

The Legacy of *Stolt-Nielsen*: A New Approach to The Corporate Leniency Program?

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Over the past two years, the commentary surrounding the *Stolt-Nielsen* case has become overheated and sensational. Not since Mark Whitacre's "I was a mole for the FBI" stories has the antitrust world experienced anything quite so dramatic. The *Wall Street Journal's* op-ed page has vilified the Antitrust Division for breaking its word and being arbitrary and vindictive.¹ Some commentators have concluded that the *Stolt* case is a fatal self-inflicted wound to the leniency program and that leniency is no longer a viable option for a company because of the inability of the Antitrust Division to keep its word and abide by its promises. A highly regarded mergers and acquisitions lawyer recently opined that any attempt by a company to seek leniency will turn out badly for the company because of *Stolt*.

From the perspective of many who practice in the criminal antitrust area, the simple fact is that *Stolt* is considered an aberrant case that will have little or no direct impact on the continued viability and success of the leniency program. Indeed, the volume of leniency applicants continues to increase at the Antitrust Division. Clearly, leniency agreements are moving ahead without fear of revocation. The important question is not whether the *Stolt* controversy has harmed the leniency program, but how *Stolt* has caused the U.S. leniency program to adapt and evolve. This article will address that post-*Stolt* impact, as well as the nuanced lessons and insights that both the Antitrust Division and defense counsel have learned from the *Stolt* case.

The Background of the *Stolt-Nielsen* Case

Most of the antitrust world is already familiar with the basic story line. *Stolt-Nielsen, S.A.* applied for leniency under the Antitrust Division's program in late 2002 relating to activities in the parcel shipping industry. *Stolt's* application for leniency followed on the heels of a wrongful termination lawsuit by a former member of its in-house legal department. The former employee alleged that he had been terminated for bringing potential antitrust violations to the attention of management in March 2002.

The Division entered into a conditional leniency agreement with *Stolt* on January 15, 2003. Following the terms of the standard letter used by the Division, the agreement required *Stolt* to have taken "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity."² Pursuant to the agreement, *Stolt* provided information that aided the Division's prosecution of other parcel tanker companies and their executives.³

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¹ Holman W. Jenkins, Jr., *If Sergio Leone Made a Movie About Antitrust* . . . , WALL ST. J., Oct. 25, 2006, at A15.

² *Stolt-Nielsen, S.A. v. United States*, 352 F. Supp. 2d 553, 558 (E.D. Pa. 2005).

³ *Id.* at 559.

Stolt's cooperation helped the Antitrust Division to collect a total of \$62 million in fines from two co-conspirators and to send three high-ranking executives of those companies to jail.⁴

In April 2003, the Division suspended Stolt's participation in the leniency program, contending that Stolt had breached its obligations under the leniency agreement by failing to terminate its anti-competitive activities when those activities were first brought to the company's attention in March 2002.⁵ Under threat of indictment, Stolt filed a complaint on February 6, 2004, seeking enforcement of its rights under the leniency agreement.⁶ The suit sought to enjoin the Division from indicting Stolt.

Several authors have discussed the various issues and arguments raised in the district court proceedings,⁷ so only a brief summary is needed here. After conducting the preliminary injunction hearing, the district court concluded that (1) Stolt had not breached its obligations under the leniency agreement, and (2) the Division should be enjoined from prosecuting Stolt and its executives.⁸ Specifically, the district court held that the Division received the benefit of its bargain by garnering evidence from Stolt's cooperation that enabled the Division to convict other parcel tanker companies and executives. Although the leniency agreement required Stolt to cease its participation in the anticompetitive conduct for which the Division was promising leniency, nothing in the agreement explicitly required Stolt to cease its participation before applying for leniency—or, in this case, to have ceased its participation when senior management was allegedly informed of the conduct by in-house legal counsel. As long as Stolt had ceased the conduct at issue at the time of the agreement—something that the Division did not dispute—that was sufficient for the court to conclude that Stolt satisfied its obligations under the leniency agreement.

Oral discussions between Division staff and Stolt's outside counsel regarding the Division's expectations and concerns with regard to Stolt's conduct could not enlarge or otherwise alter the plain meaning of the written agreement, which did not address Stolt's representations concerning the date that the conduct was "discovered." Because Stolt had abided by its obligations under the agreement, the district court held, the Division was likewise required to abide by its promise not to prosecute Stolt or its executives.

