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Please find enclosed the headnote of the decision

*T905190 - 3.3.1*

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- (A)  Publication in OJ  
(B)  To Chairmen and Members  
(C)  To Chairmen

**D E C I S I O N**  
**of 13 November 1992**

**Case Number:** T 0905/90 - 3.3.1

**Application Number:** 84301975.3

**Publication Number:** 0125766

**IPC:** C07F 9/38

**Language of the proceedings:** EN

**Title of invention:**

Phosphonates

**Patentee:**

Albright & Wilson Limited

**Opponent:**

Monsanto Europe SA/NV

**Headword:**

Fee-reduction/ALBRIGHT

**Relevant legal norms:**

EPC Art. 14(4), 99(1), 125

EPC R. 6(3)

Rules Relating to Fees Art. 9(1)

**Keyword:**

"Fee reduction - inessential parts of proceedings in non-official language"

"Fee reduction - meaning 'small' in Rules Relating to Fees"

"Goodfaith - relevance of general conduct of EPO"

"Goodfaith - Need of timely announcement by EPO of changes in practice"

"Goodfaith - EPO practice relaxed"

"Goodfaith - appellant not mislead, opposition inadmissible"

"Equality of treatment"

**Decisions cited:**

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File Number: T 905/90 - 3.3.1

Application No.: 84 301 975.3

Publication No.: 0 125 766

Title of invention: Phosponates

Classification: C07F 9/38

D E C I S I O N  
of 13 November 1992

Applicant: Albright & Wilson Limited

Opponent: Monsanto Europe SA/NV

Headword: Fee-reduction/ALBRIGHT

EPC Articles 14(4), 99(1), 125, Rule 6(3)  
Article 9(1) Rules Relating to Fees

Keyword: "Fee reduction - inessential parts of proceedings in non-official language" - "Fee reduction - meaning 'small' in Rules Relating to Fees" - "Goodfaith - Relevance of general conduct of EPO" - "Goodfaith - Need of timely announcement by EPO of changes in practice" - "Goodfaith - EPO practice relaxed" - "Goodfaith - appellant not mislead, opposition inadmissible" - "Equality of treatment"

Headnote follows

**Headnote:**

- I. Rule 6(3) EPC must be narrowly construed so as to preclude fee reductions in cases where only inessential parts of the first act of the relevant proceedings had been filed in an authorised non-official language (cf. point 3, first paragraph, of the Reasons for the Decision).
- II. The essential nature of the first act in the relevant proceedings is the decisive criterion for entitlement to fee reduction under Rule 6(3) EPC, and not the linguistic sensitivity of such an act (G 6/91, OJ EPO 1992, 491 followed; cf. point 3, second paragraph, of the Reasons for the Decision).

Neither a request for fee reduction, nor a notification that only a reduced fee had been paid, is an essential part of the first act of the relevant proceedings (cf. point 4, of the Reasons for the Decision).

- III. Rule 6(3) EPC does not permit the advance withholding by a party of the amount provided for by Article 12(1) of the Rules Relating to Fees (cf. point 6, last paragraph, and 7 of the Reasons for the Decision).
- IV. A 20% shortfall in any relevant fee, being the amount specified by Article 12(1) of the Rules Relating to Fees is not "small" within the meaning of Article 9(1) of these Rules (deviation from T 290/90, OJ EPO 1992, 368; cf. point 10 of the Reasons for the Decision).
- V. The legitimate expectation of parties, as to the future conduct of organs of the EPO can arise not only from express statements made by duly authorised officials acting in a particular case, or from official EPO announcements, but also from a settled relevant EPO administrative practice (cf. point 5 of the Reasons for the Decision).

All changes in these practices should be officially announced at the earliest possible moment in order to avoid misleading the parties (cf. point 7 of the Reasons for the Decision).



Case Number : T 905/90 - 3.3.1

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.1  
of 13 November 1992

**Appellant :** Monsanto Europe SA/NV  
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**Decision under appeal :** Decision of the Opposition Division of the  
European Patent Office pursuant to Rule 69(2) EPC  
dated 19 October 1990 deeming the opposition  
against European patent No. 125 766 not to have  
been filed under Article 99(1) EPC.

