

Competition Law Insight

www.competitionlawinsight.com

The leniency comeback

A view from Germany

by **Thomas G Funke**

Leniency is alive and kicking. In 2022, the European Commission received twice the number of leniency applications as in 2021, and three times as many as in 2020.¹ This trend coincides with an uptick in the number of investigations, indicating that a credible threat of enforcement is paramount when it comes to deciding to whether to blow the whistle on a cartel.

The Covid-19 years saw a slowdown in antitrust enforcement across the world; it came close to a standstill in some jurisdictions. With enforcers confined to home offices, dawn raids were few and far between. The European Commission and the national competition authorities of the EU member states focused on digital antitrust, pursuing dominance cases against Big Tech. It was only logical for traditional cartelists to conclude that the risk of being discovered or pursued was significantly reduced. The number of leniency applications was at an all-time low in 2020.

These days are gone. Competition authorities across Europe have been allowed to create (and fill) additional positions, innovative cartel screening tools have come a long way,² and the fading of the pandemic has allowed them to step up their enforcement efforts. Europe saw more than 40 dawn raids during the first three quarters of 2022.³ Germany's Bundeskartellamt alone conducted searches of 18 companies.⁴

What has influenced the number of leniency applications?

The lowest numbers of leniency applications were recorded as Covid-19 spread worldwide, yet it is true that a downward trend had begun much earlier. OECD statistics show that the number of applications went down between 2015–2020.⁵ During the same period, the number of private enforcement actions went up across the European Union, sparked by the EU Damages Actions Directive.⁶ Coincidence or causation? As Germany's Monopolies Commission has highlighted, empirical evidence does not suffice to demonstrate a causal link.⁷ Rather, multiple factors should be considered:⁸

- The mid-2010s showed all-time highs in the number of leniency applications so cannot be considered a proper benchmark.⁹ During those years the auto parts cartels in particular caused an unusually high number of companies to blow the whistle, often in relation to multiple tenders or several vehicle technologies.¹⁰
- Private enforcement increases the deterrent effect. The prospect of having to pay fines and damages discourages the formation of cartels. A recent study from Germany suggests that a credible threat of private enforcement results in fewer cartels being formed.¹²
- Compliance programmes and internal monitoring have become more sophisticated and widespread. Awareness of the risks of non-compliance has also increased, not least because of the record fines imposed on the European truck manufacturers or American tech platforms. There are still classic cartels out there, but they might be fewer.
- The number of jurisdictions operating leniency programmes increased sharply until the mid-2010s. This required a larger number of submissions and might explain the record numbers of leniency applications during the same period. It also increased the administrative burden required to receive amnesty worldwide, sometimes with incoherent or excessive requirements.¹³ It is entirely possible that the resulting frustrations (for example, because some leniency programmes require that the anti-competitive conduct must be stopped immediately, while others require it to continue until the agency is ready to conduct a dawn raid) caused companies and their legal advisers to question whether the effort was ultimately worthwhile.
- The EU Damages Actions Directive might explain trends in Europe but not so much in other parts of the world, in which leniency also experienced a downward trend between 2015–2020. Besides, decisions in which cartel damages are awarded have remained rare in most EU member states – their numbers went up substantially only over the past two years, during which time the number of leniency applications did not go down but bounced back.¹⁴ Hence, the OECD concludes: “that there are likely other additional factors causing the decline in