The Division appealed to the Third Circuit, which reversed the district court in an opinion by a two-judge panel.⁹ The Third Circuit concluded that the district court lacked jurisdiction to enjoin a criminal prosecution in this case.¹⁰ The district court's power to enjoin a criminal prosecution, the Third Circuit held, was limited to circumstances where "the mere threat of prosecution would inhibit the exercise of constitutional rights."¹¹ Stolt's constitutional rights were not implicated by the

⁴ *United States v. Odfjell Seachem AS*, Crim. No. 03-654 (E.D. Pa. Sept. 29, 2003) (plea agreement Nov. 3, 2003), available at <http://www.usdoj.gov/atr/cases/f201900/201938.htm>; *United States v. Jo Tankers B.V.*, Crim. No. 04-221 (E.D. Pa. Apr. 19, 2004) (plea agreement June 9, 2004), available at <http://www.usdoj.gov/atr/cases/f204600/204614.htm>.

⁵ 352 F. Supp. 2d at 559.

⁶ *Id.*

⁷ See, e.g., Jim Walden & Kristopher Dawes, *The Curious Case of Stolt Nielsen S.A. v. United States*, ANTITRUST SOURCE, Mar. 2005, <http://www.abanet.org/antitrust/at-source/05/03/02-mar05-walldawe323.pdf>.

⁸ 352 F. Supp. 2d at 563.

⁹ See *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006). Then Judge, now Justice Samuel A. Alito, Jr., heard oral argument in the case but did not take part in the decision because of his elevation to the U.S. Supreme Court.

¹⁰ *Id.* at 187.

¹¹ *Id.* at 183.

Division's attempt to indict Stolt and certain of its executives. As the court reasoned, "being indicted and forced to stand trial is not generally an injury for constitutional purposes but is rather 'one of the painful obligations of citizenship.'"¹² Consequently, the Third Circuit reversed and remanded the case to the district court with instructions to dismiss Stolt's complaint with prejudice. The Third Circuit, however, left open the possibility that Stolt could "interpose the Agreement (as a defense to conviction) in a pre-trial motion."¹³ Stolt's petition for certiorari to the Supreme Court seeking review of the Third Circuit's decision was denied in October 2006.

In the meantime, Stolt, two subsidiaries and two of its executives were indicted by a grand jury in the Eastern District of Pennsylvania on September 6, 2006.¹⁴ After some procedural wrangling about which judge should preside over the case, the criminal case against Stolt is now proceeding.¹⁵ Stolt filed a motion to dismiss the indictment on the basis of the leniency agreement on November 22, 2006, and an evidentiary hearing is scheduled for March 19, 2007.

Having determined the outcome of the initial appeal based on the threshold separation of powers question, the Third Circuit did not need to address or decide the arguments regarding the contractual obligations of the parties. Those issues, which Stolt and the Division joined in the original district court action, are the focus of the motion to dismiss.

Stolt will be required to prove its breach of contract case all over again. Because the Third Circuit concluded on separation of powers grounds that the district court lacked jurisdiction even to consider Stolt's claims, it effectively annulled the district court's holding that Stolt had not breached the leniency agreement.¹⁶ Thus, the district court's prior opinion regarding the meaning of the leniency agreement and the parties' obligations under that agreement has no preclusive effect for the criminal case.

It remains to be seen how the case will turn out. Stolt will continue to focus on the contractual analysis and support its argument that it fulfilled its part of the bargain by providing cooperation that enabled the Division to convict other parcel shipping companies and executives. The information obtained through that cooperation now will likely be used directly against Stolt.¹⁷ The Division will emphasize the dates that the conspiracy was "discovered" and "terminated," contending both that Stolt lied about the timing of these events to obtain leniency and that the January 15, 2003, conditional leniency agreement allows the Division, in its sole discretion, to void a leniency agreement if it determines that the applicant has not met its obligations.

In deciding whether those indicted are entitled to leniency, the district court is likely to examine and weigh the very information that the Division obtained from Stolt. Regardless of where the district court draws the line, Stolt is likely not a case that will provide bright-line guidance for the

¹² *Id.* (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

¹³ *Id.* at 186.

¹⁴ *United States v. Stolt-Nielsen, SA.*, Case No. 2:06-cr-00466-BWK (E.D. Pa.), available at <http://www.usdoj.gov/atr/cases/f218200/218212.htm>.

¹⁵ Stolt argued unsuccessfully that the criminal case should be assigned to the judge who heard and decided the case Stolt filed to enjoin the Division's prosecution. Under normal Eastern District case assignment, the criminal action would not be assigned as a related case to the judge that handled the injunction case.

