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EUROPEAN COURT REFUSES TO EXTEND PROFESSIONAL PRIVILEGE TO IN-HOUSE LAWYERS

On September 17, the European Court of First Instance (CFI) handed down its judgment upholding a decision of the European Commission (EC) that documents seized during an EC antitrust investigation were not covered by legal professional privilege. Despite indications by the President of the Court during the early part of the proceedings that the CFI might extend the scope of legal professional privilege in EU law, the CFI held that communications between in-house counsel, and internal clients, are not privileged in relation to EC competition investigations, and it set out the procedure that EC officials should follow if a dispute as to privilege arises during an on-site investigation.

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SECOND CIRCUIT APPLIES TWOMBLY TO DISMISS DETAILED ALLEGATIONS OF ANTITRUST CONSPIRACY

In May of this year, the United States Supreme Court issued a highly important decision significantly tightening the requirements for pleading antitrust conspiracies. In *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Court held that allegations of parallel conduct and conclusory assertions of agreement will not suffice to survive a 12(b)(6) motion to dismiss. Rather, the complaint must state "enough factual matter (taken as true) to suggest that an agreement was made" and such allegations must be enough to raise a right to relief "above the speculative level." In

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reaching this conclusion, the Court expressly rejected the longstanding formulation for deciding motions to dismiss set forth in *Conley v. Gibson*, 355 U.S. 41 (1957), which held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Now, under *Twombly*, an antitrust plaintiff may not rely on the possibility that it may later establish "some set of undisclosed facts to support recovery," but instead must plead "enough facts to state a claim to relief that is plausible on its face," and not merely "conceivable."

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BROKEN PROMISE TO STANDARD-SETTING ORGANIZATION MAY BE ANTICOMPETITIVE, THIRD CIRCUIT RULES

A patent holder that promises a standard-setting organization that it will license its technology on fair and reasonable terms, but reneges once its technology is adopted as the industry standard, may be held liable under the Sherman Act Section 2, the U.S. Court of Appeals for the Third Circuit announced in *Broadcom Corp. v. Qualcomm Inc.*, No. 06-4292 (3d Cir. Sept. 4, 2007), available at 2007 U.S. App. LEXIS 21092.

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INTERNATIONAL HIGHLIGHTS

On September 17, the European Court of First Instance (CFI) essentially rejected the appeal by Microsoft against the European Commission's (EC) decision that it had abused its dominant position. The CFI upheld the EC's finding that Microsoft had breached Article 82 by virtue of its refusal to grant interoperability information, and its bundling of Windows Media Player with the Windows PC operating system. The CFI also confirmed the €497 million fine imposed on Microsoft, and the EC's remedies requiring the provision of interoperability information, and the unbundling of Windows Media Player. However, the CFI concluded that the mechanism for the appointment of a monitoring trustee was unlawful. It concluded that the EC had no authority to compel Microsoft to grant a monitoring trustee powers that the EC itself is not authorized to confer

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on a third party, or to require Microsoft to pay the costs of the monitoring trustee.

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