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CCBE comments on the Unified Patents Court draft code of conduct

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Introduction

On 17 May 2016 EPLAW/EPLIT/epi provided a Proposal for a Code of Conduct for the UPC (3rd draft) to The Preparatory Committee for the UPC.

The CCBE letter of 4 May 2016 provides preliminary and general comments about the draft. Our understanding from the recent telephone call is that references to the CCBE and epi will be omitted and accordingly it is not intended to imply that either code is considered applicable to all representatives before the UPC.

In relation to point 6 in the letter, it is not presently clear what power the judges have to control behavior in their Courts during hearings (other than excluding "representatives" from "proceedings").

This document records additional feedback and comments on the draft Code of Conduct.

Background

R 290(2) (UPC Rules of Procedure 18th Draft) states that Representatives who appear before the Court shall comply strictly with any Code of Conduct adopted for such representatives by the Administrative Committee.

The ultimate sanction for the Court appears to be set out in R 291(1) where the Court may inform the person concerned that they are in breach of the Code of Conduct and may (after having given the person concerned the opportunity to be heard) **exclude that person from the proceedings** by way of order[1].

As has been alluded to in the background section of the proposal, this sanction appears to be inflexible and potentially draconian and may compromise the position of a party and its representative in ongoing litigation. Indeed, as mentioned in section 10 of the letter of 4 May 2016, the opposing party could also be disadvantaged by stay in proceedings (e.g. an injunction would be delayed). Moreover, exclusion from proceedings may not be the appropriate remedy in any case (and in extreme cases may not suffice to exclude the person from being present at the hearing). The rules committee should consider whether 291(2) should require a mandatory stay or should it be discretionary, for example in the case where a party deliberately engineers the exclusion of their representative in order to buy time.

[1] As an aside, there does not appear to be any similar power of exclusion granted to the Court in respect of witnesses, parties or members of the public who might exhibit conduct towards the Court, towards any judge or towards any member of the staff or the Registry (or to other parties, witnesses or members of the public) which is incompatible with the dignity of the Court.

Draft Code of Conduct

1. Field of Application

This Code is the Code of Conduct referred to in R. 290 (2) RoP. It shall apply to Representatives under Art. 48 (1) or (2) of the Agreement on a Unified Patent Court ("Agreement") with respect to all activities related to proceedings before the Unified Patent Court ("Court"), considering that said Representatives may at the same time be subject to other professional and commercial codes and laws. For the avoidance of doubt, in case of any conflict between this CoC and the RoP, the latter prevail.

*Note: The reference to national professional laws is intended to remind practitioners that they may be subject to national, regional (e.g. **epi** or CCBE) or other codes of conduct in addition to this CoC. Also, for legal reasons, the scope of this CoC has to be limited to the scope required by the RoP, i.e. in particular the relationship between the Court and Representatives, and cannot be in contradiction to binding national law.*

Patent attorneys who may speak at hearings

The proposed CoC is said to apply to Representatives under Art. 48 (1) or (2) of the Agreement. However, it does not therefore apply to patent attorneys who may speak at hearings of the Court while assisting Representatives (Art. 48 (4)). This might be deliberate, as there is no similar obligation on such patent attorneys not to misrepresent cases or facts before the court as there is on Representatives (Art. 48(6)). The recommendation is that the obligation should extend to all professionals appearing before the Court.

Priority of obligations

The proposed CoC states that in case of conflict between the CoC and the RoP, the RoP will prevail. However, it might be necessary (as it is assumed to be intended) to explicitly state that the following hierarchy applies:

1. national laws or codes of conduct
2. regional codes of conduct (if any)
3. the Agreement
4. RoP, and finally
5. CoC.

It may be that the national laws and codes of conduct of a member state allow some flexibility for legally qualified persons acting in matters before other courts (generally these would be envisaged to be in other countries, but there might be some flexibility for acting in other courts in the qualified person's own country). Please see the attached note which relates to the SRA and BSB codes of conducts.

2. General Conduct

2.1 Relationship with the Court

In all dealings with the Court and its employees, a Representative shall act respectfully and courteously and - based on sufficient education on the law and Rules governing the Court and proceedings before the Court - competently, and shall do everything possible to uphold the good reputation of his or her respective professional association.

Note: While the term "competently" is not and cannot be intended to impose any formal requirement for Continuing Professional Education (CPE), it seems important for enabling the Court to reach the objective of ensuring decisions of the highest quality (see Preamble of RoP) that Representatives inform themselves sufficiently about the new system and applicable law to prepare their cases correspondingly.

"The Court and its employees"

Query whether the "Court" has employees and, even if so, whether judges are, in fact, employed by the Court. Consider using instead the wording in R 291(1) for consistency, which says "the Court, …any judge of the Court or … any member of the staff of the Registry". It is unclear why the code should not extend to the protection of others in the hearing, e.g. witnesses, experts and parties.

