

Kevin Mooney May 2022

## The UPC Opt-Out Jurisdiction of the UPC

- Article 31 UPC Agreement International jurisdiction
  - The international jurisdiction of the Court shall be established in accordance with Regulation (EU) No 1215/2012 (BR) or, where applicable, on the basis of the Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Lugano Convention)
  - Regulation BR was amended in 2014 by Regulation 542/2014 to accommodate the UPC and specifically to amend BR by inserting a new Article 71. This Article has the following effects:
    - Article 71a and b(1) The UPC is treated as a court of a Member State of BR and enjoys the same jurisdiction as a court of a Member State in respect of defendants domiciled in another Member State.

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## Jurisdiction of the UPC

- Article 71b(2) The UPC has jurisdiction over defendants not domiciled in a Member State (a "third state", eg the UK) for infringements of European Patents within the EU. Article 35 BR expressly applies even if the courts of the third state (UK) have jurisdiction over the substance of the dispute.
- Article 71b(3) the UPC also has jurisdiction to grant relief over a defendant domiciled in a third state (the UK) in respect of infringements of a European patent in the third state if certain conditions are satisfied ("the long arm jurisdiction"). The relevant conditions are:
  - (i) The defendant is infringing a European patent in the EU
  - (ii) The defendant has property located in any Member State of UPC
  - (iii) The infringement dispute has "sufficient connection" with a such Member State.
- Article 71c.1 the lis alibi pendens provisions of BR (Articles 29-32) applies to the UPC during the transitional period (see below)

#### The UPC Opt-Out

### Jurisdiction of the UPC

• The BR has no effect on the internal jurisdictional arrangements in the UPC Agreement. The one exception to this is the possible application of the lis alibi pendens provisions of BR on Articles 32 and 33 UPCA as a result of Article 83(1) UPCA.

## The UPC Opt-Out Jurisdiction of the UPC

- Article 32 UPC Agreement "Exclusive" Competence
  - 1. The Court shall have exclusive competence in respect of
    - a) actions for actual or threatened infringements of patents and supplementary protection certificates and related defences, including counterclaims concerning licences
    - b) actions for declarations of non-infringement of patents and supplementary protection certificates
    - c) actions for provisional and protective measures and injunctions
    - d) actions for revocation of patents and for declaration of invalidity of supplementary protection certificates
    - e) counterclaims for revocation of patents and for declaration of invalidity of supplementary protection certificates
    - f) actions for damages or compensation derived from the provisional protection conferred by a published European patent application

## The UPC Opt-Out Jurisdiction of the UPC (continued)

- g) actions relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the invention
- h) actions for compensation for licences on the basis of Article 8 of Regulation (EU) No 1257/2012; and
- i) actions concerning decisions of the European Patent Office in carrying out the tasks referred to in Article 9 of Regulation (EU) No 1257/2012
- 2. The national courts of the Contracting Member States shall remain competent for actions relating to patents and supplementary protection certificates which do not come within the exclusive competence of the UPC
  - e.g. pure contractual licence disputes but a defence of license could be considered by the UPC
  - entitlement disputes
  - employees' invention remuneration
  - Frand issues unless, again, raised by way of defence

## The UPC Opt-Out Jurisdiction of the UPC (continued)



- The UPC Opt-Out
- When the Agreement was first drafted it was proposed that this "exclusive" jurisdiction should apply from the day of the court opening. (The "purist theory" of jurisdiction)
- The purist theory of jurisdiction was subsequently diluted by the following transitional provisions

#### Article 83 UPC Agreement

- 1) During a transitional period of seven years after the date of entry into force of this Agreement, an action for infringement or for revocation of a European patent or an action for infringement or for declaration of invalidity of a supplementary protection certificate issued for a product protected by a European patent may still be brought before national courts or other competent authorities
- 2) An action pending before a national court at the end of the transitional period shall not be affected by the expiry of this period

## Jurisdiction of the UPC – Transitional Provisions (continued)

- 3. Unless an action has already been brought before the court, a proprietor of or an applicant for a European patent granted or applied for prior to the end of the transitional period under paragraph 1 and, where applicable, paragraph 5, as well as a holder of a supplementary protection certificate issued for a product protected by a European patent, shall have the possibility to opt out from the exclusive competence of the Court. To this end they shall notify their opt-out to the Registry by the latest one month before expiry of the transitional period. The opt-out shall take effect upon its entry into the register
- 4. Unless an action has already been brought before a national court, proprietors of or applicants for European patents or holders of supplementary protection certificates issued for a product protected by a European patent who made use of the opt-out in accordance with paragraph 3 shall be entitled to withdraw their opt-out at any moment. In this event they shall notify the Registry accordingly. The withdrawal of the opt-out shall take effect upon its entry into the register

## Jurisdiction of the UPC Article 83 UPC Agreement – Issues

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- Summary
  - Article 32(1) "exclusive competence" for "actions" (a) to (i) in respect of EP and Unitary patents EXCEPT
  - Article 83(1) Transitional period of 7 years for parallel national actions "for infringement or for declaration of invalidity" of a European patent or SPC which have not been opted out
  - Article 83(3) The opt-out possibility if an action has not already been brought before the UPC in respect of the relevant European patent or SPC

## The UPC Opt-Out Opt-Out Issues

- What is the meaning of opting out from the "exclusive competence" of the UPC pursuant to Art 83(3)? Does this leave a non-exclusive competence with the UPC?
- Better view is that there is no residual non-exclusive jurisdiction otherwise there is no difference between Art. 83(3) and Art. 83(1) but if a party attempts a parallel UPC action (eg revocation in the Central Division response to a national action for infringement), which Court will decide the jurisdictional issue – the national Court with possible reference to CJEU under Brussels Regulation or the UPC as this involves interpretation of the Agreement
- Is Article 83 limited to the transitional period for opt-outs or is an opt-out effective for the life of the patent and for all designations and SPCs unless withdrawn (the "purist approach"). All seem to agree that the purist approach is correct.

## The Basic Opt-Out Provisions

- Rule 5 of the Rules of Procedure set out the opt-out provisions. Essentially a granted European bundle patent may only opted out by the "proprietor" (and an SPC by the "holder" of the SPC) during the 7 year transitional period. Expired patents can also be opted out (Rule 5.1) and also published applications. If an application is opted out but later granted as an unitary patent the opt-out will be deemed withdrawn (Rule 5.9).
- Rule 8 Who is the "Proprietor"?
- Rule 8.5 makes clear that the "proprietor" of a European patent is the person entitled to be
  recorded as proprietor in each country where the patent has been validated even if not in fact
  registered. This also applies to an applicant for a patent as well i.e. the person entitled to be granted
  the patent even if not the original applicant

## The Basic Opt-Out Provisions

- Rule 5 provides
  - Application to opt out must be filed at the Registry (standard form will be available on the Case
     Management System see later)
  - All proprietors of all designations of the parties and the holders of all existing SPCs must make the application
  - Note the proposed amendment to Rule 5 re "all designations" see later.
  - In practice the proprietors will appoint a person to make the application. If this is a "representative" no mandate is required otherwise a mandate from the proprietor(s) must be lodged.

