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The High Price Of Leniency For Stolt-Nielsen

Friday, May 09, 2008 --- The U.S. Department of Justice Antitrust Division's Corporate Leniency Program ("Leniency Program") has long been instrumental in the Antitrust Division's crusade against antitrust violators, with antitrust violators entering the Leniency Program at rates as high as two per month and resulting in the prosecution of some of the Antitrust Division's biggest cases.[1]

Many Leniency Program applicants walk away owing no fines, facing substantially lowered civil liability, and with agreements protecting their executives from prosecution.

Their former co-conspirators, on the other hand, are left potentially facing hundreds of millions of dollars in fines and lengthy prison terms.

This is what Leniency Program participants expect, but the path to corporate leniency is not always smooth.

Stolt-Nielsen, a Luxembourg shipping company, understands just how rough the road to leniency can be. Stolt-Nielsen sought and received leniency, only later to have it revoked by the Antitrust Division. The company and its officers were thereafter indicted.

Leniency was replaced with aggressive prosecution for nearly two years at which point the indictment was dismissed based on Stolt-Nielsen's participation in the Leniency Program.

Until the indictment was dismissed at the end of 2007, some questioned the very integrity of the Leniency Program. But even while courts were grappling with these questions in 2007, the Leniency Program had one its best years ever — from the perspectives both of cooperators who avoided prosecution and of the Antitrust Division which drew some of its biggest cases from the Leniency Program.[2]

Although the Leniency Program appears alive and well, potential leniency applicants never forget the lessons to be learned from Stolt-Nielsen's fight over the Leniency Program. Potential applicants ignore these lessons at their peril. The Stolt-Nielsen litigation offers valuable lessons in evaluating the value and requirements of the Leniency Program.

Stolt-Nielsen's Long Road To Leniency

Background

Stolt-Nielsen SA, a Luxembourg shipping company, participated in a customer-allocation, price-fixing and bid-rigging conspiracy with two other shipping companies, Odfjell Seachem AS and Jo Tankers[3] – 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.[4]

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 by the Division), leniency may be granted under the following conditions:

(1) the Division has not received information about the illegal activity from any other source;

(2) on discovering the illegal activity, the applicant "took prompt and effective action to terminate its part in the activity";

(3) the applicant reports the wrongdoing "with candor and completeness" and provides 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 applicant makes restitution to injured parties (where possible); and

(6) the applicant was not the leader or originator and did not coerce another party to participate in the illegal activity.[5]

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-prong test is satisfied:

(1) the company is "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."[6]

Stolt-Nielsen came forward after the Antitrust Division had already begun an investigation,[7] but it met all of the conditions of the three-prong test to the satisfaction of the Antitrust Division – at least initially.[8]

Stolt-Nielsen provided the Division with "volumes of highly incriminating evidence" concerning its role in the customer allocation conspiracy.[9]

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.[10]

Indeed, according to the district court, these convictions would not have been possible without Stolt-Nielsen's cooperation.[11]

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.[12]

The district court also found that 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.

Notwithstanding these steps, Stolt-Nielsen's perceived noncompliance with leniency requirements (that is, not taking sufficient action to end its antitrust violations) gradually became a point of contention with the Antitrust Division.[13]

Specifically, the Antitrust Division did not believe that Stolt-Nielsen ended its illegal activities "promptly" but rather continued its anti-competitive conduct in subsequent meetings with its co-conspirators.

The Antitrust Division's suspicion arose largely from allegations from one of Stolt-Nielsen's former co-conspirators who claimed that Stolt-Nielsen did not end its anti-competitive activity.[14]

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.[15] The obligation to cooperate was

suspended, an executive was arrested, and leniency was formally revoked.[16]

Stolt-Nielsen filed suit to enjoin the Antitrust Division from indicting the company and its executives. At first the Company was successful.

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,[17] but that decision did not stand.

