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To Cooperate or Not: The Corporate Leniency Program After *Stolt-Nielsen*




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Excerpt of article which first appeared in *The Antitrust Source*, February, 2008. (www.abanet.org/antitrust/at-source/at-source.html)

Since 1993, the U.S. Department of Justice Antitrust Division's Corporate Leniency Program has been instrumental in the Antitrust Division's crusade against antitrust violators. In fact, antitrust violators have entered the Leniency Program at rates as high as two per month, resulting in the prosecution of some of the Antitrust Division's biggest cases.

The Leniency Program's success is due largely to its ability to offer an incentive that is simply too good to pass up. If accepted into the Leniency Program, a company can avoid all criminal penalties (both for itself and its officers and employees) for its antitrust violations, as long as the company complies with its obligations under its agreement with the Antitrust Division. This is a tremendous inducement for corporations that would otherwise face multi-million dollar fines and prison terms for their executives.

In 2004, the Leniency Program's benefits were statutorily enhanced through the de-trebling of civil damages for successful leniency applicants, increasing the incentive for a company to come forward. But the recent completion of the *Stolt-Nielsen* saga—revocation of leniency, followed by indictment, and then dismissal of charges—raises questions about the value and requirements of the Leniency Program in the future, as well as the risks associated with participating in the program. Should companies still seek such leniency? If so, how should they make sure that their leniency is permanent?

Stolt-Nielsen: From Leniency to Indictment to Vindication

Background. Stolt-Nielsen S.A., a Luxembourg shipping company, participated in a customer-allocation, price-fixing,

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and bid-rigging conspiracy with two other shipping companies, Odfjell Seachem AS and Jo Tankers—a classic per se antitrust violation with serious exposure for criminal fines and jail time. When responsible officials at Stolt-Nielsen discovered the violation, the company sought and received protection under the Leniency Program.

Participation in the Leniency Program depends on the applicant's ability to satisfy several conditions. Where an investigation has not yet begun (that is, the applicant's self-reporting is truly the cause of a subsequent investigation), leniency is subject to these conditions: (1) the Division has not received information about the illegal activity from any other source; (2) on discovering the illegal activity, the company "took prompt and effective action to terminate its part in the activity"; (3) the company reports the wrongdoing "with candor and completeness" and continues to provide full and complete cooperation throughout the investigation; (4) the confession of wrongdoing is "truly a corporate act," (as opposed to isolated confessions of individual executives or officials); (5) the company makes restitution to injured parties (where possible); and (6) the company was not the leader or originator and did not coerce another party to participate in the illegal activity. If the Division has already begun an investigation (or has received information about the activity at issue), a company can still obtain leniency if a three-pronged test is satisfied: (1) the company is the "the first one to come forward and qualify for leniency," (2) the Division does not yet have evidence that is "likely to result in a sustainable conviction" of the company, and (3) granting leniency would not be "unfair to others."

Stolt-Nielsen came forward after the Antitrust Division had already begun an investigation, but it met all of the conditions to the satisfaction of the Antitrust Division, at least initially. Stolt-Nielsen provided the Division with "volumes of highly incriminating evidence" concerning its role in the customer allocation conspiracy. This information allowed the Antitrust Division to prosecute Stolt-Nielsen's co-conspirators: Odfjell was fined $42.5 million and two of its executives served prison terms and were fined personally; Jo Tankers was fined $19.5 million and one of its executives served a prison term and was fined personally. Indeed, according to the district court, these convictions would not have been possible without Stolt-Nielsen's cooperation.

Stolt-Nielsen took extensive internal measures to comply with the obligation to take prompt and effective action to end the illegal activity, including:

- Instituting a new antitrust policy and publishing an Antitrust Compliance Handbook;
- Distributing the Compliance Handbook to all employees and competitors;
- Holding mandatory seminars for all employees on antitrust compliance;
- Requiring all employees to sign certifications that they would comply strictly with all terms the new Antitrust Compliance Policy; and,
- Informing competitors of the new policy and of Stolt-Nielsen's intent to comply with it.

In addition to informing its competitors of its new compliance policy, Stolt-Nielsen also began competing with its co-conspirators on at least some accounts—as the district court would later find.

Notwithstanding these steps, Stolt-Nielsen's perceived lack of compliance with ending its antitrust violations gradually became a point of contention with the Antitrust Division. Specifically, the Antitrust Division did not believe that Stolt-Nielsen ended its illegal activities "promptly" but rather continued its anticompetitive conduct in subsequent meetings with its co-conspirators. The Antitrust Division's suspicion arose largely from allegations from one of Stolt-Nielsen's former coconspirators who claimed that Stolt-Nielsen did not

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end its anticompetitive activity. The Antitrust Division eventually found six other witnesses, all former conspirators, willing to corroborate that account.

