

CCBE response to the consultation paper on the European Patent Litigation Certificate Proposals

21/07/2014

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. The CCBE has examined the consultation paper on the European Patent Litigation Certificate (EPLC) and we attach comments which we hope are of assistance towards the development of the EPLC.

In addition, we would welcome the opportunity to meet or to answer any questions that may arise from our comments. We would also appreciate being kept informed of developments.

General Comments

The introduction of the Unified Patent Court (UPC) represents a significant challenge for all parties involved, including judges and the parties representatives.

The legal judges who will be appointed before the UPC have all been legally trained through studies in law in their home jurisdictions. For years lawyers - often assisted by patent attorneys - have successfully worked together with judges to establish case law in patent infringement matters.

Under the UPC regime, a new case law will be established in infringement proceedings which will harmonise the national application of patent law. The same will be true regarding procedural law - a substantially new procedural law will be established by Rules of Procedure which will need to be interpreted in order to address practical issues.

Infringement proceedings in patent cases do not only require the application of substantive patent law and procedural law, but it also involves the application of many other fields of law in addition to issues regarding, for example, the enforcement directive, antitrust law, competition law, law of torts and the general rules of law.

Establishing and developing a new set of European case law in patent infringement matters will require the development of many innovative approaches which may have to be proposed by the representatives of the parties. It can be envisaged that the representatives of the parties will have to assist the courts in applying the new European patent law in a consistent way. This is the only way to develop a reliable European patent jurisdiction for the future. In this context, it appears to be imperative that all representatives acting before the UPC have detailed knowledge of all legal issues of relevance in patent infringement proceedings including, but not limited to patent law issues.

Therefore, it is essential that broad knowledge and qualification based criteria exist to underpin the rules for the admission to representation rights in order to represent parties and to appear before the UPC.

Starting from there, it goes without saying that Article 48 UPCA stipulates as a basic rule that parties shall be represented by lawyers authorised to practice before a court of a contracting member state.

Article 48 (2) deviates from this basic rule in the sense that parties may alternatively be represented by European patent attorneys who have appropriate qualifications such as a European patent litigation certificate. Article 48 (2) UPCA clearly starts from the basic idea that a European patent attorney's legal qualification over and above their EPA qualification must be equivalent to the legal qualification of lawyers. This applies in particular with respect to patent infringement cases often combining various fields of law having nothing to do with patent law. Any representative of any party in proceedings before the UPC needs to be highly legally qualified to assist the judges. With respect to the judges the system requires highest standards competence and proven experience in the field of patent litigation (Article 15 (1) UPCA). In order to have a well-balanced system, it is vital to request the same level of qualification from each representative. Taking into consideration that in many jurisdictions studies of law at a university require at least 4 to 5 years, usually combined with a period of two years or more of additional practical experience, an equivalent education would require a very substantial timely input combined with strong standards for examinations. This applies even if it is considered that it is not required to cover the legal education in total.

It is notable that the practical effect of the present draft of the Rules, notably Rule 12, is (according to our understanding) that all German EPAs, all French EPAs and a substantial majority of UK EPAs (ironically excluding the oldest and most experienced UK EPAs) would be "grandfathered" into the new regime. This is in effect a complete circumvention of the intent of Art 48(1) which primarily envisaged that qualified lawyers and not EPAs would have rights of representation. As currently drafted, we believe that some 7000-8000 EPAs would be grandfathered into the system despite the fact that only a minority of these would ever have had any education about litigation, and only a very few would ever have had any real practical experience of patent litigation.

It is important to emphasise that rules on the "right of audience" guarantee, in the interest of clients and courts, that professional litigators are actually competent to act. Some European countries have chosen not to apply such guarantees. In these countries, it is thus clear to both the parties and the courts that they cannot take any minimum competence for granted. Most European countries, however, have rules on "right of audience". The right of audience often requires a combination of academic legal training, professional training and the performance of one or more test cases. Those who have a right of audience are usually monitored by ethical bodies.

The CCBE, on a general level, suggests that the criteria for a "right of audience" for European Patent Attorneys be aligned with the average criteria set by those participating states that do have such rules. To this end, the CCBE calls upon the administrative committee to clarify the criteria that participating states currently apply.

