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**Datasheet for the decision  
of 24 October 2016**

**Case Number:** T 1637/13 - 3.2.01  
**Application Number:** 05794250.0  
**Publication Number:** 1786667  
**IPC:** B64C13/26, B64C9/14, B64C3/50  
**Language of the proceedings:** EN

**Title of invention:**

SYSTEMS AND METHODS FOR PROVIDING DIFFERENTIAL MOTION TO WING  
HIGH LIFT DEVICES

**Patent Proprietor:**

The Boeing Company

**Opponent:**

Airbus SAS

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2)  
RPBA Art. 12(2)

**Keyword:**

Added subject-matter (main request, auxiliary request I : yes)  
Substantiation of grounds of appeal concerning inventive step  
(no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 1637/13 - 3.2.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.01**  
**of 24 October 2016**

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**Decision under appeal:** **Interlocutory decision of the Opposition**  
**Division of the European Patent Office posted on**  
**24 May 2013 concerning maintenance of the**  
**European Patent No. 1786667 in amended form.**

**Composition of the Board:**

**Chairman** G. Pricolo  
**Members:** C. Narcisi  
O. Loizou

## **Summary of Facts and Submissions**

I. The European patent No. 1 786 667 was maintained in amended form by the decision of the Opposition Division posted on 24 May 2013. Appeals were filed against this decision by the Patentee and by the Opponent, both filed on 23 July 2013, and the appeal fees were paid. The statement of grounds of appeal was filed by both the Patentee and the Opponent on 3 October 2013.

II. Oral proceedings were held on 24 October 2016. Appellant I (Patent Proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, in the alternative, that the patent be maintained in amended form on the basis of the set of claims of auxiliary request I as filed during oral proceedings before the Opposition Division, or on the basis of the set of claims of auxiliary request II, as amended forming the basis of the decision of the Opposition Division, or on the basis of the auxiliary requests III to X as filed with its reply. Appellant II (Opponent) requested that the decision under appeal be set aside and the patent be revoked.

Auxiliary request II corresponds to the form in which the Opposition Division decided to maintain the patent.

III. Granted claim 1 reads as follows:

"An aircraft wing system, comprising:

- a wing (110) having a leading edge and a trailing edge;
- a first deployable lift device (212) having a first spanwise location and being movable relative to the

wing (110) from a stowed position to at least one first deployed position;

- a second deployable lift device (213) having a second spanwise location different than the first (212) and being movable relative to the wing (110) from a stowed position to at least one second deployed position;

- a drive system (350) having a drive link (353) operatively coupleable to both the first and the second deployable lift devices (212, 213), the drive system (350) further including a first motor (351) and a second motor (352); and

- a control system (320) operatively coupled to the drive system (350), the control system (320) having:

- a first configuration for which the drive link (353) is operatively coupled to the first and second deployable lift devices (212, 213), and activation of the first motor (351) and at least a portion of the drive link (353) moves the first and second deployable lift devices (212, 213) together; and

- a second configuration for which the drive link (353) is operatively coupled to the first deployable lift device (212) and operatively decoupled from the second deployable lift device (213), and activation of the second motor and at least a portion of the drive link (353) moves the first deployable lift device (212) relative to the second deployable lift device (213); characterized in that the drive link (353) is coupled to both the first motor (351) and the second motor (352), the second motor (352) being an alternate or backup motor that is arranged to provide power to the first and second deployable lift devices (212, 213) in the event the first motor (351) is unable to do so."

Claim 1 of auxiliary request I differs from granted claim 1 in that the wording "moves the first and second deployable lift devices (212, 213) together" is

replaced by the wording "moves the first and second deployable lift devices (212, 213) together through relatively large angles during takeoff and landing", and the wording "moves the first deployable lift device (212) relative to the second deployable lift device (213)" is replaced by the wording "moves the first deployable lift device (212) relative to the second deployable lift device (213) by relatively small amounts to tailor the lift distribution across the span of the wing (116)".

