Inputs from Member States and Regional Patent Offices to the Thirty-Eighth Session of the Standing Committee on the Law of Patents

Respondent Information

First Name:

[redacted]

Last Name:

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Country:

Switzerland

IP Office

Federal Institute of Intellectual Property (IPI)

Job title

Legal Advisor

Email address:

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Disclaimer:

The information provided in response to this questionnaire is understood to be submitted on behalf of the Member State or regional organization concerned, through its competent authority and in accordance with its applicable official internal procedures.
It is assumed that the person completing and submitting the questionnaire is duly authorized to do so and that the information reflects the official position or practice of the Member State or organization, to the extent possible.

I confirm that I have read and understood the statement above and that I agree with its contents.

A. Prior Art

1. How is prior art defined under the applicable national or regional law?

Art. 7 para. 2 Patent Act (https://www.fedlex.admin.ch/eli/cc/1955/871_893_899/en#art_7)

The state of the art comprises everything made available to the public by means of a written or oral description, by use, or in any other way prior to the filing or priority date.

2. Against which date is prior art assessed under the applicable law?

filing or priority date (Art. 7 para 2 Patent Act)

3. Which types of information may constitute prior art under the applicable law, and how is it determined whether such information is considered to form part of the prior art?

see above Art. 7 para. 2 Patent Act, broad application:

"written description": anything in writing (patent documents, scientific paper, catalogues, news articles, public presentations, even handwritten notes (even if theres only one copy).

"publicly available" means any form of making it accessible.

"oral description": public presentation, even giving the information to a single person is sufficient (if it can't be ruled out that person disseminates the information further. However, oral description obviously is rarely a source cited for prior art.

"use, or in any other way": use can mean manufacturing, offering, putting in circulation etc.

4. Does the applicable law provide for any category of prior art that is taken into account for patentability purposes notwithstanding that it was not publicly available before the relevant filing or priority date (sometimes referred to as "secret prior art")?

Yes

If yes, please indicate, where applicable, the types of information or documents concerned (for example, earlier-filed patent applications), the relevant date(s) for determining such prior art, as well as any limitations, exclusions, or special rules applicable to such prior art. : yes, Art. 7 para 3 Patent Act: 3 With regard to novelty, the state of the art also includes the content of an earlier application or application with earlier priority designating Switzerland in the version originally filed, and with a filing or priority date that precedes the date mentioned in paragraph 2, and which was only made available to the public on or after that date, provided that: a. in the case of an international application, the requirements of Article 138 are fulfilled; b. in the case of a European application based on an international application, the requirements of Article 153 paragraph 5 of the European Patent Convention of 5 October 1973 in its revised version of 29 November 200017 are fulfilled; c. in the case of a European application, the fees for the valid designation of Switzerland as per Article 79 paragraph 2 of the European Patent Convention of 5 October 1973 in its revised version of 29 November 2000 have been paid.

5. Please provide any additional information that may be relevant to the understanding or application of prior art under the applicable law, including where applicable, any guidance (for example, patent office manuals or guidelines) or key judicial decisions in your jurisdiction with general relevance to applicants or interested parties, captured by patent office practice.

Please upload any document that may be relevant to the understanding or application of prior art under the applicable law.

6. Please indicate whether any legal provisions, including those applicable to utility models or any other similar system (where different from those applicable to patents of invention), are relevant to the subject matter of this section and, if so, kindly provide the relevant information and references.

B. Novelty

1. How is the requirement of novelty defined under the applicable national or regional law?

Art. 7 para 1 Patent Act (https://www.fedlex.admin.ch/eli/cc/1955/871_893_899/en#art_7):

An invention is considered to be new if it does not form part of the state of the art.

2. For the purposes of assessing novelty under the applicable law, are there any novelty-specific considerations regarding the relevant date or the scope of information taken into account, beyond those addressed in the Prior Art section of this survey?

Art. 7b Patent Act - Non-prejudicial disclosures (https://www.fedlex.admin.ch/eli/cc/1955/871_893_899/en#art_7_b)

New use of known substances: Art. 7c / 7d Patent Act (https://www.fedlex.admin.ch/eli/cc/1955/871_893_899/en#art_7_c)

3. Does the applicable law apply an absolute novelty requirement, or does it provide for any limitations or qualifications to novelty (for example, relative novelty or other restricted approaches), apart from any grace period mechanisms addressed separately in this survey?

absolute requirement: there is only yes or no regarding novelty. it is assessed by objective criteria. Whether the inventor e.g. had knowledge of prior art or not is irrelevant.

C. Inventive Step

1. How is the criterion of inventive step or non-obviousness defined under the applicable national or regional law?

Art. 1 para 2 Patent Act (https://www.fedlex.admin.ch/eli/cc/1955/871_893_899/en#art_1)
2 Anything that is obvious having regard to the state of the art (Art. 7 para. 2) is not patentable as an invention.

