ODD MAN OUT, THE EXECUTIVE PERSPECTIVE IN PURSUIT OF LENIENCY

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Much has been written about corporate risks and rewards in the Antitrust Division's Leniency Program but much less about the perils of the executive who knows of or is implicated in cartel behavior. This is natural. The Program contemplates that corporations and executives alike can gain leniency by being first to confess but most applications are corporate acts deriving from institutional investigations. Representations to the Division about the activity reported on are shaped by corporate lawyers, not implicated executives or lawyers they select. The unusual soul with the information and temerity to approach the government unbidden, the odd man out[2], is the exception in antitrust leniency. So how does an executive navigate the Division's Leniency Program to avoid the worst consequences of the cartel inquest either with corporate sponsorship or alone?

I. The Executive in the Corporate Leniency Scheme

Typically, executives are leniency candidates because their companies are. Upon discovery of potential price-fixing or other *per se* antitrust conduct, companies are well advised to pursue a coveted "marker" from the Antitrust Division, the first step in attaining leniency and possible amnesty for the company and its executives. This is the familiar circumstance posed in the Division's Corporate Leniency Program, both as

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[2] The "odd man out" has been defined as "one who, because of strangeness of behavior or belief, stands alone out from a group." *The American Heritage Dictionary of the English Language, Fourth Edition*, Houghton Mifflin (2000)

codified in August 1993[3], and in November 2008. The best hope of the culpable executive is to benefit from the corporation's actually winning corporate leniency. If the corporation is first to bring the conduct to the government's attention and can demonstrate that it neither is the leader or originator of the activity or coerced another party[4], the sponsored executive may preserve his liberty if not his career.

But the corporation's elation at obtaining a marker or even a conditional leniency letter may yet prove illusory for its executives. Unless our executive is the exclusive or primary source of the company's information, his control of the situation, if any, is tenuous. Corporate counsel, desperate to perfect leniency, will insist on an early interview with the executive. This may be a true turning point in the executive's quest to avoid prosecution. In theory, he might have the opportunity to, and should, consult personal counsel. But the natural inclination to rely on in-house counsel and to appear cooperative usually rules this out. The executive must assume his information will be imparted to the government in some form even if not attributed to him initially. He has no privilege to prevent it anyway. But he also has little say over when or how corporate counsel describes his evidence. In any event, as noted in its 2008 publication on the Program, "[t]he Division may also insist on interviews with key executives of the applicant who were involved in the violation before issuing the conditional leniency

[3] The Division first implemented a leniency policy in 1978, but had few takers. *See* ABA Section of Antitrust Law Oral History Interview of John H. Shenefield, available at http://www.abanet.org/antitrust/at-taskforces/at-oralhstry/interviews/shenefield-john.shtml

[4] *See* "FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (November 19, 2008)" at FAQ 3, available at http://www.usdoj.gov/atr/public/criminal/239583.htm

letter."[5] Under corporate sponsorship, the executive readily may find himself disclosing valuable or even incriminating evidence without any enforceable assurance of immunity. Alternatively, he may be foreclosed from the first chance to admit his involvement in the offense while others secure their places among the immune.

Where corporations succeed in receiving amnesty, executives face no criminal consequences because they benefit from the deal as long as they provide what the prosecutors consider full, continuing and complete cooperation throughout the investigation.[6] To reinforce this protection and the requirement for truthful cooperation, the Division normally supplements the letter with a side agreement immunizing the executive to the same extent that the corporation expects to be immunized under its conditional leniency letter. In such cases, the executive is unlikely to see the need for separate, personal counsel, his employer is unlikely to offer it, and the government is unlikely to insist on it.

II. The Odd Man Out

The foregoing scenario played out without incident possibly a hundred times over the 15-year history of the Division's formal leniency program. An application by a leading competitor in the parcel tanker shipping industry occasioned the first public test of limits of Program's benefits to executives and companies. The 2002 leniency application of Stolt-Nielsen SA spawned both the first revocation of conditional leniency and, at length, the first enforcement of leniency protection in the Program's history.