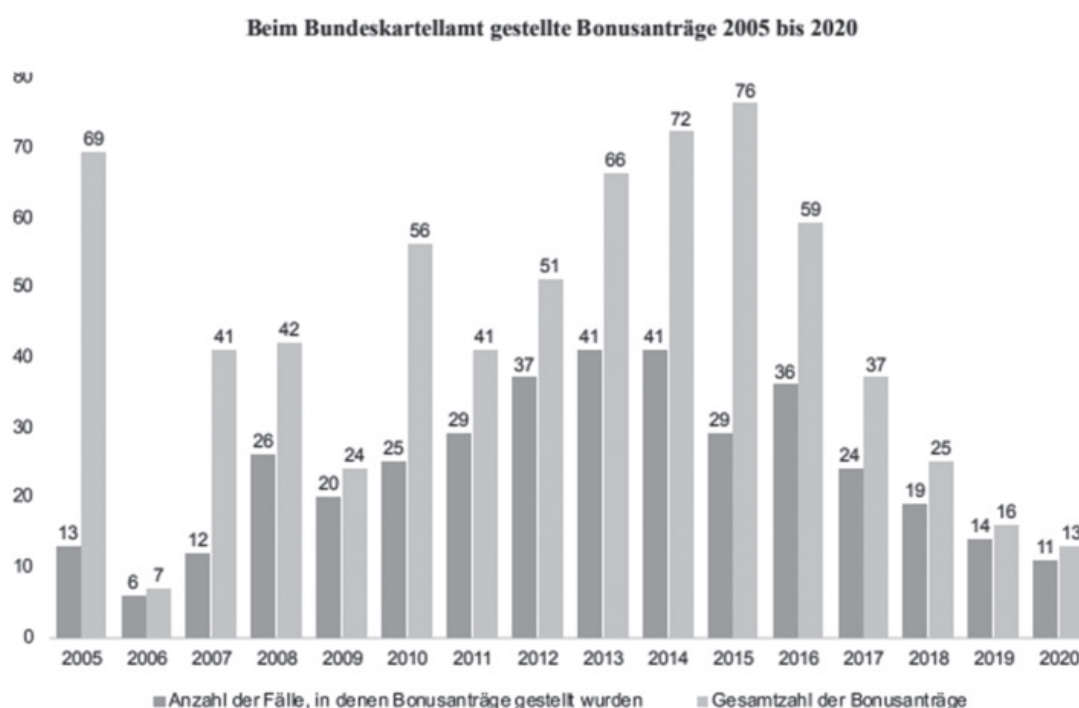


Figure 1: Leniency applications in Germany peaked in the mid-2010s.¹¹
 Source: Bundeskartellamt, *Activity Report 2019/2020*, at p 39.

leniency applications. Indeed, some academic literature has commented on the US, where a decline in leniency applications has also been observed in the past few years despite no recent change in private enforcement which is already well established.”¹⁵

In the US, Ginsburg and Cheng have concluded that multiple factors have contributed to the decline in the number of leniency applications, notably:

- Increasingly large fines in multiple jurisdictions have lessened the incentive to apply for leniency in any one jurisdiction;
- Technology has allowed the substitution of lawful tacit for unlawful express collusion; and
- Effective enforcement has succeeded in deterring cartel formation.¹⁶

What can competition authorities contribute?

Competition authorities play a major part in ensuring the continued attractiveness of leniency. Certainty as to whether full immunity from fines is available, internationally coherent requirements for receiving amnesty and proportionate cooperation requirements throughout the investigation are among the areas where significant room for improvement remains. Furthermore, immunity from personal sanctions is a key factor for potential whistleblowers. Finally, amounts paid in fines should be used to remedy the harm caused by the anti-competitive conduct.¹⁷

The EU has taken some steps to enhance the attractiveness of leniency regimes:

- In October 2022, the European Commission published its FAQ document¹⁸ providing further transparency, predictability and accessibility to potential leniency applicants. It signals the Commission’s intention to discuss potential leniency applications on a “no-names” basis, without the need to disclose the sector, the parties involved or any other details identifying the potential cartel. This will allow potential applicants to ascertain whether the conduct at stake is likely to be considered a secret cartel and whether reporting it to the Commission would entitle them to benefit from the programme. The European Commission’s leniency programme¹⁹ gives companies the opportunity to disclose, on a confidential basis, their participation in a cartel and cooperate with the Commission during an investigation. A successful leniency applicant will either completely avoid a potentially high fine or receive a substantial reduction from it. Traditionally, leniency applications were submitted orally on the Commission’s premises in Brussels. Recently, the Commission has introduced the ability to submit applications remotely via an internet-based system. In either case, the goal is to create a document held by the Commission only, rather than one on the file servers of the applicant that might be discoverable in certain jurisdictions.
- Anonymous whistleblower tools have also become an important element in the destabilisation of cartels. The European Commission²⁰ and EU member states²¹ guarantee the anonymity of informers while still allowing for continual reciprocal communication with investigative staff via a secure electronic mailbox.