From Leniency to Litigation. The Antitrust Division asserted that Stolt-Nielsen had violated its leniency agreement by failing to promptly withdraw from the antitrust conspiracy. As a result, on April 8, 2003, the Antitrust Division began the process of revoking Stolt-Nielsen's leniency. The obligation to cooperate was suspended, an executive was arrested, and leniency was formally revoked.

By filing a suit to enjoin the Antitrust Division from indicting the company and its executives, Stolt-Nielsen preempted the Antitrust Division's plan to obtain a grand jury indictment of the company. The District Court for the Eastern District of Pennsylvania found that Stolt-Nielsen had not breached the agreement and enjoined the Antitrust Division from revoking leniency. The Antitrust Division appealed, and the Third Circuit reversed on the grounds that the constitutional principle of separation of powers prohibited the district court from enjoining the prosecution. On appeal, the Third Circuit found that the non-prosecution agreement could not serve as a basis for enjoining an indictment, but the court made clear that the agreement could be asserted as a defense after indictment. Thus, on remand, when the company raised the non-prosecution agreement as a defense to an indictment, the district court would then be free to consider the agreement "anew," and, among other things, consider whether the defendants fulfilled their obligations under the agreement.

Dismissal of the Indictment. Following the Third Circuit's decision, Stolt-Nielsen and two of its executives were indicted. Before trial, the defendants moved for dismissal of the indictment upon the basis of a violation of the non-prosecution agreement. The motion was heard by a new judge, who found that the Antitrust Division violated the non-prosecution agreement, and dismissed the indictment.

The district court in *Stolt-Nielsen III* used a defense-friendly principle of interpretation for nonprosecution agreements. The court held that non-prosecution agreements are unique contracts that must be construed in light of the important constitutional rights at stake. A central question in adjudicating the dispute is whether the Antitrust Division's "conduct comported with 'what was reasonably understood by the defendant when entering' the Agreement." The court explained that the Antitrust Division may not rely on a "rigidly literal" construction of the agreement; rather, it "bears the burden of demonstrating that [the defendant] materially breached the Agreement." In determining whether a breach is material, the most important factor is the incriminating nature of the evidence provided by the defendant—whether or not the government has received the benefit of its bargain. The court did not decide what quantum of proof was required to show such a material breach—whether "clear and convincing" evidence was necessary or whether a "preponderance of the evidence" was sufficient. The court found no need to reach this issue because here the Antitrust Division had not offered sufficient proof to meet the preponderance standard, much less the "clear and convincing" standard.

Why did the court find that a material breach was not established? The non-prosecution agreement required Stolt-Nielsen to take "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." The Antitrust Division alleged that Stolt-Nielsen failed to live up to this obligation. Based on the testimony of seven executives at Odfjell and Jo Tankers, the Antitrust Division alleged that Stolt-Nielsen continued to collude on the allocation of three shipping contracts. The key to the court's rejection of this assertion was that Stolt-Nielsen's actions to end the antitrust violations were deemed "prompt and effective." The court found that, "by its plain meaning, [prompt and effective action] requires a prompt and diligent process, and does not require immediate termination of all anti-competitive activity."

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The court said that this approach is what defendants would have reasonably understood.

The court readily found that Stolt-Nielsen had satisfied the requirement of "prompt and effective action" through its "large-scale effort" to "eliminate anticompetitive activity at all levels of the company, including senior management." The court's finding was supplemented by evidence that Stolt-Nielsen followed its Antitrust Compliance Policy by engaging in "genuine competition" on contracts previously allocated under the conspiracy. For example, a Stolt-Nielsen executive refused to withdraw a bid for a contract that was formerly allocated by conspiracy—defying the demands of a former co-conspirator. (The former co-conspirator did win that contract, but not because of anticompetitive activity by Stolt-Nielsen—the customer gave Stolt-Nielsen's competitor a "last look" that allowed it to win the contract.) In another case, Stolt-Nielsen significantly reduced its rates to retain a contract.