Claim 1 of auxiliary request II differs from claim 1 of auxiliary request I in that the wording "to tailor the lift distribution across the span of the wing (110); and" is replaced by the wording

"to tailor the lift distribution across the span of the wing (110); and

- a third configuration for which the drive link (353) is operatively coupled to the first and second deployable lift devices (212, 213), and activation of the second motor (352) and at least a portion of the drive link (353) moves the first and second deployable lift devices (212, 213) together by relatively small amounts to tailor the lift distribution across the span of the wing (110);".

IV. The Patentee's submissions may be summarized as follows:

The ground for opposition based on Article 100(c) EPC (in conjunction with Article 123(2) EPC) was introduced by the Opponent only shortly before the oral proceedings and should not have been admitted by the Opposition Division. At this stage of the proceedings a ground for opposition should only be admitted if the objection is prima facie highly relevant for the

outcome of the proceedings. This was however not the case, for the Opposition Division decided that the Opponent's objection did not affect the validity of the granted claim. Thus, it is all the more unfortunate and regrettable that the Opposition Division went on to formulate an objection (based on the same ground for opposition) of its own. Since the objection was presented for the first time during oral proceedings the Patentee was denied a proper opportunity to present well-prepared comments in reply.

The subject-matter of claim 1 does not infringe Article 123(2) EPC since amendment of the claim as filed by introducing a "first motor" and "second motor" (and by further indicating their respective function) according to amended features (i) (i.e. "a first configuration for which the drive link (353) is operatively coupled to the first and second deployable lift devices (212, 213), and activation of the first motor (351) and at least a portion of the drive link (353) moves the first and second deployable lift devices (212, 213) together) and (ii) (i.e. a second configuration for which the drive link (353) is operatively coupled to the first deployable lift device (212) and operatively decoupled from the second deployable lift device (213), and activation of the second motor and at least a portion of the drive link (353) moves the first deployable lift device (212) relative to the second deployable lift device (213)) and further omitting a third configuration of the control system (which is described in the patent specification (hereinafter designated as EP-B) in figure 3D and paragraph [0027]), does not introduce any subject-matter extending beyond the content of the application as filed (hereinafter designated as WO-A). In effect, the first and second configuration of the control system (corresponding to

features (i) and (ii)) are not inextricably linked to said third configuration, which is moreover not essential to the claimed invention. This undoubtedly and clearly results from the statement "if it is desired to move only the inboard flaps 212, the system can be operated while in the configuration shown in figure 3E, without first moving the inboard and outboard flaps together via the configuration shown in figure 3D" (see EP-B, [0028] and corresponding identical passages in WO-A). It is clear that by deflecting only the inboard flaps 212, a difference will be created between the inboard flaps 212 and the outboard flaps 213, so that the camber of the wing will vary in spanwise direction as a consequence. Thus the stated objective problem of the invention - tailoring the spanwise camber and lift distribution - can be attained without the allegedly essential third configuration as shown in figure 3D.

For the same reasons as above, claim 1 of auxiliary request I complies with Article 123(2) EPC.

The subject-matter of claim 1 of auxiliary request II does not extend beyond the content of the application as filed. Specifically, there is no need to introduce a "range limiter" into claim 1, given that the features implied by the second or third configuration are not inextricably linked to the use of a "range limiter". Further, simultaneous activation of the first and second motor is already implicitly excluded by the wording of claim 1, e.g. noting that the second motor is already defined in the claim as "an alternate or backup motor". In addition, a simultaneous activation of both motors is clearly excluded by the description.



The arguments of the Opponent relating to a lack of inventive step involved by the subject-matter of claim 1 of the auxiliary request II were not submitted with the statement of grounds of appeal. Merely referring to the arguments presented during opposition proceedings is not sufficient, since the grounds of appeal should be substantiated in the statement of grounds of appeal.

