

EU PATENT UPDATE – ANOTHER SET BACK. BUT IS AN EU PATENT NECESSARY?

On **2 July 2010** the advisory ‘Advocates General’ at the European Court of Justice (ECJ) issued their awaited Opinion (which became publicly available in **August**). They expressed the view that last year’s proposals for an EU Patent Court to decide EU-wide infringement issues contravene EU Treaties. This Opinion is not definitive. The decision of the ECJ itself is still awaited, but the Opinion is authoritative, and it is a serious set back for hopes of early introduction of an EU Patent (previously called a Community Patent).

European Patents (non-EU) continue to be granted under the European Patent Convention (EPC) and there are some that argue that an EU Patent is not needed. Wilson Gunn have considerable experience in obtaining European Patents. Please contact **Mark Goodwin** if you require further information or advice.

The European Patent Convention (EPC) came into force in 1977. There will be 37 European member states (including all 27 EU countries) when Serbia joins on **1 October 2010**. The EPC is a private Treaty between its members. It enables the grant of a single European Patent covering any one or more of the member states, but any post-grant enforcement has to be done at national courts, country by country.

There is, as yet, no such thing as an EU Patent that can be enforced for all 27 EU countries in a single action. There have long been proposals to allow conversion of European Patents to EU Patents but it was only last year that agreement was reached on the present proposals for a unified EU Patent Court – an essential requirement for an EU Patent system.

The Opinion of the Advocates General is that these proposals are incompatible with EU Treaties. Four reasons are given:

1. The proposals do not adequately ensure that the Court would properly apply all of EU law to the kind of inter-party disputes that would come before the Court.
2. The proposals do not provide adequate remedies if the Court fails properly to apply EU law.
3. The proposals allow for an action to be pursued in some cases in a language that is not the national language of the defendant, contrary to EU rights of defence.
4. The proposals do not give the Court any right to review decisions of the European Patent Office (EPO), so it cannot be ensured that EU Patents granted by the EPO would comply with EU law.

If the ECJ upholds this view, it seems unlikely that there will be progress towards an EU Patent in the near future. Perhaps that is for the best. The present European Patent system works well in practice. The 2008 ‘London Agreement’ went some way towards reducing translation costs, and in many cases it is convenient to rely on national laws and procedures for enforcement.

NOTE: These points are for general information. They do not constitute legal advice, nor do they necessarily represent a comprehensive list of issues.