Cartel prosecution in the US and the EU - recent developments

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In all jurisdictions with anti-trust laws, the detection and punishment of cartels remains a top priority. This chapter, which focuses on the US and the EU, addresses three main issues:

- Attempts to deter cartels, including fines, criminal sanctions and search warrants.
- The current status of leniency programmes.
- Developments in the area of private anti-trust litigation.

The chapter illustrates these issues in practice by describing current and recent competition cases, in particular US cases in the area of cartels (*see box, Sanctions in ongoing US cartel investigations*) and leniency (*see box, Recent applicants to the US Corporate Leniency Program*). The method of the European Commission (Commission) in prioritising and reducing claims, partly through leniency methods, is also considered (*see box, Methods of handling EC anti-trust cases*).

Finally, the chapter provides a summary of the main penalties, recent developments and leniency principles under US and EC anti-trust laws (*see box, The consequences of anti-competitive behaviour - key points*).

DETERRENCE

The US and EU authorities have developed a number of mechanisms to deter anti-competitive behaviour, including criminal penalties and severe fines. In addition, they both increasingly co-operate to punish anti-trust offences.

The US

Criminal competition enforcement in the US has continued to be active in 2006 and 2007, and significant sanctions have been imposed in several ongoing investigations (*see box, Sanctions in ongoing US cartel investigations*). The US mainly deters anti-competitive behaviour through:

- Fines.
- Imprisonment.
- Increasing co-operation with the EU to punish anti-trust offences carried out by non-US nationals.

Fines. The US Department of Justice's Antitrust Division obtained:

- US$473 million (about EUR331.6 million) in fines in 2006. At the time, this was the second highest annual amount collected in US history.
- US$600 million (about EUR420.7 million) in fines in connection with air transportation alone by August 2007 (*www.usdoj.gov/atr/public/press_releases/2007/224928.htm*).

Imprisonment. The Antitrust Division continues actively to seek jail sentences for individuals involved in international cartels, having long believed that individual imprisonment has a greater deterrent effect than fines alone. Cartel members have informed the Antitrust Division that some international cartels choose not to expand their activity to the US because of the risk of imprisonment. In the first half of the financial year 2007 alone, the Antitrust Division obtained criminal sentences for 21 individuals totalling 17,235 days' imprisonment, more than triple the total days' imprisonment obtained in the financial year 2006. In spring 2007, about 30 foreign defendants had served or were serving prison sentences in the US (*see below, Enforcement against foreign nationals*).

Enforcement against foreign nationals. The Antitrust Division has been increasing its co-operation with the EU and EU member states in punishing international anti-competitive behaviour, through two main methods:

- **Co-ordinated raids and search warrants.** The Antitrust Division demonstrated its willingness to co-operate with the UK Office of Fair Trading (OFT) and the Commission to shut down international cartels. In May 2007, eight foreign nationals were arrested in the US in connection with allegations that they conspired to rig bids, fix prices and allocate markets for the sale of marine hose used to transport oil. When the arrests were made, simultaneous search warrants were carried out by the:
  - Defense Criminal Investigative Service of the Department of Defense's Office of Inspector General;
  - OFT;
  - Commission.

  Thomas O Barnett, Chief of the Antitrust Division, has stated that the arrests and raids demonstrate the authorities' ability to work effectively with foreign competition authorities to shut down international cartels (*www.usdoj.gov/atr/public/press_releases/2007/223037.htm*).
- **Extradition.** In *United States v Ian P Norris (Cr. No. 03-632 (E.D. Pa.))*, the Antitrust Division is a step closer to its first extradition of a foreign national for an anti-trust offence. In June 2005, an English magistrates' court found that Ian Norris, a UK national, could be extradited on a US anti-trust charge. In February 2006 and January 2007, the High Court of Justice in London dismissed a number of appeals filed by Norris. Most recently, Norris has been granted leave to appeal these rulings to the House of Lords.

