounds for challenge to granted European patents.

Also after grant observations of third parties under Article 115, first sentence EPC are only admissible if they oppose the patentability of the invention to which the patent relates. "Patentability" refers only to the substantive requirements set out in Articles 52 to 57

EPC as the identical heading of Chapter I, Part II of the EPC suggests.

The provisions of Articles 99 et seq. and Article 115 EPC were drafted with the public interest in mind (see also T 60/91 (OJ EPO 1993, 551, Reasons 9.5). Therefore, in *inter partes* opposition proceedings before the EPO account must not only be taken of the interests of the parties involved. The Board shares the view that the EPO also has a duty vis-à-vis the public not to grant or maintain patents which it is convinced are not legally valid and that the public has to be enabled to rely as far as possible on the legal validity of a patent granted by the EPO (see T 156/84, loc. cit., Reasons 3.5). However, this duty is subject to restrictions. As set out above, opponents in opposition proceedings and third parties filing observations can challenge the patent only in a limited scope. This means that neither the public nor opponents have legitimate expectations that any deficiency of the granted patent would be remedied by the EPO. Consequently, in the present case, the public could not legitimately expect that the designation of the Contracting State GB would be corrected in opposition proceedings. Therefore, the principle of good faith does not apply in the present case.

For similar reasons the principle of proportionality does not apply in the present case. It is obvious from the EPC provisions concerning post-grant proceedings that the legislator did not envisage empowering the Opposition Division to set aside all legal and factual consequences of any mistake which occurred in examination proceedings. It is therefore the Board's

view that the authority conferred to the Opposition Division by the EPC provisions cannot be extended because of the principle of proportionality.

In view of the above the Board concludes that in the present case the Opposition Division in opposition proceedings had no competence to correct the decision taken by the Examining Division. Thus the Opposition Division would have acted *ultra vires* if it had corrected the grant decision. The same applies to the Board of Appeal in opposition appeal proceedings (Article 111(1), second sentence EPC 1973). Consequently, the request for correction of the decision to grant must be rejected.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent on the basis of the following documents:
  - Claims 1 to 8 filed as sole request during the oral proceedings;
  - Pages 2 to 8 of the description filed during the oral proceedings;
  - Drawings as granted.
3. The request for correction of the decision to grant is rejected.

The registrar:

The Chairman:

A. Vottner

S. Crane