**Composition of the Board :**

**Chairman :** K. Jahn  
**Members :** J. Stephens-Ofner  
P. Krasa

## Summary of Facts and Submissions

- I. This appeal lies against a decision of the Opposition Division, dated 19 October 1990, deeming an opposition, launched by Monsanto Europe SA/NV, a Belgian company, against European patent No. 0 125 766 in the name of Albright and Wilson Limited, a British company, not to have been filed under Article 99(1) EPC.
  
- II. The notice of opposition received 16 June 1990 was filed on EPO Form 2300 which had been completed entirely in English, except for one section headed "Other Requests", which was drafted in Dutch. This section stated that a part of the opposition fee had been withheld pursuant to Rule 6(3) EPC. A translation of this section into the official language of the proceedings, i.e. English, was not provided. The Statement of Grounds of Opposition was however drafted entirely in English.
  
- III. A communication was sent to the Opponent on 7 August 1990, informing him that the opposition fee had not been paid in full, and also that the requirements of Rule 6(3) EPC concerning fee reductions had not been met. In answer to this communication, the Opponent requested that the Opposition Division provide the legal basis for its comments. He also paid the missing amount by debit order received by the EPO on 17 August 1990.
  
- IV. The legal basis for the above communication was provided on 24 August 1990, in the form of "legal advice 5271" and "legal advice 5003", both issued during 1989. Legal advice 5003 indicated that the EPO had reached the conclusion some time earlier (cf. study BG 3748) that the practice of their allowing fee reductions under Rule 6(3) on the

sole basis that the requests for such fee reductions were made in an authorised non-official language (NOL), should "no longer be followed".

- V. The Opponent maintained that he was legally entitled to a fee reduction, and requested (Rule 69(2) EPC) that the Opposition Division issue a decision on the matter.
- VI. That decision was duly issued, and was almost entirely based upon the legal consequences of a finding of fact by the Opposition Division that an indication (in NOL), contained in the notice of opposition, that a certain amount of the opposition fee had been withheld, did not in itself constitute a significant part of the notice of opposition in the sense of being linguistically sensitive and thus requiring translation.
- VII. A Notice of Appeal was filed on 6 November 1990. The Statement of Grounds was filed on 15 February 1991. By communication dated 8 August 1991 the Opponent was informed that the oral proceeding that had been requested would be delayed, pending a decision by the Enlarged Board in a similar case. That case, G 6/91, was duly rendered on 6 March 1992. Shortly before the oral proceedings in the appeal, scheduled for 13 November 1992, the Appellant (Opponent) filed a number of motions which, in effect, amounted to a reformulation of the arguments submitted by him in his Statement of Grounds of Appeal, save an additional ground, concerning the competence of the Formalities Officer, who had acted on behalf of the Opposition Division, to issue an appealable decision in this matter under Rule 69(2) EPC. This particular limb of argument was not, however, pursued by the Appellant in the course of oral proceedings.

VIII. In addition to these motions, the Appellant also submitted fairly extensive written evidence relating to the alleged practice of the EPO of allowing fee reductions under Rule 6(3) EPC in cases where only linguistically insensitive (and thus insignificant) parts of proceedings had been filed in NOL. He also submitted further extensive notes and elaborations on his pleadings.

IX. In essence, the Appellant's arguments as set out in all the written material provided by him, and as subsequently submitted by him during oral proceedings, boil down to four distinct but interrelated propositions:

- (a) that Rule 6.3 EPC and Article 14(4) EPC needed to be broadly construed, so as to allow fee reductions (in the amount specified by Article 12(1) of the Rules Relating to Fees) in cases where only linguistically insignificant or insubstantial items in the first essential act in the relevant proceedings, here the opposition, had been filed in NOL, and even where all the remaining essential items were filed entirely in the language of the proceedings;
- (b) that the filing of the notice of opposition amounted to the giving of a clear and unequivocal indication of an intention to enter the opposition, and that that indication, coupled with an unambiguous identification of the Opponent's deposit account, was tantamount to a clear and unambiguous instruction to the EPO to debit that account with the full fee even in the case where a specific instruction to pay only a reduced fee had been given to them;
- (c) that the underpayment by 20% of the full fee, (the amount provided for by Article 12(1) of the Rules Relating to Fees), was merely a small or



insignificant amount within the meaning of Article 9(1) of those Rules as had been held in appeal decision, T 290/90, dated 9 October 1990 (OJ EPO 1992, 368);

- (d) that, regardless of the legal interpretation of Rule 6(3) and Article 14(4) EPC, the Appellant had been misled by the leniency shown by the EPO in allowing fee reductions under that Rule in cases where only linguistically insensitive or inessential parts or items of the relevant proceedings had been filed in NOL, the other parts having been filed in the language of the proceedings. This lenient practice had aroused his legitimate expectation that the particular form and manner in which the fee reduction had been effected in the present case would also be held legitimate under Rule 6(3) EPC. In the premises, the strict legal consequences of non-deemed filing under Article 99(1) EPC, should not follow.