The EU

At EC level, Articles 81 and 82 of the EC Treaty (Articles 81 and 82) regulate anti-competitive behaviour. Criminal sanctions and multiple-damages claims are not available for private litigation at EC level (*see below, Private litigation: The EU*). Therefore, the Commission's strongest deterrent remains civil fines. Between 1 October 2006 and 30 September 2007, the Commission adopted seven prohibition decisions. Most of these decisions have been challenged before the European courts and these cases are still pending.

In the same period, the European Court of Justice (ECJ) and the Court of First Instance (CFI) have upheld all the Commission's prohibitions that it had adopted in the previous years, although, as before, they have reduced the fines imposed in a number of these cases. They have also clarified the Commission's ability to impose fines, and reviewed the law on a number of long-standing cartel issues.

Fines. Between 1 October 2006 and 30 September 2007, the Commission has imposed fines totalling nearly EUR2.9 billion (about US$4.1 billion).

The Commission's Guidelines on setting fines imposed under Article 23(2)(a) of Regulation No. 1/2003 (*OJ 2006 C210/02*) apply to all cases where the Commission has issued a statement of objections to companies involved in cartels after 1 September 2006. The basic amount of the fine before mitigating or aggravating factors are taken into account is a maximum of 30% of the value of sales in the relevant product or service market, multiplied by the years of infringement. The amount is greatly increased for:

- Repeat offenders (*see below, Review of Commission fines: Repeat infringers*).
- Companies that acted as instigators or leaders of a cartel.

Reviews of Commission fines. Over the last 12 months, the ECJ and CFI reduced fines in a number of cases, but have also confirmed the Commission's discretion to increase the amount and scope of fines:

- **Double jeopardy.** In *SGL Carbon AG v Commission (case C-328/05 P, 10 May 2007)*, the ECJ confirmed that the Commission can impose fines or penalties even if non-EU states have also imposed them.
- **Repeat infringers.** In *Groupe Danone v Commission (case C-3/06 P, 8 February 2007)*, the ECJ confirmed that the Commission could increase Danone's fine for infringement of competition law by 40%, because its infringements were repeated. It was of no relevance that its two previous infringements occurred almost ten and 20 years before its involvement in this most recent cartel began, and were in a totally unrelated sector (flat glass).
- **Two-sided seller-buyer cartels.** In *FNCBV v Commission (joined cases T-217/03 and T-245/03, 13 December 2006),* the CFI upheld the Commission's decision to fine groups of sellers and buyers who had collectively entered into a price cartel. It accepted that even the buyers had an economic interest in this cartel. The judgment is important because a number of other two-sided cartel cases are pending.
- **Increasing fines.** In *Raiffeisen Zentralbank Österreich v Commission (joined cases T-259/02 to T-264/02 and T-271/02, 14 December 2006)* the Commission requested, for the first time, that the CFI increase the amount of the fine imposed on a company. This is because after having co-operated with the Commission in the course of the investigations, that company denied the existence of a number of agreements before the CFI. According to the Commission, this surprise manoeuvre had complicated its defence. However, the CFI dismissed the Commission's counterclaim because the:
  - agreements had not much impact on the legal analysis; and
  - Commission had only spent a few paragraphs in its defence rebutting the company's argument.

Reviews of Commission decisions on significant anti-trust issues. When reviewing Commission decisions, the CFI and the ECJ have confirmed the law in a number of areas:

- **Professional privilege for in-house counsel.** Companies subject to investigation by the Commission cannot rely on legal professional privilege for internal communications with in-house lawyers. These communications must be submitted for examination where they are within the scope of the Commission's investigation. This was confirmed in the long-awaited CFI judgment in *Akzo Nobel Chemicals v Commission (joined cases T-125/03 and T-253/03, 17 September 2007)*. Although the CFI reaffirmed the principle that certain conversations between external lawyers and their clients remain confidential, it rejected Akzo's attempt to extend the personal scope of protection of confidentiality beyond the limits that the ECJ has laid down. However, this was a bittersweet win for the Commission. The CFI added that if, in the course of a dawn raid, a company claims that certain documents are privileged, the Commission can no longer check the merits of this claim by even a cursory look at the documents. It must put them in a sealed envelope and adopt a formal decision rejecting the claim, allowing the company to bring the matter to the CFI.
- **Parent company liability for a wholly owned subsidiary.** According to EC case law, a parent company that owns, directly or indirectly, 100% of the shares of a subsidiary involved in a cartel can be held jointly and severally liable for the subsidiary's infringement. It escapes liability if it can rebut the presumption that it is in a position to exercise decisive influence over the subsidiary. However, in the past few years, no parent company has avoided liability by arguing that it had not instructed its subsidiary to adopt the contentious conduct or that it was not even aware of that conduct. In *Bolloré SA and Others v Commission (joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, 26 April 2007), recital 132*, the CFI seemed to qualify this settled case law by observing that "something more than the extent of the shareholding must be shown, but (…) [it] need not necessarily take the form of evidence of instructions given by the parent company to its subsidiary to participate in the cartel". However, in *Willam Prym and Prym Consumer GmbH & Co KG v Commission (case T-30/05, 12 September 2007), recital 146*, the CFI restates the settled law without further qualification.

SANCTIONS IN ONGOING US CARTEL INVESTIGATIONS

Three ongoing cases demonstrate the severity of fines and criminal liability that the US Department of Justice's Antitrust Division can impose:

- **British Airways and Korean Airlines.** (*www.usdoj.gov/atr/public/press_releases/2007/224928.htm.*) Both airlines pleaded guilty of involvement in conspiracies to fix the prices of passenger and cargo flights, and agreed to pay US$300 million (about EUR210.3 million) each in criminal fines. These fines are:
  - second only to the US$500 million (about EUR350.6 million) fine that F. Hoffmann-La Roche paid in the 1999 vitamins cartel (*United States v F Hoffmann-LaRoche Ltd (No. 99-CR-184-R N.D. Texas, 30 May 1999)*;
  - equal to the fine that Samsung paid in 2005 (*see below, Dynamic random access memory (DRAM) cartel*).

  In addition to the US proceedings, individuals at British Airways could be the first to be subject to criminal proceedings under the UK Enterprise Act 2002, which makes it a criminal offence for individuals to take part in the most serious types of cartel. On 1 August 2007, the UK Office of Fair Trading announced that British Airways would pay a record GB£121.5 million (about US$248.8 million) civil penalty, and that a criminal investigation is ongoing (*www.oft.gov.uk/news/press/2007/113-07*).
- **Dynamic random access memory (DRAM) cartel.** (*www.usdoj.gov/atr/public/press_releases/2007/222770.htm.*) When Samsung and other manufacturers of dynamic random access memory chips were accused of price-fixing, Samsung agreed to plead guilty and pay a US$300 million fine. In December 2006 and April 2007, two additional Samsung executives agreed to plead guilty and serve prison sentences for their roles in the cartel. In the most recent plea agreement, a Samsung executive agreed to serve a 14-month sentence in a US prison, the longest imprisonment ever of a foreign defendant charged with price-fixing in the US. So far in the conspiracy:
  - 18 individuals and four companies have been charged; and
  - criminal fines have exceeded US$730 million (about EUR511.8 million).
- **E-Rate investigation.** (*www.usdoj.gov/atr/public/press_releases/2007/221389.htm.*) In February 2007, an individual was convicted of wire fraud in connection with a scheme to defraud the US federal E-Rate programme, which subsidises the provision of internet access and telecommunications services to economically disadvantaged schools and libraries. The Antitrust Division then carried out a nationwide investigation of bid-rigging and fraud in the E-Rate programme, which has yielded charges against 14 individuals and 12 companies. Six companies and four individuals have agreed to pay over US$40 million (about EUR28 million) in fines and restitution and have:
  - pleaded guilty;
  - agreed to plead guilty; or
  - entered civil settlements.