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.[18]

The Third Circuit found that the non-prosecution agreement could not serve as a basis for enjoining an indictment but 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.[19]

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.[20]

The district court in Stolt-Nielsen III used a defense-friendly principle of interpretation for non-prosecution agreements. The court held that non-prosecution agreements are unique contracts that must be construed in light of the important constitutional rights at stake.[21]

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."[22]

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."[23]

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.[24]

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 either the preponderance standard, much less the "clear and convincing" standard.[25]

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 anti-competitive activity being reported upon discovery of the activity."[26]

The Antitrust Division alleged that Stolt-Nielsen failed to live up to this obligation.[27] 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.[28]

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."[29]

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."[30]

The court said that this approach is what defendants would have reasonably understood.[31]

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."[32]

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.[33]

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.[34] (The former co-conspirator did win that contract, but not because of anti-competitive activity by Stolt-Nielsen—the customer gave Stolt-Nielsen's competitor a "last look" that allowed it to win the contract.[35])

In another case, Stolt-Nielsen significantly reduced its rates to retain a contract.[36]

The court found Stolt-Nielsen's evidence to be more credible than that offered by the Antitrust Division.[37] Stolt-Nielsen was able to provide corroborating testimonial and documentary evidence to support its

position.[38]

In contrast, the Antitrust Division's witnesses were discredited by their own contradictions and motives to be untruthful.[39] 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.[40]

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.[41]

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.[42]

This put the Antitrust Division in the unenviable position of impeaching its own witness.[43] 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.[44]

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.[45] Accordingly, the court rejected the Antitrust Division's arguments and dismissed the indictment.

On Dec. 21, 2007, three weeks after Stolt-Nielsen III was decided, the Antitrust Division announced that it would not appeal the dismissal of the indictment.[46]

The Legacy Of Stolt-Nielsen: Cooperate, But With Caution

It is unlikely that Stolt-Nielsen saga will diminish the appeal of the Leniency Program to applicants or its value to the Antitrust Division. The Leniency Program is more productive than ever.[47]

As the threat to antitrust violators of being caught (based on information provided by a leniency applicant, or otherwise) increases, so does the value of the Leniency Program's incentives.[48]

This dynamic is likely to lead to more successes for the Leniency Program and its participants, and makes it tempting to dismiss the Stolt-Nielsen saga as an unfortunate anomaly in antitrust enforcement.

Indeed, immediate reactions characterized the court's decision in Stolt-Nielsen III 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.[49]

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.

There is nothing in the Stolt-Nielsen saga to suggest that the Antitrust Division would be afraid to revoke leniency in a case with stronger facts. In fact, the Antitrust Division might actively look for a case with better facts to create better law.

The most important lesson of Stolt-Nielsen's ordeal is that the benefits of the Leniency Program cannot be realized just by showing up—participants must be diligent in following through on their commitments, and should recognize that even the appearance of a relapse into anti-competitive activity could lead to devastating consequences.

Corporations continue to have a tremendous incentive to cooperate—even if Stolt-Nielsen raises doubts about the Leniency Program's carrot, the stick is stronger than ever — with 135 grand jury investigations pending at the close of 2007, potential antitrust defendants should be wary.[50]

The Leniency Program is the Antitrust Division's "most effective investigative tool," so effective in fact that it is "a model for similar corporate leniency programs ... adopted by antitrust authorities around the world."[51]

The risk that a given antitrust violator will be caught is ever greater; international cooperation — among enforcement agencies and with defendants — has led to spectacular success for the Antitrust Division and its European counterparts.[52]

For example, American and British authorities recently cooperated to crack a cartel in the marine hose manufacturing industry (marine hose is used to transfer oil from ships).[53] This led to arrests of eight executives from the U.S., Europe, and Asia, many of whom pled guilty to antitrust offenses.[54]

The Antitrust Division views this sort of international cooperation as one of the most important trends in enforcement – and one that will make it much more difficult for international cartels to operate.[55] Further, when violators are caught they face longer prison sentences and larger fines than ever before.[56]

The Antitrust Division set a record in 2007 for the average number of days of imprisonment imposed on antitrust violators.[57] The increasing severity of penalties, along with advances in international enforcement capability show

that even if there is some uncertainty associated with entering the Leniency Program, the danger of not doing so is likely greater, and increasing by the day.