2. For the purposes of assessing inventive step or non-obviousness under the applicable law, what is the relevant date and what prior art or information is taken into account?

filing or priority date (same as novelty)

3. What is the standard applied under the applicable law to determine whether an invention involves an inventive step or is non-obvious, in particular as reflected in the concept of the "person skilled in the art", focusing on how the standard is understood or applied, rather than its formal legal definition?

person skilled in the art: fictional/hypothetical person, defined as a professional with an average level of education in the relevant field. Not an excellent expert in the field who knows the entire state of the art. Where the invention relates to different fields, the "person" can be a team of professionals.

Inventive step: Inventivness does not simply begin where the state of the art ends. The Question the Federal Court asks is: could the person skilled in the art, considering the knowledge he has, make the claimed invention with only minor effort? If he needs additional creative effort = inventive

4. Are there any specific rules, limitations, or contextual factors that apply to the assessment of inventive step or non-obviousness under the applicable law?

No

Please indicate, where relevant, whether such rules or factors include geographic or territorial considerations affecting the relevance of prior art (for example, distinctions between domestic and foreign disclosures, uses, or publications, or territorial conditions applicable to particular categories of prior art) or any other particular considerations relevant to the assessment.

***Responses should be limited to such contextual factors as they relate to the assessment of inventive step or non-obviousness, without restating general rules on what constitutes prior art.*:**

D. Grace Period Mechanisms and Pre-Filing Disclosures

1. Does the applicable law provide for any mechanism under which certain disclosures made before the filing or priority date do not prejudice the patentability of an invention, in particular with respect to novelty and/or the legal effect on prior art?

Yes

If yes, please identify the relevant legal provisions (in primary and/or secondary legislation) and describe their operation.: Art. 7b Patent Act (https://www.fedlex.admin.ch/eli/cc/1955/871_893_899/en#art_7_b) Non-prejudicial disclosures Where the invention has been made available to the public in the six months prior to the application date or priority date, this disclosure does not form part of the state of the art when it is due to, or a consequence of: a. an evident abuse in relation to the patent applicant or his legal predecessor; or b. the fact that the patent applicant or his legal predecessor has displayed the invention at an official or officially recognised international exhibition falling within the terms of the Convention on International Exhibitions of 22 November 1928, and he has declared the fact at the time of filing and has produced sufficient supporting evidence in due time.

2. What is the duration of the mechanism referred to in question 1, during which the covered disclosures do not prejudice the patentability of the invention?

six months prior to the application date or priority date

3. Where such a mechanism exists, which categories of disclosures are covered by it?

disclosures covered by this mechanism must have a causal connection to the application filed that is claiming non-prejudicial disclosures, meaning the disclosure must be based on the same mental effort as the filed application. the disclosure of an identical invention made independently by another inventor is not covered under Art. 7b Patent Act.

Categories:
- evident abuse in relation to the patent applicant or his legal predecessor;
- the patent applicant or his legal predecessor has displayed the invention at an official or officially recognised international exhibition falling within the terms of the Convention on International Exhibitions of 22 November 1928, and he has declared the fact at the time of filing and has produced sufficient supporting evidence in due time.

4. Are there any formalities or procedural requirements that must be fulfilled in order to rely on the mechanism identified in question 1?

No

Please describe any such requirements, where applicable, including, for example, the need to file statements, declarations or notices, to submit certificates or other supporting evidence, or to comply with any timing or notification requirements or any information relating to the burden of proof. **:**

5. Does the applicable law provide for prior user rights or other protections for third parties who may be affected by an invention that has benefited from a graced pre-filing disclosure?

Yes

If yes, identify the relevant legal provisions (including any provisions in primary and/or secondary legislation), and describe the conditions under which such rights or protections arise (for example, good-faith use of the invention prior to the filing or priority date), as well as how such rights or protections operate. **:** not specifically for non-prejudicial disclosures, but general: Art. 35 para. 1/2 Patent Act - Prior user Rights (https://www.fedlex.admin.ch/eli/cc/1955/871_893_899/en#art_35) 1 A patent may not be invoked against any person who, prior to the filing or priority date of the patent application, was commercially using the invention in good faith in Switzerland or had made special preparations for that purpose. 2 Any such person under paragraph 1 may use the invention for the purposes of their trade or business; this right may be transferred or bequeathed only together with the trade or business.

6. Please provide any additional information that may be relevant, including, where applicable, any guidance (e.g. patent office manual/guidelines) or key judicial decisions in your jurisdiction with general relevance to applicants or interested parties, captured by patent office practice.

Please upload any document that may be relevant to grace period mechanisms and/or pre-filing disclosures.

7. Please indicate whether any legal provisions, including those applicable to utility models or any other similar system (where different from those applicable to patents of invention), are relevant to the subject matter of this section and, if so, kindly provide the relevant information and references.

Submission of information concerning other aspects of national/regional patent law

E. Sufficiency of Disclosure

IPI_Examination_Guidelines_FR.pdf

F. Exclusions from Patentable Subject Matter

IPI_Examination_Guidelines_FR.pdf

G. Exceptions and Limitations to Patent rights

Switzerland_exceptions.pdf

Final review before submission

Confirmation of submission

I am aware that by clicking "Submit" below, my responses will be sent to the SCP Secretariat.