Legal Backgrounder

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STOLT-NIELSEN RULING OFFERS LESSONS ON NEGOTIATING CORPORATE AMNESTY AGREEMENTS

by

F. Joseph Warin and Peter E. Jaffe

On November 29, 2007, the United State District Court for the Eastern District of Pennsylvania dismissed an indictment charging Stolt-Nielsen, S.A., the Stolt-Nielsen Transportation Group (collectively "Stolt-Nielsen"), and company executives Samuel Cooperman and Richard Wingfield with violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. *United States v. Stolt-Nielsen S.A*, No 06-cr-466 (Nov. 29, 2007). This decision has been closely watched by corporations as a signal about the scope of the United States Department of Justice Antitrust Division's Corporate Leniency Program.

The Antitrust Division initially granted immunity to the Defendants pursuant to its Corporate Leniency Program, which is a highly effective and unique program. Unlike other Justice Department divisions, the Antitrust Division provides complete immunity to both the corporation and its employees if the corporation meets certain criteria, including voluntarily self-reporting anti-competitive activity previously unknown to the Antitrust Division. In the *Stolt-Nielsen* matter, the Antitrust Division revoked the Defendants' immunity shortly after the company entered the program, asserting that the company had not taken "prompt and effective action" to terminate its part in the conspiracy, which the government argued was a critical representation the company had made as part of its Conditional Leniency Agreement.

The District Court found, however, that Stolt-Nielsen did take "prompt and effective action." The court found that there was no credible evidence that Stolt-Nielsen participated in the conspiracy after March 2002, when the government alleged that the company was required to take such "prompt and effective action." Additionally, the court found that the there was no evidence that any of the Defendants breached the agreement by failing to cooperate with the government's investigation. Therefore, the Court concluded that the Antitrust Division did not have any reasonable basis to revoke Stolt-Nielsen's Conditional Leniency Agreement and "fundamental fairness demands" that the indictment be dismissed. The storied *Stolt-Nielsen* case concluded when, on December 21, 2007, the Antitrust Division announced that it would not appeal the District Court's order.

The *Stolt-Nielsen* case is not just a fascinating story of an immunity agreement gone awry. The case provides valuable lessons both for prosecutors and defense counsel negotiating amnesty agreements. These lessons apply not only to agreements entered into within the confines of the Antitrust Division's Corporate Leniency Program. They apply with equal force to non-prosecution agreements, deferred prosecution agreements, and plea agreements negotiated with all federal prosecutors.

F. Joseph Warin is chair of the Litigation Department in the Washington, D.C. office of the law firm Gibson, Dunn & Crutcher LLP. He served as Assistant United States Attorney in Washington, D.C. from 1976-83. **Peter E. Jaffe** is Of Counsel in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP. He served in the United States Department of Justice from 1990-1998.

The Stolt-Nielsen story began in 1998, when the company allegedly entered into a customer allocation conspiracy with two of its primary competitors in the parcel tanker industry. Parcel tankers are massive ships that carry a variety of chemicals and other liquids. As the District Court described the facts, in November 2002 Stolt-Nielsen, through its outside counsel, approached the Antitrust Division to inquire whether it had begun an investigation into the parcel tanker industry. The Antitrust Division responded that it had begun an investigation based on a November 22, 2002 *Wall Street Journal* article, but it had not granted immunity to any company.

After several discussions with the Antitrust Division and an independent investigation, on January 8, 2003, Stolt-Nielsen made a proffer to the Antitrust Division in which it described its contacts with other parcel tanker shippers. At no time during the proffer or otherwise did the Antitrust Division ask – nor did Stolt-Nielsen represent – when the conduct ended. Shortly after the proffer, on January 15, 2003, the Antitrust Division and the company entered into a Conditional Leniency Agreement ("Agreement") pursuant to the Corporate Leniency Program. The Agreement provided that the Antitrust Division would "not bring any criminal prosecution against [Stolt-Nielsen, its directors, officers, and employees] for any act or offense it may have committed prior to the date of this letter [January 15, 2003] in connection with the anticompetitive activity being reported."

The current Corporate Leniency Program dates back to August 1993. The Antitrust Division created the current program to provide incentives for companies to self-report criminal antitrust activity. To qualify for the program and receive immunity for illegal antitrust conduct, a corporation must be the first to report the illegal activity, must incriminate itself, and must meet other enumerated requirements of the program, including taking "prompt and effective action" to terminate its part in the criminal activity. *See* Department of Justice, Corporate Leniency Policy, http://www.usdoj.gov/atr/public/guidelines/0091.htm. By providing immunity to companies reporting violations, the Corporate Leniency Program has been exceptionally successful at identifying illegal cartels in industries the Antitrust Division may have no other reason to investigate, and it has garnered more than $1 billion in fines. The Antitrust Division has described the revised program as its "most effective generator of international cartel cases" and as the Justice Department's "most successful leniency program." Department of Justice, Status Report: Corporate Leniency Program, http://www.usdoj.gov/atr/public/criminal/9938.htm.