Lastly, he also argued that a broad legal interpretation of Rule 6(3) EPC was appropriate, in the light of the recent decision of the Enlarged Board (G 2/91, OJ EPO 1992, 206), which allowed a fee reduction based on the filing in NOL of only a linguistically insensitive part of the relevant proceedings, namely the Notice of Appeal.

- X. The Appellant requested that the decision under appeal be set aside, and that the notice of opposition be declared admissible under Article 99(1) EPC.

In a letter dated 20 March 1991, the Respondent informed the Board that he did not wish to comment on the Appellant's submissions but requested that the decision under appeal be upheld. He was, accordingly, not

represented at the oral proceedings at the conclusion of which the Board's decision to dismiss the appeal was announced.

### Reasons for the Decision

1. The appeal is admissible.
  
2. The Appellant's first principal argument concerns the interpretation of Rule 6(3) EPC, in conjunction with Article 14(4) EPC. That Rule provides that: "a reduction in the filing fee, examination fee, opposition fee or appeal fee shall be allowed an Applicant, Proprietor or Opponent as the case may be, who availed himself of the options provided in Article 14, paragraphs 2 and 4" (emphasis added). Those options relate to the filing of patent applications (Article 14(2)) and the filing of certain documents which are required to be submitted within a time limit (Article 14(4)). A broad construction of the Rule in the above context would legitimise fee reductions (in the amount specifically provided for by Article 12(1) of the Rules Relating to Fees), in cases where the original document in question, filed in an authorised non-official language ("NOL"), was not an essential item in the relevant proceedings, or was not an essential item in the first act in those proceedings. Conversely, the narrowest construction of the above Rule would limit the scope of fee reductions to cases where an original document filed in NOL was an essential item in the first act in the relevant proceedings. It should be recalled that in the present case the original "document" that was filed in NOL, without the filing of any simultaneous or subsequent translation, was an indication on EPO Form 2300.2 under the heading "Other Requests", that the full opposition fee under Article 99(1) EPC had not been paid, by virtue of the provisions of Rule 6(3) EPC.

3. In its recently published decision, G 6/91 (OJ EPO 1992, 491), the Enlarged Board had had to deal with a related problem concerning the chronological order in which original documents drafted in NOL, and their translations, needed to be filed with the EPO. It had, apparently, been the practice for some time of the EPO to allow fee reductions under Rule 6(3) EPC regardless of that chronological order. The Enlarged Board, held inter alia, after confirming and re-stating earlier jurisprudence on this issue which was, in any case, not contested (see paragraph XII of the Summary of Proceedings) that fee reductions pursuant to Rule 6(3) EPC were allowable only if there had been filed in NOL an essential item of the first act of filing, examination or appeal proceedings together with a translation no earlier than simultaneously. The reason for specifying this chronological order was that translation were recognisable as such only if the original was available when they were received. Although the case before the Enlarged Board concerned appeal proceedings, and in particular the further question whether fee reductions were admissible were a Notice of Appeal was the only document that had been filed in NOL, and the Grounds of Appeal were filed in the language of the proceedings, it is quite clear that its reasoning also applies to other proceedings, including opposition proceedings before the EPO.

The Appellant in the course of his extensive and lucid argument submitted that whilst Rule 6(3) EPC was originally designed to compensate parties/their representatives whose principal place of business/mother tongue was neither French, English or German, for the actual handicap of having to provide a translation of a document of substance, that is to say one that was

linguistically sensitive, and a translation of which was therefore of crucial importance to the outcome of relevant proceedings, the decision in G 6/91 extended the field of application of the above Rule to linguistically insensitive documents, such as a Notice of Appeal, and therefore, by implication, to Notices of Opposition as well. In this connection, the Board observes that the finding of the Enlarged Board was based on the accepted earlier jurisprudence that a fee reduction under the Rule was allowable only if an essential item in the first act of relevant proceedings had been filed in NOL together with a simultaneous or subsequent translation of it. When repeatedly asked by the Board, the Appellant conceded that whilst linguistic sensitivity was not a necessary precondition to legitimate fee reduction, the essential nature of the relevant document filed in NOL was. He nonetheless maintained that only a minimal use of NOL qualified for fee reduction, such, for example as the use of NOL in filing a Notice of Appeal (G 6/91), or a Notice of Opposition (or any part thereof), as had been done in the present case.

