 <b>Regulatory Policy Committee</b>	<b>Opinion</b>	
<b>Impact Assessment (IA)</b>	Unified Patent Court implementation - alignment of exceptions to infringement	
<b>Lead Department/Agency</b>	Department for Business, Innovation and Skills	
<b>Stage</b>	Consultation	
<b>IA Number</b>	BISIPO003	
<b>Origin</b>	International	
<b>Expected date of implementation (and SNR number)</b>	6 April 2015 (SNR9)	
<b>Date submitted to RPC</b>	19 March 2014	
<b>RPC opinion date and reference</b>	20 May 2014	RPC14-BIS-2058
<b>Overall assessment</b>	<b>AMBER</b>	
<p><b>RPC comments</b></p> <p>The IA will be fit for purpose provided the Department addresses the points set out in this opinion. The IA states that, as the proposals relate to implementation of an international agreement, they are out of scope of OITO. However, the IA provides insufficient evidence to support this conclusion. The IA should provide greater clarity around the relationship between the proposals, the related European regulations and the inter-governmental agreement.</p> <p>The Department has been unable to monetise fully the costs and benefits of the proposals. However, the IA identifies the areas where these are likely to arise. The Department proposes to use consultation to inform assessment of them for the final stage. This is regarded as adequate for this stage of policy development.</p>		
<p><b>Background (extracted from IA)</b></p> <p><b>What is the problem under consideration? Why is government intervention necessary?</b></p> <p><i>Currently the exceptions to patent infringement in UK patent law do not completely agree with those in the Unified Patent Court (UPC) Agreement. UK exceptions do not extend as far as those provided by some other member states and are more limited than outlined in the agreement. To leave the exceptions as they are in UK law would create the scenario where a patent in the UK may, or may not, be considered to have been infringed depending on whether it is a GB patent, a European bundle or a unitary patent. This would create doubt and uncertainty for patent-holders and users of patented products. An amendment to UK law would bring certainty on these specific matters.</i></p> <p><b>What are the policy objectives and the intended effects?</b></p> <p><i>The overall objective is to improve legal certainty surrounding infringement of patents for parties with an interest in the development of plant varieties and computer programs in the UK. This is part of a package of changes relating to the Unified Patent Court Agreement, part of which provides the two additional infringement exceptions to those that currently exist in UK law. The new infringement exceptions would benefit some of those involved in the development of plant varieties and computer programming as it would ensure that patents do not unduly inhibit innovation in these sectors. It would also put UK law on a level playing field with much of Europe.</i></p>		

## Proposals

*The proposal would make changes to implement the UPC Agreement and also align infringement laws applied to UK national patents with those of the UPC Agreement. This would mean that all patents valid in the UK would be subject to the same infringement exceptions as under the UPC Agreement, providing legal certainty for users and bringing cost savings for research & development in the field.*

### **Identification of: costs and benefits; the impacts on business, civil society organisations, the public sector and individuals; and reflection of these in the choice of options**

Patent systems within Europe are described as fragmented. This creates uncertainty for firms and increases transaction costs. A number of changes are, therefore, being made across Europe to harmonise European patent law.

Subtle, but significant, differences currently exist in national laws when it comes to determining what constitutes an infringement of a European patent. National patent laws also vary when it comes to defining exceptions to infringement. The Unified Patent Court (UPC) Agreement includes two exceptions to infringement - relating to plant breeders and computer programs - which do not currently exist in UK patent law but will apply to unitary patents and European bundle patents within the UPC's jurisdiction.

The proposal would extend existing UK exceptions to patent infringement to align with those set out in the UPC Agreement. This would reduce uncertainty and transaction costs for firms as it would mean that all patents valid in the UK, would be subject to the same exception to infringement and, therefore, on an equal footing no matter whether the patent is enforced through the national courts or the UPC. This would mean fewer occasions where legal advice is required.

The proposals could result in the loss of licensing income for those who hold patents in either the plant breeding or computer program fields and who currently charge a licence fee for researchers to use patented products. The IA states that, as the proposed exceptions in these areas apply only to research and development and not to the commercialisation of products, the impact on patent owners would be limited. The loss of licensing income for patent holders would represent a saving for those who would not be required to pay a license fee to commence research. This equates to a transfer of costs from one party to another, resulting in no net cost or benefit.

Existing license agreements may have to be re-negotiated or re-drafted to reflect the new exceptions. This may result in transitional costs as these agreements are updated. Both patent owners and licensees would bear these costs.

Patent holders and those considering research could benefit from administrative savings as a result of the introduction of the exceptions that would remove the need to seek a license/permission to use patented products.

The Department has been unable to monetise fully the costs and benefits of the proposals, in particular relating to litigation costs and loss of licensing income. The Department proposes to use the consultation to obtain further views and evidence to inform the assessment for the final stage.

**Comments on the robustness of the small & micro-business assessment (SaMBA)**

The IA states that the proposals are as a result of an international treaty. A SaMBA has, therefore, not been included.

The IA states that small and micro-businesses are adversely affected by legal complexity and cost, and the need to take external legal advice. The innovative firms among them are also directly affected by limits to their ability to develop new products and methods, and by variations in national regimes. The IA concludes that a single exceptions regime, which is consistent with the Unitary Patent Court, is likely to benefit small and micro-businesses so there is no reason to exclude them from the proposals.

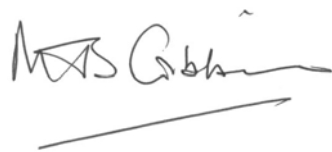
This analysis is sufficient at this stage. Following consultation, it would be helpful if the Department explains in the IA how, and the extent to which, the proposals could affect small and micro-businesses; and how it intends to might mitigate their costs.

**Comments on the robustness of the OITO assessment**

The IA states that, as the proposals relate to implementation of an international agreement, they are out of scope of OITO. However, the IA provides insufficient evidence to support this conclusion. The IA should provide greater clarity around the relationship between the proposals, the related European regulations and the inter-governmental agreement. If there are no European or international requirements to implement domestic regulation or, indeed, to ratify the inter-governmental agreement, then the proposals could be in scope of OITO. The final stage IA will, therefore, need to provide further information to enable the RPC to determine the appropriate OITO classification.

If in scope of OITO, the final stage IA should include an estimated equivalent annual net cost to business (EANCB) figure. The Department would have to strengthen the evidence supporting the EANCB calculation so the RPC could validate the figure at the final stage.

**Signed**



**Michael Gibbons, Chairman**