On January 15, 2003, the Division signed a letter agreement with Stolt-Nielsen

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[5] *See* "FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (November 19, 2008**)**" at FAQ 5, available at http://www.usdoj.gov/atr/public/criminal/239583.htm

[6] *Id.* at FAQ 23

not to bring any criminal prosecution against [Stolt–Nielsen] for any act or offense it may have committed prior to the date of the Agreement in connection with the anticompetitive activity being reported.'' This promise was, of course, subject to company's strict compliance with stated conditions, ''[s]ubject to verification [by the Government] and subject to [Stolt–Nielsen's] full, continuing and complete cooperation.''[7] Within weeks of the signing of the conditional leniency letter, Stolt-Nielsen counsel produced to the government over 6,000 pages of documents, including customer lists and voluminous journals delivered to counsel by managing director Richard Wingfield.[8] These documents were central evidence of the conspiracy.

The fate of Stolt-Nielsen executives covered under terms of the conditional corporate letter is an interesting study in government discretion. Under those terms, Stolt-Nielsen counsel arranged for the government to interview two key executives, one a subordinate of Wingfield. The Division provided each with a letter stating that employees who cooperated fully with the investigation would be immune from prosecution for any act or offense committed prior to the date of the Agreement. During his initial interview with the Division, Wingfield's subordinate represented that unlawful conduct ended in March 2002. But the Division concluded that the cartel, with Wingfield's participation, continued after this date, prompting revocation of Stolt-Nielsen's conditional leniency. After the Division suspended Stolt–Nielsen's cooperation obligations and the Division threatened to revoke the witness's personal immunity, he was interviewed again, recanted his earlier statements and claimed that the conspiracy continued after March 2002. The

[7] *Stolt–Nielsen, S.A. v. United States.*, 442 F.3d 177, 180 (3d Cir. 2006)

[8] *United States v. Stolt-Nielsen, S.A.*, 524 F. Supp 2d 586, 602 (E.D. Pa. 2007)

Division did not seek to interview Wingfield or any other Stolt-Nielsen executive thereafter.[9] Neither did the government pursue perjury or obstruction charges against Wingfield's subordinate.

In historic actions in April 2003, the Division notified Stolt-Nielsen that its leniency was in jeopardy and outright revoked the protection of Wingfield, a New Zealander living in the U.S. Based on an FBI affidavit citing documents Wingfield himself produced to counsel in the company's gambit for amnesty, a Sherman Act warrant issued for Wingfield's arrest in June 2003. Two trials later, Stolt-Nielsen, Wingfield and the company's chief executive managed to enforce the conditional leniency agreement and quash their indictment.[10] Division officials and others differ on the import of the *Stolt-Nielsen* decisions for the Leniency Program.[11] But, from the perspective of the executive, one lesson is that an individual who unburdens himself to corporate counsel can yet find himself in the dock even if he did not refuse to cooperate with the Division or conceal evidence. What guidance comes from the cases and from the Division's present Leniency Program?

a. Tell the story or be the story.

The Division's position at trial and now in Program pronouncements is that an executive cannot benefit from corporate leniency without actually coming forward with

[9] *United States v. Stolt-Nielsen, S.A.*, 524 F. Supp 2d 586, 601 (E.D. Pa. 2007)

[10] More than incidentally, the Government parlayed Stolt-Nielsen's cooperation, such as it was, into guilty pleas from the company's co-conspirators, resulting in prison sentences for individual executives at those companies and fines totaling $62 million.