In the Board's judgment the law, as stated by the Enlarged Board in the above case in confirmation of the earlier jurisprudence, is entirely clear. To qualify for fee reduction what needs to be filed in NOL, with the appropriately timed translation, is a document which is an essential item in the first act in the relevant proceedings. A Notice of Appeal, although linguistically insensitive, is clearly an essential item to appeal proceedings, whereas a simple notification, whether it be in a covering letter or, as in the present case, embodied in a Notice of Opposition filed entirely in English under a space provided for other requests, to the effect that 20% of the relevant fee had been withheld pursuant to Rule 6(3) EPC, cannot by any stretch of the imagination

be regarded as an essential item in the relevant proceedings, here the opposition.

4. It follows, and the Board so finds, that the notification in Dutch contained in the Notice of Opposition, otherwise filed entirely in English, advising the EPO that the full fee under Article 99(1) EPC had not been paid, was not an essential item of (and not in) the first act in the opposition proceedings, and that, accordingly under this heading of the Appellant's argument, his withholding of 20% of the full fee was not legitimate under Rule 6(3) EPC. It also follows that the Opposition Division was right in its decision on this issue. The question still remains, however, whether they were also right in holding that this automatically resulted in the opposition being deemed not to exist, pursuant to Article 99(1) EPC. In this connection, the Appellant relied on three additional lines of argument, as set out in his Statement of Grounds of Appeal, but abandoned the fourth one relating to the absence from the wording of Article 99(1) EPC of any requirement that the opposition fee had to be paid "in full".
  
5. The most important of these additional arguments is the one concerning bona fides or good faith between the parties and the EPO. The principle of procedural law generally recognised in the Contracting States (Article 125 EPC) provides that actions (or omissions) by an institution (here the EPO) must not violate the legitimate expectations of those concerned: an expectation is not legitimate unless it is reasonable. In decisions such as J 3/87 (MEMTECH/Membranes) OJ EPO 1989, 3; T 14/89 (UHDE/Re-establishment) OJ EPO 1990, 432; J 10/84 (TEXAS/Amendments) OJ EPO 1985, 71; and more recently in G 5/88 (MEDTRONIC/Administrative agreement) OJ EPO 1991, 137, the applicability of this general principle of

procedural law to proceedings under the EPC has been repeatedly confirmed. As was stated by the Enlarged Board in the above-cited case: "One of the general principles of law which is well established in European community law which is generally recognised among the Contracting States and within the jurisprudence of the Boards of Appeal is the protection of legitimate expectations ... in the application of this principle to procedure before the EPO, measures taken by the EPO should not violate the reasonable expectations of parties to such proceedings." Up till now the decided cases show the source of such legitimate expectations to be confined to two categories of information: the first made by organs of the EPO within the framework of an individual case, either in the form of a specific communication or by other means, and the second, information contained in an official statement of general applicability and published in the Official Journal, as was the case in G 5/88. In the present case, the communication that was sent to the Appellant on 24 August 1990 was not at all misleading, but was given far too late to be acted upon. The legal advice to which it referred and incorporated did, however, provide internal evidence of a particular practice of the EPO which, so the advice stated, would "no longer be followed". It also stands established that at the relevant time there was no official statement of general applicability, such as for example guidelines, indicating any departure in practice from the clear jurisprudence relating to Rule 6(3) EPC. However, in the Board's judgment, specific communications or other actions within the framework of particular proceedings, and official statements such as guidelines, are not the only sources of legitimate expectations which can also properly arise from the actual general conduct or established practice of organs of the EPO.

6. The Appellant contends that there had developed in the EPO, over the years, a settled practice of leniency in regard to fee reductions which, regardless of the clarity or obscurity of the jurisprudence relating to the scope of Rule 6(3) EPC, had misled him into a course of conduct (withholding the fee in advance, notifying the withholding in Dutch in the space provided for other requests in the Notice of Opposition otherwise written in English, and not providing a translation), that had resulted in his opposition being held inadmissible under Article 99(1) EPC.