The continuing appeal of leniency is evident from the fact that the Third Circuit's decision in favor of the Government's authority to indict did not diminish 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 at the end of 2007, numerous companies continued to contact the Antitrust Division to try to be the first in the door to qualify for the Leniency Program—including companies such as Virgin Atlantic and Lufthansa in summer 2007.[58]

These leniency applicants paid zero dollars in fines and received non-prosecution protection for their executives.[59] The co-conspirators faced hundreds of millions of dollars in fines.[60] The leniency revocation litigation of 2007 and the attendant uncertainty did not deter companies from seeking the benefits of the program.

Though it appears that the Leniency Program emerged from the Stolt-Nielsen saga no worse for the wear, it is also true that to the extent that Stolt-Nielsen revealed a weakness in the Leniency Program, the Antitrust Division will address it.

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."[61]

The Antitrust Division has also recognized that the Corporate Leniency Program needs to have a fairly high degree of certainty, predictability, and freedom from prosecutorial discretion,[62] but it does not have be "risk free" in order to be an attractive option for antitrust violators.[63] The success of the program in the shadow of Stolt-Nielsen proves this out.

There are other indications that the Department of Justice will not hesitate to enforce compliance with plea agreements. For example, the Department of Justice recently succeeded in indicting a Bristol-Myers Squibb executive for making false statements to federal regulators, a violation the conditions of the company's agreement to plead guilty to antitrust charges.[64]

Still, the Antitrust Division would be remiss not to recognize that to some extent Stolt-Nielsen undermined the certainty and predictability of the Leniency Program. This will be alleviated to some extent by the recent positive leniency experiences of companies that entered the Leniency Program in 2007 and had no apparent trouble avoiding fines and imprisonment of their executives.65

Still, it is likely that the Antitrust Division will take an active role in avoiding

another revocation. There likely will be more oversight by the Antitrust Division into the actions of leniency applicants.

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 more clear, particularly with respect to what the leniency applicant is bargaining away and what specifically will be required.

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 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.

Conclusion

The ordeal of Stolt-Nielsen has done little to impede the continuing success of the Leniency Program, and revocation of leniency will still be a very rare occurrence.

This makes it tempting to dismiss the case as mere anomaly with few broad implications. Any potential Leniency Program participant taking this view does so at its own risk. Certainly the Antitrust Division will continue accepting leniency applications with the expectation that the applicant intends to meet its obligations under the agreement.

But nothing from the Stolt-Nielsen saga should be taken as indicating that the Antitrust Division will be unwilling to revoke leniency in the future; to the contrary, it is certain that Antitrust Division will be better equipped to litigate revocation of leniency in the future. Companies that fail to acknowledge this are likely to fare even worse than Stolt-Nielsen.

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[1] Joseph Harrington, Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion, Fair Trade Commission of Japan International Symposium: Towards an Effective Implementation of New Competition Policy, Jan. 31, 2006, at 23-24, available at www.econ.jhu.edu/People/Harrington/Tokyo.pdf (last visited Feb. 8, 2008).

[2] Scott D. Hammond, Dep. Asst. Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dept. of Justice, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Presentation before the ABA Section of Antitrust Law 56th Annual Spring Meeting at 14-15, (March 26, 2008), available at www.usdoj.gov/atr/public/speeches/232716.pdf.

[3] United States v. Stolt-Nielsen SA (Stolt-Nielsen III), 524 F.Supp.2d. 609, 611 (E.D. Pa. 2007).

[4] Id. at 612-13.

[5] See U.S. Dep't of Justice, Antitrust Division Corporate Leniency Policy (1993), available at www.usdoj.gov/atr/public/guidelines/0091.pdf.

[6] Id.

[7] United States v. Stolt-Nielsen SA (Stolt-Nielsen III), 524 F.Supp.2d. 609, 612 (E.D. Pa. 2007).