[11] Compare remarks of Scott D. Hammond, Deputy Assistant Attorney General, available at http://www.usdoj.gov/atr/public/speeches/234840.htm with "Broken Promises, Bold strategy forces Justice Department to live up to its antirust amnesty deal," *The American Lawyer*, July 2008

information.[12] Consider, however, that the corporate vetting process under conditional leniency, including the order and manner of debriefing individuals, is arranged between company counsel and the government. While the Program obliges corporate applicants to use their best efforts to secure the cooperation of directors, officers and employees in the investigation, this does not entitle all hands to a debriefing. As in the *Stolt-Nielsen* cases, whether the Division elects to conduct an interview at all or how it reacts to early information can prove crucial. The Division did not inform either Stolt-Nielsen or executives personally that Stolt-Nielsen employees were obliged to appear for interviews with the Division or to provide information without a subpoena.[13] Executives may wait while others are interviewed, unsure until the day they are invited for their turn whether they are immunized. Even then, of course, their position may be undermined by contradictions offered by others, including competing leniency applicants. While no individual ever enjoys immunity from dissembling, the government never even alleged that Wingfield lied. He never had an opportunity to lie to prosecutors. Yet, his amnesty was revoked.

b. Cooperation via corporate counsel gets no credit.

The executive's contribution to the government's investigation will be unrequited unless it is identified with the executive. Wingfield produced to corporate counsel damning documents detailing a global cartel but, since he never had a turn in a government interview, got no protection. In court, the government even took the position

[12] "In practice … the Division ordinarily provides leniency to all qualifying current employees of Type B applicants in the same manner that it does for Type A applicants." "FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (November 19, 2008)", FAQ 23 available at http://www.usdoj.gov/atr/public/criminal/239583.htm

[13] *United States v. Stolt-Nielsen S.A.*, 524 F. Supp.2d 586, 601 (ED PA 2007)

that producing the documents did not count for him under leniency because the government simply could have subpoenaed them. There is no suggestion in the record how the Division would have known to subpoena these documents had Stolt-Nielsen not applied for leniency.

c. Leniency letters are not non-prosecution agreements.

Prior to Stolt-Nielsen, counsel might have assumed that, in Antitrust Division leniency, their client earned a pass from prosecution. But, in dissolving a pre-indictment injunction the company and Wingfield won to enforce corporate leniency, the Third Circuit followed precedent that "immunity agreements that have promised not to charge or otherwise criminally prosecute a defendant, like the agreement at issue in this case, have * * * been construed to protect the defendant against conviction rather than indictment and trial."[14] This position has been codified in the revised model corporate conditional leniency letter which obliges an applicant to agree that "[j]udicial review of any Antitrust Division decision to revoke [an individual's] conditional non-prosecution protection granted [under the corporate conditional leniency letter] is not available unless and until the individual has been charged by indictment or information."[15]

So what actually protects a culpable executive in the leniency scheme? If he has the luck to be debriefed and believed, he derives protection not so much from the letter agreement as from grace exercised by the Division. Consider the executive's position if the agreement with the company is revoked. "If the Division revokes a corporation's conditional acceptance into the leniency program, the conditional leniency letter it

[14] *See Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 183-187 (3d Cir. 2006)

[15] See Paragraph 4, Model Corporate Conditional Leniency Letter (11/19/2008) available at http://www.usdoj.gov/atr/public/criminal/239524.htm

received "shall be void." [Footnote omitted]. … However, as a matter of prosecutorial discretion, even if the Division revokes a company's conditional leniency letter, the Division will elect not to prosecute individual employees, so long as they had fully cooperated with the Division prior to the revocation and, *in the Division's view, were not responsible for the revocation*."(emphasis added)[16]

III. The Odd Man Way Out

The correlative protection offered by the Division is Individual Conditional Leniency.[17] The protections of this type of leniency are superior to those of the corporate type in that they do not derive from the company's situation and are not subject to later government doubts about actions of others to end the cartel or disclose it. On the other hand, the occasions for individual leniency are rare. Executives generally do not stray from in-house counsel even when the cloud they are under is personal. This means that it is the extraordinary individual, possibly the blackmail target, who ventures to retain independent advice let alone considers turning government evidence without his employer.

