

In J.18/04 (OJ 2006, 560) the board held that the term "pending ... patent application" in R.25(1)EPC.1973 did not set a time limit, but rather established a **substantive requirement** which had to be fulfilled at the point when a divisional application was filed. A board had no power to exempt an applicant from compliance with this substantive requirement. No substantive rights were established in a divisional application before the actual filing date of the divisional application. Substantive rights which were lost in the parent application could not be re-established in the divisional application by applying Art.122 EPC.1973.

3.5.2 Pendency before the EPO acting as patent-granting authority according to the EPC

In J.18/09 (OJ 2011, 480) the Legal Board of Appeal decided that an international application which did not fulfil the requirements according to Art.22 PCT for entering the European phase was not pending before the European Patent Office and therefore could not be considered a pending earlier European patent application pursuant to R.36(1)EPC. The term "pending earlier European patent application" under R.36(1)EPC included the requirement that the application must be pending before the European Patent Office acting as patent-granting authority according to the EPC. On the basis of the provisions of the PCT and the EPC, a **Euro-PCT application** not having entered the European phase was not a pending earlier European application within the meaning of R.36(1)EPC. See also G.1/09, point 3.2.5 of the Reasons.

3.5.3 Pendency in case of grant of earlier application against which no appeal was filed

An application is pending up to (but not including, see J.7/04, J.24/10) the date on which the European Patent Bulletin mentions the grant of the European patent. By way of an obiter dictum, the Enlarged Board of Appeal held in G.1/09 (OJ 2011, 336) that, in the case of a decision to grant, the pending status of the European patent application normally ceased on the **day before the mention of its grant was published** since from that point in time **substantive rights** under the EPC were no longer derived from the patent application, but now derived from the granted patent. In J.8/19 the board confirmed that there is no overlap between the phases of a pending patent application and a granted European patent.

3.5.4 Pendency in case of grant of earlier application against which an appeal was filed

In J.5/08 the Legal Board had to decide whether the parent application was pending at the date of filing of the divisional application which took place after the appeal in the parent application had been filed but **before the interlocutory revision decision** by which the examining division revised the appealed decision (decision to grant referring to uncorrected text of claim 1). According to the Legal Board, a revision decision pursuant to Art.109 EPC.1973 as such opened up the possibility that the patentability of the claimed subject matter would be completely re-assessed. In the case at issue, the grant proceedings which had been terminated by the revision decision were still pending up to that date of the revision decision. The Legal Board concluded that in general where a decision is taken on the **allowability of an appeal**, an application was pending within the