HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

24th Report of Session 2015–16

Draft European Union Referendum (Conduct) Regulations 2016

Draft Patents (European Patent with Unitary Effect and Unified Patent Court) Order 2016

Draft Renewables Obligation Closure Etc. (Amendment)

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Includes 2 Information Paragraphs on 3 Instruments

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Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

Historical Note

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a "sifting" mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012–3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).

(2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives;

(e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;

(f) that there appear to be inadequacies in the consultation process which relates to the instrument.

(3) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Baroness Andrews	Lord Hodgson of Astley Abbots	Baroness Stern
Lord Bowness	Baroness Humphreys	Rt Hon. Lord Trefgarne *(Chairman)*
Lord Goddard of Stockport	Rt Hon. Lord Janvrin	Lord Woolmer of Leeds
Lord Haskel	Baroness O'Loan	

Registered interests

Information about interests of Committee Members can be found in Appendix 3.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee's work, or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020–7219 8821; fax 020–7219 2571; email hlseclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at http://www.legislation.gov.uk/, together with a plain English explanatory memorandum.

Twenty Fourth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft European Union Referendum (Conduct) Regulations 2016

Date laid: 25 January 2016

Parliamentary procedure: affirmative

Summary: These Regulations set out all the mechanics of how the EU referendum is to be run, including the wording of the ballot paper. The proposed administration of the referendum broadly follows the pattern of polls since the Parliamentary Voting System and Constituencies Act 2011. Further instruments will be required to specify details such as the date on which the poll will be held, the referendum period and the designated organisations.

These Regulations are drawn to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

1. These Regulations are laid by the Cabinet Office under the European Union Referendum Act 2015 and are accompanied by an Explanatory Memorandum (EM). No Impact Assessment or estimate of the approximate cost of the poll has been provided.

2. This instrument sets out all the mechanics of how the EU referendum will be run. The proposed administration of the referendum broadly follows the pattern of polls since the Parliamentary Voting System and Constituencies Act 2011 (including the minor changes made by the Electoral Registration and Administration Act 2013). A specific modification is required to enable the Referendum to take place in Gibraltar as well as the United Kingdom.

3. The text of the ballot paper is set out in Schedule 4 to the Regulations, it offers two alternatives:

   - to "remain a member of the European Union" or
   - to "leave the European Union".

4. Paragraph 4.2 of the EM states that further statutory instruments will be required to set the appointed day on which the referendum will be held, the referendum period (that is the period prior to the vote in which campaign expenditure is regulated) and the process by which the Electoral Commission will designate the main referendum campaigners (the "designated organisations").

Draft Patents (European Patent with Unitary Effect and Unified Patent Court) Order 2016

Date laid: 19 January 2016

Parliamentary procedure: affirmative

Summary: The Order gives effect to an intergovernmental Agreement on a Unified Patent Court ("the UPC Agreement") and a related EU Regulation. In particular, the Order implements provisions of the UPC Agreement that give the Unified Patent Court jurisdiction to decide some issues in relation to certain patents valid in the UK. We received comments from Baroness Bowles of Berkhamstead on certain aspects of the UK's implementation of the UPC Agreement, and we have in turn obtained clarification of these aspects from the Department for Business, Innovation and Skills.

We draw this Order to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

5. The Department for Business, Innovation and Skills (BIS) has laid this draft Order with an Explanatory Memorandum (EM) and three Impact Assessments (IAs). In the EM, BIS states that, in amending the Patents Act 1977 ("the 1977 Act"), the Order gives effect to the intergovernmental Agreement on a Unified Patent Court ("the UPC Agreement") and a related EU Regulation ("the Unitary Patent Regulation").[1] In particular, the Order implements provisions of the UPC Agreement that give the Unified Patent Court jurisdiction to decide some issues in relation to certain patents valid in the UK, and ensures that the new European patent with unitary effect ("Unitary Patent") is reflected in the 1977 Act.