The court found Stolt-Nielsen's evidence to be more credible than that offered by the Antitrust Division. Stolt-Nielsen was able to provide corroborating testimonial and documentary evidence to support its position. In contrast, the Antitrust Division's witnesses were discredited by their own contradictions as well as their incentives to be untruthful. The government's witnesses were former co-conspirators agreeing to testify in exchange for reduced sentences, and they all withered under Stolt-Nielsen's impeachment. Some of the government's witnesses offered testimony that did not even support the argument that Stolt-Nielsen continued to engage in anti-competitive activity after obtaining its leniency agreement. The Antitrust Division alleged that Stolt-Nielsen had entered into a quid pro quo agreement to allocate some shipping contracts with Jo Tankers, only to have their star witness deny the existence of such an agreement. This put the Antitrust Division in the unenviable position of impeaching its own witness. The Antitrust Division fared only slightly better with its other witnesses. One witness claimed that he could not remember the details of a meeting in which Stolt-Nielsen had informed him of its intent to comply with its Antitrust Compliance Policy, but two other witnesses did remember the conversation. Another witness misstated basic facts about the contracts that were allegedly still allocated by conspiracy and then went on to state that he had "no clue" who drafted his grand jury declaration. Accordingly, the court rejected the Antitrust Division's arguments and dismissed the indictment.

On December 21, 2007, three weeks after *Stolt-Nielsen III* was decided, the Antitrust Division announced that it would not appeal the dismissal of the indictment.

The Legacy of Stolt-Nielsen

So what is the practical effect of the *Stolt-Nielsen* saga? Two preliminary observations are certain and worth mention. First, corporations will continue to seek leniency under this program. Second, the Antitrust Division will continue to grant leniency. Corporations continue to have a tremendous incentive to cooperate. As before *Stolt-Nielsen*, the risk of leniency revocation will remain small: the Stolt-Nielsen revocation was the first since the current program's debut in 1993, and the Antitrust Division stated that the action was "not take[n] lightly" and was "regrettabl[e]" but "necessary." The benefits to both the companies seeking leniency, and the Antitrust Division, continue to be real and significant. It is improbable that companies will cease coming forward simply as the result of one attempted revocation. Instead, there likely will be much more oversight by the Antitrust Division into the actions of a company seeking leniency and its employees. In addition, it is likely that less ambiguous language will be used in future agreements so that the standards defining the company's expected conduct are clearer. Clear standards carry with them two primary implications. First, clearer guidelines assist companies in their attempts at compliance and therefore may make it less likely that the Antitrust Division will be tempted

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to revoke their leniency. Second, because any revocation of leniency by the Antitrust Division will be made on a clearer record, it is more likely that, if the Antitrust Division chooses to revoke leniency in a future case, it will prevail.

Indeed, the Third Circuit's decision in favor of the Government's authority to indict did not seem to affect the steady stream of applicants for the Corporate Leniency Program. Even after the Antitrust Division's revocation of leniency for Stolt-Nielsen and before the district court's dismissal of the indictment, numerous companies continued to contact the Antitrust Division in an attempt to be the first in the door to qualify for the Leniency Program—including companies such as Virgin Atlantic and Lufthansa in Summer 2007. Simply put, the leniency-revocation litigation and the attendant uncertainty did not deter companies from seeking the benefits of the program.

Likewise, from the government's viewpoint, the Leniency Program is far too valuable to permit it to fall into disuse. Significantly, the Antitrust Division has recognized that the Corporate Leniency Program needs to have a fairly high degree of certainty, predictability, and freedom from prosecutorial discretion, but it does not have be "risk free" in order to be an attractive option for antitrust violators. The Antitrust Division has described the program as its "most effective investigative tool" and "a model for similar corporate leniency programs . . . adopted by antitrust authorities around the world." The program "has resulted in scores of convictions and nearly $4 billion in criminal fines" and has been a material source of information in "the majority of the Division's major international investigations." The Department of Justice cannot afford to turn off the spigot from which flows so much of its success in breaking up cartels.

Immediate reactions to *Stolt-Nielsen III* characterized the court's decision as saving the Antitrust Division from its own error in judgment: the Antitrust Division never should have sought to revoke leniency in this particular case, much less indicted the company. This characterization may be true to an extent, but *Stolt-Nielsen III* is not as significant a decision as some might suggest. The district court did adopt a defense-friendly standard for reviewing compliance with agreements under the Leniency Program, but the case ultimately turned on the underlying facts. The Department of Justice's decision not to appeal likely had more to do with not wanting to create bad law by appealing a case with bad facts or insufficient evidence. That is, the Department of Justice decided to limit *Stolt-Nielsen III*'s precedential impact and to confine the government's loss.

Stolt-Nielsen III's practical effect will be on the likelihood and imminence of a second leniency revocation. The Antitrust Division made clear that the revocation of Stolt-Nielsen's leniency, though regrettable, was necessary to "to maintain the integrity of the program." Certainly, at some point in the future, it is likely the Antitrust Division will again revoke a grant of leniency given to another corporation. Nevertheless, it is also true that the Antitrust Division is not going to risk bringing such further action unless it concludes that the conduct of the company granted leniency jeopardizes the integrity of its premier investigative tool and that the facts are strongly in its favor. Thus, the clarity, certainty, and severity of noncompliance will likely have to be significant before the Division will take action.