As in virtually all federal immunity agreements, as part of the Agreement Stolt-Nielsen was required "to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported." The court found that Stolt-Nielsen and its employees had fulfilled this obligation because they "provided the [Antitrust] Division with volumes of highly incriminating evidence revealing their roles in the customer allocation conspiracy." Based on this information, the government successfully prosecuted the other companies involved in the cartel and four individual executives as well. The government secured $62 million in fines from the two other corporations and prison sentences against three individual executives. The court found that without the company's cooperation, the Antitrust Division would not have had sufficient evidence to sustain those convictions.

Nevertheless, shortly after signing the Agreement, the Antitrust Division raised concerns about Stolt-Nielsen's participation in the Corporate Leniency Program. As in other Corporate Leniency Program agreements, the Antitrust Division reserved the right to verify the representations Stolt-Nielsen made in seeking immunity. Among those representations, the Agreement includes a statement that the company "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." "Discovery" in the context of the Corporate Leniency Program has a very specific meaning. In an April 1, 1998 Policy Statement, the Antitrust Division defined discovery as "the earliest date on which either the board of directors or counsel for the corporation (either inside or outside) were first informed of the conduct at issue."

Just three months after granting Stolt-Nielsen conditional leniency, on April 8, 2003, the Antitrust Division informed Stolt-Nielsen that it had obtained evidence that the company had not terminated its part in the illegal activities in March 2002. Rather, the Antitrust Division alleged, anti-competitive conduct continued until at least the second half of 2002. The Antitrust Division stated that Stolt-Nielsen had thus failed to meet the conditions for leniency as set forth in its policies and in the Agreement. The Antitrust Division premised the March 2002 date on the discovery by the company's then-general counsel of a memorandum that was left anonymously on his desk in February 2002. The memorandum weighed the advantages and disadvantages of competing with Odfjell Seachem AS, one of the members of the customer allocation cartel, concluding that

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"continued coop is preferable." As a result of the memorandum, the general counsel became concerned about the company's antitrust compliance and reported his concerns to the then chairman of the board.

According to court submissions, the Antitrust Division had never before revoked an agreement issued under the Corporate Leniency Program, but it took this unique step without giving the company an opportunity to respond to the allegations. In fact, on June 24, 2003, the government arrested Wingfield, who was then the company's Manager of Tanker Trading. The Antitrust Division formally revoked Stolt-Nielsen's leniency on March 2, 2004.

Expecting that it soon would be indicted, in February 2004, the company took the unusual and creative step of filing an action for declaratory and injunctive relief, seeking to enjoin the Antitrust Division from prosecuting the company and its executives. Following an evidentiary hearing, on January 14, 2005, the district court held that Stolt-Nielsen had not breached the Agreement and enjoined the Antitrust Division from revoking Stolt-Nielsen's conditional amnesty. S*ee Stolt-Nielsen S.A. v. United States,* 352 F. Supp. 2d 553 (E.D. Pa. 2005). The Third Circuit reversed, on the grounds that the Constitution's Separation of Powers clause precluded a court from enjoining prosecutors from seeking an indictment. *See Stolt-Nielsen S.A. v. United States,* 442 F.3d 177 (3d Cir. 2006). The appellate court allowed, however, that the Agreement may provide a defense after indictment.

On September 6, 2006, Defendants were indeed indicted, and on November 22, 2006, they moved to dismiss the indictment, arguing that the Agreement provided a defense to prosecution. The motion was critical to the Defendants, because as part of its cooperation with the government, Stolt-Nielsen had provided the Antitrust Division with "volumes of highly incriminating evidence revealing their roles in the customer allocation conspiracy." All the evidence it had provided could be used against the Defendants in a criminal trial.

Beginning on May 30, 2007, the district court held an evidentiary hearing to determine when Stolt-Nielsen "discovered" its anticompetitive conduct, what subsequent actions Stolt-Nielsen and the individual defendants took, and whether these actions constituted "prompt and effective action to terminate [Stolt-Nielsen's] part in the anticompetitive activity being reported upon discovery of the activity." During the hearing, the court heard testimony from numerous witnesses presented by the Defendants and the government. The government's witnesses included several corporate competitors who presented evidence that showed, according to the government, that Stolt-Nielsen continued to seek to allocate customers after March 2002.

The Antitrust Division's argument that Stolt-Nielsen and its executives did not qualify for leniency hinged on the allegation that the company failed to take "prompt and effective action" upon the discovery of the anticompetitive activity by the company's general counsel. The court found, however, that when the Antitrust Division drafted the Agreement it knew about the general counsel's allegations that he learned of the customer allocation conspiracy by March 2002. Yet it did not include any reference to that date in the Agreement itself.