6. In section 7 of the EM, BIS says that the Order makes changes to the 1977 Act to reflect three general themes, namely: jurisdiction; effect of the Unitary Patent; and infringement. In respect of the last of these themes, BIS says that the UPC Agreement includes provisions on what rights are given to owners of unitary patents and European bundle patents within its jurisdiction to prevent the use of their invention, and also what exceptions to those rights are available; and that these rights and exceptions are the same as are currently provided in UK law, apart from the introduction of two new exceptions. Those exceptions are, firstly, in relation to the ability of plant breeders to use patented biological material to create a new plant variety without infringing a patent for that material; and, secondly, in relation to the use of a lawfully acquired computer program for certain purposes without the permission of the patent owner, and without that use being an infringement of any patent covering that program.

7. As regards the plant breeding exception, BIS has told us that the plant breeding industry is very supportive of introducing it for all patents valid in the UK. The UK has the fourth largest plant breeding industry in Europe after Germany, France and the Netherlands. The exception already exists in Germany, France and the Netherlands and applies to all patents valid in those countries. The introduction of this change is intended to put the UK industry on a level footing with major competitors in other parts of Europe.

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1 Regulation (EU) No 1257/2012 for the creation of unitary patent protection.

8. The Committee has also received representations about the draft Order from Baroness Bowles of Berkhamstead. In particular:

- as regards the computer program exception, Lady Bowles commented that this appeared to be an acceptable decision and compliant with the European Patent Convention (EPC); but also that, while the Government had been reasonably transparent over why they made the decision, it would have been good to have the EPC argument laid out and also to receive more information about the review of the UK's implementation of the UPC Agreement, mentioned in section 12 of the EM;

- as regards contributory infringement (where one person knowingly provides another with the means to infringe a patent), Lady Bowles commented that it should have been extended to bundle patents (as that is what the UPC says); that a counter-argument over the meaning might be possible using an 'or' interpretation which, in her view, was not intended; and that case-law already existed in the UK that took account of cross-border activity, and so to pre-empt judges' decisions was probably wrong. Here too, more explanation about the decision should have been given.

9. We put these concerns to BIS, and we have received a letter of 27 January 2016 from Baroness Neville-Rolfe, Parliamentary Under Secretary of State in that Department, which we are publishing at Appendix 1. Baroness Neville-Rolfe expresses her regret that a full explanation of the issues raised was not given in the information laid in support of the draft Order, and deals with the concerns about the software exception, contributory infringement, and the intended review of the legislation.

10. As the Minister herself writes, these issues are both complex and technical; but the Government's decisions on implementation of the UPC Agreement will no doubt have an impact on patent-holders and others, as the EM and IAs demonstrate. The House may find it helpful to draw on the clarification provided by the Government when it considers the draft Order.

Draft Renewables Obligation Closure Etc. (Amendment) Order 2016

Date laid: 25 January 2016

Parliamentary procedure: affirmative

Summary: The Order proposes that from 31 March 2016 the Renewables Obligation (RO) should be closed to solar photovoltaic generating stations where the generating capacity of the station is below or equal to 5 megawatts (MW) in size ("small solar pv stations"). The Department for Energy and Climate Change (DECC) says that current estimates suggest significantly more potential deployment of such stations than was anticipated a year ago, and that early closure of the RO to these stations is proposed as part of wider action to control Levy Control Framework costs.

The Explanatory Memorandum laid with the Order gives an account of consultation responses which fails both to indicate the level of opposition to, and paucity of support for, the proposed changes and to acknowledge the concerns expressed by large numbers of respondents about the methodology used by the Department to justify its proposals.

We draw this Order to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.

