PATENT OFFICE
OF THE REPUBLIC
OF POLAND

POLAND

NATIONAL CONSULTATIONS

ON THE DRAFT PROPOSAL FOR

A COMMON EUROPEAN POSITION

ON

SUBSTANTIVE PATENT LAW HARMONISATION

DEC 2025- FEB 2026

OUTCOME OF THE ANALYSIS,
PATENT OFFICE OF THE REPUBLIC OF POLAND

MARCH 2026

CONTENTS

1.INTRODUCTION

Within the framework of its collaboration with the European Patent Office (EPO) and other European patent offices, the Polish Patent Office (PPO) conducted consultations among national stakeholders on the draft common practice for substantive patent law harmonization.(SPLH: Draft proposal for a common European position regarding best practice from a European perspective in an SPLH context, CA/PL 21/25).

The draft proposal focuses on three core elements: the grace period (GP), prior user rights (PURs), and conflicting applications (CA), with the aim of advancing ongoing efforts towards substantive patent law harmonization in Europe.

Consultation among Polish stakeholders on the Draft Common Practice for Substantive Patent Law Harmonization

On 19 December 2025, PPO circulated invitations by email to relevant stakeholders, including a link to the survey. The consultation was also promoted via the PPO website and social media channels. Responses were invited until 7 February 2026.

Survey Questions

Stakeholders were invited to provide their views on the following questions:

1. *Is the draft proposal considered to be generally balanced, coherent and workable, even if not every detail is supported?*
2. *Would the draft proposal form a good basis for further work on SPLH?*
3. *If the draft proposal is not supported, the elements which prevent it from being agreed to should be identified?*

The consultation targeted representatives of academia, patent attorneys, the pharmaceutical sector, and industry.

Key Stakeholders and Responses

Ten entities submitted responses (several of which included detailed written comments) including universities, research institutions, industry representatives, patent professional associations, and one individual expert.

Most respondents considered the draft proposal to constitute a possible basis for further work on Substantive Patent Law Harmonisation (SPLH), indicating that SPLH may contribute to improving the functioning of the global intellectual property protection system. At the same time, it was emphasised that the proposed solutions require further analysis and clarification in order to ensure an appropriate balance between the interests of applicants, users of the patent system and the public interest. Overall, most respondents considered the draft proposal generally balanced, coherent and workable, and view it as a good basis for further work on SPLH.

One respondent, an organisation representing entrepreneurs from the pharmaceutical sector in Poland, presented an opposite position. It stated that the current European system, based on the “first-to-file” principle, provides a high level of legal certainty and best meets the needs of European businesses; accordingly, it suggested that Poland should not engage further in work on SPLH. It was also argued that the proposed

changes could benefit entities outside Europe to a greater extent, while at the same time increasing the risk of disputes and the costs of operating within the patent system, particularly for SMEs. Furthermore, it was noted that, given the non-binding nature of the initiative and its focus on potential concessions towards non-European patent systems, it is difficult to regard it as a genuine example of substantive patent law harmonisation.

2. GRACE PERIOD (SECTION 3.1 OF THE DRAFT PROPOSAL)

IMPORTANCE OF THE "FIRST-TO-FILE" PRINCIPLE FOR LEGAL CERTAINTY

The grace period was identified as the most controversial element of the draft proposal. Some respondents expressed clear opposition to the introduction of GP, emphasising the importance of maintaining the "first-to-file" principle as one of the key elements ensuring predictability of the patent system. Other respondents indicated that such a solution could be acceptable, provided that appropriate mechanisms ensuring transparency of the system and protection of the interests of its users are introduced.

Respondents further stressed that the "first-to-file" principle promotes transparency in economic transactions and enables market participants to take investment decisions on the basis of stable legal frameworks. For this reason, it was indicated that any novelty grace period should constitute an exception to this principle and be limited to clearly specified situations.

At the same time, it was emphasised that if the introduction of GP were to prove unavoidable, such a solution could only be accepted as part of a reasonable, coherent and balanced regulatory framework which:

- does not undermine the "first-to-file" principle,
- does not impose excessive burdens on any party operating on the market,
- ensures full transparency of the system,
- provides harmonised, effective and realistic PURs, treated as an integral element of any system incorporating GP.