The CCBE would like to stress that the quality of representation will ultimately play a large role in the trust, quality and success of the UPC.

Specific comments

Rule 2

European Patent Course

The Certificate may be issued by universities and other non-profit educational bodies of higher education in a Contracting Member State [as well as by the Unified Patent Court's Training Centre in Budapest (hereinafter referred to as Training Centre)] to European Patent Attorneys entitled to act as professional representatives before the European Patent Office pursuant to Article 134 of the European Patent Convention (hereinafter referred to as European Patent Attorneys) who have successfully completed a course on European patent litigation accredited pursuant to Rules 6 to 8 (hereinafter referred to as Course).

Comment: The term "non-profit educational body of higher education" is vague and cannot be accepted as such. It is important to ensure that a "university" or "other non-profit educational body of higher education" demonstrate that sufficient guarantees will be in place to maintain a suitable standard for those who pass its exams. The rule needs a clarification how to ensure that the education is of a sufficiently uniform standard. It is understood that in some countries the standard of university degrees is subject to some measure of quality control, but one needs to be satisfied that the same is true in every Contracting Member State. In addition, there should be a body (possibly a committee) that oversees how the accredited institutions evaluate their students.

Rule 3

Content of the Course

(1) *The curriculum of the Course shall cover*

- a) a general introduction into law, including main aspects of European law;*
- b) basic knowledge of private law, including contract law, company law and tort law, in both common and continental law;*
- c) basic knowledge of international private law;*
- d) the role, organisation and patent-related case law of the Court of Justice of the European Union, including case law on supplementary protection certificates;*
- e) enforcement of patents, providing knowledge of Directive 2004/48 (EC) on the enforcement of intellectual property rights and relevant case law of the Court of Justice of the European Union;*
- f) unitary patent protection, providing advanced knowledge of Regulations 1157/2012 (EU) implementing enhanced cooperation in the area of the creation of unitary patent protection and 1160/2012 (EU) implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements as well as the Rules relating to unitary patent protection;*
- g) a comparative overview on patent infringement proceedings and revocation of patents in Contracting Member States;*
- h) the operation of the Unified Patent Court, providing advanced knowledge of the Agreement on the Unified Patent Court and the Unified Patent Court's Statute;*
- i) litigation before the Unified Patent Court, providing advanced knowledge of procedures, practice and case management before the Unified Patent Court, with special regard to the Rules of Procedure of the Unified Patent Court.*

(2) *The Course shall focus in particular on the contents mentioned in points (f)-(i) of paragraph (1) and include practical exercise on litigation and negotiation.*

Comment: The CCBE believes that a special focus on (a) – (e) above is absolutely necessary. In addition, it is essential that legal professional issues must also be comprehensively addressed, for example, rules regarding ethics and codes of conduct and no system could operate without a good understanding of procedural law. It is also suggested that litigation skills be added to the course and it would be helpful to have the addition of advocacy skills.

Rule 4

Duration of the Course and examination requirements

- (1) *The minimum duration of the Course shall be 120 hours.*
- (2) *The Course shall be concluded by both a written and oral examination.*

The CCBE is of the opinion that 120 hours are not sufficient. It is inconceivable to teach the subjects mentioned above under Rule 3 (1) a) – e) within a time frame of three weeks lecturing all day. This applies all the more since it appears that the course appears to be limited to teach law leaving aside practical experiences in the application of law. Even if a course of 120 hours should be regarded as a starting point: It is unclear what is meant by the phrase “*minimum duration of the Course*”. At one extreme it could mean that the course could be completed inside five days, at the other extreme it could mean that there is 120 hours of contact time between tutors and students with students taking extra time to read, write essays, etc. It is necessary to have at least 120 hours of effective course in a classroom (or connecting to a real e-learning system) and it may be beneficial to have a minimum duration on the practical exercise on litigation and negotiation. Compulsory attendance should also be required.

Litigation skills courses, theoretical private law courses, practical training and practicum courses (field placements) should be allocated hours (out of the proposed 120 hours) according to their levels of difficulty and intensity.