Nonetheless, the Antitrust Division pressed March 2002 as the date of "discovery" and argued that the accuracy of the company's representation that it had taken "prompt and effective action" was a condition precedent to the Agreement. According to this argument, the failure of this condition precedent rendered the entire Agreement void, and the Agreement no longer protected the defendants from prosecution. The Antitrust Division also argued that the alleged continuation of the conspiracy made the information the company provided to the government incomplete or inaccurate, thus breaching Stolt-Nielsen's obligation to provide "full, continuing, and complete cooperation."

The court found, however, that the Antitrust Division failed to produce any credible evidence that Stolt-Nielsen's participation in the customer allocation conspiracy continued past March 2002. In fact, the court found that the Antitrust Division failed to present any "conceivable" motive for the conduct it alleged. The court stated that "it would defy logic for executives …to risk their careers to continue a criminal conspiracy that had been exposed publicly and repudiated by their company's revised Antitrust Policy." The court found the government's evidence and witnesses to be non-credible, contradictory, or unpersuasive. To the contrary, the court found that Stolt-Nielsen engaged in "genuine competition" with its former co-conspirators after March 2002, including on contracts that had previously been subject to the customer allocation agreement.

A central issue in the case is the meaning of the phrase "prompt and effective action." Does it require an immediate cessation of all anticompetitive activity? The phrase is not defined in the Agreement. The court found that the plain meaning of the phrase requires a prompt and diligent *process*, and does not require immediate termination of all anticompetitive activity. Significantly, the court found that the phrase was chosen by the Antitrust Division, and the court applied the familiar principle of contract interpretation that ambiguity is to be construed against the drafter. In light of this interpretation, the court found that Stolt-Nielsen persuasively established that it took "prompt and effective action to terminate its part in the anticompetitive activity[.]" Therefore, its representations were accurate. In response to the concerns raised by Stolt-Nielsen's general counsel, Stolt-Nielsen promptly instituted a comprehensive and revised Antitrust Compliance Policy, including drafting and distributing a revised Antitrust Compliance Handbook, training its employees around the world, requiring all relevant employees to sign compliance certifications, and informing its competitors of the revised Policy and the company's intention to comply with it. At all times, the court found, Stolt-Nielsen's management unambiguously conveyed the message that all anticompetitive activity should stop immediately.

The court also held that the Antitrust Division could not revoke a leniency agreement based on facts that it knew at the time it entered into the Agreement. The court found that the Antitrust Division was aware of the general counsel's allegations when it signed the Agreement. In evaluating the evidence, the court was "mindful" of the fact that those who enter non-prosecution agreements often forgo "valuable constitutional rights." The court held that it must determine "what was reasonably understood" by the Defendants when they entered into the Agreement. Furthermore, the court determined that it must consider whether the non-breaching party received the benefit of the bargain, and it must also consider the incriminating nature of the information provided by the defendant. In this case, the government received the benefit of its bargain in the form of Stolt-Nielsen's cooperation in its investigation and the fact that the information provided by the defendants led to the successful prosecution of its co-conspirators. The incriminating nature of the evidence Stolt-Nielsen provided was apparent. In light of these considerations, the court held that the prosecutors needed to prove more than a mere breach of the Agreement. Prosecutors had the burden of showing that the Defendants *materially* breached the Agreement.

Many practitioners have questioned whether revoking Stolt-Nielsen's immunity – even if the government were able to prove that it had engaged in anticompetitive behavior after March 2002 – was in the government's long term interest. Without incontrovertible evidence of a significant violation of the agreement, such a revocation would surely – and predictably – cause future companies to think twice before seeking immunity. And the importance of the Antitrust Division's immunity program cannot be overstated. The majority of the Antitrust Division's major international investigations have resulted from its Corporate Leniency Program. On the other hand, some have argued that the case signals the Antitrust Division's willingness to hold those who enter the program accountable. In short, although the incentives for self-disclosure are quite high, including single damages instead of the treble damages available under the Sherman Act, uneven application of the Corporate Leniency Program's standards suggests caution.

In any case, the Stolt-Nielsen saga provides important insights for the practitioner. The case reminds all of us who negotiate cooperation agreements how important it is to define unambiguously every material term and specify every relevant date, even if the language is derived from numerous prior agreements or could even be considered "boilerplate." Similarly, after the agreement is executed, it is critical to document compliance – drawing a line in the sand, so there can be no mistake that the company cooperated with the government's investigation and fulfilled its other obligations. Finally, it is valuable to both the prosecutor and the company to keep the lines of communication open, so concerns can be addressed effectively.

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