



Mr Sean Dennehey  
Chairman of the Committee on Patent Law  
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Bob-van-Bentham-Platz 1  
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27<sup>th</sup> August 2015

**epi Note on the patent term for European Patents**

Dear Mr Dennehey,

Please find attached a note highlighting the different interpretation of Article 63(1) EPC among the Contracting States, according to which in some countries the patent expires on the anniversary date and in others it expires on the day before the anniversary.

The **epi** thus considers it necessary to achieve a harmonized interpretation of Article 63(1) EPC and pleads the Committee on Patent Law to take into account the attached note for further discussion during its upcoming meeting in order to reach a determinative interpretation of this provision. Given the importance of this topic, the **epi** also wishes to direct the attached paper to the Select Committee for their information.

Best regards,

A handwritten signature in blue ink, appearing to be 'AT', with a long horizontal line extending to the right.

Antonius Tangena  
President

Attached: **epi** Note on the patent term for European Patents

Cc: Mr Jérôme Debrulle (Chairman of the Select Committee)



27<sup>th</sup> August 2015

### What is the patent term for a European Patent?

This is a simple question, and the answer appears simple, 20 years from filing [Article 63(1) EPC]. Extensions to that term are only permitted in limited circumstances [Article 63(2) EPC].

However, Article 63(1) EPC appears to have been interpreted differently in different Contracting States. In some countries the term is considered as expiring on the day before the anniversary (“day before” interpretation). In more countries the term is considered as expiring on the anniversary (“anniversary” interpretation).

As the EPC may be presumed to have one correct meaning, then either:

- the “day before” countries are in breach of Article 63 EPC by virtue of providing a term one day short of the full 20 year term under Article 63(1); or
- the “anniversary” countries are in breach of Article 63 EPC by virtue of providing a term one day longer than the full 20 year term under Article 63(1) EPC and outside the limited exceptions of Article 63(2) EPC.

In either case, the question arises of what interpretation the Unified Patent Court (UPC) will apply in respect of the European Patent with Unitary Effect.

If the UPC adopts the “anniversary” interpretation, then it will be an incentive for patentees to go for unitary protection, since an extra day’s patent term will be achieved in those countries such as FR and GB that follow the day before interpretation.

If the UPC adopts the “day before” interpretation, then it will be an incentive to **not** go for unitary protection, since by not choosing unitary protection, an extra day’s patent term will be achieved in those countries such as DE that follow the anniversary interpretation. For a product with big sales, one day’s extra patent term may be worth the added cost of national rather than unitary validation.

One might think that the uncertainty will disappear when the UPC has adopted either interpretation. However, the UPC will also have jurisdiction for non-opted-out bundle patents. It is hard to imagine what the UPC should do, when faced with elements of the bundle patent having different terms (and presumably established case law to support these differences).

In either case, having European patents of different term in any jurisdiction appears unsound, since then the same provision of the EPC (Article 63 EPC) may be interpreted differently according to whether a patent is a bundle patent or a unitary patent.



It would appear desirable to get some clarity as to what the term of a unitary patent will be; and as to whether national laws need changing to accord with the EPC.

The arguments for the “day before” interpretation include that the duration of a patent is not to be computed as a deadline and that the term includes the date of filing; and that it is arguable as to whether Article 120 EPC and Rule 131 are intended to apply to time limits set out in the EPC.

The arguments for the anniversary interpretation include that such an interpretation is in accord with:

- The natural interpretation of the word “from” as implying measurement from the nearest point (i.e. from midnight on the date of filing and not including the date of filing);
- Rule 131 EPC and its predecessor Rule 83 EPC 1973 which extend not only to terms set by the Office but also to terms set by the EPC;
- Article 3(2)(c) of EU 1182/1971 determining calculation of periods within the EU, which was part of the legal environment within which the EPC was drafted.

The Committee on Patent Law appears to be a suitable forum for this discussion in order to reach a determinative interpretation of Article 63(1) EPC. Once a consensus has been reached, **epi** trusts that the relevant Member States will take the necessary steps for harmonisation.

This paper is also sent to the Select Committee, for information.