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# Report from Europe

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## THE EU AND GERMAN LENIENCY GUIDELINES – A COMPARATIVE LOOK

### INTRODUCTION

In recent years, competition authorities in Europe, such as the European Commission (EC) and the German Federal Cartel Office (FCO), have notably increased their activities in pursuing potential antitrust violations, in particular cartels. Both authorities have thereby made extensive use of their powers to impose fines for antitrust violations. Most recently, the EC imposed a record fine totalling €990 million on participants of an elevator cartel and the FCO imposed a fine totalling €208 million on suppliers of liquefied gas.

It is obvious that such high fines, which can reach up to 10% of a company's worldwide turnover under both systems, have an intimidating effect on companies. Companies involved in illegal cartels that are willing to end their involvement may thus be dissuaded from coming forward unless they get something in return. The EC and the FCO – as well as 24 other competition authorities within the European Union (EU)<sup>1</sup> – have therefore introduced leniency programs. These foresee that leniency applicants can obtain a reduction of, or immunity from, fines that would otherwise be imposed on them as members of the cartel, if they provide information to the authorities that significantly help them with the cartel investigation. Having found that their previous systems had room for improvement, both the EC and the FCO issued new leniency guidelines in 2006.

This report reviews the new EC and FCO guidelines and discusses the main differences of the two systems.

### NEW EU LENIENCY GUIDELINES

On 8 December 2006, the Commission Notice on immunity from fines and reduction of fines in cartel cases<sup>2</sup> (EU Leniency Notice) came into force. The EU Leniency Notice sets out the framework for rewarding co-operation in the EC investigation by companies which are, or have been, party to a secret cartel. The particular objectives of the new EU Leniency Notice were to provide more guidance to applicants, to increase the transparency of the procedure, and to encourage companies to come forward with information (commonly called “whistle-blowing”). Those were perceived as the three main weaknesses of the 2002 Leniency Notice<sup>3</sup> in force at the time.

Although the 2002 EU Leniency Notice had been relatively successful, public consultations carried out in February and October 2006<sup>4</sup> showed that the business and legal community were nonetheless unsatisfied with certain aspects of the existing system. The number of applications submitted during the four years that the 2002 EU Leniency Notice was in operation amounted to a mere 167. Many commentators felt this was due to a lack of protection from third-party civil actions and an inability to obtain sufficient information required for the high leniency thresholds.<sup>5</sup>

The new EU Leniency Notice was designed to overcome these weaknesses in three ways: (i) by clarifying the information required to meet the immunity and reduction thresholds; (ii) by introducing

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<sup>1</sup> Currently, only Malta and Slovenia do not have leniency programs.

<sup>2</sup> European Commission (EC), *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* [2006] OJ C298/17 (EU Leniency Notice).

<sup>3</sup> EC, *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* [2002] OJ 45/3.

<sup>4</sup> See EC, *Public consultation on amendment of the Leniency Notice – comments received* (2006), [http://www.ec.europa.eu/comm/competition/cartels/legislation/leniency\\_consultation.html](http://www.ec.europa.eu/comm/competition/cartels/legislation/leniency_consultation.html) viewed 27 August 2008.

<sup>5</sup> See, eg Reynolds MJ and Anderson DG, “Immunity and Leniency in EU Cartel Cases: Current Issues” (2006) 27(2) ECLR 82 at 85: “when a company uncovers an antitrust violation, it may not feel able to make an immunity application, as it must assemble all information in its possession and provide the Commission with sufficient evidence to undertake a dawn raid or

a marker system for immunity applications; and (iii) by clarifying the scope of protection of oral and written corporate statements from discovery in civil damage proceedings.

The EU Leniency Notice is structured in five chapters. In addition to an introduction and general considerations, the main chapters set out the substantive requirements and procedural rules for application for immunity from and reduction of fines, as well as detailing the rules on protection of corporate statements. The following subsections discuss these areas in more detail.

### **Immunity from fines**

Immunity from fines is available to the first company to submit sufficient information to (i) allow the EC to carry out a targeted inspection in connection with the alleged cartel; or (ii) find an infringement of Art 81 of the *Treaty of the European Communities* (EC Treaty).<sup>6</sup> The main difference between the two types of immunity is that, in the first case, the EC only becomes aware of the cartel through receiving an application or has mere suspicions as to the existence of a cartel but not enough information to start an investigation *ex officio*. In the second scenario, the EC will generally already be aware of an alleged cartel but will still lack proof of the infringement. Therefore, the threshold of information and evidence required in an immunity application under (ii) is higher than for an immunity application under (i).