Rule 5

Course languages and e-learning

- (1) *The Course may be provided in any official language of a Contracting Member State.*
- (2) *E-learning facilities are encouraged as an integral part of the Course. However, practical training always requires personal participation.*

Comment: This appears more as guidance rather than a Rule. It may be better placed in another document.

1. We propose that in addition to the training courses for UPC judges, the Training Centre (Budapest) should also provide a Certificate course for EPAs in order to achieve harmonization among the UPC judges and attorneys.
2. The Training Centre could harmonize programmes and courses around the EU.
3. The Training Centre should distribute study materials for both E-Learning and traditional learning.

It is also suggested that the Training Centre should take the lead in facilitating E-Learning by recording its lectures and posting them online.

It will be appreciated that CCBE makes this proposal only on the basis that the necessary investment, both financial and of suitably skilled and knowledgeable academic staff, will be effected so that the Training Centre can deliver tuition at the appropriate post graduate level.

Rule 6**Accreditation requirement**

Universities and other non-profit educational bodies of higher education of a Contracting Member State may offer the Course subject to accreditation by the Administrative Committee.

Comment: We propose limiting the scope to universities. The term "non-profit educational body of higher education" is extremely vague and if included should be better defined

Rule 7**Request for accreditation**

The request for accreditation of the Course shall be filed with the Unified Patent Court in one of the official languages of the European Patent Office and shall contain:

- a) the curriculum of the Course envisaged;*
- b) information concerning the requirements under Rules 4 and 5;*
- c) information concerning the requestor's status;*
- d) information concerning the number of hours for each topic of the Course;*
- e) names and titles of the selected teachers;*
- f) draft scheme of examination, defining the objectives and the method of examination, including the number and duration of written and oral exams.*

Comment: There is no guidance as to how much detail must be given about any of the items listed in (a) to (f).

Rule 8**Examination of the request and decision**

- (1) The request for accreditation shall be decided upon by the Administrative Committee on the basis of an opinion of the Advisory Committee.*
- (2) If the requirements under Rules 3 - 6 are met and the request for accreditation complies with Rule 7, the Advisory Committee shall give an opinion in favour of accreditation to the Administrative Committee.*
- (3) If the requirements under Rules 3 - 6 are not met or if the request for accreditation fails to comply with Rule 7, the Advisory Committee shall give a negative opinion on the request. In this event, the Administrative Committee shall communicate the Advisory Committee's opinion to the requestor and invite him, according to the nature of the objection, to correct the deficiencies noted or to submit comments within a non-extendable period of two months. If the deficiencies are not corrected in due time, the Administrative Committee shall refuse the request. If the requestor corrects the deficiencies or submits comments, the Administrative Committee shall consult the Advisory Committee once again and decide on the request on the basis of the second opinion of the Advisory Committee.*
- (4) Accreditation is granted for five academic years following the date of the notification of the decision on accreditation. The request for the prolongation of the accreditation for another five years may be filed one year before the expiry of the five-year period at the earliest.*

Comment: On the face of it, provided some information is given under each of these headings, it is not open to the Administrative Committee to turn down a request. It is in effect a formalities check, not a guarantee of quality or consistency. It would be useful to require that expert law professors must be members of the Advisory Committee.

Rule 9

Reports

Participating educational bodies are required to report every year to the Unified Patent Court on the curriculum, results and statistics of the accredited Course. The Administrative Committee takes note of this report.

Comment: Although the educational bodies are required to prepare a report, no detail is given as to how detailed the report must be, nor whether there is intended to be any form of quality control on the basis of the report. Whilst a highly respected academic institution would no doubt have sufficient internal controls to ensure that any course it ran was thorough and effective and that its examination requirements were rigorous, it is difficult given the large number of universities and higher education organisations throughout the Contracting Member States, to be confident that all of them would be equally punctilious if there is no sanction if they allow their standards to drop.

As a suggestion, there may be benefit in having an independent review of the course offered by each body accredited at least once during a 5 years period by academic experts and skilled lawyers, to ensure that an appropriate standard is maintained.

Rule 10

Training Centre

(1) The Training Centre, by offering the necessary infrastructural and organizational assets, shall assist the educational bodies that wish to provide a Course at the seat of the Training Centre as well. It may also facilitate e-learning options.