Clearly, in order to succeed under this heading, the Board needs to find on the basis of the evidence submitted to it, as well as upon the basis of any investigation it might have undertaken pursuant to Article 114(1) EPC, that there was indeed a settled and established practice of leniency at the relevant time, and that the Appellant had been led by this practice to act the way that he did. In this connection, it is self-evident that isolated incidences of EPO practice will not suffice: what needs to be proved beyond the balance of probability is either a settled practice or a clearly discernible trend towards it. The greater the degree of uncertainty in this practice, or in any trend leading to it, the more pressing the need, in the Board's opinion, for timely clarification by an authoritative source; in other words for an enquiry addressed to the EPO.

Leaving aside the internal evidence contained in the above-mentioned legal advice, there was written evidence submitted to the Board by the Appellant on 11 November 1992, in the form of a letter written on 10 July 1984 in Dutch, with a translation filed on the same date in English, in which Unilever N.V. (not a party to these

proceedings) requested a fee refund under Article 14(4) and Rule 6(3) EPC. The additional item of relevant written evidence adduced by the Appellant was a Notice of Opposition, dated 7 October 1987, filed by the patent department of DSM, and a letter dated 7 February 1991 from the above patent department, addressed to the Appellant, explaining the background of this Notice of Opposition and also recounting the relevant EPO practice. In this letter DSM explained that the first page (drafted in Dutch) of the Notice of Opposition requested the deduction of the full opposition fee but that nonetheless a sum of DEM 112.00 was "refundable" because the opposition fee had in fact been overpaid. DSM also stated that its deposit account was subsequently credited and that since 27 January 1988, DSM had not changed its method of filing such requests for refunds but that "no longer any refunds of (overpaid) opposition fees have been received". They also stated that "your remaining question, if Octrooibureau would have any experience of filing an opposition (and paying immediately a reduced fee) cannot be answered in the affirmative. We are not aware of any precedent with any of our colleagues at other companies either". The above letter also stated that in the period between August 1984 and January 1988, at least 75 refunds had been received, the last of these having been in January 1988.

Taken as a whole, the above evidence clearly establishes the existence not only of a trend towards leniency but also of a settled and established practice during the above-mentioned period of allowing fee refunds in cases where

(i) the full fee had been paid,



- (ii) a covering letter written in NOL, accompanied by a translation into the relevant official EPO language, requested a refund pursuant to Rule 6(3) EPC.

In the case of the Unilever evidence, this request was contained in a covering letter (written in Dutch), whereas the single example of DSM practice merely referred to a deduction of the opposition fee (in Dutch) within Notice of Opposition. Additional evidence, submitted by the Appellant was in the form of a request by AGFA for the grant of a European patent (EPO Form 100110RG) containing, in Dutch, a request for the refund of the reduction under Article 14(4) and Rule 6(3) EPC. Although the AGFA document does not indicate that any simultaneous or subsequent translation of this request for a refund had been filed, this does not affect the Board's finding in relation to the overall impact of the evidence relating to the EPO's practice between 1984 and 1988, namely to make refunds in cases where an inessential item in relevant proceedings had been filed in NOL (contrary to the relevant jurisprudence).

The next question that falls to be decided is whether the Appellant here had followed this practice as a result of having been misled by it, or whether he had followed some other practice that he surmised might also prove acceptable to the increasingly lenient EPO. In the course of oral proceedings, the Board put it to the Appellant that a party who was confused as a result of unclear practice should seek clarification of that practice, and not jump to conclusions. In particular, it was pointed out to the Appellant that the practice adopted by him differed in at least two significant respects from that which he alleged had become EPO practice between 1984 and 1988, firstly, that there was no translation of the passage drafted in NOL, and secondly, that instead of paying in

full and requesting a refund the amount provided for by Article 12(1) of the Rules Relating to Fees was withheld at source. The Appellant admitted, as he had to, that this was indeed the case, but went on to maintain that the leniency of the EPO practice was such as to justify his assumption that on this occasion too a fee reduction would be permitted.