These instruments are often used by current or former employees and officers and have become an important element in Europe's fight against cartels.

- Since 2021, EU member states have been under an obligation to operate leniency programmes.²² The ECN+ Directive requires leniency programmes providing for the possibility of a reduction in fines for undertakings who disclose their participation in cartels. It also harmonises existing regimes and requirements. Nonetheless, securing protection across Europe still requires working with multiple agencies; there is no one-stop shop. Administrative burdens should be further reduced to ensure the future attractiveness of leniency across Europe.

What lies ahead?

If leniency is key to antitrust enforcement, one should ensure the well-being of the goose that lays the golden eggs. At the same time, as Europe's highest court has emphasised,²³ one must consider that a leniency recipient benefits from immunity from fines in public enforcement, which is a major incentive.

Buccirossi, Marvao and Spagnolo suggest minimising the amount of damages the immunity recipient is liable for, while maximising the share of information collected by the competition authority and made accessible to the claimants (including leniency statements). They advocate a legal regime in which cartelists are jointly and severally liable with the exception of the first successful leniency applicant who is kept immune from fines and civil liability.²⁴

This position deviates from the current EU framework, which already protects leniency recipients in several ways:²⁵

- While undertakings which together infringe competition law are jointly and severally liable, an immunity recipient is liable only to its own direct and indirect purchasers or suppliers for the share of harm it caused them, provided that the claimants can obtain full compensation from the other undertakings that were involved in the infringement.
- The Damages Actions Directive defines certain categories of documents that may not be disclosed. Most notably, courts are not supposed to order the disclosure of leniency applications or settlement submissions. By these rules, the EU legislator assures potential leniency applicants that its secrets will be safe with the enforcers.
- The Directive also provides for temporary protection of documents that the parties have specifically prepared for the purpose of public enforcement proceedings (such as the replies to the authority's request for information) or that the competition authority has drawn up in the course of its proceedings. Those documents can be disclosed only after the agency has closed its proceedings.

Buccirossi, Marvao and Spagnolo suggest that all documents should be accessible to cartel victims. Their findings might serve to inform future revisions of the EU framework, even though older studies have arrived at different conclusions.²⁶ In particular, where leniency

recipients are immune from fines and civil liability, it might no longer be necessary to protect their submissions from discovery.²⁷ Economic considerations apart,²⁸ there may be legal reasons to reform the present rules that blacklist certain categories of documents: the European Court of Justice mandates that a balancing exercise be conducted, in which the legitimate interests of the cartelists and their victims are duly examined.²⁹ The categorical language in the EU Damages Actions Directive pre-empts this balancing exercise mandated by the Court of Justice. While clear categories are normally to be preferred, the risk of judges voiding the respective provisions in the EU Damages Actions Directive should be minimised by reforming them – unless the Court of Justice sufficiently clarifies whether leniency statements are comprehensively protected in response to a recent Austrian request for a preliminary ruling in Case C-2/23 – *FL und KM Baugesellschaft and S*.³⁰

According to Buccirossi, Marvao and Spagnolo, the evaluation of economic incentives suggests that the leniency recipient should be fully immune from civil liability independently of the other cartel members' ability to pay awarded damages.³¹ Yet EU law would not allow exempting the leniency recipient from liability where full compensation cannot be obtained from the other cartel members. As the European Court of Justice has observed, it follows from the direct effect of EU primary law that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and the infringement of EU competition rules. Simply put, the right to full compensation has priority and it would be difficult for future EU directives or laws of the EU member states to limit it. If the exposure of leniency recipients in damages actions were to be reduced any further, this would need to be subject to the ability of the cartel victim to effectively obtain compensation from the other cartelists.

