

Mr Alexander Ramsay
Chairman
Preparatory Committee
Unified Patent Court

4 May 2016

Re: CCBE comments on the draft Code of Conduct for the UPC

1. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. As such CCBE represents all the lawyers who will have rights to act as representatives pursuant to Article 48(1) of the UPC agreement.

2. No Involvement of CCBE in the drafting of the code.

We note that the proposal for a Code of Conduct for the UPC – Second Draft, of which CCBE was only made aware of on 15 April 2016, refers to the Code of Conduct developed by CCBE. I should make clear that, although those at EPLAW who worked on the draft may have seen the CCBE Code, CCBE has not, either through its Patents Working-Group or its Deontology Committee, had the opportunity to consider the draft Code.

3. Desire to provide assistance to support the Preparatory Committee

You will be aware that the CCBE has made a number of representations to the Preparatory Committee about various aspects of the UPC throughout its gestation. We remain committed to assisting the Preparatory Committee (and in due course the Administrative Committee) in ensuring that, as far as possible, the Court is established on a sound basis so that litigants will chose to use it. As a bold venture in international cooperation on dispute resolution, there are many challenges. We believe these can best be met by careful consideration of all the key regulations affecting the Court before the Court starts to hear its first cases. We believe that the CCBE is well-positioned to make a considerable contribution to this process, particularly in areas where it has long standing expertise, such as the Codes of Conduct for lawyers in Europe.

4. Scope

The background to the draft proposal refers to the CCBE and epi Codes of Conduct being “supplemented”. It is not clear from this wording whether it is intended that those Codes of Conduct should both apply to all representatives before the UPC.

5. A minimum standard

In each of the Member States of the UPC there are likely to be two or more relevant Codes of Conduct – at least one for lawyers and another for patent attorneys. In some jurisdictions there may be more (for example, in the UK, where barristers, solicitors and patent attorneys each have separate Codes). Whilst many of these Codes will share common principles, there are significant differences. This could give rise to a perception that the UPC does not provide a level playing field as some representatives will be subject to a different set of rules from others. We do not believe that this supports the concept of the Court as “unified”.

Whilst it may be unrealistic to impose a single Code of Conduct for all representatives covering all matters, we believe that consideration should be given to the enunciation of at least basic principles which would apply to all representatives (in addition to any obligations they have under their national codes). That would ensure at least a minimum standard for all appearing before the Court. This could go a long way to allaying the fears of some that different representatives are operating under significantly different rules but also assist the judges and the Court in knowing that all representatives were at least abiding by those minimum standards, whatever their respective national Code might say.

6. Enforcement of the Code

Whilst it is understood that judges must have the power to control behaviour in their Courts during hearings, it is normal for issues of professional conduct to be determined by an independent body (such as an Ethics Committee of the relevant regulator). This has two advantages. First, it overcomes the risk that the decision will be attacked under Article 6 of the European Convention on Human Rights or under the Rule of Natural Justice *Nemo iudex in causa sua*. It also helps protect the representative (and his or her client) from any perception of being inhibited from representing the client’s interests fearlessly and in the client’s best interests. Effective representation requires that the advocate be free to disagree, sometimes forcefully, with views expressed by the Tribunal.

CCBE therefore agrees with the concerns expressed in the final paragraph of the background section of the draft Code proposing that complaints should be adjudicated by “a relevant body” rather than the judges themselves or “the Court”.

It is not clear that the judges will have the jurisdiction under UPCA, or training, to handle issues of professional conduct.

7. Complaints Procedure

Neither the Rules of Procedure nor the Code appears to explain how a complaint of a breach of the Code is to be made, whether anyone is free to make such a complaint, to whom they should complain, nor whether there is any time limit.

8. Possible conflicting obligations

Certain aspects of the draft Code (in particular point 2.5 "False or misleading information" and point 2.6 "Privileged Information") may not take into account the diversity of national deontological rules, and consequently, risk creating conflicting obligations regarding national codes and charters. This could give rise to a situation whereby a representative could not comply with both the national rules and the UPC Code of Conduct. If such conflict exists, then the draft UPC Code should be changed so that representatives are not placed in an impossible situation. The CCBE would require sufficient time to check these aspects.

9. Appeals

The Rules of Procedure and draft Code are both silent on to whom a representative or client may appeal if they consider that a sanction applied by the Court is unfair or inappropriate. It may be suggested that this must be to the UPC Court of Appeal but it is unclear whether that achieves the degree of independence of the tribunal which the ECHR calls for.

10. Sanctions

The Rules of Procedure appear to indicate there is only one sanction available to the judges, namely exclusion from the proceedings under Rule 291. Regulators and Ethics Committees enforcing Codes of Conduct normally have available to them a wide range of sanctions so that they can deal proportionately with each complaint. The CCBE has in mind the very severe consequences both for a representative and the client where the power to exclude is exercised. Indeed, the opposing parties may also be disadvantaged by a stay in proceedings.

11. Interpretation of the Code

You will be aware that under some Codes, any law which establishes a penalty or restricts the free exercise of a right is to be subject to a strict (narrow) interpretation. [See for example Canon 18 of the Codex Iuris Canonici 1983]. By contrast most professional Codes of Conduct tend to proceed by way of broad principle. It is important, especially in view of the reference in rule 290 (2) of the 17th draft Rules of Procedure to complying 'strictly', to understand whether the Code is to be interpreted strictly or liberally. For example, the Code applies only to "activities related to proceedings before the Court". On a strict interpretation this could be taken to mean that the representative's behaviour before the proceedings were commenced is not regulated by the Code. It might then be thought that, for example, the provisions on dealings with witnesses and party experts apply only once the proceedings have actually commenced. An understanding on this point may be important to understand whether the code should be drafted as general principles or detailed and unambiguous regulations.

12. Concluding remarks

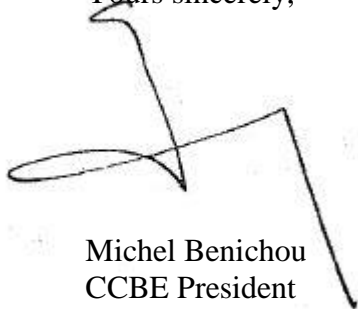
It is not the intention of this letter to indicate any specific criticism or proposal for amendment of the draft Code. The CCBE can only realistically do that after consultation

with both its Patents Working-Group and its Deontology Committee. In this regard, the above-mentioned points are only initial observations from within the CCBE which are provided without the benefit of full study. However, the above-mentioned points are being conveyed at this stage, as we believe it is advisable to identify issues that require consideration in order to ensure that the Code is as fit for purpose as can be achieved.

We understand however that the Preparatory Committee is anxious to complete its work by its meeting in June 2016 and CCBE is sympathetic to the Committee's desire to conclude its work promptly. However, bearing in mind the CCBE consultation process and the normal scheduling of CCBE meetings, together with internal approval procedures, we do not believe it will be possible to provide a fully considered view on the Code during May 2016. We do, however, note that it is currently suggested that the Court might start to hear cases from May 2017. Bearing in mind that the draft Code has been in gestation since late 2013, a slightly extended timetable for this aspect of the Preparatory Committee's work would help achieve a code which is fully fit for purpose. The CCBE will do what it can to ensure a prompt response to the draft Code, but we believe that for a properly considered response to be given, the earliest our views are likely to be available is 24 June.

We hope the above-mentioned points are of assistance, and we look forward to having the possibility to provide further comments.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Michel Benichou', written over a light blue grid background. The signature is stylized with a large loop and a long tail.

Michel Benichou
CCBE President