  Two individuals have been sentenced to serve more than five years in prison.

- **Successor liability for a predecessor.** In an opinion of 3 July 2007 in *Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani - ETI SpA e.a. (case C-280/06)*, Advocate General Kokott considered how to attribute liability to the economic successor of an undertaking for conduct committed before the acquisition. In her opinion, the principle of economic succession cannot overrule that of personal responsibility for infringements. Liability for participation in a cartel should be imputed to the legal or natural person managing the undertaking at the time of the infringement. This should apply even if, at the time of the Commission decision, another company had assumed responsibility for operating the undertaking. It is only in exceptional circumstances that competition law infringements should be imputed to the successor undertaking.

LENIENCY PROGRAMMES

One of the major ways in which the US and the EU deter involvement in cartels is by offering reductions in or immunity from fines to those who report anti-competitive behaviour. US and EC leniency programmes increasingly attract applicants (*see box, Recent applicants to the US Corporate Leniency Program*) and converge to work together across borders (*see below, The US* and *box, Methods of handling EC anti-trust cases: European Competition Network (ECN) model leniency programme*). The EC leniency programme has recently been fine-tuned, and should be looked at in conjunction with other methods of deterring applications (*see box, Methods of handling EC anti-trust cases*).

The US

If a firm reports its illegal anti-competitive behaviour at an early stage, the Antitrust Division may grant it immunity from criminal prosecution under its Corporate Leniency Program. The applicant should:

- Be the first entity to bring the conduct to the Antitrust Division's attention.
- On discovery of the illegal activity, terminate its participation in it.
- Report the activity with candour and completeness, and provide continuing and full co-operation to the Antitrust Division.
- Apply as a corporate entity, rather than confessing as an individual.
- Provide restitution to injured parties where possible.
- Not have coerced any other party into, or been the leader or originator of, the illegal activity.

There are alternative requirements that may also be met (*www.usdoj.gov/atr/public/guidelines/0091.htm*). The vast majority of the Antitrust Division's major investigations have involved an undertaking applying for its Corporate Leniency Program. It attributes its success in defeating cartels in large part to its ability to secure the co-operation of cartel insiders in this way. In addition, companies that lose the race for complete immunity may receive reduced penalties through plea negotiations.

Scott D Hammond, the Deputy Assistant Attorney General for Criminal Enforcement of the Antitrust Division, has explained that transparency and predictability in the application of a leniency programme are essential to encouraging companies to self-report (*www.usdoj.gov/atr/public/speeches/219332.htm*). He applauds:

> "the developing global convergence among leniency programs - convergence of transparency that allows a potential leniency applicant to predict with precision, in each jurisdiction where it is considering reporting, both the benefits that are available if it is the first company to report, and whether it is eligible to receive those benefits".

Hammond noted that:

- Transparency encourages cartel participants to apply for immunity simultaneously in multiple jurisdictions, which, in turn, allows those jurisdictions to co-ordinate their investigations of the cartel.
- There is significantly less global convergence for companies who are not eligible for full immunity, but can still offer valuable co-operation.

The EU

The EU published its Revised Notice on immunity from fines and reduction of fines in cartel cases (*OJ C-298/17*) on 8 December 2006 (Notice). This contains a number of amendments to the Commission Notice on immunity from fines and reduction of fines in cartel cases of 2002 (*OJ C-45/3*). The following changes and clarifications are now final:

- **Higher evidence threshold (*paragraph 9, Notice*).** There are now clear definitions of the type of information and evidence a leniency applicant must submit to the Commission to qualify for immunity.