In addition to submitting an immunity application, companies are under an obligation to co-operate genuinely, fully and continuously with the EC throughout the investigation, to end involvement in the cartel and not destroy, falsify or conceal evidence, to obtain immunity.

The EU Leniency Notice also allows a company to present the necessary information initially in hypothetical terms. The applicant does not need to reveal its identity, or that of other cartel members, but must provide a detailed descriptive list of the evidence it proposes to disclose at a later date. The application must also clearly identify the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration as part of its initial presentation of information on hypothetical terms.<sup>7</sup>

The EC initially grants a successful applicant conditional immunity in writing.<sup>8</sup> If, at the end of the investigation, the applicant still fulfils the conditions of genuine and full co-operation, the EC will confirm its initial finding in the relevant decision. Unsuccessful applicants will be informed in writing by the EC. The applicant can then either withdraw the evidence submitted as part of its immunity application, or request that it be considered as an application for a reduction in fines.<sup>9</sup> It should also be noted that no immunity of any kind is available to a company which took steps to coerce others to join or remain in the cartel. Such company might, however, be eligible for a reduction in a fine if it satisfies the relevant reduction criteria.

### ***Information and evidence enabling the European Commission to carry out a targeted investigation***

The main flaw of the immunity system under the 2002 Leniency Notice was the lack of clarification as to the amount of information required in an application. In order to address this deficiency, the new

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prove its case. An internal audit that would satisfy the demands of the [EU] Leniency Notice's initial reporting requirements may be very time-consuming and logistically complex (particularly in relation to multinational companies) and, as such, may deter prospective applicants."

<sup>6</sup> Art 81(1) of the EC Treaty provides: "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

<sup>7</sup> See EU Leniency Notice, n 2 at [16(b)].

<sup>8</sup> See EU Leniency Notice, n 2 at [19].

<sup>9</sup> See EU Leniency Notice, n 2 at [20].

EU Leniency Notice introduces the concept of “targeted investigation”.<sup>10</sup> Accordingly, an applicant needs to provide insider information on the cartel that would allow the EC to better target its investigation and, in particular, information on what to look for and where in terms of evidence.<sup>11</sup> The quality of the information is evaluated on an ex ante basis.

Applicants must submit a corporate statement, in which they disclose the details of their involvement in the cartel. The EU Leniency Notice sets out a list of information and evidence that corporate statements must contain for the EC to be able to conduct such a targeted investigation.<sup>12</sup> This includes a detailed description of the cartel arrangement, name and address of the legal entity, information on all individuals involved and information on which other competition authorities have been approached.<sup>13</sup>

This type of immunity will not be granted if, at the time of the company’s submission, the EC already has sufficient evidence to adopt a decision to carry out an inspection or has already carried out such an inspection.

### ***Information and evidence enabling the EC to find an infringement of Art 81 of the EC Treaty***

This type of immunity remains largely unchanged following adoption of the new EU Leniency Notice and requires applicants to submit information and evidence to much the same threshold as set by the 2002 Leniency Notice. However, the new regime describes in more detail the type of information and evidence required from applicants.

In order to receive immunity under this alternative, applicants must submit contemporaneous and incriminating evidence of the alleged cartel, as well as a corporate statement containing the type of information discussed above.<sup>14</sup>

This type of immunity is not available to an applicant where another company has already obtained conditional immunity for enabling the EC to carry out a targeted investigation, or where the EC had, at the time of application, itself sufficient information to find an infringement of Art 81 of the EC Treaty.

### ***The marker system***

The introduction of a marker system is one of the key features of the new EU Leniency Notice. It comes as a response to concerns that applicants face difficulties gathering all the information and evidence necessary to meet the high immunity thresholds within a short time frame. Arguably, this might have discouraged potential applicants in the past. Acknowledging this issue, the EC’s new marker system allows applications for immunity to be made on the basis of limited (initial) information, enabling applicants to protect their places in the queue of other immunity applicants. If the company perfects the marker within the period set by the EC, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.<sup>15</sup>

To be granted a marker, each applicant needs to provide the EC with information concerning its name and address, the parties to the alleged cartel, the affected product(s), and territory/ies, the

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<sup>10</sup> See EU Leniency Notice, n 2 at [8(a)].