Another recent proposal for further limiting the leniency recipient's civil liability respects that, where cartel victims cannot obtain full recovery otherwise, the leniency recipient will remain liable to them. Germany's Monopolies Commission suggests the whistle-blower should be immune from civil liability unless: (a) compensation cannot be obtained from the remaining cartel members; (b) the leniency recipient is dominant; or (c) the leniency recipient has misinformed the competition authority.³² The reference to dominance acknowledges that it might harm competition and cement market conditions where a market leader escapes fines and civil liability, while its smaller competitors bear both. While that seems in line with the goals of competition policy in general, the follow-on damages action would be further complicated if the court had to assess whether the leniency recipient is dominant. Furthermore, the road to effective compensation would be even longer where cartel victims would first need to sue the remaining cartel members (and try to enforce a decision against these) prior to initiating action against

a more solvent leniency recipient (which would give rise to limitation issues also). The Monopolies Commission's proposal remains subject to controversy;³³ it was left out of the 11th set of amendments to Germany's competition act.³⁴ As the civil liability of leniency recipients is already the subject of an EU Directive, it would appear less than ideal for individual EU member states to enact diverging rules.

The European Court of Justice recently addressed the liability for cartel damages in *Skanska*, highlighting that “the entities which are required to compensate for the damage caused by a cartel or practice prohibited by Article 101 TFEU are the undertakings, within the meaning of that provision, which have participated in that cartel or that practice”.³⁵ It would appear inconsistent with this ruling to fully exempt any cartel member from civil liability.

Against this backdrop it would be preferable to enhance the position of leniency recipients not in the context of their liability to cartel victims but in the context of contribution claims, ie by allowing the first (and possibly the second) leniency recipient to recover any payments of awarded cartel damages from their fellow cartelists.³⁶

In conclusion, the attractiveness of leniency does not primarily depend on the threat of private enforcement but on multiple factors. The number of leniency applications received by the European Commission has risen steadily over the past two years even though courts in member states including Germany, Italy, Portugal and Spain awarded damages to cartel victims during the same period.³⁷ Legislators and competition authorities can – and should – enhance the attractiveness of leniency programmes without impeding the right of cartel victims to effective loss recovery.

Dr Thomas G Funke, LL.M. (Virginia) serves as the co-head of the international competition law service line at Osborne Clarke (<https://www.osborneclarke.com/>). He can be contacted at thomas.funke@osborneclarke.com.

