

be stayed with retroactive effect from that day (J 7/96, OJ 1999, 443; J 36/97, J 15/06). If a department of first instance has wrongly stayed grant proceedings, their continuation can be ordered on appeal only with effect for the future. The immediate effect of the stay cannot be set aside with retroactive effect or reversed by a decision in appeal proceedings (J 9/06; see also J 10/19).

In J 28/94 (OJ 1997, 400) the Legal Board found that it was right not to hear the applicant in cases of suspension of proceedings, noting that R. 13 EPC 1973 said nothing about this. It justified the automatic and immediate nature of suspension by the fact that it constituted a preventive measure in favour of the third party requesting it, and also by the need to maintain in full the rights derived from grant of the patent in dispute.

In J 15/06 and J 18/06 the Legal Board followed the justification in J 28/94 (OJ 1997, 400). In J 18/06 the Legal Board considered the communication ordering suspension to be a preliminary procedural measure "sui generis" which was justified as a preventive measure to preserve the third party's possible rights to the patent in dispute and took immediate effect. In J 15/06 the Legal Board noted that the respondent's withdrawal of its request for suspension of the proceedings had significantly changed the procedural situation in the appeal proceedings. There existed no provision in the EPC that the withdrawal of a request for suspension had the effect that the suspension was automatically terminated. However, the existence of a legitimate interest of a third party was an unwritten prerequisite for a further stay of the proceedings under R. 13 EPC 1973. The withdrawal was therefore equivalent to and to be interpreted as consent to the continuation of the proceedings pursuant to R. 13(1) EPC 1973.

Under Art. 97(4) EPC 1973 (Art. 97(3) EPC) the grant proceedings ended on the date on which the European Patent Bulletin mentioned the grant. In the interim period, proceedings for grant were still pending before the EPO and a request for suspension of proceedings under R. 13 EPC 1973 was admissible (J 7/96, OJ 1999, 443). See also J 33/95 of 18 December 1995, J 36/97, J 15/06, according to which the EPO could also order suspension pursuant to R. 13(1) EPC 1973 after the publication of the mention of the grant of a patent was acknowledged, provided that an allowable request had been filed before the publication. Suspension of the proceedings for grant meant that the legal status quo existing at the time they were suspended was maintained, i.e. neither the EPO nor the parties might validly perform any legal acts while the proceedings were suspended (J 38/92 and J 39/92). See also J 14/19, in which the Legal Board held that proof of the existence of the conditions for a stay of proceedings under R. 14(1) EPC must be furnished during a pending grant procedure and thus before publication of the mention of grant in the European Patent Bulletin. Evidence filed after this date may not be taken into account by the European Patent Office for this purpose.

In J 20/05, G. 1/09 and J 9/12 the boards established that R. 14 EPC prevents the filing of a divisional application if the proceedings for grant concerning the earlier application are stayed. In J 9/12 the Legal Board held that an application filed after the effective date of the stay of proceedings concerning the parent application, but before communication of stay, is to be treated as a divisional application.