Accordingly, companies also should expect more scrutiny from the Antitrust Division regarding the details of leniency agreements. *Stolt-Nielsen III* turned in large measure on the court's perception of the parties' understanding and intention in the leniency agreement. To limit the effects of *Stolt-Nielsen III*, the Antitrust Division presumably will require greater specificity in leniency agreements—provisions that will demonstrate more clearly what the leniency applicant was bargaining away and what specifically will be required. Future participants in the Leniency Program may well be subject to more clearly defined agreements and may also be required

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to make a stronger showing that they meet the conditions of leniency. Consequently, Stolt-Nielsen III may actually mean that companies can have a marginally greater level of comfort about retaining the leniency after they are accepted into the Leniency Program,

But *Stolt-Nielsen III* does not mean that companies should test the limits of how far they can go before being deemed noncompliant. The risk of becoming the next revocation case may be small, but the cost is potentially staggering: Even though Stolt-Nielsen prevailed, it did so only after years of litigation—years in which the company and its cooperating officers and employees faced both expense and significant high-stakes risk. Additionally, had the district court denied the motion to dismiss, Stolt-Nielsen would have been in a far worse position than it would had it not cooperated in the first place.

Conclusion

Stolt-Nielsen III is unlikely to affect the fundamentals of the Leniency Program, because there is too much at stake both for the applicants and for the Department of Justice. Nevertheless, leniency applicants can expect greater clarity and specificity of requirements in their leniency agreements, and successful applicants must plan to live up fully to those commitments

Dorsey in the News

- Ed Magarian was quoted in a Feb. 4, 2008, *Minnesota Lawyer* article, "High Court Looks At Indemnity in Fraud Cases." Magarian commented on a decision by an upcoming argument before the Minnesota Supreme Court concerning whether employees who are convicted of a crime committed during the course of their work are entitled to indemnification by their employer.
- In their Jan. 17, 2008, *New York Law Journal* article, "When the FBI Makes Demands," Dorsey partner G. Michael Bellinger and Dorsey associate Joshua Colangelo-Bryan considered the expanding use of national security letters by the FBI.
- Michael Lindsay commented in November in *Global Competition Review* on Congressional efforts to overturn the recent Supreme Court decision in *Leegin v. PSKS*.
- In December, 2007, the Associated Press quoted Zachary Carter, a former U.S. attorney in Brooklyn, New York, in a wire story about new U.S. Attorney General Michael Mukasey.
- In his regular *National Law Journal* column Nick Akerman discussed the compliance challenge of consumer notification laws in the United States (Dec. 3, 2007).
- Michael Lindsay was quoted in a November, 2007, *Dow Jones MarketWatch* story about how antitrust oversight of Microsoft could trigger a glut of needless litigation for already overburdened courts.
- Bill Michael was quoted in *The New York Times* on the growing conflict between auditors and their corporate clients over auditor requests for confidential documents on issues that could affect the company's bottom line.

Attorney Profile: Michael A. Lindsay

Michael is co-chair of the Dorsey Antitrust Practice Group and a member of the firm's White Collar Crime and Civil Fraud practice group. The Antitrust Group has a broad practice of civil litigation (both plaintiff and defense work), merger investigations, and counseling on a wide variety of distribution and pricing issues. It also assists the White Collar Criminal practice group by providing substantive antitrust advice and helping clients with the civil litigation follow-on work flowing from criminal investigations.

Michael's practice includes both federal and state antitrust litigation. He has represented buyers, sellers, and non-parties in merger investigations before the U.S. Justice Department and the Federal Trade Commission, as well as the Minnesota Attorney General. He has developed a specialty subpractice in antitrust issues for cooperatives and standards organizations.

In addition to his active litigation and counseling practice, Mr. Lindsay is deeply involved in antitrust bar association matters. He was the Chair (2005-06) of the Minnesota State Bar Association's Antitrust Section, and he is Vice-Chair of the ABA Antitrust Section's Trial Practice Committee. This year he is chairing the "mock trial" at the ABA Antitrust Section's Spring Meeting on a case involving a Rule of Reason challenge to a resale price maintenance agreement.

