

**Standing Committee on Patents**  
**Questionnaire on the Publication of Patent Applications**

**Questions**

Groups are invited to answer the following questions under their national laws:

**I. Analysis of current law and case law**

1. Please provide a brief description of your law concerning publication of patent applications and identify the statute, rule or other authority that establishes this law.

Publication of Swiss patent applications is regulated by Art. 58a of the Swiss Patent Act (PatA) and Art. 60, 60a, 60b and 60c of the Swiss patent Ordinance (PatO).

2. Does publication of patent applications occur automatically in your jurisdiction? If so, when does publication take place? If not, what are the requirements to effect publication?

Patent applications are published automatically immediately after the expiry of a period of 18 months from the filing date or, if priority has been claimed, from the priority date.

3. If a patent application claims priority from or the benefit of an earlier application how, if at all, does this affect the timing of publication?

If a patent application claims priority of an earlier application, the publication occurs 18 months after the priority date.

4. Is there a specific point in time up to which the applicant can withdraw its application without it being published?

Yes, there is. The application is not published if it has been withdrawn (or rejected) within 17 months from the filing date or the earliest priority date. <sup>1</sup>

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<sup>1</sup> Art. 60c(a) PatO

5. What parts of a pending patent application are published?

The publication shall contain the description, the patent claims and, if applicable, the drawings, as well as the abstract, provided it is available for publication prior to completion of the technical preparations for publication, and if applicable, the report on the state of the art or the international-type search.

6. Does a published pending patent application give rise to provisional rights (or any type of interim protection) in your jurisdiction and, if so, to what extent?

Yes, it does.

The provisional protection conferred by a Swiss patent application is effective from the date of publication.

The above means that, in case of infringement, the applicant can claim compensation for the damage caused by an infringer as from the moment he became aware of the content of the patent application, but at the latest from the publication of said application.

However, the applicant cannot start an action for compensation for the damage until the patent is granted.<sup>2</sup>

In case of an international patent application for which the IPI is the Designated Office, not drawn up in a Swiss official language, the provisional protection is effective in Switzerland only after a translation in one of the Swiss official languages is made public. In other words, the damage caused by an infringer can be counted only from the day when the applicant:

- a) provides the defendant with a translation of the claims in a Swiss official language; or
- b) makes publicly available a translation of the claims through the Swiss Federal Institute of Intellectual Property (IPI).<sup>3</sup>

In case of an EP application not drawn up in a Swiss official language (i.e. in English), translation of the claims is not necessary pursuant to Art. 67(3) EPC to obtain provisional protection in Switzerland.

7. Does an unpublished pending patent application give rise to provisional rights (or any type of interim protection) in your jurisdiction and, if so, to what extent?

No, it doesn't.

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<sup>2</sup> Art. 73 PatA

<sup>3</sup> Art. 137 PatA and Art. 123 PatO

8. Is 'early publication' allowed in your jurisdiction? If so, what are the conditions for such early publication? How is the request for early publication made? What is the effect of an early publication on a pending patent application?

The applicant may request early publication after the filing date has been accorded upon condition that the requirements of the PatO are met.<sup>4</sup>

The request for early publication shall be filed in writing before the IPI.

Reasons for requesting an early publication of a patent application might be the following:

- a) to obtain provisional rights with respect to third parties;
- b) to render the patent application opposable prior art against subsequent applications.

9. Is non-publication possible in your jurisdiction? In other words, can a pending patent application remain confidential? If so, under what conditions is such allowed? How is the request for non-publication made?

No, a pending application cannot remain confidential.

10. Will a lapsed, abandoned or withdrawn patent application be published? If not, is that automatic or by the request of the applicant? If it would otherwise be published, can the applicant request non-publication?

See point 4. above.

11. What is the position in your jurisdiction regarding the publication of continuation, continuation-in-part and divisional applications?

Continuation and continuation-in-part applications are not provided in the Swiss patent system.

There are no special conditions for the publication of a divisional application. If the divisional application is filed after the publication of the parent application, the IPI shall publish the divisional application shortly after its filing, although there is no specific guidance in this respect.<sup>5</sup>

## II. Policy considerations and proposals for improvements to your current system

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<sup>4</sup> Art. 60b PatO

<sup>5</sup> Art. 57 PatA

12. Should there be a requirement for automatic publication of pending applications by a particular deadline?  
Yes, as already present in the Swiss patent system.
13. Should there be a right for the patentee to request early publication? If so, on what basis and with what consequence?  
Yes, as already present in the Swiss patent system.
14. If your answer to question 13 is yes, should all the applications deriving from the same priority application be subject to the early publication if one application is published early?  
No
15. Should there be a right for the patentee to withdraw the application before publication?  
Yes, as already present in the Swiss patent system.
16. If your answer to question 15 is yes, what should be the consequence of such withdrawal:  
a. with respect to the patentee's own subsequent patent applications; and  
b. with respect to third party patent applications? In both cases the withdrawn application would not constitute opposable prior art.
17. If your answer to question 15 is yes, should the patent office be required to provide its initial assessment of the validity of the patent (if granted) before the applicant is required to decide whether to withdraw?  
No according to the present system, which does not provide for a mandatory prior art search.
18. In light of your answers to the previous policy questions, what would be appropriate time limits for:  
a. the patent office to provide the results of its initial assessment? -;  
b. the applicant to decide whether to withdraw the application? See point 4) above;

- c. the application to be published? [See point 2\) above.](#)
19. Should there be any exceptions to automatic publication, and if so what on what grounds, for example:
- a. on the initiative of the patentee;
  - b. on the initiative of the patent office; or
  - c. on the initiative of third parties (such as other governmental agencies)? [No.](#)
20. If your answer to question 19 is yes, who should decide on whether such exception is applied? -
21. Should there be different rules for the publication of continuation, continuation-in-part and divisional applications? [No.](#)
22. What proposals would you make to improve your current system? -

### **III. Proposals for harmonization**

Groups are invited to put forward proposals for the adoption of harmonized rules in relation to the publication of patent applications. More specifically, the Groups are invited to answer the following questions:

23. Should patent offices be required to provide examination results or at least search results prior to publication so that applicants can make an informed decision whether to pursue obtaining a patent or to withdraw the application and protect the invention idea as a trade secret?
- [Yes, it would be advisable.](#)
24. Should there be any exception to publication of applications, for example by the applicant's opt-out?
- [No.](#)
25. How should exceptional circumstances be defined, e.g., public order, morality or national security where the patent office delays or suppresses publication? To what extent should these exceptional circumstances be specifically defined? -
26. What is an appropriate period for publication after filing an application or after the priority date? Is 18 months an appropriate period?
- [Yes, 18 months is an appropriate period.](#)

27. Please make any other comments or proposals for harmonization in relation to publication of patent applications that you consider appropriate. -