V. The Opponent's arguments may be summarized as follows:

The subject-matter of claim 1 of the main request violates Article 123(2) EPC because it fails to specify that in the defined configurations the respective "other" motor is inactive and it fails to recite the features according to the configuration illustrated in figure 3D ("third configuration") of EP-B. The statement "once the outboard flaps 213 have been moved to their target positions, the inboard flaps 212 can be moved relative to the outboard flaps 213, as shown in Figure 3E" (see EP-B, paragraph [0028] and corresponding identical passages in WO-A) confirms that the application was limited to movement by the alternate motor of the inboard flaps relative to the outboard flats only after (!) unified movement by the alternate motor of both the inboard and outboard flaps.

The subject-matter of claim 1 of auxiliary request I contravenes Article 123(2) EPC for the same reasons as mentioned for the main request. Additionally, claim 1 also fails to include a "range limiter 343" which is nevertheless necessary in order to limit the deflection of the first deployable lift device relative to the second deployable lift device "by relatively small amounts" in the second configuration as claimed.

The subject-matter of claim 1 of the auxiliary request II contravenes Article 123(2) EPC, for it does not exclude simultaneous operation of the "first" and "second motor" (see main request above) and since a "range limiter" is omitted (see auxiliary request I above).

The arguments relating to lack of inventive step in the subject-matter of claim 1 of auxiliary request II were already submitted during opposition proceedings and reference was made thereto in the statement of grounds of appeal, clearly stating that all these arguments are upheld by the Opponent. The Opponent confirmed during oral proceedings that it did not intend to deviate from or make submissions in addition to the arguments already presented before the Opposition Division.

### **Reasons for the Decision**

1. The appeals are admissible.
  
2. The Patentee's contentions concerning the admission to the opposition proceedings of the ground for opposition based on Article 100(c) EPC and an alleged violation of its right to be heard (Article 113(1) EPC) are unfounded.

The Opponent's objections relating to said ground for opposition were submitted within the time limits of Rule 116(1) EPC, i.e. timely before the oral proceedings. The Opposition Division correctly decided to admit this ground for opposition since it considered that it was prima facie relevant to the issue of subject-matter introduced in granted claim 1 and possibly extending beyond the content of the application as filed. The new objections raised by the

Opponent, if well-founded, would therefore have prejudiced maintenance of the patent. Hence, pursuant to Article 114(2) EPC, the Opposition Division correctly decided to exercise its discretionary power to introduce the new ground for opposition in order to allow for an in-depth examination of the objections, after hearing the parties. This holds true regardless of the fact that ultimately these objections were not found to be prejudicial to the maintenance of the granted patent. Obviously, whether or not a late filed objection is admitted into the opposition proceedings cannot be made dependent on the final decision.

The further contention that the Patentee was not prepared to deal with the additional objection raised by the Opposition Division is unjustified and unfounded, for the Patentee was given time at least twice during oral proceedings (see minutes, points 3.1.4, 3.1.6) to prepare and formulate auxiliary requests I and II. If the Patentee considered that it was nevertheless not possible to adequately react to the objections, then it should either have asked for more time or for an adjournment of the oral proceedings. However it can be deduced neither from the impugned decision nor from the minutes that such requests were submitted. Hence it cannot be concluded that the Patentee's right to be heard was violated.

3. The subject-matter of claim 1 of the main request does not meet the requirements of Article 123(2) EPC since said first and second configurations according to said features (i) and (ii) respectively and the omission of the features relating to said "third configuration" (as shown in figure 3D of EP-B) constitute a generalization of the content of the application as filed. In effect, claim 1 as filed (see WO-A) encompasses all said three

configurations as shown in figures 3C, 3D and 3E. In particular, the feature reading "the control system having: a first configuration for which the drive link is operatively coupled to the first and second deployable lift devices, and activation of at least a portion of the drive link moves the first and second deployable lift devices together" encompasses the configurations shown in figures 3C and 3D. However, amendment of the claim as filed by including the "first motor" and "second motor" was done by further limiting the claim by said features (i) and (ii), thereby including said first and second configurations and omitting said third configuration. For such a limitation there is no basis in the application as filed (hereinafter designated as WO-A), since no embodiment of an aircraft wing system is disclosed in EP-A including said first and second configurations and at the same dispensing with said third configuration according to figure 3D. The passage cited by the Patentee (see above, point IV) merely states that under particular flight conditions or in a particular flight mode of the aircraft, "if it is desired to move only the inboard flaps 212, the system can be operated while in the configuration shown in figure 3E, without first moving the inboard and outboard flaps together via the configuration shown in figure 3D". This is manifestly no general statement to the extent that the third configuration (corresponding to figure 3D) can in general likewise entirely be dispensed with. Indeed, the passage in EP-B cited by the Opponent (i.e. "once the outboard flaps 213 have been moved to their target positions, the inboard flaps 212 can be moved relative to the outboard flaps 213, as shown in Figure 3E") clearly demonstrates that under different flight conditions or in a different flight mode of the aircraft the second configuration of the control system