<sup>11</sup> EC, *Competition: Commission proposes changes to the Leniency Notice – frequently asked questions*, MEMO/06/479 (2006), <http://www.europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en> viewed 27 August 2008.

<sup>12</sup> See EU Leniency Notice, n 2 at [9(a)].

<sup>13</sup> See further EU Leniency Notice, n 2 at [9(b)] which contains a catch-all clause.

<sup>14</sup> See EU Leniency Notice, n 2 at [9(a)].

<sup>15</sup> The request for a marker and a hypothetical application for immunity are distinct. The former allows applicants to submit initially limited information on the facts to protect their places in the queue. The latter represents a means for an immunity applicant to ascertain whether information in its hand may enable it to obtain immunity before disclosing its identity or the infringement. A hypothetical application requires therefore certain detailed information at the time of submission.

estimated duration and the nature of the alleged cartel activity.<sup>16</sup> The information must be sufficient for the EC to ascertain whether it already has a previous immunity application for the same cartel and ensure that the company is seriously engaged to provide the evidence. The rest of the evidence required to meet the relevant immunity threshold must be submitted within an agreed timeframe, determined on a case-by-case basis.

It should be noted that the EU Leniency Notice only introduced the marker system for immunity applications, not for applications for reduction of fines.

### Reduction of a fine

To incentivise further cartel members to come forward with information on a cartel in instances where immunity is no longer available to them, the EU Leniency Notice provides for a reduction of fines. A company must submit to the EC evidence of the alleged infringement, which represents significant added value with respect to the evidence already in the EC's possession. Additionally, as in the case of an immunity application, a company must satisfy certain other conditions set out in the EU Leniency Notice, ie co-operating genuinely, fully and continuously, ending involvement in the cartel, and not destroying, falsifying or concealing evidence.

The EU Leniency Notice describes "significant added value" with reference to the extent to which the evidence strengthens the EC's ability to prove the alleged cartel. For example, written evidence originating from the period during which the cartel took place and incriminating evidence directly relevant to establishing the facts will generally have greater value than evidence subsequently established or than evidence of only indirect relevance.<sup>17</sup>

If a preliminary conclusion on the application is reached, the EC confirms to the applicant seeking a reduction in fines whether it has satisfied the relevant criteria and, if successful, within which band its reduction will fall. The EC will do so before it serves the Statement of Objections<sup>18</sup> on the cartel members. The bands of reduction in fines available to successful applicants are specified in the EU Leniency Notice as follows: (i) 30-50% reduction for the first, (ii) 20-30% reduction for the second, and (iii) up to 20% reduction for subsequent companies to provide significant added value.<sup>19</sup> The final position of the applicant, in terms of its success and amount, if any, of reduction awarded will not be communicated to it until the very end of the EC's administrative procedure.

Certain commentators believe that confirmation of an applicant's standing should be given earlier on in the administrative stages. It is suggested that this period of uncertainty of outcome during which the EC decides on the value of the information submitted might in fact discourage potential applicants from assisting the EC. Applicants whose submissions do not meet the required standard of evidence might find themselves in a worse position than had they not revealed any evidence. For this reason, some believe that a marker system for applications for a reduction in fines would be helpful.<sup>20</sup> The EC's standpoint in this regard is, however, that it is necessary to maintain the race between the applicants for reduction of fines. Practical experience has shown that following on-spot investigations (dawn raids) at the premises of potential cartel members, there may be several applications for reduction of fines in a short interval. Introducing a marker system would therefore generate administrative difficulties.<sup>21</sup>

<sup>16</sup> See EU Leniency Notice, n 2 at [15].

<sup>17</sup> See EU Leniency Notice, n 2 at [24]-[25].

<sup>18</sup> The EC's Statement of Objections is a written document addressed to the parties of a cartel. It sets out the authority's objections to the addressee's agreement or practice at issue. Under EU procedural laws, the EC must send a Statement of Objections to persons or companies before adopting a decision that negatively affects their rights, so as to respect their rights of defence.

<sup>19</sup> See EU Leniency Notice, n 2 at [24].

<sup>20</sup> See Sandhu JS, "The European Commission's Leniency Policy: A Success" (2007) 28(3) ECLR 148 at 153.

<sup>21</sup> See EC, n 11.