7. In the Board's judgment, the adoption by the Appellant of the lenient practice of the EPO would clearly justify the application of the principle of good faith and the reversal of the Opposition Division's finding of inadmissibility under Article 99(1) EPC. It is, however, abundantly clear that the Appellant did not merely adopt the practice, but extended or stretched it to his advantage, i.e. paid only the reduced amount, and did not bother to file a translation either. It is clearly inappropriate that the principle of good faith should be used by parties to extrapolate or to extend changes in EPO practice, and if, as was apparently not the case here, that practice was thought to be unclear, clarification of it from an authoritative source, namely the EPO should have been sought. Mere reliance upon the experience of other users of the EPO is not, in the Board's view, sufficient to discharge the burden upon a party who seeks to take advantage of the above principle. In any case, and upon the evidence provided by the Appellant himself, the EPO's practice had grown to be clear enough by 1988, and whilst a timely announcement by the EPO of any future tightening of it would have been clearly desirable, the absence of such announcement cannot justify the assumption that a settled practice, lenient in a number of respects, would prove to contain further elements of flexibility or leniency. Accordingly the Board finds that the Appellant did not follow the relevant practice, and can therefore not be held to have been misled by it. Accordingly, the

Appellant's argument and the submission under this heading must also be rejected.

8. The third principal argument led by the Appellant concerned the judicial interpretation of the qualification or adjective "small" in Article 9(1) of the Rules Relating to Fees. The Appellant's submission was that the shortfall of 20% in the opposition fee, a specific reduction provided by Article 12(1) of the Rules Relating to Fees, could be regarded as small within the meaning of the above Article, largely, but not exclusively, because the actual quantum (DEM 112.00) was small in itself or, in the alternative, because the amount was very small compared to the "dire consequences" of not paying it (here the loss of the opposition).

Article 9(1) of the Rules Relating to Fees provides "... it may also, where this is considered justified overlook any small amounts lacking, without prejudice to the rights of the person making the payment". The German version of the Article is of the same effect but instead of referring to justification states "... wenn dies der Billigkeit entspricht, geringfügige Fehlbeträge ... unberücksichtigt lassen". The French version, too, refers to "si cela paraît justifié, l'office peut ne pas tenir ...". This aspect of Billigkeit or justification will be dealt with later in this judgment.

9. The question of what was meant by small within the above Article had also been referred to the Enlarged Board in the above-cited case, but in view of its finding on the question of the language of the Notice of Appeal, as compared to that of the Statement of Grounds of Appeal, there was no need for it to decide this issue, and it accordingly did not do so, leaving it open for this Board to come to its own conclusion on the matter. The Appellant

strongly relied on decision T 290/90 "Fee reduction/SERVIO PLASTICA" OJ EPO 1992, 368,. The Board held in that case (ratio decidendi) that the fact that the reduced opposition fee had been paid on purpose was not necessarily a decisive point in justifying a refusal to overlook the amount that was lacking so that while it was necessary to decide whether a party's submission concerning a reduction in the opposition fee was correct, it was inappropriate to punish him merely for making that submission (cf. paragraph 4(a) of the Reasons). The Board then went on to find, without however giving any detailed reasons for this finding, that a 20% reduction of the opposition fee could properly be regarded as small for the purposes of Article 9(1) of the Rules Relating to Fees.

10. This matter clearly cannot be decided in an absolute sense. Nor is the ability to pay a relevant factor, for if it were, different standards would need to be applied to parties having different financial means, in contravention of the generally accepted legal principle of equality of treatment between all parties. Nor can there be much substance in the submission that smallness should be determined by, or be at least a function of, the consequence of any failure to pay the full amount, for if the legal and attendant financial consequences of failure to pay the full amount greatly outweighed the quantum of the missing amount then most if not all such shortfalls would qualify as small. In the present case, for example, if only DEM 1.00 had been paid leaving DEM 559.00 outstanding, the consequences of not paying DEM 559.00 would still be the same as those of not paying DEM 112.00. Such an interpretation of Article 9(1) clearly leads to absurd consequences and cannot, therefore, be correct. The Board finds confirmation of its view in the fact that EPO fees are, in most cases, extremely small compared with the consequences (legal and pecuniary) of not paying them in

