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**Datasheet for the decision  
of 6 December 2019**

**Case Number:** T 3023/18 - 3.3.09  
**Application Number:** 13710146.5  
**Publication Number:** 2831152  
**IPC:** C08J3/00, C08L23/12, H01B3/44,  
B29C47/88  
**Language of the proceedings:** EN

**Title of invention:**

PROCESS FOR PRODUCING POLYPROPYLENE BLENDS FOR THERMOPLASTIC  
INSULATION

**Patent Proprietor:**

Dow Global Technologies LLC  
University Of Southampton  
Gnosys Global Ltd

**Opponent:**

Borealis AG

**Headword:**

Entitlement to reduced appeal fee

**Relevant legal provisions:**

EPC Art. 108  
EPC R. 6(4)  
GebO Art. 8, 12

**Keyword:**

Payment of reduced appeal fee - Appeal treated as not filed  
Admissibility of appeal

**Decisions cited:**

G 0002/97, G 0001/18, T 0152/82, T 0170/83, T 0905/90,  
J 0027/92, T 0290/92, T 0806/99, T 0642/12, T 1222/19

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 3023/18 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 6 December 2019**

**Appellant:** Borealis AG  
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**Respondent:** University Of Southampton  
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**Respondent:** Gnosys Global Ltd  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 8 October 2018  
rejecting the opposition filed against European**

patent No. 2831152 pursuant to Article 101(2)  
EPC.

**Composition of the Board:**

**Chairman**            D. Rogers  
**Members:**            F. Rinaldi  
                             M. Ansorge

## **Summary of Facts and Submissions**

- I. The opponent, Borealis AG, (hereafter "appellant"), appeals against the opposition division's decision to reject its opposition against the patent in suit.
- II. The Notice of Appeal was filed, and the reduced appeal fee was paid, on the last day for doing so, 18 December 2018. The Notice of Appeal was filed at 16:22 hours on 18 December 2018.
- III. The appellant paid the full appeal fee on 8 February 2019.
- IV. Under cover of a letter dated 7 March 2019 the Board sent its first communication to the parties in this case. In this communication the Board pointed out that the appellant had paid the reduced fee for appeal, but had not filed the declaration necessary for this reduction. The Board invited the appellant to file such a declaration.
- V. The appellant replied to this first communication in a letter dated 16 May 2019. The appellant confirmed that it was not entitled to a reduced fee and that it would not be filing a declaration. The appellant argued that it was evident from the Notice of Appeal that the full fee was due because no declaration of entitlement to a reduced fee was contained therein, hence the EPO should have deducted the full appeal fee.
- VI. The appellant referred to case T0152/82 as authority for the proposition that a debit order must be carried out, notwithstanding incorrect information given in it, if the intention of the person giving the order is clear. From this the appellant argued that it was clear that its debit order contained an obvious error and that the intention

was to pay the appeal fee at the higher rate for a large entity. The intention in the Notice of Appeal was clear, it was to pay the valid amount of the appeal fee. The appellant also argued that it was known to the EPO that the appellant was a large entity.

VII. The appellant further argued that the difference between the full and reduced fee is "small", being only 20%, and cited case law where a 20% underpayment was considered small and thus rectifiable (J0027/92 and T0290/92).

VIII. The Board sent a communication to the parties summoning them to oral proceedings and indicating that the sole issue to be discussed and decided upon at the oral proceedings would be the deemed non-filing of the opponent-appellant's notice of appeal.

IX. The EPO issued a "Notice dated 18 December 2017 concerning the reduced fee for appeal (Article 108 EPC) for an appeal filed by a natural person or an entity referred to in Rule 6(4) EPC" (hereafter the "Notice"). This concerns the modalities for an appellant to file a declaration of entitlement to the reduced appeal fee.

## **Reasons for the Decision**

*The intention of the appellant to pay the full fee was clear from the Notice of Appeal*

1. The appellant principally relies upon case T0152/82 as support for its argument that its intention to pay the correct appeal fee was clear.
2. T0152/82 concerns the payment of the wrong amount of an appeal fee, when at the time of payment the appeal fee had just been increased. The appellant in T0152/82 became

aware of this after the time limit for paying the appeal fee had passed and paid the difference thereafter. The board considered the intention expressed in the debit order: this intention was taken to be that the appellant wished the valid amount of the appeal fee to be debited. The board found that the debit order could therefore be carried out in the clearly intended manner by the EPO itself without any further enquiry being necessary.