### Protection of corporate statements from access by third parties

The revised EU Leniency Notice sets out specific procedures for the treatment of corporate statements. In doing so, it formalises the EC's previous practice of accepting oral corporate statements from leniency applicants. The new regime explicitly sets out that upon the applicant's request, the EC may accept that corporate statements be provided orally. Oral corporate statements will be recorded and transcribed at the EC's premises.<sup>22</sup> The reason behind accepting oral corporate statements is to frustrate attempts by third-party litigants, particularly in the United States, to seek discovery of written statements provided to the EC by leniency applicants.

Furthermore, under the EU Leniency Notice, access to oral and written corporate statements is only granted to the addressees of the Statement of Objections relating to the alleged cartel, and on the condition that the information obtained as a result of access is used in connection with those proceedings only. Parties wishing to inspect the files must commit not to make any copy by mechanical or electronic means. Third parties will not be granted access to an applicant's corporate statement unless the applicant has himself disclosed the information to third parties. The EC has further indicated that it will not grant access to documents and written or recorded statements received in the context of leniency applications even after it has taken a decision.<sup>23</sup> While this protection is clearly to be welcomed, it is limited by the fact that the EC may use the information contained in a corporate statement in evidence, ie in its final decision.

### NEW GERMAN LENIENCY GUIDELINES

In March 2006, the FCO adopted its new Notice No 9/2006 on the immunity from and reduction of fines in cartel cases of 7 March 2006 (German Leniency Notice)<sup>24</sup> replacing the 2000 leniency program. Similar to the EU Leniency Notice, the amended rules offer participants in cartels more incentives to come forward with information revealing the cartel to the FCO. The need for an improved and more effective leniency system was made clear after the FCO received a mere 45 applications for immunity during the six years the German leniency system had been in force – a rather poor statistic.<sup>25</sup> Under the 2000 Leniency Notice, the FCO could award immunity from fines on a purely discretionary basis, and it communicated its decision only at the very end of its investigation. The incentive for cartel members to come forward with information on cartels was, accordingly, relatively low.

In order to remedy these deficiencies, the German Leniency Notice offers immunity applicants the possibility of obtaining, under certain conditions, "automatic" immunity and introduces a marker system. Unlike the EU system, the German Leniency Notice does not make provision for filing a leniency application in hypothetical terms. Applicants can, however, initially contact the FCO anonymously, eg via a lawyer, or on a confidential basis. The German leniency system applies to individuals as well as corporate entities.<sup>26</sup>

The German Leniency Notice is structured in six sections. Section A establishes the objective and scope of application. Section B sets out the provisions relevant to immunity applications. Section C contains the requirements for obtaining a reduction of fines. Section D establishes the applicant's obligation to co-operate fully and continuously in leniency proceedings. Section E sets out procedural

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<sup>22</sup> See EU Leniency Notice, n 2 at [32].

<sup>23</sup> See EU Leniency Notice, n 2 at [40].

<sup>24</sup> German Federal Cartel Office (FCO), *Notice No 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases – Leniency Programme* (2006) (German Leniency Notice), [http://www.bundeskartellamt.de/wEnglisch/download/pdf/06\\_Bonusregelung\\_e.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_Bonusregelung_e.pdf) viewed 27 August 2008.

<sup>25</sup> See Zöttl J, "Though Shallst Co-operate – New Immunity Guidelines in Germany" (2007) 28(3) ECLR 197 at 198.

<sup>26</sup> See German Leniency Notice, n 24 at [1]. This relates to the peculiarity of Germany's enforcement system in that, conceptually, individuals rather than businesses are primarily liable for fines (s 130 of the German *Administrative Offences Act* (AOA) (Gesetz gegen Ordnungswidrigkeiten). However, to follow suit with the EC, the FCO has deviated from its system that the FCO may fine corporations only if it can attribute the infringement by an individual to the actual corporation concerned. Instead, the FCO intends to follow the EC's extensive interpretation of the "undertaking" concerned.



rules including provision on the marker system. Section F contains rules on confidentiality and on the impact of leniency on possible subsequent proceedings. These sections will be discussed in more detail with particular focus on immunity from, and reduction of, fines and confidentiality.

### **Immunity from fines**

As in the EU system, the German Leniency Notice recognises two types of immunities from fines. The FCO grants immunity from fines to the first applicant that (i) presents to the FCO information and, where available, evidence which enables the latter to obtain a search warrant, or (ii) provides information and, where available, evidence enabling the FCO to prove an antitrust violation. The threshold for the immunity under (ii) is higher than for immunity under (i).