11. The Department for Energy and Climate Change (DECC) has laid this draft Order with an Explanatory Memorandum (EM) and Impact Assessment (IA). The Order proposes that the Renewables Obligation (RO) should be closed to solar photovoltaic generating stations where the generating capacity of the station is below or equal to 5 megawatts (MW) in size ("small solar pv stations"). DECC states in the EM that the small solar pv closure date is intended to be 31 March 2016.[2]

12. DECC says that the RO was closed early to large solar pv stations (those above 5MW) on 1 April 2015 because such stations were being deployed more rapidly than previously estimated, and because it was necessary to control the cost of large solar pv generation in order to ensure that it was affordable within the Levy Control Framework (LCF) - which places limits on the aggregate amount levied from consumers by energy suppliers to implement Government policy. We brought the relevant statutory instrument–the draft Renewables Obligation Closure (Amendment) Order 2015 - to the special attention of the House in our 26th Report[3] of the 2014–15 Session (HL Paper 113). We commented that the Department's estimates made at the end of 2012 of the likely growth in large solar pv deployment had clearly been well off the mark.

13. In the EM to the latest draft Order, DECC says that information available in early 2015 suggested that projects of 5MW and below formed a relatively small part of the expected future solar pv deployment under the RO, with the rate of deployment of these smaller solar pv projects posing a lower risk to the LCF. However, the Department says that current estimates suggest significantly more potential deployment and that, as part of wider action to

2 However, DECC adds that, if the Order is not made by 31 March 2016, the closure date will be the last day of the month in which the Order comes into force.

3 See: http://www.publications.parliament.uk/pa/ld201415/ldselect/ldsecleg/113/113.pdf.

control LCF costs, it proposes to close the RO early to these small solar pv stations.

Consultation, and information provided to Parliament

14. DECC states in the EM that it carried out public consultation on the early closure of the RO to small solar pv stations over six weeks, from 22 July to 2 September 2015. **We note that this largely coincided with the August holiday period, but that DECC makes no mention of having considered any mitigating action, as Departments are expected to do under the Government's Consultation Principles. Despite setting a consultation deadline of 2 September, it was only on 25 January 2016, almost four months later, that the Department laid this Order.**

15. The EM summarises consultation responses in a single paragraph (8.2), noting that 94 responses were received; that "a majority of respondents was opposed to the small solar pv closure but believed that if implemented the grace periods should be consistent with those provided for the large solar pv closure"; and that respondents pointed to repercussions for investor confidence, and to increased financial risks and potential losses from investments made in developing project pipelines.

16. On 17 December 2015, DECC published a summary of consultation responses;[4] this is considerably more informative than the EM. It states that, of the 94 responses, only six agreed with the proposed closure while 63 disagreed (21 offered no comment, and four were "indeterminate"). The summary also notes that respondents questioned the rationale for the proposal because no evidence had been provided to detail the breakdown of the LCF overspend: and that respondents were concerned that solar deployment was not the cause of the LCF overspend, and suggested that early closure would make little difference.

17. The summary also sets out responses to a question posed in the consultation paper about DECC's projections for the deployment of new solar pv projects of 5MW and below, estimated to be in the range of 800MW to 2 Gigawatts (GW) in both 2015–16 and 2016–17. 22 respondents agreed with these projections. However, an almost equal number, 21, disagreed, and they voiced concern about the absence of methodology or evidence to explain how the numbers were reached, and about the flaws in the Renewable Energy Planning Database (REPD) used by DECC. They also expressed a lack of trust in DECC's deployment forecasting, based on previous experience.

18. Both the summary and the IA laid with the Order state that "no information was received during the consultation that challenged our assessment of future deployment" and that DECC had revised its estimates in both 2015–16 and 2016–17 based on updated information from the REPD. DECC now states that, without RO closure, smaller-scale solar pv deployment in 2015–16 is estimated at 1.2 to 1.8 GW and in 2016–17 at 1.2 to 2 GW.

19. We do not expect Departments to replicate all the detail from summaries of consultation responses in the consultation sections of EMs. In this case, however, **the account given in paragraph 8.1 of the EM fails both to indicate the level of opposition to, and paucity of support for, the**

4 See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486091/20151216_Small_scale_solar_PV_government_response_FINAL.pdf.

proposed changes and to acknowledge the concerns expressed by large numbers of respondents about the methodology used by the Department to justify its proposals.

