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Legal Updates

Considerations for Company Counsel When a Company Seeks Amnesty for Antitrust Violations

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When the General Counsel of Stolt-Nielsen Transportation Group Ltd. ("Stolt-Nielsen" or "Company") resigned in March, 2002 after he advised his superiors of illegal collusive trading practices and had found that the Company failed to take action to resolve the issue, little did the Company know that in the ensuing months Stolt-Nielsen would be ensnared in the only instance since the amnesty program was begun in 1978 that amnesty protection was revoked. The record of that case as it subsequently traveled through the federal courts raises relevant issues for corporate counsel who may be faced with similar circumstances in the future and sheds light on some troubling actions of the U.S. Department of Justice ("Department").

Stolt-Nielsen is part of multi-national Stolt-Nielsen S.A., a large parcel tanker shipping company. In August, 1998 Stolt-Nielsen's representatives met in the Company's London offices with executives of a large Norwegian competitor in the parcel shipping business. Each group agreed not to compete for one another's customers on deep-sea trade routes, a clear violation of the Sherman Act. The parties exchanged customer allocation lists which came to be known as the "coop" (presumably for "cooperation") or "status quo" lists. Contemporaneously, Stolt-Nielsen also developed an arrangement with a large Dutch competitor to avoid competing for one another's customers on trade routes as well. The Managing Director of the Company designated himself and a subordinate to handle all collusive communications and contacts.

Although the Company's General Counsel reported his concerns about antitrust compliance to upper management, he resigned in March, 2002 apparently believing the Company had failed to take "prompt and effective action" to terminate the conspiracy as required by the Department's amnesty program. In February, 2002 the Company instituted a comprehensive and revised antitrust compliance policy, together with an Antitrust Compliance Handbook that was distributed to employees. The Handbook, *inter alia*, prohibited collusive contacts with competitors and required that any contact with competitors be approved in advance by the Chief Executive Officer. Sublease of tanker space and vessel charters negotiated with competitors did not require advance approval. The Handbook stated that violation of any of its provisions would result in demotion or termination. The Handbook was also distributed to Company competitors and "pool" partners. In March and April, 2002 the Company retained outside antitrust counsel to conduct mandatory seminars. Attendees were required to sign in and a roll call was conducted. The seminars were held in the United States and in several foreign locations. Employees were also required to sign certifications agreeing to comply with all provisions of the policy and attesting that they knew of no pending violations.

The institution of the re-invigorated policy, Handbook, and seminars transformed the Company's culture. Although after March, 2002 competitors continued to contact the Company to

pursue collusive discussions and arrangements, such calls were reported to superiors. Between March and November, 2002, the Company won a number of customer contracts formerly off limits due to the prior allocation agreements. Similar vigilance appeared to be lacking at the Company's Norwegian competitor as one of its employees could not resist demanding compensation in exchange for his agreement not to disclose the conspiracy. The Norwegian company also sought to conceal its involvement.

Through the efforts of its outside antitrust counsel, the Company entered into a Conditional Leniency Agreement ("Agreement") with the Government on January 15, 2003. Under the terms of the Agreement, the Government agreed not to bring any criminal prosecution against Stolt-Nielsen or its executives "for any act committed prior to the date of the Agreement", i.e. January 15, 2003. The Agreement allowed the Antitrust Division to revoke the conditional acceptance into the leniency program should it be determined that the Company violated any of its terms. Using the information Stolt-Nielsen and its executives provided, the Government secured guilty pleas from the Company's competitors. Several executives were imprisoned and fines totaling $62 million were paid to the Government. In the first quarter of 2003, however, the Government's investigation of the conspiracy revealed that Stolt-Nielsen continued to participate in the conspiracy from the time its General Counsel resigned in March, 2002 through November, 2002. Concluding that the Company's Managing Director of Tanker Trading had not fulfilled his obligations under the Agreement, the Government withdrew its grant of conditional leniency to Stolt-Nielsen on March 2, 2004 and prepared to indict the Company and its Managing Director for violations of the Sherman Act.

As a result, the Company began its action in the United States District Court for the Eastern District of Pennsylvania seeking enforcement of the Agreement and an injunction preventing the Government from filing the indictments. By January, 2005, the District Court granted judgment in favor of Stolt-Nielsen and the Managing Director and permanently enjoined the Government from indicting either for violations of the Sherman Act. The question before the United States Court of Appeals for the Third Circuit, therefore, was one of first impression. Did federal courts have authority, consistent with the separation of powers, to enjoin the executive branch from filing an indictment? The Third Circuit answered that question in the negative in March, 2006 and remanded the case to the District Court for further proceedings.

By the time of the District Court's opinion in November, 2007, the Court had concluded there was "no credible evidence" that [the Managing Director] stated or suggested that the *ad hoc* customer allocation arrangement between Stolt-Nielsen and its Norwegian competitor would continue. Nor was the Court persuaded by credible evidence that the Managing Director revealed the Company's rates or colluded on certain contracts. Testimony that the Division introduced showing the Managing Director had contacted his counterpart with price guidance was contradicted by ample credible testimony and contemporaneous evidence of vigorous competition. Nor was there credible evidence that Stolt-Nielsen agreed not to compete on certain other contracts.

