

been withdrawn and, according to R. 36(1) EPC, an applicant could only file a divisional application relating to any pending earlier European patent application. The Legal Board saw no difference between the case of an application deemed to be withdrawn due to the non-payment of fees (which had been dealt with in J 4/11, OJ 2012, 516) and an application that had been voluntarily withdrawn by a communication from the applicant. In neither case was the withdrawal the result of a decision taken by the Office. From the wording of Art. 67(4) EPC ("withdrawn" in contrast to "finally refused"), and the further clarification given in decision J 4/11, it could be concluded that an application was no longer pending as from the moment it had been withdrawn. This was not altered by the possibility of filing a request for correction of a withdrawal under R. 139 EPC, nor by the actual filing of such a request. It was not necessary for the board to decide what the position would have been if the request for correction pertaining to the parent application had been allowed.

3.6. Time limits under Rule 36(1)(a) and (b) EPC in the version in force between 1 April 2010 and 31 March 2014

In the original version of R. 25 EPC 1973 of 1 October 1988, a divisional application could be filed only up to the date on which the applicant approved the text in which the patent was to be granted under R. 51(4) EPC 1973 (in the version which entered into force on 1 September 1987). For a brief overview of the case law in respect of the version of 1 October 1988 see "Case Law of the Boards of Appeal of the EPO", 6th edition 2010, p. 389-390. Under R. 25(1) EPC 1973 in the amended version of 2 January 2002, the applicant could file a divisional application in respect of any pending earlier European patent application (see "Case Law of the Boards of Appeal of the EPO", 6th edition 2010, p. 390-391). This requirement of pendency was adopted into R. 36(1) EPC.

Between 1 April 2010 and 31 March 2014, R. 36(1) EPC additionally required that the divisional application must be filed within the time limits laid down in R. 36(1)(a) and (b) EPC. The nature of the communication starting the time limit for voluntary division (R. 36(1)(a) EPC) was specified with effect from 26 October 2010. The requirements under R. 36(1)(a) and (b) EPC were removed in the amended version of R. 36(1) EPC which entered into force on 1 April 2014. On the interpretation of R. 36(1)(a) and (b) EPC see J 13/13, summarised in "Case Law of the Boards of Appeal of the EPO", 9th edition, chapter II.F.3.6.2.

4. Procedural questions

4.1. Procedural independence of divisional application

4.1.1 Principles

The procedure defined in the EPC for the filing of divisional applications is self-contained and complete (see e.g. T 587/98, OJ 2000, 497). The procedure concerning the divisional application is, in principle, independent from the procedure concerning the parent application. Although there are some connections between the two procedures (e.g. concerning time limits), actions (or omissions) occurring in the procedure concerning the