¹⁶ 442 F.3d at 187 n.7.

¹⁷ Under the express terms of the leniency letter, the Antitrust Division may use "any documentary or other information provided by ABC, as well as any statements or other information provided by any current [or former] director, officer or employee of ABC to the Antitrust Division pursuant to this agreement . . . against ABC in any such prosecution." Model Corporate Leniency Letter at 3, available at <http://www.ftc.gov/atr/public/speeches/2247.htm>.

antitrust criminal bar; it will provide finality only on the very distinct—and highly unusual—facts before the court.

The “Common Law” of the Corporate Leniency Policy

Far more important than the ultimate outcome of the *Stolt* case itself, however, is the impact of the *Stolt* case on the corporate leniency program. The *Stolt* controversy has already had a significant impact on the way that the Antitrust Division and the antitrust criminal bar have handled leniency applications since *Stolt* was first expelled from the program, and it will continue to affect how they will handle leniency application in the future. These developments will have far-reaching implications for the future strategy and decisions of leniency applicants.

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The Antitrust Division’s leniency program is constantly evolving.¹⁸ From its creation in 1978, through its major revision in 1993, through the variations now known as “amnesty plus,” “penalty plus,” and “affirmative amnesty,” the leniency program is, first and foremost, an administrative creation of the Antitrust Division. The policy was not born of legislation;¹⁹ it was originally conceived and defined in a series of major speeches by Division leaders.

John Shenefield, then Assistant Attorney General of the Antitrust Division, was greeted with nervous laughter in 1978 when he first explained the new self-reporting and cooperation program to an assembly of corporate general counsel.²⁰ When AAG Anne Bingaman announced the revised policy in 1993, many believed this amendment would not materially increase the small number of leniency applications up to that time. Since 1993, however, things have changed dramatically. The leniency program is now considered the Division’s most powerful tool for deterring and prosecuting cartels. Thus, over 25 years after the birth of the leniency program, Deputy Assistant Attorney General Scott Hammond was greeted not with nervous laughter, but with respect and careful attention at the ICN Cartel Conference in 2004²¹ and at subsequent ICN workshops, which were attended by enforcement officials from many nations that have sought to imitate and replicate the U.S. leniency program.

As with most of the developments in the criminal antitrust area, the leniency policy developed and evolved through the actions of the Antitrust Division and the antitrust criminal bar that represented leniency applicants. In 1993, self-reporting to the Division was still an alien concept. Most defense counsel, accustomed to litigating against the Division, did not trust the government sufficiently to provide sensitive information by proffer to the Division. In leniency’s early years, many Division prosecutors also did not believe in the leniency idea. As a result, the trust essential to the program’s success took time to develop.

¹⁸ For a much more detailed discussion of the U.S. leniency policy and its evolution and development, see Donald C. Klawiter, U.S. Corporate Leniency After the Blockbuster Cartels: Are We Entering A New Era, Proceedings of the 2006 EU Competition Law and Policy Workshop, European University Institute (June 3, 2006) (forthcoming in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2006)).

¹⁹ The first and only time the leniency program was mentioned in legislation was in the 2004 Antitrust Criminal Penalty Enhancement and Reform Act of 2004 in which Congress provided for single damages and no joint and several liability for a leniency applicant cooperating with the plaintiffs. See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No.108-237, Title II, § 201, 118 Stat. 665.

²⁰ John H. Shenefield, Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, Statement Before the 17th Annual Corporate Counsel Institute (Oct. 4, 1978), noted in [Current Comment 1969–1983 Transfer Binder], Trade Reg. Rep. (CCH) ¶ 50,388.

²¹ Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Dep’t of Justice, Cornerstones of an Effective Leniency Program, Remarks to the ICN Workshop on Leniency Programs (Nov. 22–23), 2004, available at <http://www.usdoj.gov/atr/public/speeches/206611.htm>.