At the time the Division revoked its grant of conditional leniency, it was of the view that March, 2002 was the triggering date for Stolt-Nielsen to take "prompt and effective action" to terminate its involvement in the conspiracy, notwithstanding the Division's letter and Agreement of January 2003 stating that no criminal prosecution would be brought for any offense committed prior to January 15, 2003. When the Division accepted the Company into the leniency program, it was aware that Stolt-Nielsen and its Chairman had not conducted an independent investigation in early

2002, had not reported past antitrust violations in early 2002, and had been accused publicly of ongoing antitrust violations (through an article in *The Wall Street Journal* in November, 2002). The Division has never defined "prompt and effective action" as stated in the policy. It was also aware that by the time Company counsel made his proffer on January 8, 2003, the individuals who had provided the information contained in the proffer were still employed by the Company. Nor did the Division make any allegation that antitrust violations continued after November, 2002.

The District Court concluded that the evidence showed Stolt-Nielsen did take "prompt and effective action" to terminate its part in the conspiracy (through the Antitrust Compliance Policy which was instituted and enforced) and that there was no credible evidence the Company or its employees participated in the conspiracy after March, 2002. The Court noted that the Division "bears the burden of demonstrating that Stolt-Nielsen *materially* breached the Agreement." The Division's unilateral suspension of the Agreement was made without interviewing or informing either the Chairman or the Managing Director. Significantly, in determining whether the immunity agreement was breached the Court noted that it must consider whether the non-breaching party received the benefit of the bargain, as well as the incriminating nature of the information provided by defendant. The text of the agreement, of course, must be construed against the Government as the drafting party. The Court concluded that the Division did receive the benefit of the bargain in the fines it collected and the prison terms which were imposed. In concluding that Stolt-Nielsen did take "prompt and effective action" to terminate its part in the conspiracy the Court concluded there was no credible evidence the Company breached the Agreement or failed to cooperate with the Division in any manner. Accordingly, the District Court dismissed the Indictment which had by this time been issued.

For inside counsel, some of the interesting issues that bear consideration are the following:

1. **Does taking "prompt and effective action" to terminate illegal conduct mandate the termination of employees involved in that conduct?** The answer would appear to be no, at least based on the facts and record of this case. While the Court concluded the Company did take "prompt and effective action" to terminate its part in the conspiracy, the individual conspirators remained on the Company's payroll and the Division never required they be terminated or alleged that failure to do so was another indication of failure to take "prompt and effective action."
2. **To what extent was the Court influenced by the Division's conduct?** In this case the Court determined it was irrefutable that the Division made an express promise in the Agreement not to bring any criminal prosecution for any act or offense prior to January 15, 2003. In the face of that agreement the Division nevertheless concluded the Company did not terminate its part in the illegal activities in March, 2002 and that those activities continued until November, 2002. Without so much as speaking to the Chairman or Managing Director of the Company, the Division revoked the leniency under the program and arrested both individuals. Neither executive was given the opportunity to respond to the allegations, yet the Court also found that neither had refused to cooperate with the Division at any time. Clearly in the Court's opinion, those who enter into non-prosecution agreements typically forego valuable constitutional rights, so the question whether the Government's conduct comported with "what was reasonably understood by the defendant when" the Agreement was negotiated and executed is crucial. Citing *United States v. Roe*, 445 F. 3d 202, 207-208 (2d Cir. 2006), the Court noted that as a matter of fundamental fairness the Division may not seek to

revoke the Agreement based on facts it knew at the time it entered into the Agreement—yet that is precisely what the Government did in this case. After revoking Defendants' immunity, the Division "then proceeded to solicit the cooperation of the very co-conspirators whom Defendants had reported to the Division in reliance on its promise of immunity" and used the co-conspirators' testimony to prosecute Defendants. The existence of due process, therefore, is an essential element that must form a part of the Division's conduct.

3. **What does the requirement to take "prompt and effective action" really mean?** The Court concluded that prompt and effective action has as its plain meaning that there must be a "prompt and diligent *process*" undertaken: continuation of certain anticompetitive activity is not inconsistent with that meaning. Nor would it seem must a company necessarily terminate the conspirators; Stolt-Nielsen did not. The Company did put in place a comprehensive Antitrust Compliance Policy, distributed the Handbook to employees and competitors, initiated a series of mandatory seminars, and required all employees to sign certifications. Further, during the March – November, 2002 period there was credible evidence that the Company did engage in genuine competition with both its Norwegian and Dutch competitors.
4. **Where does the burden lie?** In this Court's view the burden starts with the Division to demonstrate that the Company *materially* breached the Agreement. The Division in this case argued that it had the obligation to show by a "preponderance of evidence" that the Agreement was breached. The Defendants urged a "clear and convincing" standard. Although this Court found that the findings of fact and conclusions of law would be unchanged regardless of which standard was applied, the fact that the Division could not meet its burden by convincing credible evidence was significant.
5. **What are the implications here for corporate antitrust compliance programs?** In this case the Court gave great weight to post-amnesty compliance. A properly drawn and vigorously enforced compliance policy thus plays an essential role in any future company's defense strategy.
6. **What if, faced with anticompetitive activity, a future company decides *not* to report? What is an inside counsel's obligation?** If, having been counseled properly, the company knowingly decided not to report its conduct, must the inside counsel resign as Stolt-Nielsen's General Counsel did in this case? Obviously, the facts and circumstances of each case are unique. But this question is perhaps the most troubling one remaining. Most inside counsel may well conclude they must do what Stolt-Nielsen's General Counsel did.

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