Scott Hammond on Stolt-Nielsen

In January, the US Department of Justice announced that it would not appeal against a court's reinstatement of Stolt-Nielsen's leniency arrangement. Its decision ended the first-ever attempt to revoke an offer of immunity made to a whistleblower. Scott Hammond, deputy assistant attorney general at the DoJ, tells DAVID VASCOTT what happened

Why did the Department of Justice originally terminate the Stolt-Nielsen amnesty agreement?

To answer your question, I have to begin with a bit of background. Our investigation was initiated when Stolt's participation in international cartel activity was reported in the *Wall Street Journal*. The article disclosed that Stolt's former general counsel was suing the company for constructive termination on the basis that he had discovered that high-level officials from Stolt were conspiring to fix prices with their competitors, that he tried to put an end to it, that the conspiracy nevertheless continued unabated, and that he had been forced to resign or risk being viewed as a co-conspirator.

As disclosed during the Stolt litigation, when Stolt's outside counsel rushed in after the article appeared, the division immediately raised the question as to whether the company had taken prompt and effective action to terminate its participation in the conspiracy after its discovery by the general counsel, as required under the division's corporate leniency policy. Stolt's attorneys informed the division that the general counsel's lawsuit was frivolous, and that the company had terminated its involvement in the cartel after his discovery. At the time, we didn't know who was telling the truth – Stolt's general counsel or the company. Stolt, however, was willing to represent that it took prompt and effective action to terminate its cartel activity upon discovery. Therefore, we gave Stolt a conditional leniency letter that advised the company that if that representation turned out to be false, then the company and its executives would lose all protection afforded under the agreement.

Within a month or so of signing the agreement, and after talking to two Stolt witnesses, we interviewed an employee of one of Stolt's co-conspirators who told us that Stolt's participation continued well after the general counsel's discovery, and, in fact, was ongoing at the time of the *Wall Street Journal* article. We confronted one of the two Stolt witnesses who we had previously interviewed. He got separate counsel, recanted his earlier statements that Stolt's participation in the cartel had ended when the general counsel discovered the conduct, and admitted that it had, in fact, continued. As a matter of fairness to Stolt, we promptly suspended Stolt's cooperation obligations under the conditional letter and investigated further.

By the time the decision was made to formally revoke Stolt's leniency, there were six co-conspirators on record saying that Stolt continued to meet and carry out its customer allocation agreement with competitors after the general counsel discovered the wrongdoing.

The Stolt executives implicated in the continuing conspiracy were not rogue employees – in fact, far from it. They included Stolt's managing director and one of its business directors, the same actors who were managing the day-to-day operation of the cartel at Stolt at the time it was discovered by Stolt's general counsel. Stolt's co-conspirators stated that they met privately with Stolt's managing director after the general counsel's discovery. They stated that he informed them of counsel's discovery and advised them that they would need to be more careful and contacts would have to be more limited, but otherwise it would be business as usual for the cartel.

Based on the statements of these witnesses, we revoked Stolt's leniency because we believed that Stolt had failed to take prompt and effective action to terminate the conduct, making them ineligible for leniency, and because we believed that the company had not been truthful about its continued participation in the cartel.

The Department of Justice clearly felt very strongly about its position in the Stolt-Nielsen case, but the courts did not find in its favour. Why did the DoJ decide not to appeal? Do you still feel as strongly now as you did when the case was under way?

I am disappointed that the court, after siding with the division in finding that the general counsel discovered the conduct, rejected the sworn testimony of numerous witnesses that the conduct continued thereafter. Obviously, we revoked Stolt's conditional leniency because we believed that these witnesses were telling the truth. However, the court held a full evidentiary hearing, and we realised that the court of appeals was unlikely to reverse credibility findings.

I do feel strongly that the actions taken by Stolt's top management after the general counsel's discovery were disturbing and were designed to conceal the wrongdoing of Stolt's chairman and its other culpable executives from the independent members of Stolt's board of directors and, of course, from the government. Wholly apart from how we administer our leniency programme, I do not believe that any practitioner who is an advocate of good corporate governance would ever advise a company or its board of directors to take the actions that Stolt took when the price-fixing conduct was discovered by its general counsel. Let me give you three examples from the Stolt case.

First, one of the ringleaders of the cartel was put in charge of Stolt's internal investigation. After the conduct was discovered by Stolt's general counsel, he reported it to Stolt's chairman. Unbeknownst to the general counsel, Stolt's chairman initiated Stolt's participation in the cartel. As the court found in its findings of fact, the cartel was formed when Stolt's chairman personally met with his counterpart and others from Stolt's biggest competitor and entered into a customer allocation agreement. So, this publicly traded company put the person at Stolt with the most to lose if the cartel was ever exposed in charge of its internal investigation. If you were truly committed to putting an end to criminal conduct, would you put one of the criminals in charge of the internal investigation?

I'll give you a second example. It should come as no surprise that no Stolt executives involved in the wrongdoing were fired, suspended, or disciplined in any way as a result of the chairman's internal investigation. In fact, it is undisputed that none of the available sanctions listed in Stolt's existing corporate compliance programme for employees who violate the antitrust laws were invoked. More importantly, it is also undisputed that Stolt's managing director and business

director, both of whom had been meeting and exchanging price lists with competitors right up until the cartel's discovery by the general counsel, were allowed to continue to meet with those very same conspirators after discovery without any counsel or any other sort of witness being present. Again, if one were representing a company or its board of directors that was serious about terminating its involvement in a cartel, is that consistent with how you would advise a company to put a stop to criminal conduct?