## The UPC Opt-Out The Basic Opt-Out Provisions

- The opt-out applied for in the sunrise period will be formally entered on the register and effective on the date that the court opens.
- The opt-out will last for the life of the patent/SPC unless withdrawn
- An opt-out may be withdrawn by all proprietors and holders.
- The manual application on the CMS will take 15 to 60 seconds to complete depending on the extent of information to be inputted.
- Applications for multiple opt-outs are possible via an API (see the UPC website)
- SPCs granted at the time of opt-out must also be opted-out as part of the same application. SPCs granted following the opt-out of the basic patent will be automatically opted out.
- There must be certification that the person lodging the application is authorised by all "proprietors" etc and for non-representatives a mandate must be lodged.

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## The Opt-Out Provisions

- Restrictions on applications to opt out
  - a Unitary Patent cannot be opted out
  - a European Patent cannot be opted out if there has been any proceeding in the UP Court prior to the date of application
  - an opt-out cannot be withdrawn if there has been any proceeding in any national court in respect of any member of the patent family (or any granted SPC) before the date of the application
- In order to prevent fraudulent applications the identity of the person lodging the application to opt out will be assured by a "strong authentication system" still under discussion
- There will be a procedure for the cancellation of an unauthorised opt-out (eg mistaken number)

## The Opt-Out Provisions

- Incorrect Details Rule 5.6

  If certain details required for opting out (Rule 5.3) are missing or incorrect the opt-out is ineffective until corrected. The details in question are essentially the names of all proprietors/applicants/holders and the countries where the EP is validated
- Sunrise procedure Rule 5.13
   This will now be operated by the Registry of the UPC as part of the provisional application of the UPCA before the Agreement and the Court comes into effect

### Opting Out - requirements

- The current draft of Rule 5 states that the opt-out is to be made in respect of "all of the Contracting Member States" for which an EP/application is granted/designated
- This will be amended to refer to "all of the states..."
  - Existing wording said to be "inconsistent with the indivisibility of the application to not opt out" and "implies that the UPC solely has jurisdiction over [UPC states], which is not the case"
  - New wording avoids a 'moving target' of proprietors if additional states ratify the UPCA
- BUT now means:
  - Proprietors/applicants for <u>all</u> designations, including outside UPC states must lodge the opt-out not just other EU states (e.g. Spain), but non-EU EPC states (e.g. Turkey)
  - Greater due diligence to ensure all proprietors/applicants of all designations are covered
  - May include designations outside of main 'European' commercial markets (e.g. Turkey) that may be treated differently (e.g. assigned to third parties).

### AIPs for 'automated' opt outs

- The UPC has published details of an API (application programming interface) to carry out automated optout, withdrawal and correction filings via the case management system (CMS)
- By carrying out repeated API 'calls', it can file applications for multiple patents
- The CMS will
  - search the EPO's system for the patent number (and, if found, retrieve basic information)
  - require mandatory fields to be filled (such as the applicant and patent number) and documents to be supplied (e.g. a mandate, if applicant is not a registered representative)
  - and reject the application and return an error message if there are gaps
- The UPC provides only the API code, not the user interface
  - Commercial third parties are likely to provide this for patent proprietors
  - Patent attorney firms are expected to commission their own software and offer optouts/withdrawals as a service

## The UPC Opt-Out Opting out – due diligence

#### Wholly owned patents

- Are all designations with the same group entity (including non-EU/UPC designations)?
- Are the right entities on all registers? Cleaner and may avoid later challenges

#### Co-owned patents

- All co-proprietors must opt out who will file it? Seek a joint mandate?
- Seek confirmations that no one else entitled and the right parties are registered?
- Licensed patents licensees, even if exclusive, have no role in opt out under UPCA/Rules
  - Patents licensed to
    - What does the licence say about the opt-out (if anything) or control of litigation etc.?
    - Write to licensor asking them to opt out (or not to!) and reminding them to do their DD

#### Patents licensed by

Ask licensee's views on opt out? Make a recommendation?

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## **Unauthorised op-outs/withdrawals**

- The UPC will use two-factor authentication using SMS and email to ensure the person logging into an account is the owner of the account, described as "balanced approach"
- Because of the lack of a definitive list of proprietors, filing opt-outs/withdrawals has not been restricted to registered proprietors there is therefore concern about unauthorised filings
- A new Rule 5A has therefore ben proposed
  - The proprietor/applicant may lodge an application to remove an unauthorised opt-out/withdrawal,
     setting out its reasons
  - The registrar is to decide as soon as practicable and, if he accepts the application, will delete the unauthorised opt-out/withdrawal from the register
  - The decision may be subject to an application for review by the President of the CA
- If an opt-out/withdrawal has been made by an unauthorised third party it seems likely that a declaration from the genuine proprietor to that effect would be sufficient for the Registrar to act

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### Risk of challenge to an opt-out?

- The Registry will not conduct any substantive checks on an opt-out (or withdrawal)
- Rule 5.5 (and similar rules for withdrawal of opt-outs under Rule 5.7) provides:
  - An opt-out which meets the requirements ... shall be regarded as effective from the date of entry in the register" so an opt-out that does not meet Rule 5 may be <u>ineffective</u>
  - Missing or incorrect details may be corrected, in which case the opt-out is effective from the date of correction (unless "obvious to the reasonable third party", according to CMS)
- Uncertain how strictly the UPC will interpret "meets the requirements" e.g.
  - Non-obvious but minor errors (e.g. an out-of-date address for the correct proprietor)?
  - More significant errors (e.g. omitting one designation/SPC, wrong entity in a group)?
- If an 'opted-out' EP is attacked in a revocation action, claimant is informed of opt-out (Rule 16.1) <u>but</u> not struck out
  - The claimant can continue the action and the proprietor would need to bring a Preliminary Objection (Rule 19)
  - Onus then on the proprietor and the defence deadline continues to run
- The opt-out contains limited details (e.g. only a declaration that proprietors are entitled to be registered) so may be difficult to unpick unless wrong on its face (e.g. missing designations)