Endnotes

1. Jaspers, M, Global Cartel Enforcement Trends Webinar, *Concurrences*, 24 January 2023, <https://content.mlex.com/#/content/1444817>.
2. OECD, Ex-officio cartel investigations and the use of screens to detect cartels, <https://www.oecd.org/competition/exofficio-cartel-investigations.htm>.
3. Frankfurter Allgemeine Zeitung, 7 February 2023, <https://www.faz.net/-gqe-b3z6b>.
4. Bundeskartellamt press release, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/22_12_2022_Jahrerueckblick.html.
5. OECD, *Competition Trends 2022*, <https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf>, at page 46.
6. Directive no 2014/104/EU, <https://www.osborneclarke.com/insights/where-should-i-bring-my-follow-on-claim-in-future-the-impact-of-brexit-and-the-damages-directive-on-international-cartel-damages-litigation>.
7. Monopolkommission, Wettbewerb 2022, XXIV, Hauptgutachten, https://www.monopolkommission.de/images/HG24/HGXXIV_Gesamt.pdf, at para 310s.
8. Rusche, C, 2020, Wettbewerb. Mehr Kronzeugen braucht das Land, IW-Kurzbericht, Nr 38, Wettbewerb: Mehr Kronzeugen braucht das Land – Institut der deutschen Wirtschaft (IW) (iwkoeln.de)
9. OECD, *Competition Trends 2022*, <https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf>, page 47 cont.
10. European Commission press release, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1774.
11. Bundeskartellamt, *Activity Report 2019/2020*, at p 39, https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202019_2020.pdf;jsessionid=2D66902A8EFD7F9D280F55081477E9FE.1_cid378?__blob=publicationFile&v=5.
12. Fremerey, M, Der Effekt privater Schadensersatzklagen auf die Kartellaktivität: “The deterrent effect of damages payments resulted in a significant reduction of the number of newly formed cartels”, <https://www.hhu.de/news/der-effekt-privater-schadensersatzklagen-auf-die-kartellaktivitaet>. The same study observes that, while fewer cartels are formed under credible threat of private enforcement, those few might be more stable than they would have been otherwise.
13. The OECD roundtable in 2018 considered several success factors and areas for improvement, <https://www.oecd.org/competition/challenges-and-coordination-of-leniency-programmes.htm>.
14. Laborde, J-F, “Cartel Damages Actions in Europe: How Courts have assessed overcharges”, *Concurrences*, September 2021, <https://www.concurrences.com/en/review/issues/no-3-2021/pratiques/102086>.
15. OECD, *Competition Trends 2022*, <https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf>, at p 47.
16. Ginsburg, DH and Cheng, C, “The Decline in US Criminal Antitrust Cases: ACPERA and Leniency in an International Context”, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460091.
17. Germany's Bundeskartellamt accepted and declared binding commitments offered by power suppliers which had charged excessive tariffs, which provided for compensation payments to customers, http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2011/B10-31-10.pdf?__blob=publicationFile&v=3.
18. European Commission, Frequently Asked Questions (FAQs) on Leniency, https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf.
19. European Commission, Commission Notice on Immunity from fines and reduction of fines in cartel cases, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC1208%2804%29>.
20. https://competition-policy.ec.europa.eu/cartels/whistle-blower_en.
21. For a description of the Bundeskartellamt's whistleblower system in Germany, see https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/01_06_2012_BKMS.html.
22. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market, PE/42/2018/REV/1, OJ L 11, 14 January 2019, at pp 3–33.
23. European Court of Justice, C-536/11 – *Donau Chemie*, at para 46 s.
24. Buccirossi, P, Marvão, C, and Spagnolo, G, “Leniency and Damages: Where Is the Conflict?”, *The Journal of Legal Studies*, 2020 49:2, at 335–379.
25. For an overview of incentives and legislative options that were considered in the EU and in the UK prior to the Damages

- Actions Directive, see Cauffmann, C, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941692.
26. Ibid.
 27. Monopolkommission, Wettbewerb 2022, XXIV. Hauptgutachten, https://www.monopolkommission.de/images/HG24/HGXXIV_Gesamt.pdf, para 322.
 28. Wissing, C, Spieltheoretische Grundlagen von Kronzeugenprogrammen, WuW 2022, 605.
 29. As the European Court of Justice held on 6 June 2013 in C-536/11 – *Donau Chemie*, it follows from the principle of effectiveness of EU competition rules that national courts need to have the opportunity to balance the relevant interests involved. The court's decision concerned the compatibility of a national statute with EU law. However, its reasoning is based on the effectiveness of Article 101 TFEU; in other words, on the primary law of the Union with which not only the laws of the member states but also the provisions of EU secondary law (such as the Damages Actions Directive) must be aligned.
 30. <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=270561&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4317358>.
 31. Paolo Buccirossi, P, Marvão, C and Spagnolo, G, "Leniency and Damages: Where Is the Conflict?", *The Journal of Legal Studies*, 2020 49:2, at 335–379.
 32. Monopolkommission, Wettbewerb 2022, XXIV, Hauptgutachten, https://www.monopolkommission.de/images/HG24/HGXXIV_Gesamt.pdf, at para 317.
 33. Makatsch, T and Bäuerle, R, Kronzeugenschutz und Kartellschadenersatz: Stimmt die Balance noch? Warum der Vorschlag der Monopolkommission zur weiteren Privilegierung von Kronzeugen nicht greift, WuW 2022, 529.
 34. Bundesministerium für Wirtschaft und Klimaschutz press release, <https://www.bmwk.de/Redaktion/DE/Meldung/2022/20220920-bmwk-legt-entwurf-zur-verschärfung-des-wettbewerbsrechts-vor.html>.
 35. European Court of Justice, 14 March 2019, C-724/17 – *Skanska*, at paras 28–32.
 36. Kersting, C and Preuß, N, Umsetzung der Kartellschadenersatzrichtlinie (2014/104/EU) – Ein Gesetzgebungsvorschlag aus der Wissenschaft (Implementation of the Directive on Actions for Cartel Damages (2014/104/EU) into German Law – An Academic Proposal), 11 September 2015. *Düsseldorfer Rechtswissenschaftliche Schriften*, Nomos Verlag, Herbst 2015, <https://ssrn.com/abstract=2659020>, at p 23.
 37. Laborde, J-F, "Cartel Damages Actions in Europe: How Courts have assessed overcharges", *Concurrences*, September 2021, <https://www.concurrences.com/en/review/issues/no-3-2021/pratiques/102086>.