Sufficient education

What would amount to "sufficient education" to avoid breaching the CoC? Does strict compliance with this requirement (R. 290(2)) to be "competent" mean that *any* mistake constitutes a breach. Can an allegation of breach be adequately answered simply by proving the Representative has had sufficient education? Alternatively, if strictly has a similar meaning to that suggested as a possibility in section 11 of the letter of 4 May 2016, should such a breach only be found where there is clear and unambiguous incompetence?

The preamble to the RoP puts the burden on the Court to interpret the rules in such a way as to ensure decisions of the highest quality. It is not clear that this extends to the CoC. In any event, it will be important for judges (who will come from a variety of jurisdictions and traditions) to be trained in a consistent interpretation of any code of conduct.

Competence

The requirement that a Representative act competently would seem to import the requirement that they have an adequate knowledge of the law and the Rules governing the Court and proceedings before the Court (i.e. the "sufficient education" part is redundant). However, if a Representative is incompetent is that not a matter between the Representative and his/her client and shouldn't it be phrased accordingly (and, to that extent, be moved out of the section dealing with the relationship with the Court)? For example, the mandatory principle in the English SRA code of conduct (England and Wales) is to "provide a proper standard of service to your clients", which is elaborated to include exercising competence, skill and diligence and taking into account the individual needs and circumstances of each client. The Competence Statement recognises that requirements and expectations change depending on job role and in context. It also recognises that competence develops, and that an individual may work 'competently' at many different levels, either at different stages of their career, or indeed from one day to the next depending on the nature of their work. The definition of competence chosen by the English SRA (England and Wales) reflects this broadness: "the ability to perform the roles and tasks required by one's job to the expected standard".

Respective professional association

Why is the requirement that the Representative should do "everything possible" (and, in any event, should that be caveated as everything *reasonably* possible) to uphold the good reputation of his or her respective professional association? Presumably this is meant to mean comply with his or her own national code of conduct (as opposed to be a requirement to maintain public trust in lawyers and patent attorneys and the provision of legal services?). Although it is necessary to have regard to where conflicts might arise with national codes of conduct this should be dealt with by expressly stating that national codes of conduct prevail over this CoC. If the requirement is meant to be broader than that it should be properly subsumed within the regime along the lines of a requirement that the Representative acts in a way which maintains the trust of the public in Representatives.

2.2. Fair Conduct of Proceedings

A Representative must always have due regard for the fair conduct of proceedings. He or she shall exercise his or her rights in good faith and shall not abuse the Court process. He or she shall be reasonably accommodating and flexible regarding scheduling and routine matters.

What does having “due regard” mean? Shouldn’t it say something like “have due regard for and strive to uphold the fair conduct of proceedings”?

The requirement to be reasonably accommodating and flexible regarding scheduling and routine matters would seem to be unnecessary. The wording is, in any event, vague. How unreasonable would a representative have to be to be in breach of this obligation? Additionally, how would this be evidenced? Does the Court need powers in relation to disclosure of diaries? Is the Court expected to take account of the possible availability of professional colleagues of the Representative?

> 2.3 Contact with Judges of the Court
>
> Save to the extent necessary for *ex parte* procedures, no Representative shall contact a judge about a specific case without the participation or prior consent of the Representative of every other party to those proceedings.

The word “participation” is potentially open to interpretation. Is it intended to convey the requirement that a Representative may not contact a judge about a case without copying the other sides to the correspondence or having them on the call/visit unless all other sides gives consent to not be copied or present? If so, the danger with the current wording is that “participation” sounds more active than merely being a recipient of a copied letter and allows for the possibility that (should this interpretation be argued) the other side will not agree to participate or consent and therefore it will not be possible to contact the judge. It may be that the RoP or CoC should make clear that if a party will neither participate or consent the other party can proceed by giving adequate notice both to the Court and the uncooperative Representative.

> 2.4. Demeanour in Court
>
> 2.4.1 A Representative shall act as an independent counsellor by serving the interests of his or her Clients in an unbiased manner without regard to his or her personal feelings or interests.

This section 2.4.1 does not actually appear to relate to a Representative’s (or other person’s) demeanour in Court. It relates to a Representative’s relationship with his or her client. This does not appear to meet the requirement set out in the Background section of the draft CoC as being limited to the scope required by the RoP, in particular the relationship between the Court and the Representatives (Rule 290(2) refers to “Representatives who appear before the Court” as complying with a CoC).

CCBE code of conduct deals with independence at 2.1. and perhaps deals with demeanour before the Court in a better way at 4.3 “A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honourably and fearlessly without regard to the lawyer’s own interests or to any consequences to him- or herself or to any other person”. We would suggest that the CoC be changed to be in line with the CCBE code.

