

meaning of R. 25 EPC 1973 (now R. 36(1) EPC) at least up to the point in time when the decision was taken.

The Legal Board in J 5/08 further noted that there appeared to be diverging case law on the question of whether the suspensive effect of an appeal always had the consequence that the grant proceedings remained pending within the meaning of R. 25 EPC 1973 (R. 36(1) EPC) during the appeal proceedings. One line of decisions appeared to say that this was indeed the case (J 28/94, OJ 1995, 742 and J 3/04). However, a different view was taken in J 28/03, where the Legal Board had decided that the grant proceedings were to be considered as not having been pending during the appeal proceedings if the appeal was dismissed as **inadmissible**; the status of a divisional application filed while an appeal against the decision to grant a patent on the parent application was pending **depended on the outcome of that appeal**. In the more recent decision J 23/13 (albeit regarding an appeal against a refusal of the earlier application), the Legal Board referred to G 1/09 (OJ 2011, 336) and considered that the fact that the appeal was later rejected as inadmissible could not change the fact that, on the point in time when the divisional was filed, substantive rights were still in existence.

3.5.5 Pendency in case of refusal of earlier application against which no appeal was filed

In G 1/09 (OJ 2011, 336) the Enlarged Board of Appeal decided that, in the case where no appeal is filed, a European patent application which has been refused by a decision of the examining division is thereafter pending within the meaning of R. 25 EPC 1973 (R. 36(1) EPC) until the **expiry of the time limit for filing a notice of appeal**. It stated 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. A patent application which had been refused by the examining division was thereafter still pending within the meaning of R. 25 EPC 1973 (R. 36(1) EPC) until the expiry of the period for filing an appeal and, on the day after, was no longer pending if no appeal was filed.

3.5.6 Pendency in case of refusal of earlier application against which an appeal was filed

In J 23/13 the applicant had filed the divisional application after the filing of the notice of appeal against the decision refusing the parent application, but before the **time limit for filing the statement of grounds of appeal** had expired; since no statement of grounds was filed, the board rejected the appeal against the refusal of the parent application as **inadmissible**. The board in J 23/13 observed that the divisional application had been filed while the time limit for filing the grounds of appeal was still running. The fact that the appeal was later rejected as inadmissible could not change the fact that, on the date when the divisional was filed, substantive rights were still in existence (G 1/09, OJ 2011, 336).

In J 22/13 the applicant had filed the divisional application, in contrast to the situation in J 23/13, **after expiry of the time limit for filing the statement of grounds of appeal**. The application could thus not be treated as a divisional application.