3. The appellant argues that T0152/82, T 0170/83 and T0806/99 confirm that establishing that a statement of intent is clear is an interpretative process. Under certain circumstances the stage reached in the proceedings and the content of the file might need to be taken into consideration. According to the appellant, in the present case nothing in the file indicates that the appellant intended to take advantage of the reduced appeal fee. The appellant argues that as it did not file a declaration of entitlement, which according to paragraph 4 of the Notice should be filed at the same time as the Notice of Appeal, it was clearly not its intention to take advantage of the reduced appeal fee. In addition Borealis AG is an appellant and patentee familiar to the EPO and is a known large entity, information which in any case is clear from a simple search of the appellant's website.
  
4. The appellant argues that the implying of an intention to pay a reduced fee can be countered in this case by the fact that the EPO knows that the appellant has several hundred patents being prosecuted at the EPO and that the appellant is a large entity and hence not entitled to pay the reduced fee. The appellant states that in this case an EPO formalities officer who was familiar with the appellant telephoned the appellant sometime in January 2019 and stated that the reduced fee was not appropriate.

5. The Board notes that all the cases cited by the appellant concern situations where there was a single correct fee that was to be paid. In such situations the intention of a party is relatively easy to establish as this intention can only have a single object, the one and only correct fee. In the present case there are two different appeal fees that a party can pay, both are correct in that they are both fees that the EPO is expecting to be paid. Which fee a party should pay depends upon the internal details of the party, in particular its financial strength and number of employees. Thus if a party pays the reduced fee, then the intention of that party is to take advantage of the reduced fee possibility.
  
6. The appellant did not file the declaration necessary for the payment of the reduced appeal fee. The non-filing of such a declaration is not evidence of a clear intention by the appellant to pay the full appeal fee: it could also be a mistake, as well as an indication that the appellant does not consider itself entitled to pay the reduced fee. The Board notes that it is the practice of the Boards of Appeal to accept such declarations at any time during the appeal proceedings (see T1222/19, point III). In the present case, in its communication dated 7 March 2019, the board had invited the appellant to file such a declaration.
  
7. Rule 6(6) EPC makes the appellant responsible for assessing whether it is eligible for the reduced fee. This assessment is not straightforward. It is carried out upon the basis of Commission recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises as published in the Official Journal of the European Union L 124, p. 36 of 20 May 2003.



8. The onus is thus clearly with the appellant to assess its own entitlement to the reduced appeal fee. The EPO has no duty to carry out any ex officio enquiry to determine an appellant's entitlement to pay the reduced appeal fee.
9. In the light of the above, the Board does not accept that it is possible to establish that the appellant's intention was to pay the full appeal fee.
10. The protection of legitimate expectations requires the EPO to warn a party of any loss of rights if such a warning can be expected in all good faith. This presupposes that the deficiency can be readily identified by the EPO within the normal handling of the case at the relevant stage of the proceedings and that the user is in a position to correct it within the time limit (see G0002/97, OJ EPO 1999, 123, Reasons 4.1). The appellant explicitly stated in the oral proceedings before the Board that it did not rely upon the principle of the protection of legitimate expectations in this case. This was because the appellant, by paying the reduced appeal fee on the last day for doing so, was not in a position to pay the full fee within the time limit for doing so.

*Is the underpayment a small amount?*

11. Under Article 8, fourth sentence, RFees, the EPO may overlook an insufficient amount paid without prejudice to the rights of the person making the payment, if the following two requirements are met:
  - a. the amount lacking must be "small"; and
  - b. the legal consequence of overlooking the amount lacking must be "considered justified".