# The UPC Opt-Out Reasons <u>for</u> opting out

- Risk of central attack the key risk of the UPC for patentees
  - A single revocation action for all UPC designations
- Uncertainties of a new court
  - Risk that it could start before it is ready procedural chaos?
  - Uncertainty as to law and procedure (including how discretions will be applied, e.g. bifurcation, PIs, saisies), quality of judges and variations between divisions
  - BUT important safeguards, including:
    - Germany is acting as gatekeeper for sunrise period and is invested in UPC's success
    - UPC attractive for senior judges and will be well trained and sit in multi-national panels
    - All revocation actions will include a technical judge on the panel
    - There is a mechanism for interim and procedural orders to be reviewed/appealed

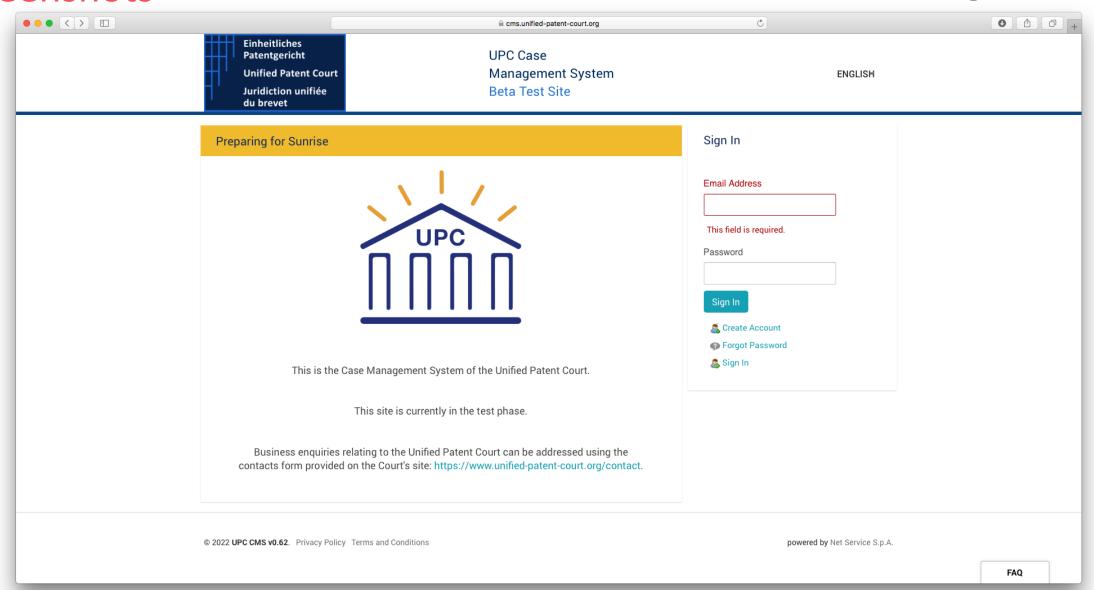
## Reasons for <u>not</u> opting out

- Ability to enforce across UPC states the key advantage of the UPC for patentees
  - Pan-UPC provisional measures PI (inc ex parte), seizure and freezing orders
  - Wide measures for obtaining evidence (e.g. saisie, disclosure, cross-examination)
  - Quick (~12 months) and likely cheaper than multiple national infringement actions
- Dual jurisdiction for EPs during transition period maximum flexibility and leverage
  - Likely to be able to 'mix and match' national proceedings with the UPC
  - e.g. use EP(DE) in German courts to get benefit of 'injunction gap', and other EPs in UPC
  - Won't get 'pinned out' of the system
- 'Long-arm' jurisdictions over non-EU/non-Lugano-domiciled defendants:
  - Possibility of provisional measures in non-participating EPC states
  - Assets-based jurisdiction for damages for acts in non-EU/Lugano EPC states, which could allow 'adding on' acts in, e.g., UK or Turkey, to a UPC infringement claim
- Experience in and influence over the court (i.e. shaping its case law)

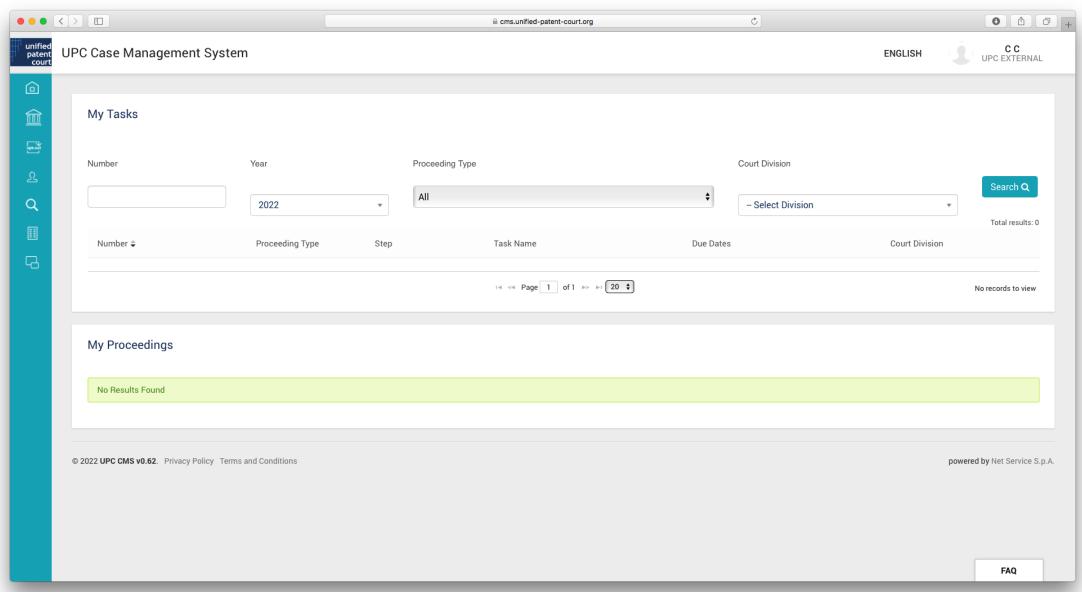
## Registration as a Representative

- Article 48 UPCA permits the following to register:
  - "Lawyers" authorised to practice before a Contracting Member State (Directive 98/5/EC)
  - European Patent Attorneys (Article 134 EPC) with an EPLC
  - European Patent Attorneys with other "appropriate qualifications (see draft Decision of the Administrative Committee Part II Rules 11 to 14)
- The procedure for registration Rule 286
  - Each person must have an account on the CMS with "strong identity authentication"
  - Each EPA must upload (in the CMS) proof of entitlement (EPLC or other)
  - Each lawyer must upload a relevant certificate authorising legal practice
  - The Registrar is required to check the entitlement of EPAs.
  - The list of representatives (EPAs and lawyers) will be available to the public



