

## Opt-Out – Legal problems

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Little has been discussed more in the drafting process than the possibility to exclude a patent or patent application from the entire package. The opt-out provisions to be observed are Articles 83 (3) and (4) UPCA and Rules 5.1 to 5.13 RoP. While on its face everything seems to be easy (“You file an opt-out with the UPC and you are out”), many aspects are unclear.

### 1. No opt-out for Unitary Patent

There is no opt-out for a unitary patent. Art. 83 (3) and (4) UPCA pertain to “European patent[s] granted or applied for”. The term “European patent” (EP) is defined under Art. 2(e) UPCA as a patent not benefitting from unitary effect.

Nonetheless, 83 UPCA (as Rule 5.1) allows an opt-out for an EP applied for, hence, when a decision whether or not the patent owner wants to apply for unitary protection has not yet been made and no such motion was filed.

The issue arises what decisions are available for the patent owner – after exercising the opt-out option during the application period - upon the grant of the patent. Even though the unitary effect is to be granted by the EPO and not the UPC, the EPO could still con-

strue an opt-out application with the UPC as a waiver of the right to apply for unitary protection. Yet, a waiver of a right must be clear, unambiguous and usually directed against the creditor. In case of an opt-out, the owner of the patent application wants to initially assure that his or her right is not dealt with by the UPC but not abandon his rights. The owner might not even have a conscience that an opt-out with the UPC could construe a waiver at the EPO. This conflict is solved in Rule 5.10. It is specified that “where an applicant for an EP subject to an opt-out pursuant to this Rule proceeds to grant as an EP with unitary effect, the proprietor shall notify the Registry.” Therefore the patent owner can still request the unitary effect at the EPO, even though he made use of the opt-out with the UPC beforehand. Upon grant of the unitary effect, the opt-out will become ineffective - in respect of the Contracting Member States covered by the EP with unitary effect, as there is no opt-out for a unitary patent. Rule 5.10 takes into account that the territorial scope of the EPs with unitary effect will most likely not cover all 25 Member States. For those Member States which will not yet have ratified the UPCA, a classical EP may still be obtained – in addition to an EP with unitary effect covering those States which have ratified the UPCA. Only in respect of

Contracting Member States covered by the EP with unitary effect, the opt-out shall be deemed to be withdrawn. As to those countries which are not providing Unitary Patent protection appear to continue to enjoy an opt-out. Likewise countries which only later ratify the UPCA appear to benefit from an opt-out possibility once they ratify. Thus, contrary to the common understanding there can be a permanent opt-out for some parts of the territory while for others the UPC in the only venue.

## 2. Opt-out application

According to Rule 5.1 RoP an opt-out is possible for the proprietor of a registered EP, including an EP that has expired, or the applicant for a published application for an EP who wishes to opt out that patent or application from the exclusive competence of the UPC.

A number of issues are of concern.

### 2.1 General issues

An opt-out application filed after entry into force of the UPCA is to be directed to the UPC. The Registry is in charge. Whether or not an opt-out with a sub-registry is valid is not explicitly addressed. Art. 10 (3) UPCA distinguishes between Registry and sub-registry and even provides for a duty of the sub-registries to notify the Registry in regard to all cases before the Court of First In-

stance. Hence an own competence of a sub-registry in regard to opt-out applications has to be doubted. Nevertheless Rule 3 RoP points out that where the Rules refer to the Registry or Registrar and provide for the Registry to perform any act that reference shall include the sub-registry of the relevant (local) division of the Court of First Instance in a Contracting Member State, see Art. 10 (2) in connection with 8 (2) UPCA and that act may be performed by this sub-registry.

Anyhow the application itself is not performed by the Registry but the applicant, so that the Registry does not act but only receives. Hence, Rule 3 RoP might not apply if an application is filed with the sub-registry. On the other hand several Rules concern the registration of an application to an opt-out/ a withdrawal of an opt-out in the register which shall be performed by the Registrar. According to Rule 3 RoP, such a registration could also be performed by the sub-registry of the relevant division. This entitlement would not make any sense in case the sub-registry may not receive the respective applications. Hence, there is a strong indication that the opt-out can also be filed with the sub-registry of the local division of the Court of First Instance. Despite, this aspect is not conclusively discussed. Thus it is recommendable to not try to act via the sub-registry. Anyhow, once the registration of the opt-out application by the sub-registry took place, any lack of form shall be cured.