Energy costs

20. DECC has based its decision to bring forward these proposals on the need to act to control LCF costs, and hence to limit the impact on consumers through their energy bills. In view of wider concerns about the level of these bills, we asked DECC about their view of reports that "energy firms' costs have hit a five-year low"[5] without corresponding reductions in their charges to consumers. DECC has responded as follows:

> "Energy prices are not regulated—they are set by energy suppliers in competition with each other. The price consumers pay for their gas and electricity is not the same as what their supplier pays. Firstly, because suppliers buy energy in advance of delivery to reduce volatility. Secondly, because wholesale costs only make up around half of energy bills and therefore movements in other costs also have an impact on bills (for example transmission and distribution costs). All the major energy suppliers reduced their standard gas tariffs at least once last year and three large suppliers have recently announced a further cut of around 5% in their gas prices for customers on standard tariffs. This is a good start, but the Government wants to see more suppliers cutting their standard tariffs."

21. In the context of this Order, we also asked DECC whether it had considered the extent to which support to small solar pv installations could continue and costs to consumers could be stabilised, if energy firms were required to reduce their charges to consumers in line with reductions in their own costs. DECC has given us the following response:

> "Solar PV is a UK success story, with rapid deployment over last 5 years: over 99% of the UK's solar PV capacity has been deployed since May 2010. But when costs come down, as they have with solar, so should support; hence we have taken steps to control the costs of support schemes and put solar on a path to delivering without subsidy."

5 See, for example: http://www.bbc.co.uk/news/business-35308022.

National Health Service Mandate Requirements (SI 2016/51)

Date laid: 27 January 2016

Parliamentary procedure: negative

Summary: In the last Parliament the Government established the Better Care Fund (BCF) to improve out-of-hospital care. This requires every clinical commissioning group ("CCG") to hold a pooled fund with a local authority, and agree a joint plan to commission services. The mandate to NHS England for 2016–17 focuses on the creation and management of the BCF, in particular by requiring NHS England to ring-fence £3.519 billion within its allocation.

These Regulations are drawn to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

22. The Department of Health (DH) has laid these Regulations under sections 13A (9) and 272(7) of the National Health Service Act 2006 ("the 2006 Act") together with an Explanatory Memorandum (EM).

23. DH is required to publish an annual mandate for the National Health Service Commissioning Board (NHS England) which sets out objectives that NHS England must seek to achieve, and any requirements with which it must comply. Under section 13A(9) of the 2006 Act, requirements in the mandate must be underpinned by regulations. In the last Parliament the Government established the Better Care Fund ("BCF") to improve out-of-hospital care. The BCF requires every clinical commissioning group ("CCG") to hold a pooled fund with a local authority, and agree a joint plan to commission services. The mandate to NHS England for 2016– 17 establishes key requirements in relation to the creation and management of the BCF.[6] In particular NHS England is to:

- ring-fence £3.519 billion within its allocation to CCGs to establish the BCF, to be used for the purposes of integrated care;
- consult the DH and the Department of Communities and Local Government (DCLG) before approving spending plans drawn up by each local area; and
- consult DH and DCLG before exercising powers in relation to areas failing to meet specified conditions attached to the BCF as set out in the BCF Policy Framework.

24. Individual allocations of the BCF for 2016–17 to local areas and the detailed formulae used are published on the NHS England's website.[7]

6 For further detail see BCF Policy Framework.
7 See: https://www.england.nhs.uk/wp-content/uploads/2016/01/allocations-201617–202021.pdf).