[8] Id.

[9] Id. at 614.

[10] Id.

[11] Id.

[12] Id. at 611-12.

[13] United States v. Stolt-Nielsen SA (Stolt-Nielsen III), 524 F.Supp.2d. 609, 614 (E.D. Pa. 2007).

[14] Id. at 614, n.7.

[15] Id. at 614.

[16] Id.

[17] Stolt-Nielsen SA v. United States (Stolt-Nielsen I), 352 F.Supp.2d 553 (E.D. Pa. 2005) rev'd 442 F. 3d 177 (3d Cir.), cert. denied 127 S.Ct. 494 (2006).

[18] Stolt-Nielsen S.A. v. United States (Stolt-Nielsen II), 442 F.3d 177 (3d Cir. 2006), cert. denied 127 S.Ct. 494 (2006).

[19] Id. at 187, n.7.

[20] United States v. Stolt-Nielsen S.A. (Stolt-Nielsen III), 524 F.Supp.2d.

609, 610, 615 (E.D. Pa. 2007).

[21] Id. at 615 (citing Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Baird, 218 F.3d 221, 229 (3d Cir. 2000)).

[22] Id.

[23] Id. at 616 (italics in original) (citing United States v. Fitch, 964 F.2d 571, 574-75 (6th Cir. 1992)).

[24] Id. (citing United States v. Castaneda, 162 F.3d 832, 837 (5th Cir. 1998); Fitch, 964 F.2d at 574; United States v. Johnson, 861 F.2d 510, 513 (8th Cir. 1988)).

[25] Id.

[26] Stolt-Nielsen SA v. United States (Stolt-Nielsen II), 442 F.3d 177, 181 (3d Cir. 2006).

[27] United States v. Stolt-Nielsen SA (Stolt-Nielsen III), 524 F.Supp.2d. 609, 610, 616 (E.D. Pa. 2007).

[28] Id. at 623-27.

[29] Id. at 617-18.

[30] United States v. Stolt-Nielsen SA (Stolt-Nielsen III), 524 F. Supp. 2d. 609, 617 (E.D. Pa. 2007).

[31] Id. at 617, n.11 (citing Baird, 218 F.3d at 229).

[32] Id. at 617.

[33] Id. at 618.

[34] Id. at 619.

[35] Id.

[36] United States v. Stolt-Nielsen S.A. (Stolt-Nielsen III), 524 F. Supp. 2d. 609, 620 (E.D. Pa. 2007).

[37] Id. at 623-27

[38] E.g., id. at 619, n. 13.

[39] Id. at 623.

[40] Id. at 623-27.

[41] Id. at 623-24.

[42] United States v. Stolt-Nielsen SA (Stolt-Nielsen III), 524 F.Supp.2d. 609, 623-24 (E.D. Pa. 2007).

[43] Id.

[44] Id. at 625.

[45] Id.

[46] Press Release, U.S. Dept. of Justice, Justice Department Will Not Appeal Stolt-Nielsen Decision (Dec. 21, 2007) available at www.usdoj.gov/atr/public/press_releases/2007/228788.pdf.

[47] Hammond, Recent Developments, supra note 2 at 16-17.

[48] See generally Gary R. Spratling & D. Jarrett Arp, Making the Decision: What to Do When Faced with International Cartel Exposure—Developments Impacting the Decision in 2008, Presentation before the ABA Criminal Justice Section 22nd Annual National Institute on White Collar Crime (March 5-7, 2008),(on file with author).

[49] See Carl W. Hittinger & John D. Huh, Federal Court Enforces Antitrust Amnesty Agreement, Dismisses Indictment, DLA Antitrust Alert, Dec. 13, 2007, http://www.dlapiper.com/files%5Cupload%5CAntiTrust_Alert_Dec07.html; Michael H. Byowitz & David B. Anders, U.S. District Court Reaffirms Integrity of Criminal Antitrust Amnesty Policy, Real Corporate Lawyer, Dec. 2, 2007, www.realcorporatelawyer.com/pdfs/U.S.%20District%20Court%20Reaffirms%

[50] Hammond, Recent Developments, supra note 2 at 2.