  Applicants must provide enough evidence to enable the Commission to carry out an inspection in a targeted manner. Therefore, applicants must submit:

  - a corporate statement covering, among other things, a detailed description of the alleged cartel and the home addresses of all individuals involved in the cartel (*paragraph 9(a)*);
  - other evidence relating to the alleged cartel in their possession or available to them at the time of the submission, including in particular any evidence contemporaneous to the infringement (*paragraph 9(b)*).

  If the applicant had not completed its internal inquiries at the time of applying (for example, to avoid the risk of leaks prior to a conditional immunity decision and/or a Commission inspection), it must complete them directly afterwards.

RECENT APPLICANTS TO THE US CORPORATE LENIENCY PROGRAM

Several recent examples of leniency applicants in the US include:

- **Virgin Atlantic.** After Virgin Atlantic reported its participation with British Airways in a conspiracy to fix passenger fuel surcharges, it was granted conditional acceptance into the US Department of Justice Antitrust Division's Corporate Leniency Program in connection with its investigation (*www.usdoj.gov/atr/public/press_releases/2007/224928.htm*).
- **Lufthansa AG.** In connection with an air cargo conspiracy, Lufthansa AG has been granted conditional acceptance into the Corporate Leniency Program after disclosing its role in the conspiracy in which British Airways and Korean Air were participants (*www.usdoj.gov/atr/public/press_releases/2007/224928.htm*).
- **Bank of America Corporation.** The Bank voluntarily provided information in connection with bidding practices in the municipal derivatives industry before the start of the Antitrust Division's investigation. It has entered into an amnesty agreement in return for its continuing co-operation with US authorities (*newsroom.bankofamerica.com/index.php?s=press_releases&item=7674*).

- **Continued co-operation (*paragraph 12, Notice*).** The new continuous and genuine co-operation obligation means that during the whole administrative proceedings, the immunity applicant must provide the Commission with all relevant information and evidence relating to the alleged cartel that is available to it and that is not misleading. This obligation is fully in line with recent EC judgments. The co-operation obligation now also covers partial leniency applicants.
- **Oral proffers (*paragraph 32, Notice*).** Leniency applicants can confess their participation in a cartel and give all relevant information in the form of an oral corporate statement. It must be accompanied by all available pre-existing documentary evidence of the cartel available to the applicant.

  The distinction between the oral and written elements concerns access to information. The oral statement remains under the Commission's control at all times. This is to minimise discoverability and disclosure in national courts, to reassure leniency applicants that they will not be put into a worse position in civil anti-trust claims than non-co-operating participants.

  The oral statement is taped and transcribed at the Commission's premises. Applicants do not retain or receive any copies of it from the Commission, because it becomes a Commission document immediately. To guarantee its value as evidence, the applicant making the oral statement must check it for accuracy against the recording, at the Commission's premises.

  If the Commission issues a statement of objections to the cartel participants, they can access the file, including documentary evidence. However, they can only read the transcript of the oral statement (and listen to the tape) at the Commission's premises. They can take notes, but not make copies of the transcript or tape (*paragraphs 31 to 35, Notice*).

METHODS OF HANDLING EC ANTI-TRUST CASES

Despite the number of prohibition decisions and the level of fines, the European Commission (Commission) is seeking ways to handle its workload, and leniency applications, efficiently and consistently.

No-action letters

The Commission issues these if it decides not to pursue investigations brought to its attention by leniency applicants (either because the case is not important enough or because national competition authorities are better placed to pursue it).

Plea-bargaining

Parties may pay substantial fines in return for closure of the case. According to the European Commissioner for Competition, Commissioner Kroes, this method saves time without sacrificing deterrence (*europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=0&language=EN&guiLanguage=en*).

European Competition Network (ECN) model leniency programme

The ECN provides a forum and mechanism for co-operation between EU member states and with the Commission in all aspects of competition enforcement (including leniency), in accordance with the European Commission's Notice on co-operation within the network of competition authorities (*OJ 2004 C101/43*).