INSTRUMENTS OF INTEREST

Draft National Assembly for Wales (Representation of the People) (Amendment) (No. 2) Order 2016

25. Our 20th Report of this Session[8] noted that there had been a number of errors in the Welsh translations of the forms attached to the Recall of MPs Order which then had to be corrected by a replacement draft. The National Assembly for Wales (Representation of the People) (Amendment) Order had similar problems but in this case, because of time factors, the Government have chosen to make the necessary corrections by a second Order which will be considered in parallel with the original Order. Unfortunately that in turn has had to be withdrawn and re-laid with corrections. We have previously commented on the number of additional instruments having to be laid due to inadequate checking within Departments and this case is another example of poor practice. We understand that the Cabinet Office is seeking to address this by involving more Welsh speakers in the checking process. A description of the revised process is published at Appendix 2.

Draft Register of People with Significant Control Regulations 2016

Draft Statutory Guidance on the meaning of "Significant influence or control" over companies in the context of the Register of People with Significant Control

26. The Department for Business, Innovation and Skills (BIS) has laid these draft Regulations with an Explanatory Memorandum (EM) and three Impact Assessments (IAs).[9] In the EM, BIS says that the Regulations supplement the operation of Part 21A of the Companies Act 2006 which requires companies to keep a register of people with significant control over the company (a "PSC register"). In particular, Regulations 22 to 46 make detailed provision for setting up a protection regime for individuals at serious risk of violence or intimidation as a result of their association with a company. The regime allows applications to be made to the registrar of companies so that the PSC's information is not publicly disclosed in order to protect that individual or a person living with the individual from violence or intimidation, without compromising the integrity of the overall PSC register. On 26 January 2016, Baroness Neville-Rolfe, Parliamentary Under Secretary of State at BIS, made a Written Statement about these Regulations.[10]

27. BIS has also laid draft statutory guidance on the meaning of "significant influence or control" in the context of the PSC register. On 27 January 2016, Baroness Neville-Rolfe made a further Written Statement about this draft guidance.[11]

8 20th Report, Session 2015-16 (HL Paper 78).
9 The three IAs set out the costs and benefits of the policy, dealing respectively with enactment (the broad costs and benefits of the policy package); fees; and the protection regime. BIS has said that the fees and protection regime IAs were required because the policy content of the regulations was not sufficiently developed at the time the enactment IA was produced, for them to be included in there.
10 HL WS478.
11 HL WS484.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft instruments subject to affirmative approval

Electricity Supplier Payments (Amendment) Regulations 2016

Employment Allowance (Excluded Companies) Regulations 2016

Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016

National Assembly for Wales (Representation of the People) (Amendment) (No.2) Order 2016

Register of People with Significant Control Regulations 2016

Social Security Benefits Up-rating Order 2016

Social Security (Contributions) (Limits and Thresholds Amendments and National Insurance Funds Payments) Regulations 2016

Draft instruments subject to annulment

Draft Statutory Guidance on the meaning of "Significant Influence or control" over companies in the context of the Register of People with Significant Control

Draft instruments subject to affirmative approval

SI 2016/63	Employment Allowance (Increase of Maximum Amount) Regulations 2016

Instruments subject to annulment

Cm 9191	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Iraq on the Transfer of Sentenced Persons
SI 2016/51	National Health Service (Mandate Requirements) Regulations 2016
SI 2016/70	Administrative Forfeiture of Cash (Forfeiture Notices) (Northern Ireland) Regulations 2016

APPENDIX 1: DRAFT PATENTS (EUROPEAN PATENT WITH UNITARY EFFECT AND UNIFIED PATENT COURT) ORDER 2016

Letter from Baroness Neville-Rolfe, Parliamentary Under Secretary of State for the Department for Business, Innovation and Skills to Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee.

I understand that the Secondary Legislation Select Committee will be considering the above draft Order at your meeting on 2 February. I wished to write to you with some further information which I hope will be helpful, particularly in light of a number of technical issues which I believe Baroness Bowles of Berkhamsted has brought to your attention. I regret that a full explanation of these issues was not laid out in the accompanying documents to the draft Order. As I hope the committee will appreciate, the issues are highly complex and very technical. Therefore, I am pleased to have the opportunity to provide this further information and to explain the Government's decisions.