[51] Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program, Presentation Before the ABA Section of Antitrust Law Cartel Enforcement Roundtable 2007 Fall Forum at 11, available at www.usdoj.gov/atr/public/speeches/227740.pdf.

[52] See Hammond, Recent Developments, supra note 2at 18-19; see also Thomas O. Barnett, Asst. Att'y Gen. Antitrust Div., Global Antitrust Enforcement, Presentation before the Georgetown Law Global Antitrust Enforcement Symposium at 2-5 (Sept. 26, 2007), available at www.usdoj.gov/atr/public/speeches/226334.pdf.

[53] See Hammond, Recent Developments, supra note 2at 18-19;; see also Press Release, U.S. Dep't of Justice, Eight Executives Arrested on Charges of Conspiring to Rig Bids, Fix Prices, and Allocate Markets for Sales of Marine Hose (May 2, 2007), available at

www.justice.gov/atr/public/press_releases/2007/223037.pdf.

[54] Hammond, Recent Developments, supra note 2 at 19; Press Release, U.S. Dep't of Justice, Former U.S. Executive of Italian Marine Hose Manufacturer Agrees to Plead Guilty to Participating in Worldwide Bid-Rigging Conspiracy (April 17, 2008), available at www.justice.gov/atr/public/press_releases/2008/232332.pdf.

[55] Hammond, Recent Developments, supra note 2 at 18-20; Barnett, Global Antitrust Enforcement, supra note 52 at 1-2, 5.

[56] Hammond, Recent Developments, supra note 2 at 2-3.

[57] Id. at 1. Prosecutions by the Antitrust Division resulted in over 31,000 days of jail imposed, more than twice the number imposed in any other year. Id. This also resulted in the highest ever average jail sentences; with defendants sentenced in 2007 facing an average of 31 months in jail. Id. at 6. This is well above the average since 2000 of 19 months and even the previous high since 2000 of 24 months in 2005. Id.

[58] See posting of Tyler M. Cunningham to Antitrust LawBlog, British Airways, Korean Air Lines to Plead Guilty to Passenger and Cargo Price Fixing Conspiracies, www.antitrustlawblog.com/article-british-airways-korean-air-lines-to-plead-guil (Aug. 6, 2007).

[59] Hammond, Recent Development, supra note 2 at 14.

[60] Id. at 14.

[61] Press Release, U.S. Dep't of Justice, Stolt-Nielsen S.A. Indicted, supra note 2.

[62] Scott D. Hammond, Dir. of Criminal Enforcement Antitrust Div. U.S. Dep't of Justice, Cornerstones of an Effective Leniency Program, Presentation Before the ICN Workshop on Leniency Programs: Cornerstones of an Effective Leniency Program, at 3 n.1 (Nov. 23-24, 2004), available at www.usdoj.gov/atr/public/speeches/206611.pdf ("The Amnesty Program was revised ... to ensure that amnesty is automatic if there is no pre-existing investigation. That is, if a corporation comes forward prior to an investigation and meets the program's requirements, the grant of amnesty is certain and is not subject to the exercise of prosecutorial discretion."); id. at 5 ("[T]here must be transparency and predictability to the greatest extent possible throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not.").

[63] See posting of Risto Keravuori, Joseph Saunders, Cheryl Kong to Overt Collusion, Breaking the Silence: The Corporate Leniency Program, econ419.blogspot.com/2007/03/breaking-silence-corporate-leniency.html

(Mar. 21, 2007, 15:13 EST).

[64] Press Release, U.S. Dep't of Justice, Former Bristol-Meyers Squibb Senior Vice-President Indicted for Lying to the Federal Government About Popular Blood-Thinning Drug (April 23, 2008), available a www.justice.gov/atr/public/press_releases/2008/232525.pdf.

[65] Hammond, Recent Developments, supra note 2at 14-15.