Beginning in 1996, when the current leniency policy first began to gain acceptance and then to flourish, the rules and practices of leniency have evolved—carefully and delicately. In the last ten years, the Division has worked hard to encourage leniency applications—at first aggressively marketing the policy to the bar (“facing fines of zero”)²² and then by explaining and interpreting the provisions to achieve transparency and certainty in the program.²³

From the beginning, the Division has always made clear that its intention is to make leniency as easy as possible for the applicant to obtain. It sought to avoid creating roadblocks. One of the Division’s major objectives was to ensure that a leniency applicant was never put in a worse position than other parties because the applicant had sought leniency. “The Division’s philosophy,” according to Scott Hammond, “has always been that, wherever possible, we will tilt our program in favor of finding ways to make companies eligible for our program rather than looking for ways to keep them out. We maximize the opportunities for companies to report conduct, and we are extremely adverse to practices that may create disincentives.”²⁴

The Division has also worked tirelessly to influence its international counterparts by arguing persuasively that roadblocks and obstacles created in one jurisdiction are harmful in all jurisdictions because they deter the filing of leniency applications throughout the world. That seems to be clear evidence that *Stolt* is an aberration, not a policy intention to crack down on leniency, as some detractors suggest.

The reason for keeping the leniency program attractive to potential applicants is self-evident. The program has spawned some of the largest cases—and fines—in history: vitamins, graphite electrodes, rubber chemicals, DRAM, art auctions, and a substantial number of food and feed additives and commodity chemical cases, to name the most obvious. The Division has collected over \$2 billion in criminal fines as a direct result of the leniency program. Observing the success of the Division’s leniency policy, the enforcement officials of the world quickly began to jump on the leniency bandwagon. Consider that Japan’s leniency program only went into effect 11 months ago and has already produced almost 60 leniency applications.²⁵

The success of the U.S. leniency program and those around the world modeled on its success is, at bottom, the result of transparency and trust. The program is set up to provide as little discretion as possible—you either qualify or you don’t. Beyond that, the Antitrust Division must trust defense counsel to move the process forward and the defense counsel must trust the good faith of Division staff to honor its obligations. The Division knows that if leniency is granted only grudgingly or made more difficult, there will be fewer leniency applications, with unhappy consequences for the leniency program. That is why the *Stolt* decision is receiving so much notoriety. How the Division and defense counsel react and adapt to future leniency applications will tell the ultimate story of *Stolt*’s impact.

²² Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, Making Companies an Offer They Shouldn’t Refuse, Remarks to the Bar Association of the District of Columbia’s 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2247.htm>.

²³ Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, The Corporate Leniency Policy: Answers to Recurring Questions, Remarks to the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998), available at <http://www.usdoj.gov/atr/public/speeches/1626.htm>.

²⁴ Hammond, *supra* note 21.

²⁵ *Japan’s Leniency Program Silences Critics*, COMPETITION L. 360, Nov. 7, 2006.

What Is the Antitrust Division Doing Differently Today?

The major outcome of the *Stolt* case—and probably its enduring legacy—is a subtle but clear shift in how the Antitrust Division is operating its leniency program today. Quietly, but consistently, the Division has altered the way in which it is using its “marker” process.

From the outset of the 1993 Revised Leniency Policy, the applicant was given the opportunity to obtain a “marker” from the Division before presenting all of its evidence. The “marker” device was the Division’s way to create a race to the Division. If the applicant started the internal investigation and discovered some bad conduct, counsel could call the Division before completing its investigation and ask for a “marker” to preserve first place in line while counsel continued the internal investigation. The marker would extend for a very short time, usually no more than a few weeks. When counsel was ready, the leniency proffer would be presented and, typically, the applicant would be accepted into the leniency program conditionally and receive the leniency agreement. Then the applicant would provide its full cooperation to the Division.

In earlier times, the parties—and the Division—were very anxious to close the leniency deal quickly and decisively. In many leniency applications, counsel came in, made their presentations, and walked out of the Division offices with the clear understanding that their client was “in the program.” This certainty was what the applicant wanted—especially when it was taking the risky leap of applying for leniency. The Division was equally anxious to close the deal and receive the promise of substantial evidence from the applicant to move its case forward against the co-conspirators. There was a certainty and predictability—and mutual relief—to concluding the first meeting or an early meeting with “the letter” (literally or figuratively).

In looking at the timeline in *Stolt*’s leniency application, the time between the first presentation and the receipt of conditional leniency was very short indeed—with the first approach to the Division in November 2002 and receipt of the “letter” in January 2003. This is consistent with the timing of many pre-*Stolt* applications, where the elapsed time between the first contact with the Division and the agreement to grant conditional leniency was measured in days or weeks. Although no one outside of the Division knows the precise numbers, the anecdotal evidence is strong that because *Stolt* was expelled from the program there has been a subtle shift away from early grants of conditional leniency based exclusively on counsel’s representations to the use of an “extended marker” investigation, which is the model more commonly employed today.