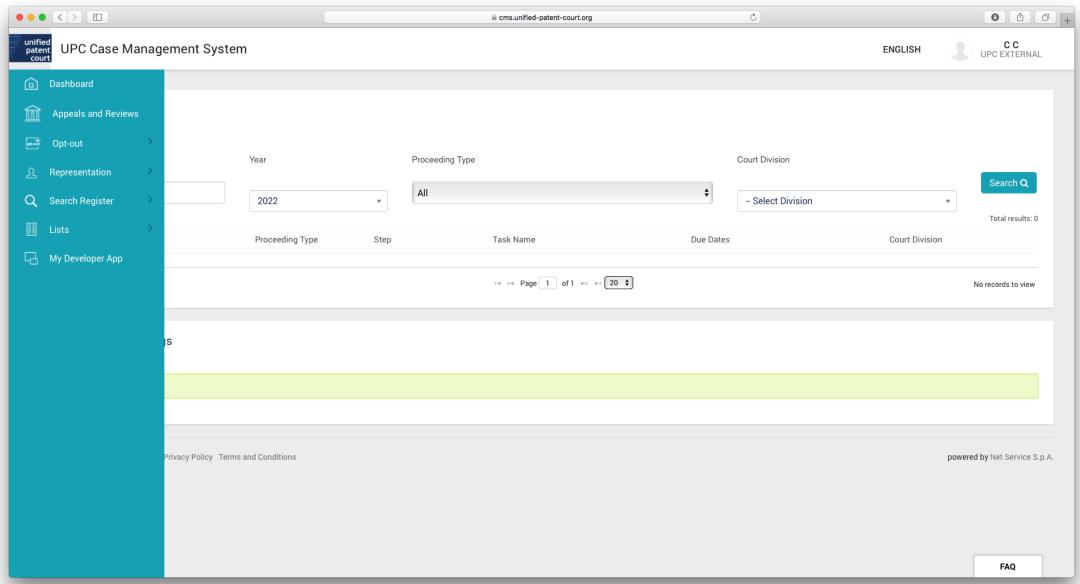




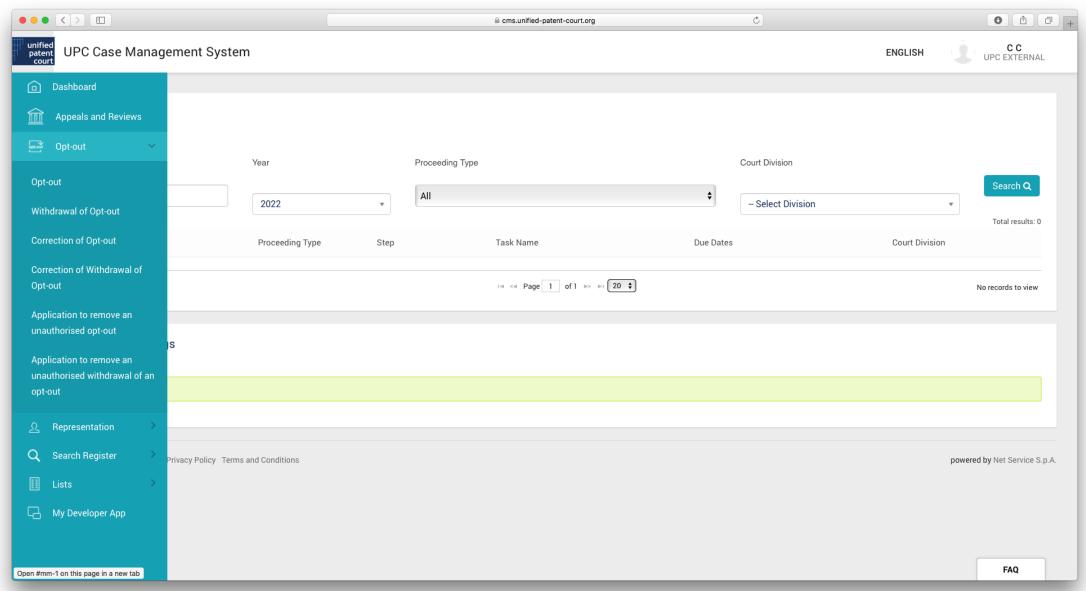




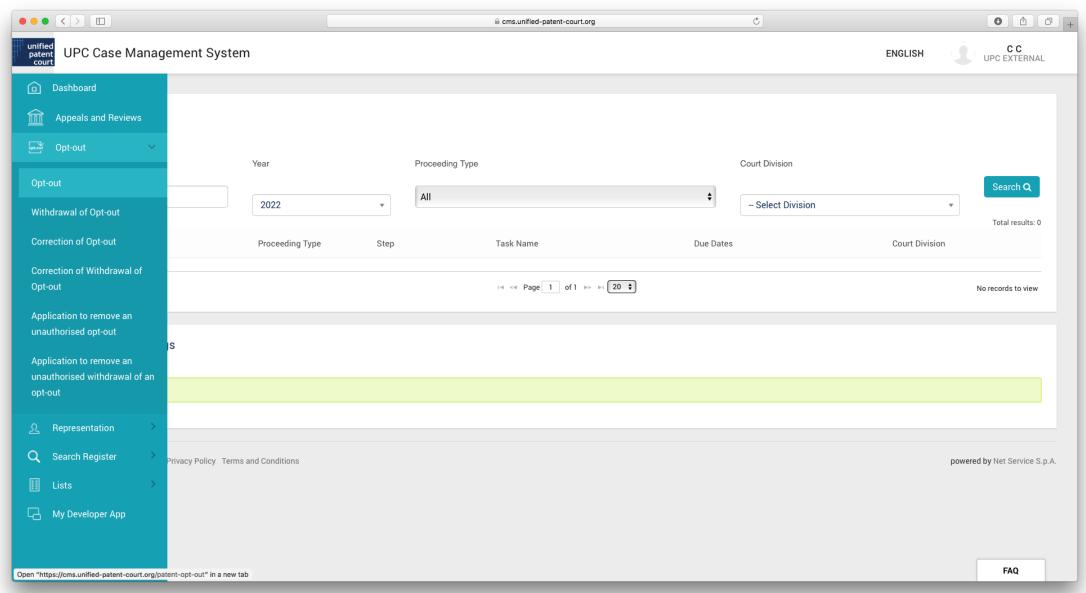
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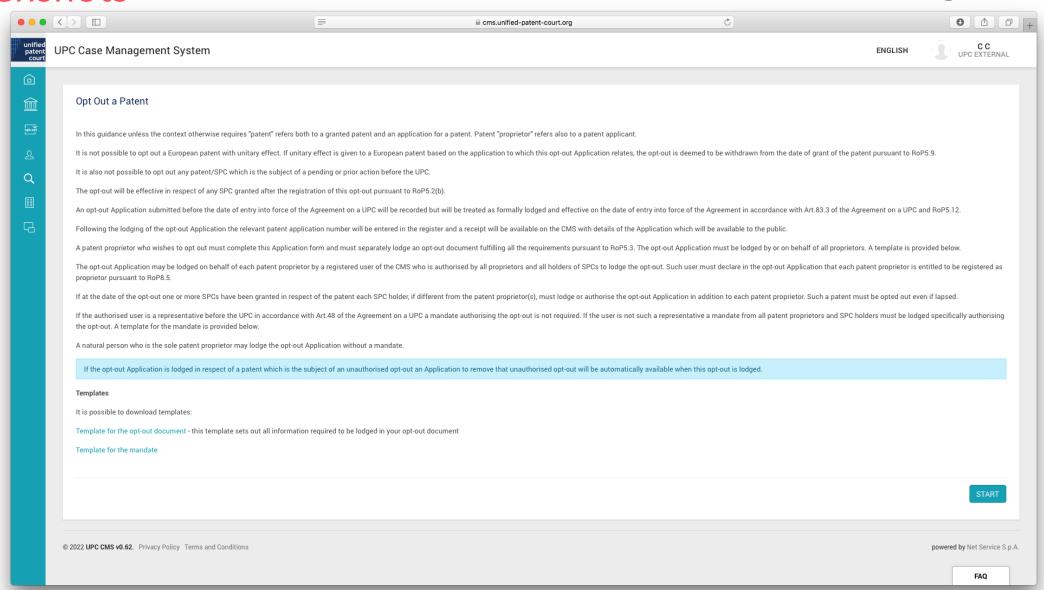