The application may be lodged by the proprietor(s) or applicant(s). Rule 5.4 RoP explicitly states that Rule 8 RoP (requirement of representation) does not apply to opt-out applications according to Rule 5 RoP. Nonetheless, in case a representative is appointed, this representative may but does not have to comply with the requirements of Art. 48 UPCA. Art. 48 UPCA names lawyers authorized to practice before a court of a Contracting Member State or European Patent attorneys with appropriate qualifications. Rule 5.4 RoP also accepts European Patent attorneys according to Art 134 EPC, hence without additional qualifications.

The application will only be successful as long as no action has been commenced before the UPC (which is possible during the transitional proceeding) in regard to the EP (and/ or a patent application).

As to formalities, the application to opt-out shall contain the names and addresses of the proprietors and details of the patent including the designated contracting member states concerned, Rule 5.3.

Different from German law and its principle that administrative fees have to occur with the work executed, the fee to be paid for an opt-out is fixed according to Rule 5.5 and Part 6/ Rule 370. The amount of this fixed fee

has not been determined. Rumors range between Euro 200 up to Euro 1.000 per patent (at least including any of its supplementary protection certificates granted for it). This shows that patent owners shall be discouraged from opting out as the fee may sum up to a considerable amount of money if large portfolios are involved. The Preparatory Committee (PC) confirmed this assumption in its Responses to the Public Consultation of the Rules of Procedure of the UPC, dated June 25, 2013. Here the request was raised that the fee should not be prohibitive but calculated on the administrative costs incurred. A change of the wording was however refused as the amount of fee would be a political question and the RoP should not and cannot restrict the room for this decision. Only in May 2015, the Preparatory Committee has now expressed an opinion on the opt-out fee in its consultation paper on court fees and recoverable attorney fees. The opt-out fee (and the fee for withdrawal of an opt-out shall reflect the work associated with dealing with the opt-out. Hence, EUR 100 to EUR 150 can be expected. The fee is for the entire EP and not for each designation.

Registration shall take place “as soon as practicable.” This is determined by payment of the fee to the Registry within 30 days and the work-load of the Registry. The Application is only entered in the register once the fee has been paid. (This rule remains open

for opt-out applications during the sunrise period. Since the EPO has refused to collect the fees, but registration of the opt-out shall be deemed to be effective on day one of the Court, registration appears to take place without payment in this case.)

## 2.2 Specific issues

Besides these general topics specific aspects and constellations have to be examined.

The answer to most of the problems to be discussed may be found by taken into account one keynote of the UPCA: the avoidance of diverging decisions by the UPC and national courts. Regarding this fundamental idea the PC stated in its Responses dated June 25, 2013 that:

The exclusion of the jurisdiction of the UPC regarding EPs - an opt-out – is only allowed

- completely (= regarding all claims, all designations, all owners – even though 5.10 RoP takes another tale)
- erga omnes and
- forever (if no opt-in).

### 2.2.1 More than one proprietor

Rule 5.1 (b) addresses the situation that the patent or patent application is owned by two or more proprietors. It provides that all pro-

prietors shall lodge the application for the opt-out. The term “shall” makes clear that an application filed by less than all proprietors has to be deemed invalid. “Proprietors” are the applicants listed in the registry of the EPO or the respective national registries.

The request of a jointly committing application also applies where a patent is owned by different proprietors in different Contracting Member States. Rule 5.1 (c) RoP makes clear that the opt-out application has to be lodged with respect to all of the Contracting Member States for which the patent is designated. Therefore the proprietors must not opt-out for some countries (designations) only and remain subject to the UPC with respect to other countries.

This provision ensures an EP is exclusively either under the regime of the UPC or the regime of the national courts to avoid diverging decisions by the UPC and the national courts. An access to both court systems is therefore prevented. (But for the transitional period where the proprietors can decide to file a patent infringement in a national court and for other countries with the UPC with a motion limiting the sought injunctive relief to other jurisdictions).

Proprietors who cannot agree whether to opt-out or not, the UPC will not be in charge. The proprietors will have to take recourse to the national courts being in charge applying the conflict of laws rules of the for a in question.

## 2.2.2 Date when opt-out becomes effective

One further problematic issue is the date when the opt-out is or is deemed effective. In principle, Art. 83 (3) UPCA (as well as the Rules) is clear in this respect. The opt-out shall be regarded as effective from the date of entry into the register. (But see the sunrise- period discussed below.)