Editor

Dr Alan Riley
profalanriley@mac.com

Editorial Board

Bernardine Adkins
partner, Gowling WLG LLP

William Bishop
CRA International

Alec Burnside
partner, Dechert LLP (Brussels)

John Davies
co-head of Freshfields' antitrust, competition and trade practice

Claus Dieter Ehlermann
senior counsel, Wilmer Hale (Brussels)

Leo Flynn
Legal Service, European Commission

Judge Nicholas Forwood

formerly Judge of the General Court
of the European Union, counsel,
White & Case (Brussels)

Julian Joshua

formerly of counsel, Shearman & Sterling LLP (Brussels)

Nicole Kar

partner, Linklaters

Mark Katz

partner, Davies Ward Phillips & Vineberg (Toronto)

Stephen Kon

senior consultant, Macfarlanes (London)

Valentine Korah

Professor Emeritus of Competition Law,
University College London

Alex Nourry

partner, Clifford Chance (London)

Nigel Parr

partner, Ashurst (London)

Suzanne Rab

Serle Court chambers

Dirk Schroeder

partner, Cleary Gottlieb (Cologne)

Jonathan Scott

consultant and former senior partner, Herbert Smith
Freehills

François Souty

counsel for multilateral affairs, French Competition
Authority

John Temple Lang

solicitor, professor, Trinity College, Dublin

Pat Treacy

partner, Bristows

David Wood

partner, Gibson, Dunn & Crutcher (Brussels)

Competition Law Insight is published by Lloyd's List Intelligence, 13th Floor, 240 Blackfriars, London SE1 8BF. *Competition Law Insight* alerts you to new opportunities and potential pitfalls in areas such as mergers, joint ventures, distribution agreements, international enforcement and technology licensing, whilst also covering overlapping policy areas that are helping to shape the framework of antitrust law and policy. For our full range of legal titles visit about.l-i-law.com.

Copyright © 2023 Maritime Insights & Intelligence Limited • ISSN 1478 5188. All rights reserved; no part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electrical, mechanical, photocopying, recording, or otherwise without the prior written permission of the publisher, or specific licence.

Customer Success: Please contact our Customer Success team: EMEA: +44 (0)20 8052 0560; APAC (Singapore): +65 6973 3570; Americas: +1 212 600 3460, Toll Free: +1 (0)800 549 8227, or email customersuccess@lloydslistintelligence.com

Editorial queries: Please contact Kate Clifton on kate.clifton@lloydslistintelligence.com

Copyright: While we want you to make the best use of *Competition Law Insight*, we also need to protect our copyright. We would remind you that copying is not permitted. However, please contact us directly should you have any special requirements.

Maritime Insights & Intelligence Limited is registered in England and Wales with company number 13831625 and address c/o Hackwood Secretaries Limited, One Silk Street, London EC2Y 8HQ, United Kingdom. Lloyd's List Intelligence is a trading name of Maritime Insights & Intelligence Limited. Lloyd's and the Lloyd's crest are the registered trade marks of the society incorporated by the Lloyd's Act 1871 by the name of Lloyd's.

Print managed by: Paragon Customer Communications.

While all reasonable care has been taken in the preparation of this publication, no liability is accepted by the publishers nor by any of the authors of the contents of the publication, for any loss or damage caused to any person relying on any statement or omission in the publication.

Lloyd's List Intelligence 