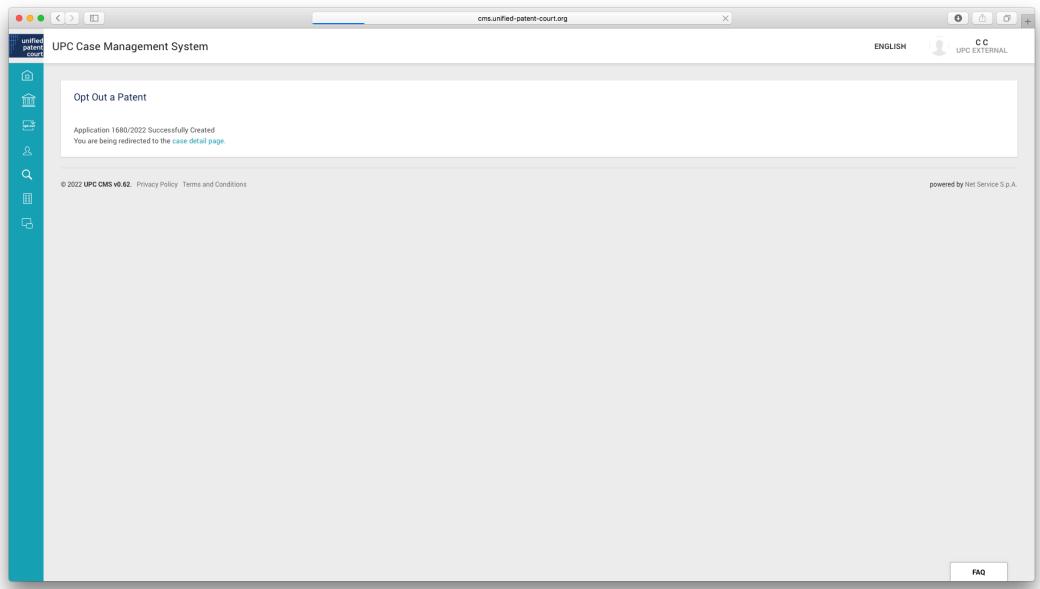




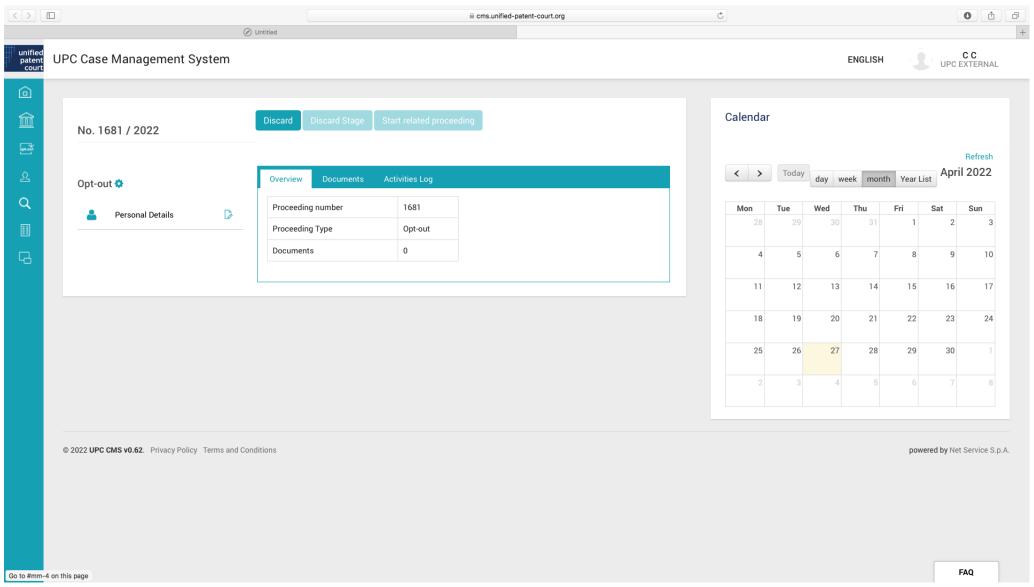


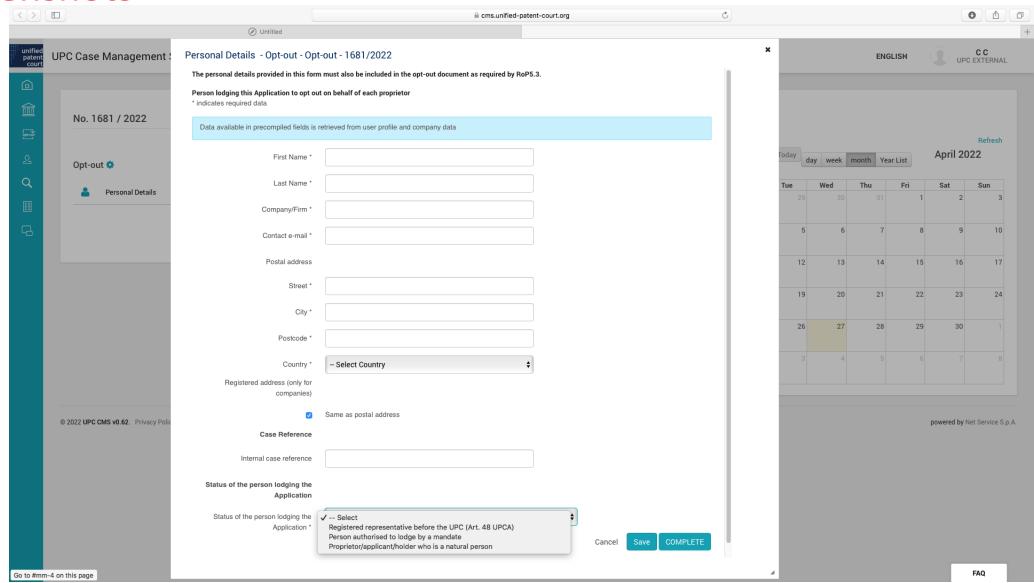




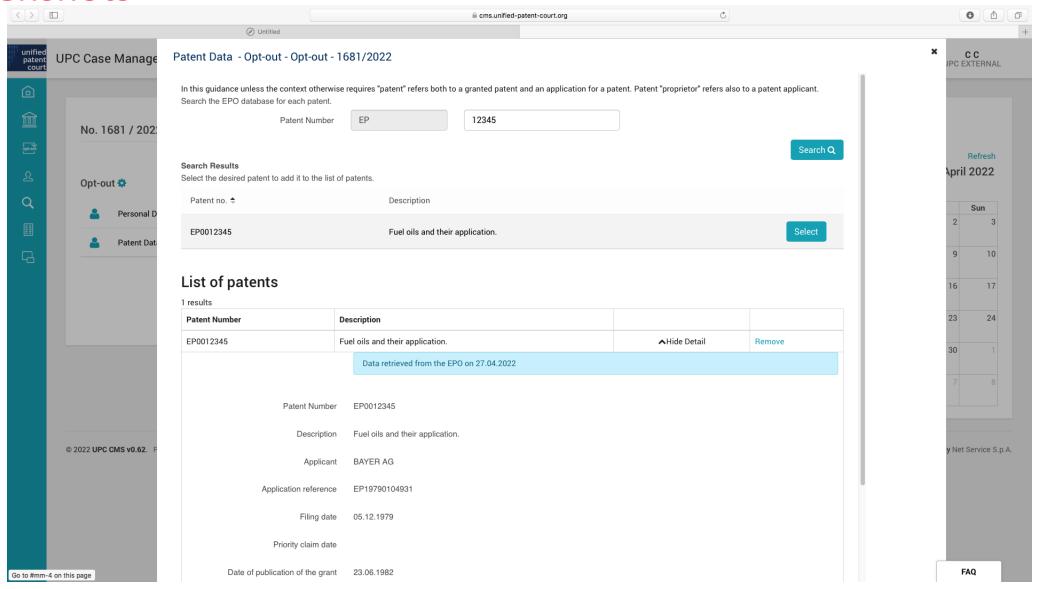


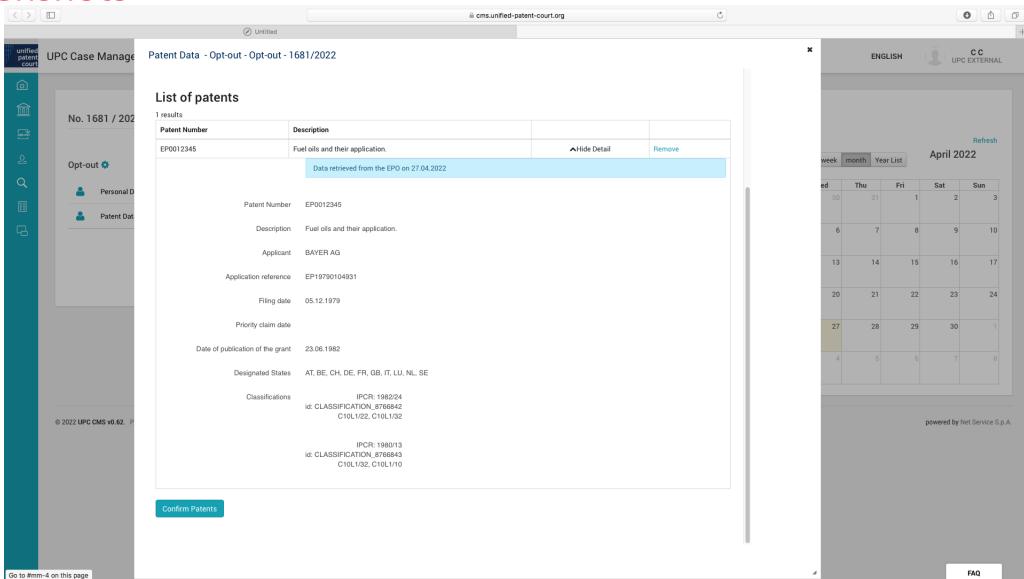


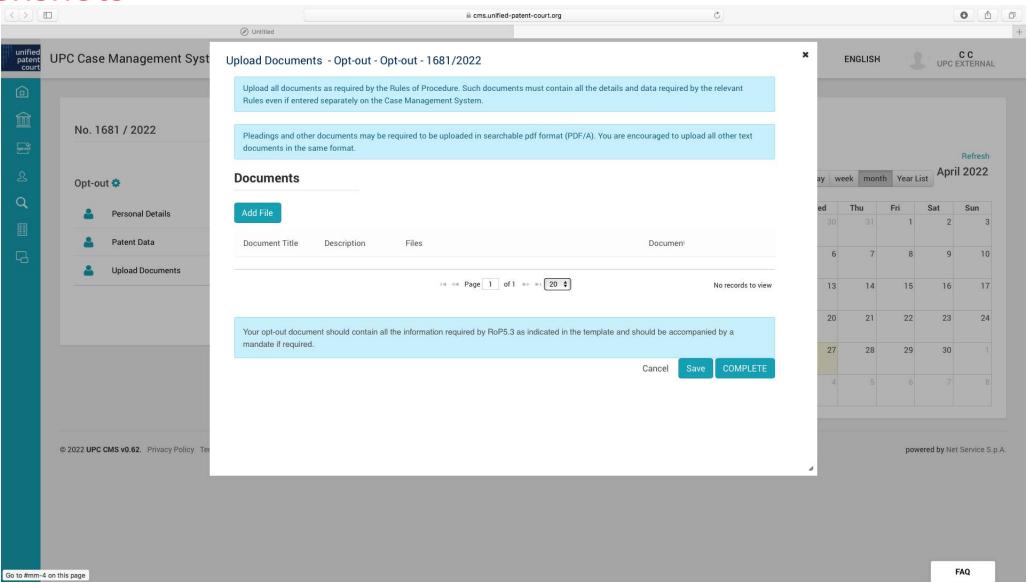




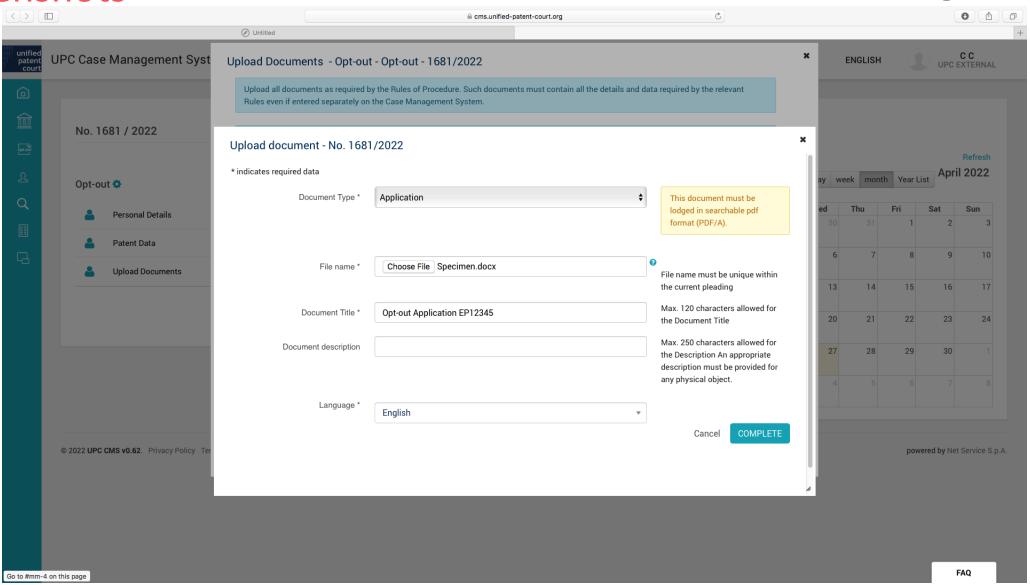


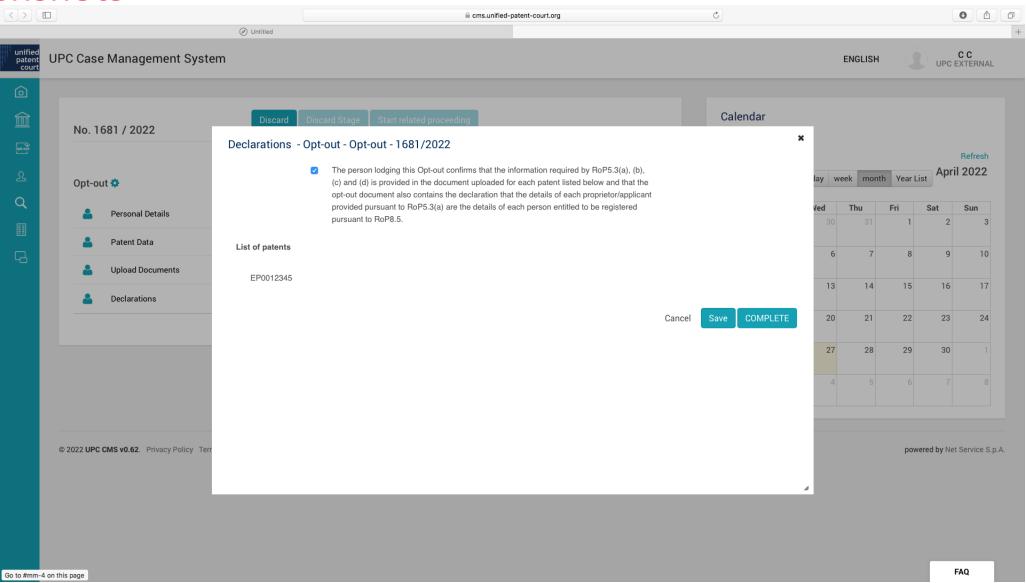












11/05/2020

The UPC Opt-Out

"	Note: Rule-5.3 requires: the following-information- and-declaration- in-respect-of- each-patent/application/SPC listed-below.) ¶	
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ſΛ	Note: This section must be repeated for each application the subject of this Application to opt out.)	
