



Antitrust Division's conduct in revoking immunity "fundamentally unfair"

Court dismisses charges against Stolt-Nielsen

BY W. MICHAEL G. OSBORNE, AFFLECK GREENE ORR LLP.

The US Department of Justice, Antitrust Division has lost its fight to evict Stolt-Nielsen S.A. from its immunity program. The US District Court for the Eastern District of Pennsylvania rejected the Division's allegation that Stolt-Nielsen had failed to take prompt and effective action to terminate its involvement in a conspiracy. The Division received and used evidence from Stolt-Nielsen to prosecute other conspirators, then it made deals with the conspirators that Stolt-Nielsen reported in order to prosecute Stolt-Nielsen. This was fundamentally unfair, the court held in dismissing all charges against Stolt-Nielsen.¹

Stolt-Nielsen is a global company that operates several maritime related businesses, including parcel tanker shipping. Beginning in 1988, it participated in a customer allocation conspiracy with two of its main competitors.

In early 2002, Stolt-Nielsen's general counsel, Paul O'Brien, learned of the conspiracy and raised concerns with the company's Chairman. Stolt-Nielsen quickly implemented an antitrust compliance policy, withdrew from the conspiracy, and began competing vigorously. In late 2002 and early 2003, Stolt-Nielsen entered the Division's corporate leniency program and executed a Conditional Leniency Agreement drafted by the Division.

Stolt-Nielsen and its employees provided the Division with "volumes of incriminating evidence" about the conspiracy. This evidence ultimately enabled the Division secure guilty pleas, fines totaling \$62 million, and prison terms for certain individuals.

In March 2002, however, Mr O'Brien resigned from Stolt-Nielsen and in June, he sued Stolt-Nielsen for constructive dismissal, alleging an ongoing violation of antitrust laws. The Division knew about these allegations before granting conditional immunity to Stolt-Nielsen.

In April 2003, the Division revoked Stolt-Nielsen's immunity because, it alleged, Stolt-Nielsen did not terminate its participation in the conspiracy in March 2002, but continued to participate until at least the second half of 2002. The Division appears to have relied on the evidence of another participant in the conspiracy, to whom it gave immunity, in reaching this decision. It did not speak with Stolt-Nielsen executives before revoking their immunity nor did it give them a chance to respond.

In 2004, Stolt-Nielsen sued the Division in an attempt to block an indictment. It was successful in the District Court. On appeal, the Third Circuit held that the court could not enjoin the government from indicting Stolt-Nielsen, but that the matter would have to be considered if Stolt-Nielsen raised the immunity agreement as a defence after an indictment.

In September 2006, Stolt-Nielsen, one of its subsidiaries, and two of its offices, were indicted on charges of conspiracy contrary to Section 1 of the Sherman Act.² Stolt-Nielsen and its co-defendants moved to dismiss the indictment.

On November 29, 2007, Kauffman J. dismissed the indictment. Kauffman J. accepted that, in order to qualify for immunity, Stolt-Nielsen had to take prompt and effective action to terminate its

participation in the conspiracy after "discovery" of the anticompetitive conduct. Mr O'Brien's discovery of the conspiracy and report to the Chairman in early 2002 constituted "discovery".

Kauffman J. found that Stolt-Nielsen did take prompt steps to terminate its participation in the conspiracy. It implemented an antitrust compliance program and refused to engage in anticompetitive discussions with its competitors. The dealings it did have with its competitors related to lawful arrangements.

The Division relied on the evidence of several witnesses from Stolt-Nielsen's competitors to support its allegation that Stolt-Nielsen continued to participate in the conspiracy. None of this evidence was credible, Kaufman J. held. Several of these witnesses contradicted earlier sworn evidence they had given. Others acknowledged that they did not have personal knowledge of the allegations they made; their evidence was hearsay.

Overall, Kauffman J. was highly critical of the Division's conduct. The government cannot revoke an immunity agreement based on facts it knew at the time it entered the agreement, he noted, yet that is precisely what the Division did. He found that having obtained the benefit of its bargain with Stolt-Nielsen, the Division denied Stolt-Nielsen its benefit of the bargain. This was fundamentally unfair:

Using highly incriminating evidence produced by Stolt-Nielsen and its employees, ... the Division obtained the benefit of its bargain -- it successfully dismantled the cartel and secured guilty pleas from Stolt-Nielsen's co-conspirators which included prison terms and fines totaling \$ 62 million. Defendants, however, have not been afforded the benefit of their bargain. On April 8, 2003, after accepting volumes of incriminating evidence from Defendants, the Division suspended Stolt-Nielsen's cooperation obligations solely on the discredited word of Finlay. Without ever speaking either to Wingfield or Cooperman, whose cooperation obligations under the Agreement were prospective from January 15, 2003, or providing either of them the opportunity to respond to Finlay's allegations, the Division revoked Defendants' immunity. It 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. Not only was the Division's conduct inconsistent with "what was reasonably understood" by the Defendants when they entered into the Agreement, ... it was fundamentally unfair.

On December 21, 2007, the Division announced that it will not appeal this decision. The Division emphasized that it "will continue to use the Leniency Program as a weapon in the fight against cartels, and administer the program in a transparent and equitable manner that ensures that those conditionally admitted to the program adhere to all requirements to obtain leniency".³ The Division pointed out that Stolt-Nielsen is the only company whose immunity the Antitrust Division has ever attempted to revoke.

Corporate immunity/leniency programs depend for their success on the willingness of parties and their counsel to trust that the competition authority will act fairly. The court's finding that the Division acted unfairly towards Stolt-Nielsen has the potential to damage the Division's leniency program, and thus undermine its effectiveness as an investigative and enforcement tool. It remains to be seen, however, what impact this case will have.

In Canada, the Competition Bureau operates an immunity program similar to the Division's. Immunity has only ever been revoked from two individuals in Canada, and never from a corporation. The Bureau has recently revised its immunity program to clarify that before it discuss any issues with an immunity applicant and give the applicant a chance to cure any defects before recommending to the Director of Prosecutions that immunity be revoked.⁴

**For more information contact:**

W. Michael G. Osborne, Affleck Greene Orr LLP
Tel: 416-360-5919
Email: mosborne@agolaw.com

¹ *US v. Stolt-Nielsen S.A.*, 2007 US Dist Lexis 88628 and 2007 US Dist Lexis 88011 (Eastern Dist Penn, 2007)

² 15 U.S.C. §1.

³ USDOJ Press release, Justice Department Will Not Appeal Stolt-Nielsen Decision, 21 December 2007, http://www.usdoj.gov/atr/public/press_releases/2007/228788.htm

⁴ See *The year of the guideline*, http://www.agolaw.com/litigatorca.asp?file=archive/reslibrary_archives_guideline20080123_content