> 2.4.2 A Representative is responsible for taking appropriate steps to ensure the appropriate demeanour in Court of anyone accompanying him or her.
>
> *Note: “Accompanying” means attending in person or otherwise, e.g. by telephone or video link. “In Court” includes interim conferences, telephone conferences, video conferences or anything where there is an official communication between the Representative and Court. “Anyone” includes inter alia clients and patent attorneys assisting under Art. 48 (4) of the Agreement.*

Accompanying

The accompanying person is said to relate to "anyone" and could, for example, include the client's spouse or relatives over which the Representative has no control. Presumably it is intended to include witnesses and experts? What about hostile witnesses? The recommendation at least should be that the word "accompanying" should be better defined. Using the word "attending" does not assist as it implies that anyone attending Court is accompanying someone who has obligations under the CoC. Preferably, it would be made clear that professionals accompanying the Representative will be separately bound by the CoC (and the hierarchy of obligations set out above), so that they accept primary responsibility for their own behaviour.

> 2.5. False or Misleading Information
>
> A Representative shall be obliged not to misrepresent cases or facts before the Court either knowingly or with good reasons to know or where the inaccuracy could reasonably have been discovered. If a Representative becomes aware that he or she has inadvertently misled the Court, or that a witness has given evidence which is not true, the Representative shall seek the Client's consent to inform the Court as appropriate and in the absence of consent shall cease to represent the Client.
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> *Note: The first sentence repeats Art. 48 (6). It serves mainly as an introduction for the second sentence. It addresses the situation where non-witness evidence is provided to Court by the Representative in good faith which turns out to be misleading later-on, or that witness evidence turns out to be incorrect. While this is important to achieve the objective of Art. 48 (6) of the Agreement, the intention is not to introduce a US-style inequitable conduct doctrine.*

The first sentence does not quite repeat Art. 48(6), as the phrase "or where the inaccuracy could reasonably have been discovered" does not appear in Art. 48(6). The second half of the paragraph reflects the English SRA indicative behavior IB(5.4), but might give rise to conflicts with other jurisdiction's codes of conduct (this does however highlight the difficulty that different Representatives may be subject to different obligations).

We propose that point 2.5 should read: "*A Representative shall be obliged not to misrepresent cases or facts before the Court either knowingly or with good reasons to know."*

We would also be in agreement with the following wording "*A Representative shall be obliged not to misrepresent cases or facts before the Court either knowingly or with good reasons to know. If a Representative becomes aware that he or she has inadvertently misled the Court, or that a witness has given evidence which is not true, the Representative shall seek the Client's consent to inform the Court as appropriate".*

> 2.6. Privileged information
>
> A Representative shall not disclose any document that is subject to privilege without the consent of the Client. Privileged "without prejudice" *inter partes* correspondence shall not be submitted in the absence of a waiver of the privilege on both sides.
>
> *Note: This is to emphasize that only a Client can waive privilege. and that privileged "without prejudice" inter partes correspondence shall not be submitted in absence of a waiver of the privilege on both sides.*

Privilege

There are different types of privilege and these have been conflated with without prejudice privilege in this paragraph. We believe point 2.6 should be deleted due to the wide-variation in the treatment, and the meaning, of privilege in different member States.

3. Dealings with Witnesses and Party Experts

3.1. Information on legal obligations

A Representative shall ensure that witnesses are at all times fully informed about their obligation to tell the truth and of their liability under applicable national law in the event of any breach of this obligation. Equally, a Representative shall ensure that party experts are fully informed about their obligation to assist the court impartially, being independent and objective and not advocating for any party.

Ensure that witnesses are at all times fully informed

This obligation on Representatives is onerous. What is the applicable national law which applies may be difficult to determine, let alone requiring Representatives potentially to know the specifics of a multitude of national laws (not their own and potentially criminal in nature) and the additional requirement to advise a witness which might put the Representative in conflict with their client. If all that is intended is that Representatives can be counted on to have told witnesses the importance of telling the truth and experts the importance of assisting the Court impartially then the liability section could be deleted. Of course, R 175(2) requires the witness to sign a witness statement with a statement of truth confirming that this has happened, so this is just the corollary obligation on the Representative, but the Rule might create difficulty as it is unclear from whom the witness is intended to obtain advice on the applicable national laws.

Query whether this is strictly related to the relationship of a Representative with the Court. Might this not better form additional RoPs rather than CoC?

3.2. Contact

Subject to Clause 3.1 and to the extent necessary, a Representative may contact witnesses and party experts out of court in the context of a specific pending case in which they are involved, to verify the eligibility for their respective roles, to explain their roles, and to assist with the preparation of their evidence . A Representative must do everything to ensure that the substance of the evidence of a witness or party expert solely reflects the witness's or expert's respective recollection or opinion.