P	UBLICATION NUMBER of the European Patent Application []	
	Details of the applicant(s) for the patent ¶	
-	(Note: This: "Details of the applicant(s)" section must be repeated for each applicant.)	
	Applicant: [	
-	Postal address: []*I	
	Electronic address: []¶	
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	PERSON·LODGING·THIS·APPLICATION·TO·OPT·OUT·(RoP·5.3(b)) ¶
	alls of the person lodging this opt-out on behalf of each proprietor of each patent/application advabove and each holder of an SPC based on each such patent. (RoP-5.3(b)).
	Name: [
	Company/Firm: [
	Postal address: [
	Electronic address: [
	Status: ← (tick the applicable option) ¶
·····	[···]·Representative·pursuant·to·Article·48·of·the·Agreement·on·a·UPC¶
	[···]·User·authorised·to·file-this·opt-out-with·a·mandate¶
······	[.··]·Personal-proprietor-of-each-listed-patent*
	DECLARATION·(RoP·5.3(e)) ¶
The	person-lodging this-opt-out-must-provide the following declaration: ¶
[]	Thereby declare that each proprietor of each patent/application listed above is entitled to be registered pursuant to RoP⋅8.5. ■
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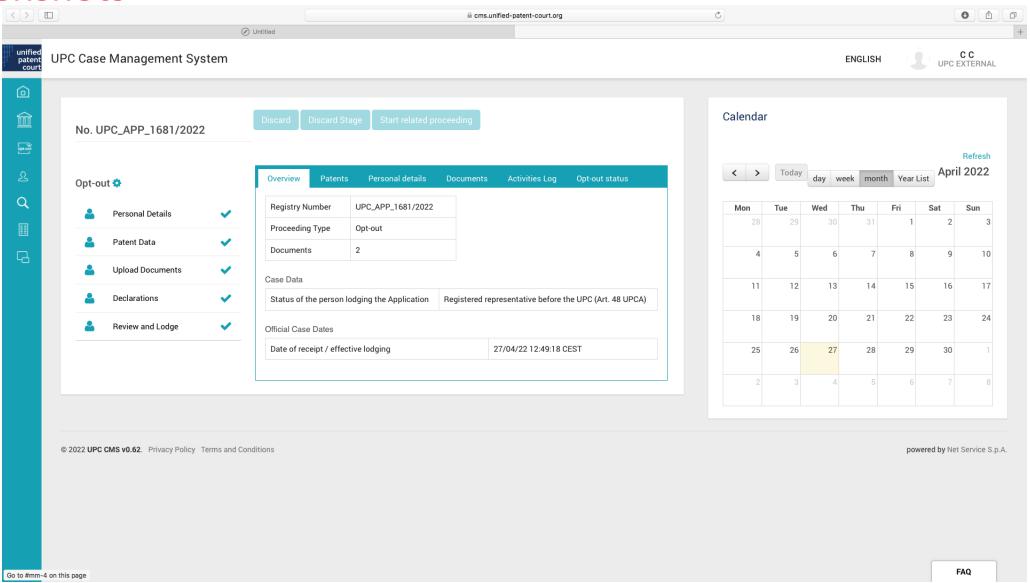
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Opt-out-Document-Template