Lastly, as I just noted, it was never challenged that the two executives from Stolt who were managing Stolt's day-to-day participation in the cartel before the general counsel's discovery were allowed to continue to meet alone with the very same co-conspirators after his discovery. Our witnesses testified that it was at those meetings that Stolt's managing director told the conspirators that the attorney-client privilege would prevent the general counsel from ever revealing what he had discovered, and so Stolt's participation in the cartel would continue. However, the court discounted their sworn testimony, so let's put that version of the events aside. Instead, consider Stolt's account of what happened at those meetings. The company had to concede that the chairman knew that the managing director continued to meet with his co-conspirators after the general counsel's discovery. However, it claimed that the chairman sent the managing director to meet privately with his co-conspirators to deliver the message that Stolt was actually withdrawing from the conspiracy rather than continuing it. Again, others can judge as to whether that is a responsible way for a publicly traded company or the chairman of its largest subsidiary to act. However, I find it hard to believe that any attorney representing a company or its board of directors would send a co-conspirator, who has been meeting with competitors and fixing prices for years, to meet again repeatedly with his co-conspirators, with no involvement by counsel and no record and no witness to verify what was discussed.

As I said, I do not think a company sincerely intent on putting an end to its wrongdoing would follow in Stolt's path, and I do not think that responsible outside or inside counsel or an independent board of directors would allow it to happen on their watch. It is certainly the case that we have never run across a company or its chairman that behaved in this manner before or since this case.

What lessons has the DoJ learned from the Stolt-Nielsen case? Has the amnesty decision-making process changed in light of the Stolt-Nielsen case?

We intend to make some revisions to our Model Conditional Leniency Letter. The point was bought home many times during the Stolt litigation that, as the authors of the conditional leniency letter, any ambiguities in the language would be held against the government. Therefore, we will tighten up some of the language in our model letter to avoid any uncertainty in the future. The antitrust bar should not be surprised by any revisions to the letter that we are contemplating. The changes to the model letter that are being considered are consistent with what the division has said publicly, beginning well before the Stolt litigation, as to how the leniency programme is implemented.

I've been asked repeatedly if the division will change its practice and delay granting leniency until we have completed our investigation so as to avoid being put in the position again where we have to rely on the conditional nature of the agreement to revoke leniency when an applicant is found to be ineligible. I want to make clear that we do not intend to mess with the formula that has made the division's leniency programme such a profound success. The division understands that cooperating companies and their executives want a voluntary disclosure programme that is as transparent and predictable as possible. We also know that they want assurances up front, even if they are conditional, that they will be rewarded with non-prosecution protection at the end of the day if they meet the requirements of the programme. The division's use of a conditional leniency letter helps address those needs. It is noteworthy that outside the division you will find plenty of other prosecuting agencies with voluntary disclosure programmes that will not provide any upfront assurances not to prosecute and will instead require companies to wait until the end of the investigation to learn whether their cooperation will earn them a pass from prosecution. We will not change our practice in this regard. Aside from revisions to the model letter, you will not see significant changes to the leniency application process.

In future, will the DoJ – like the EU – make the burden of obtaining an amnesty marker greater?

No, there is no reason to change our marker system. The marker system is designed to encourage companies to race in and seek a marker for leniency when they uncover the first whiff of cartel activity. The burden for obtaining a marker is quite low, particularly when companies are reporting conduct that is not already under investigation. Although it would be ideal to have convergence between the US and EU marker systems, we think the US model of setting a low threshold for obtaining a marker works best to accelerate the race for leniency.

What advice would you give future conditional amnesty applicants on what to do before contacting the DoJ?

My advice is to run to the division and seek a marker as soon as the company has any reason to believe that it has engaged in criminal antitrust activity. If the company does so, its application is already distinguishable from Stolt's. In the wake of the Stolt case, I understand why a company that discovers its involvement in cartel activity but chooses to hunker down instead of reporting the conduct will be concerned about whether it is subsequently eligible for leniency if it considers reporting after the conduct is detected. However, that is not our applicant pool. Other than Stolt, I do not believe we have had a single leniency applicant that fits that profile.

Our applicants are companies that detect wrongdoing and recognise that the leniency programme offers them a golden opportunity – no criminal conviction, no fines and no jail sentences – but only if they race in first and meet the other eligibility requirements. The programme is a success because we have always implemented it so as to tilt the programme in favour of helping companies who are trying to do the right thing get into the programme rather than looking for excuses to keep them out. We have also strongly advocated that philosophy when exporting our leniency programme to foreign enforcers. It's not just words on paper. We have a time-tested track record to back it up. Stolt is the only company that we sought to remove from the leniency programme since the programme was initially adopted in 1978, and then substantially revised in 1993. So, it is fair to say that we do not take revocation lightly. We recognise that the programme's success is based on the defence bar's and the business community's confidence that the division will administer the programme in a transparent and equitable manner. We have never lost sight of that principle, and we will continue to implement the programme in a way that validates that trust.

Thank you.