In fairness, three other factors are also at play in lengthening the time between the application and the conditional grant of leniency. First, because of the great value of being “first in” for leniency, there is often a race to the Antitrust Division to obtain leniency. Sometimes the difference between being the leniency applicant and being a criminal defendant is literally a matter of hours. Anxiety about the race has caused counsel to move quickly, usually before the company has conducted anything close to a complete investigation. The process of collecting and producing evidence is, of necessity, protracted, and because the initial information is sketchy and incomplete, the Division considers the applicant to need more time to “perfect” its marker.

Second, the cases for which leniency is sought today are, for the most part, more difficult cases to prove. Much of the “low hanging fruit” was picked in the late 1990s. Fewer of today’s cases involve worldwide allocation meetings attended by senior executives of all the competitors, and few have the trail of documents providing the scorecard of market shares agreed to by the conspirators as were available in, for example, the vitamins and related cases. In today’s cases, the investigative process is necessarily longer and more complex. This trend in leniency applications—with some notable exceptions—has been going on for several years.

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Third, with the advent of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which provided, among other things, the possibility of single damages available to the leniency applicant, companies are seeking leniency in less hard-core cases so they may avail themselves of the single damages option in the civil actions that they are defending. This is tempting, especially if the case can be characterized as conduct that the Division may view, even marginally, as criminal conduct. The Division will be wary of many of these applications, and a prudent way to deal with them is to explore the evidence under a marker rather than to grant conditional leniency when it is unclear whether a triable criminal case will ever be made out.

Although these three factors are important, the primary reason for the extension of the marker process is the degree of certainty the Division obtains from being able to develop evidence methodically. The Division appears to be much more comfortable when it sees the actual evidence, as opposed to counsel's proffer, before committing itself to a conditional leniency agreement. By operating for weeks and even many months under the marker, the Division is protected from claims of contractual breach and reliance that the *Stolt* case raised on the public stage. Today's use of the marker system allows the Division to verify first—and trust later. This has replaced the trust—and then verify—system of earlier times. If the Division offers a marker and methodically collects the evidence from the applicant, it does not have to obligate itself to give more than a place in line until it is satisfied that it has verified the evidence by interviewing the witnesses. It can also better define the scope of the leniency it is granting when it has already seen the evidence because it knows definitively the areas where there is evidence and where there is not.

Is the New Process Harmful—or Less Helpful—to the Potential Applicants?

Over the past ten years, the greatest advantage of the leniency program to a company has been the certainty and transparency of the process. If an applicant approached the Division and presented valuable information, the applicant would expect to obtain an agreement that it had conditional leniency. After receiving the agreement, the applicant would then complete the steps of the cooperation process. There was always the concern that the Division would find the evidence untrustworthy, or that the witnesses would not deliver what counsel promised. Until *Stolt*, however, the Division never took any steps to revoke the leniency.

Today's dynamic is very different. The marker recipient is still first in line; no one will take its place in line while it is cooperating. Aside from that, the terminology used by the Division has shifted from "you are in the program" to "you are perfecting the marker." In reality, that means that the applicant will have no assurances of conditional leniency at the front end and, being somewhat anxious, will be motivated to work harder at persuading the Division step by step of its full cooperation.

Does the change of process disadvantage the applicant in any way? This is the ultimate question that may have a lasting effect on the leniency program. Although one view is that the leniency applicant must work hard at each step to persuade the Division to keep it in that position, in most respects this is no different from cooperating in good faith when the applicant already has conditional leniency. Overall, there does not seem to be any real disadvantage.

Can the extended marker process be an advantage to the applicant? Given that many of the leniency applications today will, of necessity, involve evidence that is less decisive and less compelling than the vitamins-style cases, there may be an advantage in presenting the evidence to the Division piece by piece rather than presenting a conclusion that certain conduct amounts to a violation of the criminal law. The Division will be more attentive to helping the applicant establish the details if it is done step by step than it would be if it is first presented in a conclusory statement by counsel. Thus, the marker may provide a viewfinder for the Division to assess and eval-

uate the evidence at an early stage, allowing the Division to make determinations as the case is put together—especially a very hard case. Watching this process unfold, the Division is more likely to determine that the applicant acted responsibly and will work cooperatively with the applicant in good faith, even if it ultimately concludes that there was no violation or no violation that it will seek to prosecute.