I should first like to address the issues around the implementation of the software exception. This is a particularly complex legal point and I have provided a fuller explanation of the legal arguments as an annex to this letter. I am pleased to note that Lady Bowles agrees that our chosen approach to implementation of this exception is compliant with the European Patent Convention.

The Government considered a range of options for implementing the infringement provisions of the Unified Patent Court (UPC) Agreement into UK law as discussed in detail in Impact Assessment number BISIPO003 which I laid before Parliament with the draft Order on 19 January.

At consultation stage, the Government proposed to apply the software exception to all patents valid in the UK. This approach was taken because the exception was considered to be narrow in scope and applying the exception to all patents valid in the UK would provide greater legal certainty for all users of the patent system.

The responses to the consultation highlighted serious concerns about the scope of the software exception which, in the respondents' view, might be interpreted broadly allowing widespread use of patented inventions in this field thus devaluing any software-implemented patent. Many, including the Chartered Institute of Patent Attorneys (CIPA) and the IP Federation, advocated the creation of a "safe haven" whereby the exception would not be applied to national patents.

IPO officials engaged closely with concerned stakeholders, including CIPA, the IP Federation and TechUK, throughout last year to better understand their concerns and to explore the potential impacts of the various options. These further discussions were very beneficial in providing further evidence with which I reassessed the options. In doing so I took account of the concerns of industry, the need to provide legal certainty for all users of the patent system, and the legal consequences of each option.

On balance I considered that it would be best to adopt a two stage approach providing the "safe haven" advocated by stakeholders at first with a commitment to review the implementation within 5 years of entry into force. This approach ensures compliance with the UPC Agreement while also addressing the real concerns of industry regarding the uncertain scope of the exception. Further

discussion of this issue is covered in paragraphs 49 to 55 of the Government Response and in the Impact Assessment (BISIPO003).

Lady Bowles has also raised some concerns related to how the changes proposed to the Patents Act on contributory infringement will work. Contributory infringement is where a person knowingly provides another with the means to infringe a patent. For example, supplying someone with a part that is essential to the patented device without permission of the patent owner could be contributory infringement.

The changes proposed in the draft Order implement Article 26 of the UPC Agreement. This Article requires that an act of contributory infringement must occur within the territory of the Member State in which the patent has effect. Article 26 applies to a European bundle patent (each patent in the bundle being valid in the territory of one Member State only) and to unitary patents (valid in the territory of all the participating Member States of the unitary patent).

Contributory infringement is provided for in UK law under Section 60(2) of the Patent Act 1977. That provision already applies to European bundle patents valid in the UK in compliance with Article 26 of the UPC Agreement; further amendment is not considered necessary. The aim of the proposed amendment in this draft Order is to account for the wider territory of unitary patents and thus the wider territorial context within which contributory infringement can occur for such patents. I do not believe that the amendment pre-empts judges' interpretation of Article 26 of the Agreement.

Finally, I understand that the Committee may wish to know further details of the review of the legislation which the Government proposes to carry out. As highlighted in paragraph 12.1 of the Explanatory Memorandum and Impact Assessment BISIPO003 (in particular pages 1 and 19), the UK legislation will be reviewed within 5 years of the UPC entering into force which is expected in early 2017. That review will look closely at the impact of applying the software exception only to European bundle patents and unitary patents in particular but it will also consider other provisions in the legislation.

The review will consider patenting behaviour in the field of software-implemented inventions to determine whether companies take advantage of the "safe-haven" and file more national patent applications. The review will also investigate how the UPC or national Courts (in the UK or elsewhere in Europe) have interpreted the exception if cases have been brought before the courts. The Government will also consult users to discover the effect the software exception has had on their businesses.

My officials in the IPO are already considering the evidence that will be required for the review to ensure they are able to collect the right data to measure the impact of the legislation from now onwards.