An immunity applicant must co-operate fully and continuously with the FCO. Such co-operation shall include: (i) ending involvement in the cartel upon the FCO's request; (ii) continuously furnishing the FCO with information and evidence that is available to it after submitting an application; (iii) keeping the co-operation with the FCO confidential; (iv) submitting names of current and former employees that participated in the cartel; and (v) ensuring co-operation of those employees who may be able to provide information and evidence to the FCO.<sup>27</sup> Should an applicant disregard any of these obligations, the FCO will not grant immunity from fines.<sup>28</sup>

A cartel participant who has been the only ringleader of the cartel or who has coerced others to participate in the cartel, may not qualify for immunity, but may be eligible for a reduction of fines.

#### ***Information and evidence enabling the FCO to obtain a search warrant***

The FCO will grant applicants immunity if they provide information and evidence enabling the FCO to obtain a search warrant. This type of immunity is "automatic". The German Leniency Notice states clearly that where an applicant meets the necessary criteria, immunity from any potential fine will be automatically granted. Successful applicants will receive written confirmation of this fact from the FCO.<sup>29</sup>

Unlike the EU Leniency Notice, the German provisions do not specify the type of information and evidence required. It can, however, be assumed that the standard and quality of information and evidence will be similar to that required for a targeted investigation under the EU regime.

This introduction of automatic immunity is clearly welcomed. In the past, applicants were left in a vulnerable position by the fact that the FCO could refuse immunity after having reviewed incriminating information submitted by the applicant even when the relevant thresholds had been met.

#### ***Information and evidence enabling the FCO to prove the offence***

If the FCO already has sufficient evidence to obtain a search warrant, an applicant can still receive immunity from potential fines if it provides evidence to prove an antitrust violation. As under the EU system, this type of immunity is conditional on automatic immunity not having already been granted to a member of the same cartel.

Applicants seeking this type of immunity will initially be informed by the FCO of their ranking, ie whether they are first, second etc to submit an application. The FCO will make a decision on immunity only after reviewing and examining all the information and evidence it obtained during the search, eg a dawn raid.<sup>30</sup>

Some commentators believe that the discretionary nature of this type of immunity may produce unfair results where applicants meeting the relevant thresholds could end up effectively solving the FCO's evidentiary deadlock in an investigation, yet still be subject to the discretion of the FCO as to whether immunity is granted.

<sup>27</sup> See German Leniency Notice, n 24, s D at [6]-[10].

<sup>28</sup> See, in particular, German Leniency Notice, n 24 at [19].

<sup>29</sup> See German Leniency Notice, n 24 at [19].

<sup>30</sup> See German Leniency Notice, n 24 at [20].

## Reduction of fines

The German Leniency Notice, like the EU Leniency Notice, provides for a reduction of up to 50% of fines for a cartel member who fails to meet the conditions for immunity. An applicant must (i) provide information and evidence to the FCO that significantly contributes to proving the infringement, and (ii) comply with the overall obligation to cooperate fully on a continuous basis with the FCO throughout the investigation. Reduction in fines is also available to a ringleader of a cartel.

The German Leniency Notice states that the value of the information and evidence for clarifying the infringement and the ranking of the application, in terms of when it is received by the FCO, will reflect the level of reduction granted in respect of that application.<sup>31</sup> The FCO will make a decision only after reviewing and examining all the information and evidence obtained during the search.<sup>32</sup>

## Marker system

The new German guidelines also introduce a marker system. Applicants can place markers orally or in writing and based on summary information.<sup>33</sup> The German Leniency Notice sets a timeframe of eight weeks within which applicants must perfect their marker application.<sup>34</sup>

Applicants will immediately receive acknowledgment of the marker but will not be informed of their place in the queue. An applicant, therefore, remains uncertain of his leniency status until such time that the marker is perfected and thus converted into a proper application.