In addition, the evidence that the Division would gather under a marker will largely be developed from the testimony of individual executives. This process would generally be governed by a letter to the executive promising not to make direct use of the interview information against the executive. If the Division believes the marker evidence is insufficient to proceed, it can end the process at any time. Because the executive will be questioned under the standard “no direct use” promise, the executive will not face the severe penalty that would occur if conditional leniency were granted and then revoked—the ability to use all the leniency evidence against the leniency applicant and its executives. If a marker is revoked, the direct evidence that the Division can actually use against the executives from the marker process is minimal, or nonexistent. The marker process may, in the difficult case, be a much safer place for the applicant and its executives to remain as this leniency investigation unfolds.

Despite the most thorough audit and internal investigation, there may always be rogue employees out there who think they are smarter than everyone else.

A Modest Word of Caution to the Division: The Limits of the Corporate Investigation

The primary cause of sleepless nights for defense counsel representing a leniency applicant is counsel's ultimate ability to assure the Antitrust Division that the client took prompt and effective action to terminate its role in the conspiracy and that company employees have provided complete and truthful evidence to the Division—the seminal issues in the *Stolt* case. While this is especially a concern when dealing with global companies, it is a problem for even the smallest domestic company. Many defense counsel have discovered an executive who is secretly maintaining contact with his friend at a competitor even after the company self-reports. There are always employees who continue to limit their disclosures or shade the information regardless of the heroic efforts of the board, the general counsel, and outside counsel to meet the leniency requirements in good faith. In leniency proceedings and in plea negotiations alike, the absolute confidence of counsel in the certainty of its investigative findings is a matter of great concern. Despite the most thorough audit and internal investigation, there may always be rogue employees out there who think they are smarter than everyone else.

A hypothetical will help illustrate the problem. If a company represents that the conspiracy ended at the time of a particular price increase and the Division later discovers from a competitor that the product manager continued to discuss discounts off the list price with his major competitor for another six months, the leniency applicant is in a precarious place. The company has provided the critical information about its role and the role of competitors to the Division; it has investigated thoroughly and completely, but it has a product manager directly lying to counsel and, perhaps, hiding or destroying documents. It has reviewed the post-lenieny travel and telephone records of every executive but could never discover the 20 calls that the product manager made from the pay phone across the street. Technically, the conspiracy continued for six months, but the issue is whether the *company* took prompt and effective action to terminate its part in the conduct. On facts such as these, should the Division conclude that the company did everything humanly possible to satisfy the Division?

In an age of great sensitivity to corporate governance principles, it is important to remember that the corporation is the party to the leniency application. That is why the decision is—and must be—a board decision. The board must instruct counsel that the investigation must be thorough

and complete, and all employees must know that directly. Despite the need to keep the leniency decision limited to as few people as possible, every employee directly involved in the conduct must be informed of the process and the severe penalties for violating counsel's instructions. Yet, if a rogue employee continues the conspiracy or holds back information from counsel and from the Antitrust Division, what becomes of the applicant's marker or leniency agreement? Isn't the company clearly in non-compliance with the leniency conditions? In the context of the *Stolt* case, isn't the company in breach of the agreement?

This is a very difficult situation, but it must not be a situation where the Antitrust Division adopts a bright-line conclusion that the company did not meet its obligations under the leniency policy. While the burden of proof that it was prompt, effective, and cooperative is on the company, the Antitrust Division has the obligation to evaluate the facts—to look at the good faith of the investigation—and make a reasoned decision about the company's efforts and actions. In some cases, the Division will find that the company was not thorough or careful—and it can expel the company from the program. In many situations, however, the Division will conclude that the company acted as the Division would want it to—and give the company the leniency it earned by its corporate action. A rogue employee, of course, would never be a beneficiary of the leniency program. To ensure the long-term viability of the leniency program, the Division must be able to untangle the corporate act from the independent act of a noncompliant employee.

Conclusion

The U.S. corporate leniency policy is alive and well. Far from being a harbinger of doom, the *Stolt* case is, at most, *the* single aberration in the 28-year history of the leniency program. The important legacy of the *Stolt* case has been a shift in the application of the program in practice, providing greater scrutiny of the underlying evidence for the safety and security of both parties—the applicant and the Division. Under this evolution of the system, once the leniency marker has been “perfected,” there is no further uncertainty for the leniency applicant or the Division because, by then, the evidence will have been carefully vetted.

Today, the watchwords at both the Antitrust Division and the antitrust criminal bar are caution and care. That is not a bad thing. Potential leniency applicants should find comfort in the process as it has evolved and operates successfully. Future leniency applicants should view the system as a step-by-step process intended to avoid the pitfalls that could lead to a repetition of the strange case of *Stolt-Nielsen*. ●