can be activated only after the third configuration was activated first. In conclusion, the Patentee's arguments could not convince the Board, given that all three disclosed configurations of the control system are equally necessary for proper functioning of the aircraft wing control system and are therefore linked together.

4. Claim 1 of auxiliary request I contravenes the requirements of Article 123(2) EPC, for the same reasons as stated above in relation to claim 1 of the main request.
  
5. The subject-matter of claim 1 of auxiliary request II complies with the requirements of Article 123(2) EPC. The Board is satisfied that the features reading "a third configuration for which the drive link (353) is operatively coupled to the first and second deployable lift devices (212, 213), and activation of the second motor (352) and at least a portion of the drive link (353) moves the first and second deployable lift devices (212, 213) together by relatively small amounts to tailor the lift distribution across the span of the wing (110)" (hereinafter defined as feature (iii)), based on paragraphs [0017], [0023] and [0027] of EP-B (or the corresponding identical paragraphs in WO-A), adequately describe the third configuration in a manner entirely corresponding and analogous to said features (i) and (ii) relating to said first and second configurations as claimed. The further inclusion of a "range limiter" is not seen as necessary by the Board, for such a "range limiter" is merely disclosed in EP-B as representing an option (see wording "a range limiter 343 can be engaged", paragraph [0023], line 20 in EP-B or corresponding identical passages in WO-A). Moreover, even assuming it is not disclosed as an option,

nonetheless it is not inextricably linked to said features (iii), for the skilled person could achieve the same result e.g. by a corresponding inherent configuration of the control system.

Likewise, the Board does not see that omitting explicit exclusion of a simultaneous operation of the "first motor" and "second motor" introduces subject-matter not disclosed in the application as filed. Indeed, it can be implicitly inferred from the wording of said features (i) to (iii) in claim 1 that the respective "other" motor is evidently inactive. Additionally, any construction of claim 1 alleging the contrary would be at odds with Article 84 EPC, which requires that the claim be supported by the description.

6. For submissions related to arguments concerning lack of inventive step of the subject-matter of claim 1 of auxiliary request II the Appellant-Opponent referred at the oral proceedings to its statement of grounds of appeal (see page 1), in particular to the statement reciting "the Opponent maintains all the objections he raised during opposition proceedings, both those raised in the written procedure and during the oral proceedings". The Board considers that this statement does not comply with the requirements of Article 12(2) RPBR (Rules of Procedure of the Boards of Appeal), which states that the grounds of appeal "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". Thus the grounds of opposition based on article 100(a) EPC (in conjunction with Article 56 EPC) concerning claim 1 of auxiliary request II were not substantiated in the statement of grounds of appeal, contrary to Article 12(2) RPBA and to Article 108 EPC. Also, at the oral proceedings the

Appellant-Opponent declared that it did also not intend to submit any further arguments going beyond those presented before the Opposition Division, thus giving no reason why the Opposition Division erred in its decision on the question of inventive step. It ensues that the question of admission of late filed amendments to a party's case, as implied by Article 13(1), (3) RPBA does not arise here. It is concluded that no issues related to Article 100(a) (in conjunction with Article 56 EPC) were substantiated and need to be considered by the Board in relation to auxiliary request II, thus confirming the impugned decision in that respect.

## Order

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

The appeals are dismissed.

The Registrar:

The Chairman:



A. Vottner

G. Pricolo

Decision electronically authenticated