

In J 13/14 the Legal Board observed that a divisional application of an earlier application, which was filed in an EPO official language, had also to be filed in the EPO official language of the earlier application. Otherwise, it would have been filed in an inadmissible language. A correction of the language deficiency by means of a translation into the language of the proceedings for the earlier application was neither required under R 36(2), second sentence, EPC nor was it even admissible in view of the wording of that provision and of G 4/08 (OJ 2010, 572). A correction under R 139, first sentence, EPC or Art. 123(2) EPC was also not possible. The legal consequence of the non-compliance with the language requirements was that the divisional application could not be treated as a valid divisional application by analogous application of Art. 90(2) EPC.

### 3.4. Divisional application to be filed with EPO

Divisional applications must be filed with the EPO in Munich, The Hague or Berlin (R 36(2), third sentence, EPC). If a divisional application is sent to a national authority, the latter does not have to transmit it to the EPO. However, if it does, this application will have as date of receipt the date on which it reaches the EPO (T 196/10).

### 3.5. Requirement of pending earlier application

R 36 EPC (former R 25 EPC 1973) requires that a divisional application only be filed if it is in relation to any **pending** earlier patent application. In G 1/09 (OJ 2011, 336) the Enlarged Board of Appeal decided that a "pending (earlier) European patent application" in the specific context of R 25 EPC 1973 (R 36(1) EPC) was a patent application in a status in which substantive rights deriving therefrom under the EPC were (still) in existence.

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Patent Bulletin mentions the grant of the European patent or up to the date on which the application is refused, withdrawn or deemed withdrawn (J 28/03; for pendency in case of grant of the earlier application, see chapter II.F.3.5.3 and 3.5.4; for the situations of refusal and (deemed) withdrawal of the earlier application, see in this chapter II.F.3.5.5 to 3.5.9).

Note however that a divisional application cannot be validly filed during proceedings that have been stayed, see in this chapter II.F.3.1.2.

#### 3.5.1 Requirement of pending earlier application sets no time limit

The wording "to any pending earlier European patent application" in R 36(1) EPC does **not set a period/time limit**, but rather sets a condition (J 29/10, referring to J 10/01; J 24/03, OJ 2004, 544; J 18/04, OJ 2006, 560; J 7/05, G 1/09, OJ 2011, 336, J 10/12). Therefore, the provision on the re-establishment of rights does not apply to the filing of a divisional application (J 24/03, see also J 21/96 and J 10/01). R 134(2) EPC, concerning the effects on periods of a general dislocation in the delivery of mail, does also not apply (J 29/10).