12. The appellant referred to decisions J0027/92 and T0290/92 where a missing 20% of the fee to be paid was regarded as a "small amount" within the meaning of the above provision. The amount lacking in the present case is about 17% of the due amount and the appellant has requested that the board overlooks the amount lacking under Article 8, fourth sentence, RFees.
13. As to the first requirement, the Board notes that "small" is a vague term that needs to be interpreted.
14. In contrast to the above decisions cited by the appellant, the boards held in decisions T0905/90, OJ EPO 1994, 306, point 10, and T0642/12, point 20, that "small amounts" is rather to be read as "very small", "slight", "trifling", "insignificant" or "negligible" underpayments, e.g. differences caused by unexpected bank transfer costs, currency exchange rates and the like. Consequently a shortfall of 20% was not regarded as "small" within the meaning of the above Article. It follows that a literal interpretation of the wording does not lead to an unambiguous result.
15. A teleological interpretation of Article 8, fourth sentence, RFees, sheds light on the correct understanding of this article. In this context, it must be borne in mind that Article 8, fourth sentence, RFees, does not provide for the small amount lacking to be paid at a later date. In other words, "overlooking" within the meaning of the said provision entails that the EPO accepts the payment of an insufficient amount without the user being obliged to make good the shortfall. This procedure clearly aims at avoiding unnecessary bureaucracy and serves the purpose of procedural economy. It is only compatible with this aim if "small amounts" under Article 8, fourth sentence, RFees,

are regarded as "insignificant", i.e. amounts not exceeding a few euros.

16. This result is confirmed by the travaux préparatoires where it is stated with regard to Article 9(1) RFees 1973 (the predecessor to Article 8 RFees) that "[f]or reasons of economy, however, the European Patent Office may, in the payer's favour, disregard minor amounts owing." (see document BR 93 e/71, point II6. "Miscellaneous Provisions", p. 6).
17. This result is further corroborated by Article 12, first sentence, RFees, which is the complementary provision in case of a fee overpayment. According to this provision, the excess is not refunded if the amount is "insignificant". At present, the President of the EPO has fixed the insignificant amount referred to in Article 12 RFees at EUR 15 (see Article 12, second sentence, RFees in conjunction with Article 1 of the decision of the President of the EPO dated 27 March 2018 implementing Article 12 RFees, OJ EPO 2018, A37). The procedure laid down in Article 12, first sentence, RFees, is analogous to the procedure set out in Article 8, fourth sentence, RFees, as it also aims at avoiding unnecessary bureaucracy and serving the purpose of procedural economy. This is confirmed by the travaux préparatoires where the following is stated with regard to Article 10c RFees 1973 (the predecessor to Article 12 RFees) : "To avoid unnecessary work for both the EPO and the parties to the proceedings it is considered sensible not to refund insignificant amounts and to give this a legal basis in the Rules relating to Fees." (see document CA/52/90, p. 72).
18. Consequently, the Board does not consider the amount lacking in the present case to be "small" within the meaning of Article 8, fourth sentence, RFees.

19. In addition to the above considerations, the Board also notes that with Article 2(1), item 11 of the Rules relating to Fees, the legislator introduced a reduced fee for certain categories of appellant. It seems reasonable to assume that the legislator saw this reduction as being of genuine financial assistance to the listed categories of persons, and not as a merely symbolic reduction. Thus the Board does not consider, for this reason as well, the shortfall to be "small".

20. Given the above finding, there is no necessity for the Board to examine the further requirement under Article 8, fourth sentence, RFees, that overlooking the amount lacking must be considered justified.

21. To conclude, the Board considers that the appeal is to be deemed not filed.

*Reimbursement of appeal fee*

22. Following the opinion of the Enlarged Board of Appeal G 0001/18, Headnote 1 a), an appeal is deemed not to have been filed when:

The Notice of Appeal is filed on time; and  
The appeal fee is paid after the expiry of the two month time limit of Article 108 EPC, first sentence.

23. Consequently both of the appeal fees (the reduced one paid on 18 December 2018 and the full one paid on 8 February 2019) are to be reimbursed. This is ordered ex officio (see G0001/18, Headnote 2).

**Order**

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

1. The appeal is deemed not to have been filed.
2. The appeal fees are reimbursed.

The Registrar:

The Chairman:



D. Magliano

D. Rogers

Decision electronically authenticated