FEDERAL COURT AGAIN REJECTS JUSTICE DEPARTMENT EFFORT TO REVOKE AMNESTY GRANTED IN ANTITRUST PROSECUTION

The federal district court in Philadelphia recently dismissed antitrust indictments against Stolt-Nielsen, S.A. ("Stolt-Nielsen") and two of its senior executives. This action was the latest round in a long-running effort by the Antitrust Division of the Justice Department to prosecute Stolt-Nielsen and its executives for participation in a customer allocation conspiracy.

Stolt-Nielsen voluntarily reported the conspiracy and, in return, the company and its executives were granted "conditional leniency" under the Antitrust Division's Leniency Program (the "Leniency Program" or "Program"). Under that program, the first company or individual that voluntarily discloses to the Antitrust Division a criminal antitrust violation that has not already been discovered by the government and thereafter cooperates in the government's investigation and prosecution of the disclosed wrongdoing may be eligible for immunity from prosecution. In its first attempt to do so since the 1993 commencement of the current Leniency Program, the Division subsequently sought to revoke leniency and to obtain indictments against Stolt-Nielsen and two of its executives. By dismissing the indictments, the court rejected the Antitrust Division's effort to revoke its promise not to prosecute.

Background: Grant and Revocation of Conditional Leniency

According to the district court's opinion,[1] shipping company Stolt-Nielsen entered into a *per se* unlawful customer allocation conspiracy with direct competitors Odfjell Seachem AS ("Odfjell") and Jo Tankers B.V. ("Jo Tankers") in 1998. From February 2001, a Stolt-Nielsen executive named Richard Wingfield was primarily responsible for overseeing the customer allocation conspiracy. Early in 2002, Stolt-Nielsen's General Counsel discovered possible evidence of the conspiracy and raised his concerns with Stolt-Nielsen's CEO, Samuel Cooperman. In response, beginning in late February 2002, Stolt-Nielsen instituted a revised antitrust compliance program, which the district court later described as "comprehensive." Stolt-Nielsen also began competing with Odfjell and Jo Tankers for contracts that were previously covered by the customer allocation conspiracy.

In December 2002, counsel for Stolt-Nielsen met with the Antitrust Division to discuss the customer allocation conspiracy and to seek acceptance into the Leniency Program. Stolt-Nielsen's counsel represented, among other things, that the company had taken prompt remedial steps in response to the General Counsel's initial discovery of evidence of the conspiracy. Later that month, the Division gave Stolt-Nielsen a "marker" confirming that Stolt-Nielsen was the first to disclose the conspiracy.

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[1] United States v. Stolt-Nielsen, No. 06-cr-466, 2007 U.S. Dist. LEXIS 88011 (E.D. Pa. Nov. 29, 2007) (opinion by Kauffman, J.).

Stolt-Nielsen conducted an internal investigation and made a proffer to the Antitrust Division based on detailed information provided by Mr. Wingfield and other employees. Stolt-Nielsen and the Antitrust Division then entered into a Conditional Leniency Agreement (the "Agreement"), based on the Justice Department's model Corporate Leniency Letter.

After the Agreement was signed, Mr. Cooperman and Mr. Wingfield cooperated and never refused to provide an interview or information. Based on the evidence the Division obtained from Stolt-Nielsen employees, it successfully prosecuted Odfjell, Jo Tankers, and those companies' executives. Odfjell and Jo Tankers were collectively fined $62 million.

In April 2003, the Division "suspended" Stolt-Nielsen's participation in the Program on the grounds that Stolt-Nielsen did not *terminate* illegal activities in March 2002, but continued in the conspiracy until at least the second half of 2002. The Division then arrested Mr. Wingfield in June 2003 and formally revoked Stolt-Nielsen's leniency in March 2004.

Injunction Against Prosecution Entered by the District Court and Vacated on Appeal

In February 2004, the Philadelphia district court granted Stolt-Nielsen and Mr. Wingfield an injunction barring the Antitrust Division from prosecuting them based on activities that were the subject of the Agreement, concluding that (1) the government cannot unilaterally rescind a non-prosecution agreement but rather that a court must first decide whether a party to the agreement has breached; (2) the court may enjoin prosecution *before* indictment; and (3) Stolt-Nielsen did not breach the Agreement.[2]

The Third Circuit Court of Appeals reversed and vacated the injunction, holding, *inter alia*, that courts lack jurisdiction to enjoin the executive branch from initiating a criminal proceeding *unless* a court must do so in order to avoid a chilling effect on constitutional rights such as First Amendment freedom of speech rights.[3]

On Remand, the District Court Dismissed the Indictments

After the injunction against prosecution was vacated by the Third Circuit, Stolt-Nielsen and two of its executives (Mr. Cooperman and Mr. Wingfield) were indicted for violating the antitrust laws and moved to dismiss the indictments. In response to the motion and as directed by the Third Circuit, the Philadelphia district court held evidentiary hearings to determine the "date of discovery" of anticompetitive activities at Stolt-Nielsen and whether Stolt-Nielsen took "prompt and effective action" to cease illegal practices after that date, in accordance with the company's obligation under the Agreement. The district court determined that the General Counsel's early 2002 discovery of wrongdoing triggered Stolt-Nielsen's obligation to take action and that, in the absence of more specific requirements in the Agreement, there had been no automatic

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2 Stolt-Nielsen v. United States, 352 F. Supp. 2d 553, 555 (E.D. Pa. Jan. 14, 2005) (opinion by Savage, J.).

3 Stolt-Nielsen v. United States, 442 F.3d 177, 183 (3d Cir 2005).

certification that no anticompetitive activity occurred after the discovery date. The district court found that Stolt-Nielsen's "large-scale effort" to eradicate anticompetitive activities after the General Counsel's discovery constituted prompt and effective action.

With regard to Mr. Cooperman and Mr. Wingfield, the district court held that the Agreement required the individual employees to produce documents, to make themselves available for interviews, to volunteer information not specifically requested, and to testify before the grand jury or in trial after the date of the Agreement. The court further held, however, that the employees had not made the representations that the company made with respect to taking action in response to discovery of anticompetitive activity and had not represented that all anticompetitive conduct was concluded by March 2002.

The Philadelphia district court's November 2007 opinion dismissing the indictments makes the following additional key points:

- Non-prosecution agreements raise special due process concerns.
- Courts must consider "what was reasonably understood by defendant" when determining whether the government adhered to its promises.
- The government bears the burden of proving that a Program participant *materially* breached a Conditional Leniency Agreement.[4]
- Whether or not the government received the benefit of its bargain under a Conditional Leniency Agreement is a factor that courts must weigh when determining whether there is a material breach of the agreement.

The Justice Department has stated that it will not appeal the district court's decision.

Conclusion

The result in this case suggests that courts may be reluctant to allow the government to prosecute a company or individual granted conditional leniency under the Leniency Program in circumstances in which the grantee has not violated any express provision of the agreement and has enabled the Antitrust Division to prosecute others successfully. This case may lead to more careful drafting of future Conditional Leniency Agreements, providing more specificity as to the obligations of cooperating corporations and executives. The district court's discussion of material breach also indicates that the government may find it difficult to revoke its promise once it has received the benefit of their cooperation under the Conditional Leniency Agreement.

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[4] The district court said that the result would have been the same whether the government was required to meet a "preponderance of the evidence" standard or a more demanding "clear and convincing evidence" standard.

If you have any questions regarding this memorandum, please contact Theodore C. Whitehouse (202-303-1118, twhitehouse@willkie.com), William H. Rooney (212-728-8259,wrooney@willkie.com), or the attorney with whom you regularly work.

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