The provision is unfortunate because it causes the date the opt-out becomes effective to depend on the speed of work of the Registry. For whatever reason the drafters of the UPCA decided on registration instead of application as the crucial date (presumably to make opt-out difficult and unattractive) it is now on the books.

There are some who appear to construe Art. 83 (3) UPCA as it shall fully apply only after expiration of the transitional period, with the consequence that the opt-out becomes effective not before the expiry of the transitional period. Since Art. 83 (3) UPCA refers to opting-out from the *exclusive* jurisdiction of the UPC, one can argue that there is no opting-out during the transitional period to the extent that dual jurisdiction is offered, Art. 83 (1) UPCA. This interpretation can rely on the wording of Art. 83 (3) UPCA but violates the intent of the provision i.e. to avoid diverging decisions by the UPC and national courts. The drafters of the RoP neither understand

Art 83 (3) UPCA this way. All talks about the sunrise period would make little sense. Therefore the expiry of the transitional period shall not be a suspensive condition for the opt-out to become effective.

The opt-out may already become effective during the transitional period with the effect that the choice of Art. 83 (1) UPCA between UPC and national court is no longer given as the case has to be brought to a national court.

The wording of Art. 83 (3) UPCA *inter alia* results in a scenario where (i) the UPC receives an opt-out application, (ii) subsequently the UPC receives for instance a revocation action and (iii) finally the Registry is about to enter the opt-out into the register.”

The Rules address this problem by Rule 5.7 and decide the conflict in favor of the action (in the example above the revocation action). The application for opt-out is deemed to be ineffective.

Following this delayed entry in the Register the question arises if the application to opt-out may at least become effective with regard to subsequent actions to be barred from the UPC. Art. 83 (3) UPCA is worded in general terms but in the 17<sup>th</sup> draft of the RoP Rule 5.7 now takes a stand. The revised Rule 5.7 clarifies that the option to opt-out is blocked not

only by an action pending before the UPC, but also by an action that has been concluded. Hence an action before the UPC is an absolute barrier regarding an application to opt-out for the lifetime of the patent concerned. This explicit final effect bases again on the fundamental idea of avoiding diverging decisions regarding the same patent on different levels (UPC, national courts). Such differences can arise even after the blocking action has ended, as the other court could interpret claims differently.

#### 2.2.4 Sunrise period

The ultimate effect of a delayed application to opt-out is even more apparent in the first days of entry into force of the UPCA as actions can be brought against patents immediately after the entry preventing the intended opting-out of patent owners, especially as the transitional period in Art. 83 (3) UPCA with the option to opt-out does also not become effective before the entry into force of the whole UPCA.

Rule 5.13 addresses the problem:

After a date to be announced by the European Patent Office and before the coming into effect of the Agreement, the European Patent Office may, as a service to applicants and under the terms specified by it, collect Applications to opt-out. Where the European Patent Office, until the day of the date of entry into force of the Agreement in accordance with Article 89 of the Agreement, transfers to the Registrar details of such Applications (and of any pending Applications) the Regis-

trar shall enter the Applications received on the register under the said date of entry into force of the Agreement.

In other words: The opt-out application shall prevail over any court action.

Opt-out applications may be lodged with the EPO already before the entry into force of the UPCA. The EPO simply collects the applications and on the day of entry into force the EPO will transfer to the UPC Registrar the details of the pending and completed applications for registration under the date of entry into force of the UPCA, even if the actual entry is performed later. Different to the former drafts of the RoP, the current wording does not include any duty of the EPO to check on formalities or control the payment of the fee (due within 30 days after filing the application). This change shall clarify according to the PC that the service of the EPO is a service to applicants. The EPO therefore represents the applicants and is not a representative of the UPC. Hence the Registrar has to check on formalities of the applications and control the payment of the fee.

Rule 5.13 appears to be in conflict with many provisions:

- Rule 5.13 enables the patent owner/ applicant to use the EPO as a representative to file the application to the registry and provides a fictitious date of entry. This is turning the wording of Art. 83 (3)

UPCA into its opposite and overstretching the competence reserved for the RoP.