	/application number:		plicant pursuant to Rule 8.5	
List each grante	d SPC:		Holders	Patent numb
			above on behalf of the above m	entioned
Name,		Position	Signature	Date



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- 1. Having created an account any new task does not prepopulate with the personal details of the account holder.

  Details of the account are used to pre-populate details of the representative. Such details may be changed.
- 2. Details of each patent for opting out has to be inserted manually. It is not possible to transfer data from a spreadsheet or other database.
  - Limited details have to be inserted manually but the Application to be uploaded can be pre-prepared. The manual procedure is suitable for a limited number of opt-outs because details have to be inserted for each patent.
  - For multiple opt-outs there is an alternative namely using an API which in effect allows importing data from a spreadsheet. Details of the API for this purpose are included on the UPC website.
- 3. Having entered details of a patent the name of the proprietor is not shown which would be an immediate confirmation that a correct number has been used.
  - The EPO database will show only the name of the applicant for each patent. There is no reliable database for current proprietors. However the data (description of the invention and the name of the applicant) that is retrieved from the EPO is some confirmation of the correct number.
- 4. SPCs have to be opted out per country rather than en bloc Until there is a unitary SPC this is necessarily the case.

- 5. It is unclear whether digital signatures can be used or whether wet signed documents have to be scanned.

  Once the protocol for strong authentication is in place, there will be the ability to digitally sign all documents as required by RoP4 (to be amended)..
- 6. There is no possibility for general mandates.

  A representative does not require a mandate to opt out a patent. However it is recognised that the person lodging the Application may not be a representative and may require a mandate. The use of an API should avoid the problem for multiple opt-outs. The same mandate can of course be used for all patents of a particular proprietor.
- 7. It is not possible to check documents once uploaded.

  Documents can be checked on the "Review and lodge" task before lodging the Application. If a search is made subsequently a check is possible in the "Documents" section of each Application on the register. If an error has been made an Application to correct the opt-out will be required.
- 8. It is unclear how to provide ownership data on patents that have different owners in different countries

  At present it is necessary to provide ownership data on the CMS itself. However the decision has been made to remove this requirement so that this data is only included in the uploaded Application.
- 9. It seems that the only way to opt out is via the software. This cannot be done by letter or email

  This is correct

- 10. Attempts to use the API have not provided a mechanism by which a delivery receipt can be generated.

  An acknowledgement of opt-out is provided on the CMS for each opt-out Application. The document is available in the "Documents" section of each Application on the register.
- 11. There is no option for another person to log in and check a draft opt out prepared by someone else.

  This is correct.
- 12. Required to add the information using the software and also a template that has to be completed saved and uploaded (duplicate information).
  - Certain information must be inserted into the CMS to allow the system to function. This is kept to the minimum necessary; the bulk of information is provided separately in uploaded documents.
- 13. Each application has to be listed separately, not possible to upload a spreadsheet to include all applications See no.2 above.
- 14. Personal details (details of individual submitting the opt out applications), the details cannot be saved for future pre-population (repetitive)

Personal details of representatives are pre-populated. If an API is used it should be possible to pre-populate this information.

- 15. If the person submitting the details is not the Applicant/Proprietor a mandate has to be completed with a "wet signature" (but not clear), mandate printed/signed/scanned and then uploaded (time consuming).
  - See no.5 above.
- 16. If there are co-applicants, it is not clear if they also have to sign a mandate.
  - The mandate is signed on behalf of the proprietor or co-proprietors.
- 17. The mandate has to be specific by case i.e. cannot use a GPoA.
  - See no.6 above.
- 18. When details of an application have been entered if there are any SPC's from the Granted Patent, these details have to be added separately (again individually)
  - Only the number and country of each SPC has to be entered on the CMS. Details of holders are included in the Application document. See no.8 above.
- 19. Not able to review all applications that you are submitting in when complete (not good for checking for mistakes)

  See no.7 above.
- 20. Whilst you can submit multiple applications together (albeit information individually entered), this can only be done where the applicants are the same.
  - Whether the procedure is manual or via an API it is possible for the same person lodging the Application to opt out multiple patents for multiple proprietors if there is an appropriate mandate or mandates.

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- 20. Whilst you can submit multiple applications together (albeit information individually entered), this can only be done where the applicants are the same.
  - Whether the procedure is manual or via an API it is possible for the same person lodging the Application to opt out multiple patents for multiple proprietors if there is an appropriate mandate or mandates.
- 21. A Declaration also has to be submitted, to declare the person submitting the opt out application is authorised to do so.

  This is correct.
- 22. Once these have been lodged, an e-mail is generated and sent to the submitter, however the e-mail does not contain a case reference. It contains the number it generated and a link to the UPC Case Management System.
  - The email contains the registration number generated by the CMS. The Applicant can use this number to access the CMS and see the details of the patent opted out with that specific number. If the Application was manual the registration number will show details of all patents opted out with that Application. If the API procedure has been used there will be a separate registration number for each patent.



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