



Mr Jérôme Debrulle
Chairman of the Select Committee
European Patent Office
Bob-van-Bentham-Platz 1
80469 München

23rd September 2015

epi Note on third party observations concerning European Patents with Unitary Effect

Dear Mr Debrulle,

Please find attached a note prepared by the **epi** suggesting the Select Committee to request that third party observations should be placed on the public part of the file of the unitary patent.

We highly appreciate your efforts and action in this respect.

Best regards,

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

Antonius Tangena
President

Attached: **epi** Note on third party observations concerning European Patents with Unitary Effect



Third party observations concerning European Patents with Unitary Effect

Article 115 EPC states that *“In proceedings before the European Patent Office, following the publication of the European patent application, any third party may, in accordance with the Implementing Regulations, present observations concerning the patentability of the invention to which the application or patent relates. That person shall not be a party to the proceedings”*.

Observations filed when proceedings are not pending before the EPO are placed on the non-public part of the file without transmittal to the applicant or proprietor¹.

It is not clear what legal basis there is for excluding late-filed observations from the public file. Rule 144 EPC dictates what parts of the file are excluded from inspection and makes no specific mention of late-filed observations. The decision of the President mentioned in Rule 144(d) EPC makes no mention of late-filed observations. Indeed, since late filed observations **would** serve the purpose of informing the public about European patent applications and patents, Rule 144(d) should not be used to exclude such documents.

Courts (including the UPC) have access to the whole file, including the non-public part². This means that a third party observation filed while there are no proceedings in progress before the EPO will be available to the court, but not available to the parties until after legal proceedings have been instituted, potentially resulting in wasted costs.

Further, if the late-filed observations are fatal to validity of the patent, withholding the observations from the public results in a distortion in trade, since the person filing the observation knows they have nothing to worry about, but competitors may hold back from the market for fear of an invalid patent.

Accordingly, the EPO should place late-filed observations on the public part of the European patent file, and ideally, the EPO should notify the proprietor of receipt of such observations.

The Select Committee has power concerning the administration of the European Patent with Unitary Effect, and should in any case require that where unitary effect is granted:

- any subsequent third party observation filed should be placed on the public part of the unitary patent file and notified to the proprietor; and,
- any third party observation on the non-public part of the European patent application file should be placed on the public part of the unitary patent file.

¹ GLX E-V, 3

² Article 131(1) EPC, last sentence