- Furthermore, Rule 5.13 does not give deference to the fact that the Rules will only come into effect, (i) once the UPCA has come into effect and (ii) the RoP have been passed by the administrative committee and (iii) a fee for opt-out has been determined by the UPCA. As the fee has to be paid before the application is entered into the register, the amount has to be known beforehand. Possibly the PC wanted to resolve this problem by including also pending applications. Anyhow such a solution would be contrary to Rule 5.5 stating a fee-depending entry into the register.

- Rule 5.13 provides for an additional duty of the EPO, a duty which is not listed in the Regulation 1257/2012 on the creation of unitary patent protection. Indeed the opt-out does not even relate to the unitary patent.

- Regarding the (still) missing legal basis to implement such duty of the EPO the PC delegates the responsibility to the Select Committee and the EPO according to Art. 153 (2) and 145 EPO. These provisions authorize the group of Contracting States to give additional tasks

to the EPO, Art. 143 (1) EPO. In order to carry out these additional tasks special departments may be set up within the EPO, Art. 143 (2) EPO. To supervise the activities of such a special department a Select Committee may be set up by the Contracting States, Art. 145 (1) EPO. Anyhow this assignment did not yet take place.

Nonetheless the practical impact of Rule 5.13 should not be underestimated. Few parties will proceed before the UPC arguing that the opt-out application has been invalid. Furthermore, once registration has taken place without an action having been filed in the meantime will in many cases heal a deficiency.

### **2.2.5 Duration of opt-out**

The opt-out application will result in a complete ousting of the jurisdiction of the UPC and it will be in place for the life of the relevant patent/application, irrespective how long the transitional period will last.

A proprietor or proprietors may, however, withdraw the opt-out in respect of the patent(s) or application(s) in case no action has been commenced before a national court prior to the entry of the application to withdraw in the register, Rule 5.9. Again, the ultimate effect of just one pending action is given (see above 2.2.3).

Even though only in Rule 5.1, which deals with applications to opt out, it is stated that in case the patent is owned by more than one proprietor the application has to be filed by all proprietors (Rule 5.1 b), it has to be assumed that consequently also the withdrawal of the opt out, the opt-in, has to be declared by all proprietors of the patent concerned.

Once an application to withdraw has been entered into the register no second application to opt out can be successfully lodged, Rule 5.11.

### **2.2.6 Supplementary protection certificates**

Initially, it was unclear whether if a proprietor opts-out an EP this will automatically extend to any SPC granted in respect of that patent. The handling of SPC was already taken care of in the 16<sup>th</sup> RoP-draft and was even simplified in the 17<sup>th</sup> RoP-draft.

Basically the application to opt-out a EP as well as the withdrawal of the opt-out shall extend to any SPC certificate based on this EP and even after its expiry, Rule 5.2 (a) in connection with Rule 5.1 and 5.8. The PC stated SPC shall be treated in the same manner as the EP designations, therefore:

- No SPC-opt-out without an opt-out for the EP and for other SPC

Automatic opt-out-effect of a patent-opt-out for a SPC granted later

Strictly according to this principle, any owner of an SPC, different to the patent owner, shall lodge the application to opt-out together with the proprietor, Rule 5.2. (b).

Where the SPC is granted subsequent to lodging the application, the opt-out shall take effect automatically on grant of said SPC so that a further application is not necessary, Rule 5.2 (c). In the 17<sup>th</sup> draft even the duty of the owner of the SPC to notify the Registry of the details commonly required under Rule 5.3 was removed as superfluous as the Registry already has the information in hand based on the application to opt-out the European Patent.

Consistently to the principle of equal treatment of patent and SPC, an application to opt-out will be ineffective in case an action has been commenced in respect of an SPC at the UPC prior to the entry of the opt-out application in the Register, Rules 5.2 (d) and 5.7.

Likewise the withdrawal of the opt-out will be ineffective in case national proceedings have been started in respect to an SPC prior to the entry of the application to withdraw in the register, Rules 5.2. (d) and 5.9.

Just for the avoidance of doubt, Rule 5.2. (e) states that the opt-out of an SPC based on an EP with Unitary effect is not possible. This provision is consistent with regard to the fact that there is no opt-out for EPs with Unitary effect.

Last but not least it has to be pointed out that the UPCA does not apply to applications for SPC – Art. 3 UPCA only mentions SPC issued for a product protected by an EP. Therefore the UPCA and the RoP do not apply until the certificate has been granted. This can be explained by the fact that, different to the application for a patent, there is no provisional protection resulting from the application of an SPC which could be subject of a court action.