Annex

1. Some commentators have argued that the UK implementation of the UPC exception to infringement for software decompilation is incompatible with our obligations under the European Patent Convention (EPC). These arguments are based on Articles 2 and 64 of the EPC.

2. Article 2 EPC requires that a European patent shall be subject to the same conditions as a national patent, i.e. a GB patent granted by the IPO. Article 64 requires that a European patent shall confer the same rights as a national

patent. The rights conferred by a patent are the activities which constitute an infringement of the patent, for example making a patented device without the permission of the patent owner. On this basis, some commentators have argued that it is not possible to have different infringement provisions in UK law for European patents and national patents

3. In order to comply with Article 27(k) of the UPC Agreement it is necessary to introduce the exception into UK law for European patents and European patents with unitary effect. The UPC Agreement does not make provision for national patents and does not oblige the Member States to align their substantive law for national patents with the UPC provisions. The Signatory of the UPCA have confirmed this interpretation in their note published on 29 January 2014[12] where they state:

> "The legislator has clearly not chosen to achieve a uniform application of substantive patent law through obligatory harmonisation of national patent law. There is no provision in the Agreement that obliges the contracting states to do so."

4. Article 2 of the European Patent Convention (EPC) provides for a European patent to have the same effect as a national patent unless the Convention provides otherwise. Article 64 of the EPC requires that a European patent shall confer the same rights as a national patent. However, Article 64 also states that infringement of a European patent shall be dealt with by national law.

5. Furthermore, Article 149a of the EPC states that nothing in the EPC shall limit the right of some or all of the Contracting Member States of the EPC to conclude special agreements on any matter concerning European patents which are subject to or governed by national law. Article 27 of the UPC Agreement is one such arrangement that the Member States have concluded. In doing so, the Member States of the UPC have decided to set out the rights conferred on a patent owner by a European patent and unitary patents. However, the Member States have deliberately chosen not to do the same for national patents which remain subject to national law.

6. Therefore, for the Signatory States of the UPC Agreement, national law on infringement for European bundle patents and unitary patents will be subject to the provisions of the UPC Agreement but the law for national patents will not. This means it is possible for a national patent to have different infringement provisions to those of a European patent or unitary patent.

27 January 2016

12 https://www.unified-patent-court.org/news/interpretative-note-%E2%80%93-consequences-application-article-83-upca.

APPENDIX 2: DRAFT NATIONAL ASSEMBLY FOR WALES (REPRESENTATION OF THE PEOPLE) (AMENDMENT) (NO. 2) ORDER 2016

Additional Information from the Cabinet Office

The Cabinet Office was responsible for the drafting of this instrument on behalf of the Wales Office and is responsible for electoral instruments more generally. The provider of Welsh translation services to the Cabinet Office has carried out a review of its procedures on how it provides those translation services and Cabinet Office will discuss the findings with the provider to ensure that the translation services are accurate in future. Subject to the outcome of those discussions, the Cabinet Office will consider its future arrangements for obtaining Welsh translations.

In the meantime, arrangements have been put in place for Welsh speaking administrators to check the translated forms in future, and Welsh forms will continue to be shared with the Electoral Commission, which also has an office Wales which checks such statutory instruments. Whilst they are not Welsh speakers, officials and lawyers in Cabinet Office will check all similar forms for inconsistencies and where there are any will raise such discrepancies with Welsh administrators and the Electoral Commission as above. All Welsh forms will be subject to a final proof-read and sense check by Welsh speaking administrators. The Cabinet Office hopes that this process of checking and rechecking by electoral experts will mean that any errors and inconsistencies in Welsh translations will be spotted and can be corrected.

3 February 2016

APPENDIX 3: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 9 February 2016 Peers declared no interests.

Attendance

The meeting was attended by Baroness Andrews, Lord Bowness, Lord Hodgson of Astley Abbotts, Baroness Humphreys, Lord Janvrin, Baroness O'Loan, Baroness Stern, Lord Trefgarne and Lord Woolmer of Leeds.