[(2) The Training Centre may also offer the Course in compliance with Rules 3 – 5. In this case, Rule 9 applies to the Training Centre as well.]

Comment: The requirements of this Rule as to what the Training Centre must do are left somewhat vague. The Training Centre may choose only to offer this assistance if it is appropriately remunerated. Indeed if the universities, etc are being paid a fee for the course, one would expect the Training Centre to expect to be paid for any assistance which it provides. Again, Rule 10 appears to be more guidance than material for inclusion in the regulations.

Rule 11

Law diplomas

European Patent Attorneys holding a bachelor or master degree in law according to relevant educational standards in a Member State or who have passed an equivalent state exam in law of a Member State of the European Union shall be deemed to have appropriate qualifications pursuant to Article 48(2) of the Agreement on a Unified Patent Court and may apply for registration on the list of entitled representatives.

Comment: It may be noted that this applies indefinitely. It will also be noticed that a wide variety of Bachelors and Masters Degree are available in law. For example, an MA in Canon Law would provide Patent Attorneys with little or no help in representing clients before the UPC. Law degrees are generally a preliminary requirement in order to undertake further, practical training, and to take (and pass) state examinations so as to qualify as a lawyer. We suggest, therefore that the only justifiable

qualification which justifies being able to represent clients in the UPC should be if the law degree (or other qualification) has resulted in that EPA having an entitlement to appear in all Courts in his/her home jurisdiction. In the UK there are approximately 100 such EPAs.

It is unclear what the "relevant education standards" are.

It may be noted that Rule 11 does not discriminate between different Member States, unlike Rule 5.

Rule 12

Other qualifications during a transitional period

During a period of three years from the entry into force of the Agreement on a Unified Patent Court, any of the following shall also be deemed as appropriate qualifications for a European Patent Attorney pursuant to Article 48(2) of the Agreement on a Unified Patent Court:

(a) *the successful completion of one of the following courses:*

- i) Centre d'Études Internationales de la Propriété Intellectuelle, courses leading to the Diploma on Patent litigation in Europe or to the Diploma of international studies in industrial property (specialized in patents);*
- ii) FernUniversität in Hagen, course "Law for Patent Attorneys";*
- iii) Nottingham Law School, course "Intellectual Property Litigation and Advocacy";*
- iv) Queen Mary College London, courses "Certificate in Intellectual Property Law" or "MSc Management of Intellectual Property";*
- v) Brunel University London, course "Intellectual Property Law Postgraduate Certificate"*
- vi) Bournemouth University, course "Intellectual Property Postgraduate Certificate";*

[...]

or

(b) *having represented a party on his own without the assistance of a lawyer admitted to the relevant court in at least three patent infringement actions, initiated before a national court of a Contracting Member State within the five years preceding the application for registration.*

The rule governing other qualifications during a transitional period needs to be interpreted on the basis of Article 48 (2) UPCA. The admission of other qualifications cannot lead to the conclusion that different standards are applied. It is unacceptable to accept diplomas or other evidence for successful completion of courses in cases where the curriculum of the course does not cover all the topics mentioned in Rule 3. This applies all the more, since in the very beginning of the use of the system, representatives should play an important role of inspiration for the judges and therefore, a maximum of legal skills and experience in infringement matters is required.

In addition to this, it may be noted that presumably all the six proposed courses will have been designed and would have been passed by a number of students before the UPC was even proposed. The extent of their relevance must therefore be in some doubt. It is not known what their pass rate is. The mention of four specific UK courses also appears surprising, and it would appear that very few EPAs from outside the UK, France and Germany are likely to have attended any of the courses currently listed in paragraph 12. The explanatory note suggests that other courses will be added in. It would be helpful to understand to what extent French EPAs have passed the course at (i), or German EPAs have passed the course at (ii) and UK EPAs have passed the course at (iv). It is believed that none of these courses has any substantial litigation element. If so, they cannot properly be regarded as "appropriate qualifications". There is a risk that if courses from the UK with little or no litigation content are included, other similarly unsuitable courses will be added. Of the courses mentioned, only that at (iii) is known to be directed to litigation and is a course which has been taken

by about 50 UK EPAs, several of whom have gone on to obtain rights to represent clients in the UK's higher patent courts.