Michael has written extensively on antitrust issues. He was co-principal editor of the ABA Antitrust Section's *Indirect Purchaser Litigation Handbook*, published in Spring 2007 – a how-to book on litigation under state laws permitting actions by indirect purchasers. He wrote an article on the fallout of the U.S. Supreme Court's *Leegin* decision, including a 50-state survey of state antitrust laws relating to resale price maintenance agreements. Michael has taught antitrust as an adjunct professor at the University of St. Thomas Law School and Hamline Law School, and he is a frequent lecturer at continuing legal education programs on antitrust issues.

Michael has practiced with Dorsey for more than 20 years. He is a 1983 graduate of the University of Chicago Law School, where he served as Managing Editor of the law review, and a 1980 graduate of Marquette University, and he also studied at the London School of Economics. He served as law clerk for Judge Richard Posner (a leading authority in antitrust and the "Chicago School" of law and economics) at the U.S. Court of Appeals for the Seventh Circuit. He is admitted to practice in Minnesota and several federal appellate courts.

So Strange, It Must Be True

Compiled by **Alene R. Grossman**

Forget Santa, Don't Anger Mom!

ROCK HILL, S.C. (www.blahblahblawg.com) — A local mother had her 12-year-old son arrested after he opened one of his Christmas presents early. The boy's great-grandmother had wrapped the Christmas present, a Nintendo Gameboy, and placed it under the Christmas tree telling the boy not go near it. When his great-grandmother discovered the present opened and Gameboy missing from its box the next morning, the boy denied any knowledge of the missing gift. After his mother threatened to call the police, the boy confessed. After he relinquished the Gameboy, the mother called the police and had her son arrested. The Rock Hill Police took the 12-year-old into custody, booked him for petty larceny, and released him that same day back into his mother's custody. "We wouldn't hold a 12-year-old," said Lt. Jerry Waldrop of the Rock Hill Police Department. The mother told the arresting officers that her son was a troublemaker, and that "she has simply had it" with the boy.

Mystery Burglar Breaks Into, Then Out of, Jail Cell

MATAMA, New Zealand (Findlaw) — Someone broke into a deserted police station and accidentally locked him- or herself into a jail cell, when the self-closing door clicked shut. Alarms rang, and police rushed to the scene. Just as they arrived, the intruder used a wooden chair to smash the window in the cell (which was supposedly fitted with shatter-proof glass) and fled. Sergeant Graham McGurk said, "It was quite unusual. The offender has almost done the job for us, getting himself locked in our cell." Nothing was missing from the station (apart from the intruder), and McGurk said it was not known why the person broke in.

Sheriff's Deputy Mistakes Pistol for Taser

BREMERTON, Wash. (Associated Press) – A sheriff's deputy who was trying to get a man down from a tree shot and wounded him after mistakenly pulling a gun instead of a Taser. Deputies carry both a Taser and a gun on their utility belts. The Taser, or stun gun, is similar in shape to the compact .40-caliber gun the deputy carried, sheriff's spokesman Scott Wilson said. The victim was listed in satisfactory condition. The man had climbed a fig tree and stayed there for hours, talking to himself. Deputies and rescue workers tried to coax him down for almost two hours, during which he became increasingly hostile. A witness said the man climbed down on his own after getting shot. "He said, `Ow, that hurt. I'm coming down, I'm coming down.'"

Dog still registered to vote, owner pleads not guilty

SEATTLE (*Seattle Times*) – Jane Balogh, who says it's too easy for a voter to register illegally, sought to prove her point by registering her dog, Duncan, as an absentee voter. She put her phone in Duncan's name, and that apparently sufficed. The King County prosecutor's office charged Balogh, 66, with making false or misleading statements to a public servant, a gross misdemeanor punishable by up to 90 days in jail and a $1,000 fine. "They need to fix their system," Balogh argues. "And if they don't, I've wasted my time." The elections system is designed to catch fraud in actual votes — not in the registration process, said Sherril Huff, director designee of the Records, Elections and Licensing Services division of King County Executive Services. "The bottom line is that [Balogh] took a number of calculated steps to be on the voter-registration files in a way that would not send up any red flags," Huff said. "What she proved is that if you falsify information, then yes, you may be able to get a ballot sent to you."

Armed Miss America 1944 Stops Intruder

WAYNESBURG, Ky. (The Associated Press) – Miss America 1944, Venus Ramey, 82, confronted a man she thought was stealing from her farm in south-central Kentucky. Ramey said the man told her he would leave. "I said, 'Oh, no you won't,' and I shot their tires so they couldn't leave," Ramey said. She had to balance on her walker as she pulled out a snub-nosed .38-caliber handgun. "I didn't even think twice. I just went and did it," she said. "If they'd even dared come close to me, they'd be 6 feet under by now."

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