CONCERNS REGARDING THE OPERATION OF THE GRACE PERIOD

The proposed model of the grace period raised the greatest concerns among respondents. It was pointed out that allowing the disclosure of an invention prior to the filing of a patent application may make it more difficult to determine the actual state of the art and may weaken the informational function of the patent system.

It was further emphasised that such a solution could adversely affect the ability to conduct reliable prior art searches and freedom-to-operate (FTO) analyses, as well as the assessment of the risk of infringement of third-party rights. Respondents noted that this may affect investment and research and development decisions taken by companies, which often rely heavily on such analyses. It may also reduce the overall transparency and predictability of the legal environment. Some respondents also pointed to the risk of informational asymmetry between entities making use of the grace period and those maintaining confidentiality until the filing of a patent application.

At the same time, some representatives of the academic community indicated that, in certain circumstances, the grace period could constitute a useful solution, particularly

within the academic environment. It was emphasised that, from the perspective of universities, the proposed grace period could be beneficial, for example in the case involving the prior disclosure of research results in scientific publications or conference presentations by academic staff.

However, it was also pointed out that the proposed harmonisation would require further clarification in this respect. In particular, it was suggested that a publication or conference presentation by a university employee should be clearly recognised as a disclosure made by or on behalf of the applicant (i.e. the university) or with its consent. It was further emphasised that situations involving multi-author publications with authors affiliated with different institutions should be clearly regulated.

Conditions for the Possible Introduction of the Grace Period

Respondents emphasised that the proposed harmonisation should be analysed and implemented with great caution and should take into account, inter alia, clear and uniform rules regarding the impact of the grace period on the publication date of patent applications, limitations on the strategic use of the grace period – particularly with regard to influencing the publication date – as well as mechanisms ensuring timely access to information about patent applications.

It was also pointed out that a proper balance should be maintained between the interests of applicants and patent holders and the public interest, including access to patent information, and that users of the patent system should be provided with adequate information about the state of the art.

According to respondents, the requirements related to the grace period as proposed in the draft proposal do not fully ensure the achievement of these objectives and may and may hinder achieving an appropriate balance between the interests of all patent system users.

Respondents also stressed that the possible introduction of a grace period should be accompanied by mechanisms ensuring the transparency of the patent system and the accessibility of information for its users. In particular, they indicated the need to establish an obligation to:

- submit, no later than the filing date of the patent application, a statement of the intention to rely on the grace period, containing information on prior disclosures made by or on behalf of the applicant that are intended to serve as the basis for invoking this mechanism;
- submit documentation relating to the grace period, forming an integral part of the application file, linked to the priority document and made publicly available no later than the date of publication of the application, with the burden of proof resting on the applicant;
- clearly indicate in the publication of the patent application that the application relies on the grace period, thereby publicly disclosing this fact.

One submission also suggested that, in cases involving a pre-filing disclosure (PFD), the publication of the application should take place 18 months from the earliest relevant date, including the date of such PFD. It was emphasised that common practice

should ensure that applications relying on the grace period are published 18 months from the earliest of the following dates: the priority date, the filing date, or, in the case of a PFD, the date of the disclosure forming the basis for the grace period. It was further noted that, without maintaining this rule, it would not be possible to ensure legal certainty and an appropriate balance of interests. It was also stressed that publication in such circumstances should not be considered accelerated publication, but rather publication carried out within the standard 18-month period calculated from the earliest of the above-mentioned dates.

Relationship between the Grace Period and Prior User Rights

Respondents also highlighted potential issues arising from the interaction between the grace period and prior user rights. In particular, it was indicated that granting such rights to third parties who gain knowledge of the invention through a disclosure made by the inventor during the grace period could lead to situations in which third parties benefit from the inventor's concept. This occurs even if they make no creative contribution of their own. In the view of some respondents, such a solution could undermine the purpose of the grace period and limit the ability to obtain real benefits from patent protection.