[16] *See* "FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (November 19, 2008)" at FAQ 29, available at http://www.usdoj.gov/atr/public/criminal/239583.htm

[17] See Model Individual Conditional Leniency Letter (11/19/2008) available at http://www.usdoj.gov/atr/public/criminal/239526.htm

Nor can executives decide to make an individual bid for leniency once the corporation has commenced its bid. The Division considers the avenues of leniency for an individual under the corporate leniency letter and under the individual letter mutually exclusive.[18]

> Once a corporation attempts to qualify for leniency under the Corporate Leniency Policy, individuals who come forward and admit their involvement in the criminal antitrust violation as part of the corporate confession will be considered for leniency solely under the provisions of the Corporate Leniency Policy. They may not be considered for leniency under the Leniency Policy for Individuals.[19]

An executive with actual exposure to a Sherman Act charge had better be well ahead of the company to achieve any real control of the leniency process. One might expect that individuals who pursue this route are especially astute about their own situation, the company's or both. This hardly is the norm.

The prerequisites of individual leniency are familiar and daunting. "Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun if the following three conditions are met.

1. At the time the individual comes forward to report the activity, the Division has not received information about the activity being reported from any other source.
2. The individual reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.
3. The individual did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity."[20]

An important and potentially essential safety valve in the leniency process for individuals is the policy and practice that prompts the Division to consider executives for

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[18] *See* "FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (November 19, 2008)" at FAQ 24, available at http://www.usdoj.gov/atr/public/criminal/239583.htm

[19] *Id.*

[20] *Id.*

immunity notwithstanding how individual or corporate leniency forays work out.[21] The Division in particular has a way of ignoring circumstances that make an executive otherwise unfit for leniency when that executive is first to confess. On the other hand, as with the minuet that precedes corporate leniency, the hard part is in the getting. And, such an executive is well counseled that the chances of continuing his career, at least in his present company, are not excellent, unless, of course, he or she is an owner. An executive in this circumstance must be willing to separate from all organizational protection before the employer makes the decision to make the separation.

The principal risk to an individual who seeks leniency on his own is that the government will be convinced, as in the parcel tanker investigation, that other evidence undermines his story materially. Of course, every runner-up for leniency will be urging such evidence on the Division.

IV. The Odd Man Abroad

A situation occurring with increasing regularity involves the foreign national who knows of or participated in a cartel. Those located overseas are particularly unlikely to appreciate their jeopardy in a Justice Department investigation let alone the necessity of perfecting their position for leniency. Decades of multinational corporate counseling has had but a modest effect in convincing executives abroad that antitrust is more than an institutional infraction. While new tough and personal antitrust laws in overseas venues

[21] Any individual who does not qualify for leniency under the individual or corporate leniency policies may still be considered for statutory or informal immunity." *Id.*

such as the United Kingdom may change this attitude, foreign nationals presently are unlikely to seek individual leniency. Like Richard Wingfield and others, they tend to rely on their organizations to deal with the authorities and are unlikely to appreciate the hazards until later. From time to time, lately-retained personal counsel for such individuals urge the Antitrust Division that it is unfair to expect foreign executives to "come forward" either to help their companies seek corporate leniency or to help themselves. To date, there is little to indicate official appreciation of this difficulty. In this respect, our government appears to award no handicap to foreign antitrust violators in the rush to confess Sherman Act offenses.

Conclusion

The Antitrust Division's highly successful leniency program depends largely on corporate acts of disclosure and contrition. In most cases, the individuals responsible for, or knowledgeable about, cartel offenses are obliged to depend on corporate counsel to represent to the government what they say about a suspected cartel. That representation may be imperfect or at odds with others. The opportunities to blame executives not yet debriefed under conditional leniency agreements abound. Executives face a number of perils they would be well counseled to consider at the very time they are least likely to have their own counsel. Even as refined and with some assurances to cooperating individuals who actually speak with the prosecutors, the Leniency Program has the potential to punish the odd man out.