### **2.2.7 Divisionals**

Neither the UPCA nor the RoP include provisions regarding the treatment of divisionals. The PC stated that there was a debate as to whether divisionals should be treated as part of the same application to opt-out. One faction was of the opinion that an application to opt-out a parent should also require the opt-

out of any divisionals to avoid the situation of a parent being in the system and a divisional being opted-out. The other faction considered that such requirement would be contrary to the UPCA, given that divisional are separate patents.

In the end the PC came to the conclusion that treating divisional other than as separate patents in Rule 5 for the purpose of opting-out would be administratively impracticable as well as politically controversial.

The assumption does not contradict the basic idea of the UPCA, mentioned in section 2.2: the avoidance of diverging decisions by the UPC and national courts. With regard to the prohibition of a double-patenting, an obvious distinction between the content of the parent and the divisional is ensured. Therefore the parent and the divisional are not only independent from each other but may also constitute diverging claims and decisions in court proceedings. Hence a consistent jurisdiction is anyhow not to be obtained.

Divisionals are therefore to be treated as what they are - separate patents - so that the Rules concerning EP independently apply. In consequence the patent owner may opt-out regarding the patent and not opt-out regarding the divisional and vice versa.

This evaluation of a divisional being a separate patent has to be taken into account also in case the patent applicant of the parent firstly opts-out and the divisional application is filed subsequently. There is no basis for the assumption that a divisional accrues with a formal presetting of the parent.

### 3. Transitional Period/Opt-out and the applicable law before national courts

Before deciding whether or not to opt-out or to file actions before national courts during the transitional period, one should not only focus on the consequence of the scope of the court decision (entirety of the contracting Member States / limited to one Member State). A further major aspect is the question of the law which has to be applied by the national courts during the transitional period and in case of an opt-out. Considering that, it appears necessary to take into account the regulatory content of Art. 83 UPCA.

Art. 83 (1) UPCA establishes dual jurisdiction.

Art. 83 (1) and (3) UPCA provide exceptions from the principle of exclusive jurisdiction of the UPC:

- During the transitional period – cases relating to EPs without unitary effect can be brought before national courts

- After choosing the opt-out

The wording of Art. 83 (3) UPCA seems to provide that the UPCA shall remain the applicable law in the national courts, as Art. 83 (3) UPCA just states that the exclusive competence of the UPC may be excluded. The application of the law is not mentioned in this exclusion.

Art. 83 (1) UPCA at least provides a *choice of forum*. The plaintiff may either choose the national courts or the UPC. Furthermore, Art. 83 (1) UPCA provides certain indications that the possibility to choose does not provide a possibility to introduce a different national law.

According to the wording of Art. 83 (1) UPCA actions for infringement or revocation “may still be brought” before national courts.

According to the wording, the “actions” are defined as to the same that will have to be brought before the UPC in its exclusive competence. This seems to be supported by the context of Art. 83 UPCA, especially the opt-out rule in Art. 83 (3) UPCA. Art. 83 (3) UPCA entitles the patent holder “*under certain circumstances*” to opt out from the exclusive competence of the UPC. Opting out from the exclusive competence as mentioned in Art. 83 (3) UPCA could be understood in a way that it provides an exclusion of the competence of the UPC altogether whereas Art. 83

(1) UPCA merely provides an exclusion of the exclusivity of the competence of the UPCA. Art. 83 (3) UPCA would then provide the possibility to choose the substantive law. Art. 83 (1) UPCA on the other hand would merely provide a *choice of forum*.

This interpretation complies with one keynote of the UPCA: the avoidance of diverging decisions by the UPC and national courts: Both, the UPC and the national court are charged with interpreting the same patent laws. As national courts are not bound by the UPC, diverging decisions in concern of the interpretation of the UPCA are to be expected. As a consequence it is taken that once a national court is in charge and the UPC has lost its competence, the national court has to apply the national law only. However, this is in direct conflict with the argumentation that only certain claims can be brought before the national courts under Art. 81 (1) UPCA and the possible constellation of pending suits before both - the UPC and national courts.