One respondent indicated that, in principle, they support the concept of the grace period, except in situations where prior user rights would arise from knowledge of the invention obtained through a PFD made by the applicant, the applicant's predecessor in title, or with the applicant's consent. It was argued that, although prior user rights based on independent activities of third parties may be justified, granting such rights on the basis of a disclosure directly linked to an invention that may subsequently become the subject of a patent application would be internally inconsistent.

In one submission it was further noted that the practical difficulties of the proposed solution stem from linking the grace period with the possibility of prior user rights through a PFD made by the applicant or with the applicant's consent. It was emphasised that, although extending the scope of the grace period to include disclosures made by the right holder, for example, by start-ups or smaller enterprises testing the commercial potential of an invention, may be justified, granting PURs to third parties on this basis could undermine the practical purpose of the grace period. It could also limit the ability to obtain benefits from patent protection and to recover investments in research and development.

SUMMARY

Issues concerning the grace period were the subject of particularly extensive comments from respondents. The majority of these focused on the institution of the GP, with respondents stressing the importance of preserving the "first-to-file" principle, as well as treating any grace period as a narrowly defined exception to this rule. Respondents further highlighted the need to introduce mechanisms ensuring the transparency of the system and drew attention to the potential implications of the proposed solutions for the informational function of the patent system and its relationship with PURs.

CONFLICTING APPLICATIONS (SECTION 3.2 OF THE DRAFT PROPOSAL)

According to the draft proposal, conflicting applications, i.e. earlier patent applications with a later publication date (Article 54(3) EPC):

- constitute prior art solely for the purposes of assessing novelty;
- self-collision is excluded ("anti-self-collision");
- the whole content approach applies;
- PCT applications become secret prior art only upon entry into the national or regional phase in accordance with the provisions of the EPC;
- the prohibition of double patenting applies.

Respondents indicated that such a concept merits a positive assessment and support. At the same time, they drew attention to potential risks to the functioning of the system of conflicting applications arising from the introduction of a grace period, in particular:

- the risk of an increased number of "hidden" conflicting applications ("secret prior art");
- the risk that prior art documents relevant to the assessment of novelty may emerge at a later stage of the proceedings;
- a reduction in the effectiveness of prior art searches and freedom-to-operate (FTO) analyses at an early stage of research and development projects;
- an increased risk of unfavourable technological and investment decisions being taken on the basis of an incomplete state of the art, which runs counter to the fundamental informational function of the patent system.

Respondents also emphasised the need to introduce appropriate mechanisms regulating the impact of the grace period on conflicting applications. It was noted that the absence of such safeguards could disrupt the position of entities participating in the patent system.

Furthermore, respondents stressed that the harmonisation should address the relationship between the grace period and conflicting applications in order to avoid an increase in disputes, oppositions and invalidity proceedings based, inter alia, on conflicting applications identified at later stages.

It was considered essential that the effects of conflicting applications should be limited exclusively to the assessment of novelty. Respondents also highlighted the importance of

appropriately shaping PURs as a mechanism balancing the interests of applicants and third parties acting in good faith.

SUMMARY

The majority of respondents who commented on this issue evaluated the proposals concerning conflicting applications positively and considered them worthy of support. At the same time, it was pointed out that, in the context of conflicting applications, any potential introduction of a grace period should be accompanied by safeguarding mechanisms that balance the positions of the various participants in the patent system.

It was deemed necessary to introduce rules defining the relationship between the grace period and conflicting applications. It was considered fundamental that the effects of conflicting applications be limited solely to the assessment of novelty.

3. PRIOR USER RIGHTS (SECTION 3.3 OF THE DRAFT PROPOSAL)

The draft proposal provides for a situation in which a third party may acquire prior user rights based on information disclosed by or on behalf of the applicant during the grace period.

Respondents indicated that, in this context, PURs play a stabilising role in the system and should be regarded as a key element of harmonisation. It was emphasised that harmonised PURs must constitute a mandatory component of the regulatory framework associated with the grace period. According to respondents, introducing the grace period in the form proposed in the draft proposal, without simultaneously strengthening and harmonising PURs, could lead to a significant disruption of the balance of rights between applicants and third parties.