full. Since neither ability to pay nor the pecuniary consequences of default in full payment afford a reliable guide to the interpretation of the above Article, the Board finds that the meaning of smallness in this context can best be determined by comparing the amount of shortfall with the amount of the full fee. When viewed in this light, and regardless of its absolute quantity or its quantity in relation of the ability to pay, or the consequences of not paying it, a difference of 20% clearly cannot, on purely arithmetical grounds, be regarded as a small, let alone an insignificant or trifling one. It is however precisely with such very small or trifling (insignificant) amounts that in the Board's finding Article 9(1) of the Rules Relating to Fees was designed to deal with so as to prevent a loss of rights (where this is justified) where an inadvertent error of some kind had led to a slight, small insignificant or trifling underpayment of an amount due in respect of the relevant proceedings. It was never really intended to provide a remedy where a party had deliberately paid a reduced fee, and what is more, in an amount specifically provided for by the law, namely Article 12(1) of the Rules Relating to Fees. The well recognised legal principle of de minimis non curat lex (the law does not concern itself with trifles): see Black's law dictionary, 6th Edition, page 431, is clearly of relevance here, for the law (here the above Article in the Rules Relating to Fees) is clearly and explicitly concerned with 20% and nothing else. Accordingly, the DEM 112.00 (20% of the full fee), albeit small in relation to the consequences (pecuniary) of the omission to pay it in due time, and regardless of the amounts of underpayment admitted in other justified cases by the EPO, cannot be held to be small, so as to avoid the full legal consequences specified in Article 99(1) EPC, namely the deeming of the opposition not to have been filed.

11. This leads the Board to the question of the discretion that the preconditions to a finding of smallness, namely "Billigkeit", "justification" and "justifié" confer upon the EPO. Such justification, on the grounds of the equities being on the Appellant's side, could validly stem from his having been misled by EPO practice. In view of the Board's finding on the nature of that practice, and of the extent to which the Appellant had followed it, (cf. paragraph 7 above), no justification, so based, can be held to exist here.
  
12. This leaves the Appellant's further argument, (summarised in motion number 3 submitted in the course of oral proceedings), namely that the payment voucher filed with the Notice of Opposition should be construed as a de facto order to debit the Opponent's deposit account with the appropriate opposition fee, regardless of the actual instruction to pay a reduced fee. Under this heading the Appellant argued that there was nothing in the EPC or the Regulations based upon it that prohibited the EPO from liberally interpreting a payment voucher that referred to a current deposit account. As was earlier submitted in his Statement of Grounds of Appeal, he argued that a clear and unequivocal intent to enter an opposition constituted or was tantamount to a clear and unequivocal instruction to pay the entire fee and not a reduced one. However, in the case cited in the Statement of Grounds of Appeal, T 152/85 OJ EPO 1987, 191, but no longer relied upon by the Appellant during oral proceedings, the Notice of Opposition contained no reference whatsoever to the payment of the opposition fee and so the Board of Appeal stated, in dismissing the appeal by the Opponent, that "as a matter of general principle, before the EPO can properly appropriate an amount of money from a deposit account which it holds, in settlement of a fee or of the cost of some service, it must receive a clear and unambiguous

instruction in writing to do so, signed by the account holder". In the present case, no such instruction was received by the EPO. The case upon which the Appellant sought to rely in the course of oral proceedings, namely T 152/82, OJ EPO 1984, 301, concerned the circumstance of an obvious mistake within the meaning of Rule 88 EPC having been made in specifying the fee to be paid: a case by no means analogous, or even remotely similar to the present one. Indeed, and in contrast to the first of the above-mentioned cases, the only clear instruction here was to pay the reduced amount, coupled with an explanation (Rule 6(3) EPC) for having withheld full payment. The Appellant's argument that the clerical officer receiving such an instruction would have proceeded to interpret Rule 6(3) in the light of the surrounding jurisprudence, or have sought such clarification from the appropriate organs of the EPO, and as a result have construed a clear order to pay a reduced amount as a clear and unambiguous instruction in the sense outlined in T 152/85 to pay the full amount, cannot in the Board's view, be accepted as valid.

13. Finally, the Appellant also relied upon a notice published in OJ EPO 1982 by the President of the EPO concerning deposit accounts in which notice (paragraph 6.5 et seq.) measures are outlined for giving notice to parties in cases where their deposit accounts hold insufficient funds to defray the costs of legitimate debit orders. Again, in the Board's view, the analogy between the case of underfunded accounts and accounts which do contain sufficient funds for the payment of a full, let alone a reduced fee, is too tenuous to save the Appellant's case as formulated by him under this heading.

Accordingly, and for all the above reasons, the Board cannot accept any of the arguments presented by the

Appellant, and accordingly dismisses this appeal and finds that the Opposition Division was correct in holding the notice of opposition and not to have been filed pursuant to Article 99(1) EPC.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

E. Görgmaier

K.Jahn