The ECN's model leniency programme is a non-legally binding document, which aims to improve the handling of parallel leniency applications to the ECN. It contains the essential features of the treatment that an applicant should expect in any ECN jurisdiction, now that almost all EU member states have introduced a leniency programme. This includes a:

- Uniform standard for immunity.
- Coherent set of termination and co-operation duties.
- Streamlined procedure for processing applications.

Each EU member state with a leniency programme must ensure that its programme reflects the provisions of the ECN model leniency programme. This should reduce the time and costs spent preparing and assessing applications with those authorities that will not ultimately handle the case. Applicants can safeguard their position with national authorities by supplying very limited information, in some cases given orally. Where the authority later decides to act on the case, the applicant receives additional time to complete the application.

In future, immunity applicants will always have to provide the Commission with an oral statement (*paragraphs 9(a) and 11, Notice*). The Commission views the oral statement not as only a guide to obtain a better understanding of the case, but as evidence which, when corroborated, constitutes adequate proof of the cartel (*JFE Engineering Corp and others v Commission (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00) [2004]*)).

- **Markers (*paragraphs 14 and 15, Notice*).** Previously, potential immunity applicants lost the first place in line if another company submitted sufficient evidence to the Commission before it had completed an internal investigation. Companies can now apply for immunity immediately after they learn about their cartel involvement by submitting some documentary evidence. The Commission grants markers to protect an immunity applicant's place in the queue while it carries out a full investigation to obtain necessary information and evidence.

  The Notice lists the initial data that must be provided to reach the immunity threshold, including:

  - the identity of the applicant; and
  - some details of the cartel.

  The list of information is the same as that required for the ECN model leniency programme (*see box, Methods of handling EC anti-trust cases: European Competition Network (ECN) Model Leniency Programme*).

  The marker is a key new feature in the Notice, and its practical implementation will be developed over the next few years through the Commission's practice. When several applications for leniency are made in various different jurisdictions, the Commission must co-ordinate the marker system with the other jurisdictions.

  The time period to be granted to perfect a marker is decided on a case-by-case basis, but must be kept as short as possible for reasons of efficiency. The Commission only grants a marker for applicants for full immunity, not for applicants for reduction of fines.

PRIVATE LITIGATION

In the US, significant case law has recently narrowed the ability to bring section 1 claims. The potential for private anti-trust litigation at EC level is less well established, but is being clarified.

The US

In the widely anticipated decision in *Bell Atlantic Corporation v Twombly* (*127 S. Ct. 1955, 1964 (2007)*), the US Supreme Court held that an allegation of parallel conduct alone was not enough to support an anti-trust claim under section 1. *Twombly* addressed allegations merely of parallel conduct with a conclusory allegation of conspiracy, with no factual support. However, it has potential implications in a broader context, because the opinion urged that courts cautiously assess the evidence supporting the filing of an anti-trust lawsuit before allowing it to proceed. This signals that courts may no longer allow anti-trust cases to go forward lightly.

In *Twombly*, the court explained that the complaint must have enough factual matter, assuming that it is true, to suggest that an anti-competitive agreement was made. There must be evidence of co-ordinated conduct or conduct contrary to economic interest. This means that, for example, the following are not sufficient to bring a section 1 claim:

- Parallel conduct.

- A conclusory allegation of agreement at some unidentified point.
- A bare assertion of conspiracy.

In reaching its decision, the court expressly recognised the burdens of modern anti-trust discovery on defendants. It suggested that requiring more substantive allegations is necessary to avoid the potentially enormous expense of discovery in anti-trust cases.

The effects of *Twombly* are already being felt, as courts dismiss complaints for failing to meet the pleading burdens set out by the Supreme Court. For example, in *In re Elevator Antitrust Litigation* (*No. 06-3128, 2007 U.S. App. LEXIS 21086, *3 (2nd Cir. 4 September, 2007)*), the district court dismissed an anti-trust conspiracy claim because the:

- Complaint provided no plausible ground to support the inference of an unlawful agreement.
- Allegations of unilateral monopolisation failed to allege a prior course of dealing.