## Protection of leniency applications from access by third parties

The FCO has discretion to preclude third parties from accessing the FCO's case file and information relating to, or evidence provided by, leniency applicants. For reasons similar to those in respect of corporate statements, it is important to the applicant and, consequently to the FCO, to protect information submitted and associated with the investigation from access by third parties. The FCO can, however, only act within its statutory limits,<sup>35</sup> which are the subject of review by the courts. It is not known whether the German courts will support the FCO in protecting the interests of leniency applicants over those of private claimants. As a result, and coupled with the fact that the FCO's powers are discretionary in this respect, the degree of protection actually afforded to the FCO's files is unclear. It has been suggested that the uncertainty surrounding this area might present a "significant disincentive to companies that may otherwise wish to come forward".<sup>36</sup>

## A COMPARISON OF THE SYSTEMS

The new EU and German leniency systems are similar in the sense that both share the common objectives of encouraging cartel members to come forward and reveal their participation in a cartel. Based thereon, both offer more clarity with regard to the information required in application for immunity from and reduction of fines, and have introduced marker systems. Both systems also recognise the need to protect leniency applications from access by third parties if such system is to be effective. While the general structure of the EU and German leniency systems is similar, there are some differences relevant to potential applicants, which this section briefly summarizes.

Both systems acknowledge two types of immunity. While the wording is different, the information and evidence required for the EC to conduct a "targeted investigation" and the FCO to obtain a search

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<sup>31</sup> See German Leniency Notice, n 24 at [5.2].

<sup>32</sup> See German Leniency Notice, n 24 at [20].

<sup>33</sup> An application for a marker must contain information on the type and duration of the cartel, the affected product and geographic markets, the identities of the participants, and the other jurisdictions in which leniency has been or will be sought.

<sup>34</sup> The German Leniency Notice being an administrative document, there is a possibility that this deadline might be negotiable.

<sup>35</sup> The German Leniency Notice is an administrative document. The German *Act Against Restraints of Competition* addresses access to the file within the context of administrative matters. Access to the file in the case of fines is governed by the German AOA. This provides that an injured party's legal representative may inspect the file. Third-party litigants injured by infringing conduct might accordingly be able to gain access to the file, although they may have to institute proceedings to enforce their rights.

<sup>36</sup> See Eibl S and Kubler J, "Update from Germany: Calculation of Fines and Leniency" (2007) 28(2) ECLR 116 at 124.

warrant, will de facto be similar. The same will apply to the second types of immunity, “infringement of Article 81 EC Treaty” and “prove an offence”. This is particularly the case given that the cartel offence under German law mirrors the wording of Art 81 of the EC Treaty. Some differences in the type of information and evidence an applicant must provide to fulfil the thresholds may however exist. Here it is sufficient to point out that the German Leniency Notice requires applicants seeking immunity from fines to provide “information, and *where available*, evidence”, whereas the EU Leniency Notice requests “information *and* evidence” from applicants. The evidential burden could, therefore, arguably, be higher under the EU system.

An important difference between the systems exists with regard to the marker systems. The German Leniency Notice introduced a uniform marker system applicable to all applicants. The EU system, by contrast, offers the advantage of submitting information, initially in limited form, to obtain a marker only to immunity applicants. In this context, it should be again repeated that the EU system offers applicants the possibility of submitting information and evidence on hypothetical terms. This is unknown to the German system. However, under German law, applicants can initiate anonymous or confidential preliminary contact with the FCO.

A further difference lies in the levels of protection of corporate statements. The EC protects corporate statements from access by third parties, as discussed above. The German Leniency Notice by contrast only contains a fairly general statement saying that: “[w]here an application for immunity or reduction of a fine has been filed the [FCO] shall use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned.”

Finally, the scope of application of both notices is different. While the EU has the power to fine companies only, the FCO also has jurisdiction over individuals. This is a reflection of national German law relating to individuals’ liabilities for fines. The provisions relating to the protection of corporate statements apply equally to companies’ employees. This might encourage greater cooperation from employees who are interviewed as part of the cartel investigative process.

## CONCLUSION

The recent amendments to the EU and German leniency notices are welcome improvements for applicants in leniency proceedings. The revised systems address the main concerns surrounding the previous leniency systems and clearly improve the process for applicants as compared to pre-2006. Uncertainties remain for applicants as regards their potential exposure to third-party discovery attempts resulting in potential private damage actions. This has, however, at least at EU level, not prevented potential applicants from using the new system. In May 2007, the EC reported that it was unearthing four possible cartels a month on average since the introduction of the EU Leniency Notice in 2006.<sup>37</sup> It will, however, probably take another year or two to definitively judge whether both systems will produce the desired results.

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<sup>37</sup> See Mlex, *New EU Antitrust Cases Running at 4 a Month Under New Leniency Guidelines* (11 May 2007).