A Representative must do everything

The requirement to "do everything" might be overly onerous on a Representative. The requirement to "take reasonable steps to ensure…" might be more appropriate.

Query whether this is strictly related to the relationship of a Representative with the Court. Might this not better form additional RoPs rather than CoC?

3.3. Compensation

If required, the Representative may arrange for reasonable compensation for the work of witnesses and party experts.

The Representative must upon request of the Court or upon reasonable request of a party inform the Court about the extent of that compensation.

Note: While the Court has discretion to give or withhold grounds for such a request, any party should give reasons for their request to avoid unnecessary disclosure or related obligations; whether such request is reasonable is up to the Court. Party experts are included alongside fact witnesses as their role under the Rules of Procedure is to provide for independent evidence. As part of a "reasonable compensation", appropriate accommodation, travel costs, etc. for preparatory purposes should be allowable.

Work of witnesses

Consider changing "work" to "time" so that it reflects compensation for time spent rather than work product, particularly evidence. Also, should this not expressly include expenses of witnesses and experts as this does not naturally fall under the word "time" (or "work" for that matter)?

Query whether this is strictly related to the relationship of a Representative with the Court. Might this not better form additional RoPs rather than CoC?

4. Change of representation

In the event of a change of representation in accordance with R. 293 RoP, the former Representative shall, unless the circumstances dictate otherwise, be responsible for effecting notification of the change to the Registry without undue delay.

Given that R. 293 RoP provides that the former Representative remains responsible for the conduct of the proceedings and for communications between the Court and the party concerned, it is already in the former Representative's interests to effect such notification as soon as possible. By making the former Representative "responsible" does this risk displacing the option in R. 293 that the new Representative could also make the notification?

Illustrative Extracts SRA and BSB Codes of Conduct – the English position

This note is intended to provide an example of how the issue of different codes of conducts might affect a Representative before the UPC, particularly when appearing in a Court which is situated in a country which is not the Representative's "home" country (i.e. the country in which he or she is regulated by a code of conduct).

SRA Overseas Rules

The SRA recognises that it needs to provide a regulatory framework where authorised/regulated persons are established overseas in order to take account of the regulatory risk they pose in England and Wales. There is therefore the SRA Overseas Rules and the Code of Conduct does not apply. **However, they do not apply to those engaged in temporary practice overseas (which is the most likely category for UPC work and where the Code of Conduct will continue to apply).**

Interestingly, it is said that the Overseas Principles are modified from the general SRA Principles, in order to take account of the different legal, regulatory and cultural context of practice in other jurisdictions, which may require different standards of conduct to those required in England and Wales. There is no intention to imply a lower standard of general behaviour; regulated individuals practising overseas and responsible authorised bodies are therefore required to ensure that they, or those for whom they are responsible, under these rules, behave in a way which meets both the SRA's Overseas Rules and its character and suitability requirements. Nonetheless, applicable law and local regulation should prevail in circumstances in which compliance with the Overseas Principles would create difficulties, **with the exception of principle 6 which must be observed at all times, even if to do so would result in a breach of local law or regulation**.

Overseas Principle 1: You must uphold the rule of the law and the proper administration of justice in England and Wales.

Overseas Principle 2: You must act with integrity.

Overseas Principle 3: You must not allow your independence or the independence of your *overseas practice* to be compromised.

Overseas Principle 4: You must act in the best interests of each client.

Overseas Principle 5: You must provide a proper standard of service to your *clients*/the *clients* of your *overseas practice*.

Overseas Principle 6: You must not do anything which will or will be likely to bring into disrepute the *overseas practice*, yourself as a *regulated individual* or *responsible authorised body* or, by association, the legal profession in and of England and Wales.

Overseas Principle 7: You must comply with your legal and regulatory obligations in England and Wales, and deal with your regulators and ombudsmen in England and Wales in an open, timely and co-operative manner and assist and not impede any *authorised person* or *authorised body* practising in England and Wales in complying with their legal and regulatory obligations and dealings with their regulators and ombudsmen.

Overseas Principle 8: You must run your business/the business of your *overseas practice* or carry out your/their role in the business effectively and in accordance with proper governance and sound financial and risk management principles.

Overseas Principle 9: You must run your business/the business of your *overseas practice* or carry out your/their role in the business in a way that encourages equality of opportunity and respect for diversity.

Overseas Principle 10: You must protect *client* money and assets.

D5. Cross-border activities within the European Union and the European Economic Area

O **Outcomes**

oC35 *BSB regulated persons* who undertake *cross-border activities* comply with the terms of the *Code of Conduct for European Lawyers*.

R **Rules**

rC146 If you are a *BSB regulated person* undertaking *cross-border activities* then, in addition to complying with the other provisions of this *Handbook* which apply to you, you must also comply with Rules C147 to C158 below.