The court's decision in *Twombly* has important potential implications in the cartel context, where class actions are often filed immediately following the public disclosure of government criminal (or even civil) investigation. A bare allegation of the existence of an investigation may no longer survive a motion to dismiss. Therefore, claimants may wait for further developments in the government investigation before starting private litigation, such as:

- Indictments.
- Plea agreements.
- The filing of a government civil complaint.

The EU

The overall EC position on private anti-trust damages is less clear than that of the US because EU member states generally regulate private anti-trust claims individually. According to settled case law (*for example, Manfredi and others (joined cases C-295/04 to C-298/04, ECJ, 13 July 2006)*) each EU member state's domestic legal system must:

- Designate the courts and tribunals that have jurisdiction.
- Lay down the detailed procedural rules governing damages actions.
- Not make practically impossible or excessively difficult the exercise of rights conferred by EC law.

Therefore, the Commission must strike the right balance between the principles of:

- **Subsidiarity.** It must refrain from proposing regulatory action at EC level that does not bring added value.
- **Effectiveness.** It must explore all ways to guarantee effective enforcement of Articles 81 and 82.

In an attempt to balance these two concerns in the area of private anti-trust litigation, the Commission:

- Issued on 19 December 2005 a Green Paper concerning damages actions for breach of EC anti-trust rules (*COM(2005) 672 final*) (Green Paper).
- Will issue a White Paper that will clarify issues and obstacles raised in the Green Paper (White Paper).

Green Paper. This examines the:

- Long list of obstacles to a more efficient system for bringing private damages claims for anti-competitive behaviour.
- Options for solving these problems, listing the relative disadvantages and advantages of each one.

In April 2007, the European Parliament adopted a resolution concerning the Green Paper. It expressed support for:

- The Commission's policy of enhancing the effectiveness of damages actions, not just by following up private actions (based on prohibition decisions adopted by the Commission or a national competition authority) but also by stand-alone actions.
- Alternative ways of enabling victims of cartel behaviour to obtain redress, for example, out-of-court settlements or plea agreements (*see box, Methods of handling EC anti-trust cases*).

White Paper. The European Commissioner for Competition, Kroes has made it clear, in her speech of 8 March 2007, that the Commission does not intend to impose a unified European model of anti-trust damages that would regulate all the issues identified in the Green Paper (*europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=0&language=EN&guiLanguage=en*). However, she has stated that the Commission will issue a White Paper, reviewing the list of obstacles that stand in the way of an effective private enforcement of the Green Paper's principles. The White Paper is likely to advocate one preferred option for tackling each obstacle. An official from the Directorate General of Competition has stated that it will be ready by Easter 2008.

The White Paper is likely to address the following four main issues:

- **Burden and standard of proof.** The Commission is likely to require a claimant to bring a plausible case. In its Green Paper, the Commission defines this as presenting reasonably available evidence in support of allegations. This standard of proof comes quite close to the *Twombly* standard (*see above, The US*). This may be a challenge for claimants that bring stand-alone actions, as there is likely to be an imbalance of information between them and the defendants. In its Green Paper, the Commission considers a certain degree of mandatory disclosure of documents to be an option to address this problem. In its White Paper, it is likely to confirm this and refer to *Laboratoires Boiron v URSSAF (case C-526/04, ECJ, 7 September 2006, recital 57)* where the ECJ observed that if a company faces an excessively high burden of proof, the national court of the company's EU member state must "use all procedures available to it under national law" to enable the companies to meet the burden of proof. This includes ordering necessary measures of inquiry, in particular ordering a party or a third party to produce a particular document.

THE CONSEQUENCES OF ANTI-COMPETITIVE BEHAVIOUR - KEY POINTS

Anti-competitive behaviour is regulated by, among other things:

- Section 1 of the Sherman Act 1890 in the US.
- Articles 81 and 82 of the EC Treaty.
- EU member states' national competition laws.