In our view, there is no justification for purely academic courses which have not led to a national qualification right being included in this list of courses.

We propose to delete paragraph (b) as it is unclear how a patent attorney would prove that they had represented a party without any assistance from a lawyer. In the UK, there exists situations where Patent Attorney Litigators (that is with full rights of representation for clients in the UK higher courts) nonetheless employ Solicitors for the purpose of running UK litigation.

Rule 14

Request for recognition of other appropriate qualifications

- (1) Requests for recognition of other appropriate qualifications shall be filed with the Unified Patent Court in one of the official languages of the European Patent Office.*
- (2) In case of requests filed pursuant to Rule 11 or 12(a), the request for recognition of other appropriate qualifications shall contain a copy of the respective diploma.*
- (3) In case of requests filed pursuant to Rule 12(b), the request shall include all details necessary to identify the infringement actions the European Patent Attorney intends to rely on such as
 - a) name of the parties,*
 - b) court seized with the action,*
 - c) date of commencement of the proceedings.**

Reasonably available evidence to support the request, such as a copy of the power of attorney shall be submitted.

Comment: The existence of a power of attorney does not establish that the work was done by the patent attorney without any assistance from a lawyer. We suggest deleting (3) – this would also be consistent with the deletion suggested regarding 12 (b)

Rule 15

Examination of and decision on the request for recognition of other appropriate qualifications

- (1) The request for recognition of other appropriate qualifications shall be examined by the Registrar. The Registrar may, if he deems it necessary, consult the Advisory Committee for an opinion.*
- (2) If the requirements contained in Rules 11 or 12 are met and the request for recognition of other appropriate qualifications complies with Rule 14, the Registrar shall enter the requestor on the List.*
- (3) If the request for recognition of other appropriate qualifications complies with Rule 14, but the requirements under Rules 11 or 12 are not met, the Registrar shall reject the request.*
- (4) If the request for accreditation fails to comply with the requirements of Rule 14, the Registrar shall invite the requestor to correct the deficiencies noted within a non-extendable period of two months. If the deficiencies are not corrected in due time, the Registrar shall reject the request.*

Comment: Again, this appears to be a Rule about checking the formalities rather than any investigation of the quality of the work done to obtain the alternative qualification.

Rule 17**Decisions subject to review**

Decisions of the Registrar referred to in Rules 15 and 16 may be challenged in accordance with the following provisions.

Rule 18**Formalities of the petition for review**

The petition for review shall be filed in writing with the Registrar in one of the official languages of the European Patent Office, within one month of notification of the challenged decision. It shall indicate the reasons for setting aside the decision of the Registrar.

Comment: There is no explicit mechanism to challenge decisions except those made under rules 15 and 16. It is unclear who has the right to challenge a decision of the Registrar. Is it simply the person who applies for a decision or applies for a course to be accredited? Could, for example, a third party challenge the registration of an attorney, who has in fact had substantial assistance from lawyers in appearing in cases, but has nevertheless been admitted. If so, what is the date of "notification of the challenged decision"? The implication is that the decisions can only be challenged by those who have been turned down, but not by third parties in respect of favourable decisions.

The Explanatory Memorandum

The explanatory memorandum is somewhat confusing in that at some points it seems materially to change the draft proposal, in others merely to repeat what is said. In other places it makes somewhat contentious assertions about the proposal. As the rules and decisions made under them may be the subject of challenge it would seem appropriate that they be clear in their effect without the need for explanation.

Article 48 (3) of the UPC Agreement states that the Administrative Committee shall establish qualification standards for EPAs. Likewise, the Draft proposes that the Administrative Committee should decide on the accreditation requests from educational institutions. However, it is unclear whether the Administrative Committee's decision can be challenged, and what the challenging procedure will look like. Perhaps, the President of the Court of Appeal should also be given the authority to decide on accreditation applications from educational institutions. It might be worth considering whether it may be better to leave the initial examination of accreditation application to the Administrative Committee, with the Court of Appeal serving as a forum where the Administrative Committee's decisions can be challenged.

Conclusion

As indicated, the CCBE hopes its comments are of assistance towards the development of the EPLC and we are happy to answer any questions should the need arise.