In the view of respondents, the harmonisation of the PUR framework should ensure legal certainty and the predictability of judicial decisions in the individual states, and should provide clear and detailed rules governing both the point in time at which prior user rights arise and the scope of their application.

Respondents also considered it important to provide a precise definition of the terms used in the expression: *"prior user rights can accrue where a third party has used or made effective and serious preparations to use an invention commercially"*, in particular the interpretation of *"has used"* and *"made effective and serious preparations"*, as well as guidance on how these circumstances should be demonstrated in proceedings. The burden of proof should rest with the party invoking such rights.

The proposal to regulate the scope of PURs without quantitative or qualitative limitations - such as restrictions on modifying the invention in a manner related to its natural development - was welcomed. It was noted that existing Polish case law has generally interpreted this issue in the opposite manner.

Attention was also drawn to the need for a clear definition of the territorial scope of prior user rights. In particular, clarification was requested on whether, in the case of European patents, the right would extend to all countries covered by the patent, while

emphasising that the territorial scope should be strictly linked to the geographical extent of the actual use or effective and serious preparations.

It was further suggested to remove the last condition listed in section 3.3.1 of the draft proposal (loss of rights if use or business within which it arose definitively abandoned), considering this condition to be vague and unnecessary, as it has no practical significance if the prior user does not exercise their rights.

Respondents welcomed the concept of harmonising PURs, but noted that the proposals contained in Section 3.3.2, concerning elements of "deep harmonisation," would be difficult to apply in practice in their current form. It was pointed out that these proposals contain numerous formulations that national courts may interpret differently, for example the concept of "*completeness" of the possession of the invention* ("*possession of the invention must be complete*").

SUMMARY

The majority of respondents assessed the proposals concerning the harmonisation of prior user rights positively and considered them worthy of support. Respondents emphasised that PURs play a stabilising role in the patent system and that a harmonised regime for prior user rights should constitute a mandatory component of any regulatory package linked to the introduction of a grace period.

It was further indicated that introducing a grace period without simultaneously strengthening and harmonising PURs could lead to a significant imbalance between applicants and those of third parties. At the same time, respondents noted that, given the potential for differing interpretations across jurisdictions of concepts relevant to the assessment of PURs, achieving harmonisation may prove challenging.

4. FINAL REMARKS

The analysis of the consultation responses indicates a strong interest among Polish users of the patent system in the draft proposal. Some responses consisted of detailed and comprehensive positions, containing valuable observations as well as constructive comments. The opinions received demonstrate both a thorough understanding of the subject matter and a high level of specialised knowledge among the respondents.

Based on the analysis of the responses, it can be concluded that there is broad support for the harmonisation of substantive patent law. At the same time, respondents were firmly in favour of maintaining the "first-to-file" principle. The introduction of a grace period was generally viewed as undesirable, while noting that, if its introduction were necessary, it should constitute a narrow, clearly defined exception, subject to appropriate safeguarding mechanisms.

By contrast, the two other elements, namely: conflicting applications and prior user rights, were considered essential components of the harmonisation package in the event that a grace period is introduced, as they allow for the preservation of a balanced position among market participants. Respondents also emphasised the importance of continuing the discussion in this area and expressed interest in the results of the consultation. Some

respondents additionally declared their willingness to continue supporting the process of harmonising substantive patent law.

AUTHORS:

Aleksandra Jabłońska, Director

Department of Legal Affairs and Jurisprudence

Email: Aleksandra.Jablonska@uprp.gov.pl

Małgorzata Kozłowska, Deputy Director

Department of Biotechnology and Chemistry

Email: Malgorzata.Kozlowska@uprp.gov.pl

Beata Oleszek, Head of Section II, Foreign Affairs Division

International Cooperation Department

Email: Beata.Oleszek@uprp.gov.pl

Julia Huczuk, Senior Specialist

International Cooperation Department

Email: Julia.Huczuk@uprp.gov.pl