When a company becomes aware of its participation in a cartel, there are several potential penalties it should bear in mind:

- **Fines.** In the US and EU, the severity of fines and the authorities' discretion to impose them is ever increasing. In particular, it has recently been clarified that the European Commission can impose fines:
  - even if they have already been imposed abroad;
  - of a higher amount for repeat infringers;
  - for two-sided buyer cartels;
  - on parent companies for their subsidiary's conduct.

  However, the European Court of Justice and the Court of First Instance restrict the European Commission's ability to impose fines in certain circumstances, such as on a successor entity for the conduct of its predecessor.
- **Criminal sanctions and imprisonment.** The US continues to use imprisonment and fines as a deterrent. Non-US companies should bear in mind that the US is increasing co-operation with EU countries to enforce its anti-trust laws against non-US nationals, by carrying out co-ordinated raids and search warrants, requests for extradition, and/or the detention of foreign nationals.
- **Private litigation.** In the US, private anti-trust claims are well established, but recent case law has increased the evidence threshold for bringing these types of claim. EU companies should bear in mind that they are likely to face private anti-trust claims at the national level, but that an overall EC procedure is also being clarified.

  To avoid penalties, companies can take advantage of US or EC leniency programmes. The key points to remember are that:
  - The US Corporate Leniency Program grants immunity from criminal prosecution.
  - In future, the EU leniency programme may cover private litigation as well.
  - The EU leniency programme has recently been amended, now including innovations and definitions such as:
    - a higher overall evidence threshold;
    - a marker system;
    - a continued co-operation obligation;
    - oral proffers which are currently optional but likely to become mandatory.
  - There are other ways of reducing time spent on a cartel case, such as no-action letters and plea bargaining.
  - Leniency programmes are converging, between the EU and the US and between EU member states who meet the standard set under the European Competition Network model leniency programme.

- **Standing of indirect buyers.** In principle, the direct effect of Articles 81 and 82 implies that any victim of an anti-trust infringement, including parties that are not customers of the infringing companies, can bring damages actions. They must prove the infringement, and its relationship to the damages claimed. Individual indirect buyers may struggle to gain access to the necessary evidence. Therefore, the Commission is in favour of allowing collective actions brought by a representative body authorised to bring the claim, based on pre-determined criteria. This should not be confused with class actions, which are considered in the OFT's Discussion Paper of April 2007, Private actions in competition law: effective redress for consumers and business (*www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf*).
- **Passing-on defence.** The White Paper is likely to deal with the issue of whether a defendant can argue that the claimant (whether a direct or indirect buyer) is entitled to damages if it can pass the overcharge on to its own customers. The starting point is that national courts can take steps to ensure that the protection of the rights guaranteed by EC law does not mean the unjust enrichment of those who enjoy them (*Courage v Crehan, case C-453/99, ECJ, 20 September 2001, recital 30*). However, the Commission is unlikely to conclude that passing on an overcharge necessarily involves unjust enrichment, because the overcharge may lead to a reduction in sales (*Commission Staff Working Document accompanying the Green Paper, paragraph 173 (ec.europa.eu/taxation_customs/resources/documents/common/whats_new/SEC(2007)388_en.pdf)*).
- **Interaction with leniency applications.** The White Paper is likely to expand on how to deal with leniency applicants in the context of a private claim. In the Green Paper, the Commission set out three possible complementary options:
  - excluding leniency applications from discovery (this already happens for leniency applications submitted to the Commission);
  - granting leniency applicants a rebate from private damages claims. Commissioner Kroes mentioned the rebates option in her speech on March 2007 (*see above*);
  - removing joint liability from leniency applicants, limiting their exposure to damages. Commissioner Kroes mentioned the rebates option in her speech in March 2007 (*see above*).