The PC realized the conflict due to the different interpretations at hand and the importance of its clearance for the patent owners. In its Interpretative Note, published January 29, 2014, the Committee states:

At first the Committee refers to Art. 3 UPCA, which provides that the UPCA applies to EPs

and EP applications without prejudice to Art. 83 (3) UPCA. As this reference however is ambiguous it does not give a clear answer to this matter. Therefore the Committee considered further that the intention of the Contracting States was to enhance legal certainty by creating a new jurisdiction to be interpreted by a single court. Nevertheless, the Contracting States did not include in the UPCA any provision obliging the Contracting States to harmonize national patent law. In this aspect the UPCA differs from the EU trade mark system, as

- the UPCA is not accompanied by an EU-directive harmonizing national patent systems and
- a possibility for national judges to pose interpretative questions to the UPC is not provided.

The Committee concludes that

*“it was the purpose of the contracting states to create a new jurisdiction in order for substantive patent law, to be interpreted by a court common to the contracting states exclusively (i.e. the Unified Patent Court). It was not intended to be obligatory to harmonise national patent law, nor was it intended that national courts would have jurisdiction with regard to the agreement itself.”*

Following this line of argumentation, the national court in charge, either because a case was brought before the national court during the transitional period or because the patent owner opted-out, would have to apply the national law. However, this opinion apparently does not take into account that – without distinguishing between the “total” exclusion of the UPCA (opt-out, Art. 83 (3)) and the dual jurisdiction (transitional period, Art 83 (1) UPCA), diverging decisions due to different applicable laws have to be expected.

Hence, it appears to be more reasonable that in cases of Art. 83 (1) UPCA the UPCA has to be applied by the national courts as well and, if at all, only Art. 83 (3) UPCA provides the possibility to apply national law.

#### **4. Opt-out in transitional period - consequences of jurisdiction**

The new system provides for a multitude of possibilities. As for new applications, an owner can decide to file an EP application or decide for national applications. An EP application provides the - later - options of branching off utility patents, filing divisional, validation as Unitary Patent and validation as “traditional” EP. Such “traditional” EP again offers the opportunity to opt-out.

As for granted EPs there is - only - the decision to make: whether or not to opt-out. The

decision has to be made for each EP (or EP application) at a time.

At the now decisive moment – during the sunrise in avoidance of blocking proceedings at the UPC respectively during the transitional period - the patent owner has the choice between two packages:

1. Opt-put: Already experienced jurisdiction at national courts applying familiar national patent law and the consequence that adverse impact of jurisdiction is limited to one contracting member state
2. No opt-out: Unexperienced jurisdiction of the UPC, the risk of invalidation of the EP in its entirety by a single judgment and the limitation of the legal remedy to the one and only Court of Appeal

Many may therefore be tempted to file opt-out application for all its EPs and EP applications. This will not be cheap in light of the fee to be paid. A general decision is therefore not justified. This is even more true in light of the fact that in some years access to the UPC might be preferred and a withdrawal of an opt-out is only possible as long as no national proceeding has started.

The larger a portfolio the less secure a patent owner will be. Trying to facilitate the decision making process there are two criteria, namely the importance of the patent or application and its strength. The more a patent owner believes that his or her patent will survive a

challenge, the more reasonable it is to maintain at least the possibility to use the new system and therefore not to opt-out. The other way round a high importance of the patent suggest to opt-out in order to not endanger the patent to be invalidated in one proceeding in all of Europe.

This results in the following:

- No money should be spent for an application or a patent which is not important and even strong. An opt-out is not appropriate.
- The same is true for an unimportant and weak patent. One should anyhow consider to let it lapse.
- For an important and strong patent a patent owner might consider an opt-out. The strength of the patent, however, will usually lead to not opt-out. It does not appear to be necessary because it will not be invalidated by the UPC. During the transitional period the owner can chose whether to file infringement suits with the UPC or in a national court. If there is an opt-out declaration competitors might even file a national revocation proceeding in order to exclude the possibility to withdraw the opt-out and proceed against the competitor before the UPC.
- An important but weak patent, however,

is in danger as of the entry into force of the new system. Currently, there is still the possibility to defend it on a country by country basis and maintain it in some countries. With the UPC in place a revocation for all of Europe is possible and likely. Here, an opt-out is sensible.

Of course there are more options to play with. In the context of deciding on an opt-out divisional and utility models have to be considered. With a utility model or a divisional patent one might even enjoy having the option to proceed in whatever system depending on the quality of the UPC.

Sufficient funds are necessary.

In any case the decision has to be made now  
- and not once a proceeding is already filed.



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