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## COURT PROTECTS DEFENDANT'S DUE PROCESS RIGHTS IN CRIMINAL ANTITRUST CASE

by  
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A United States District Court in Philadelphia recently ordered the government to comply with an amnesty agreement, a ruling which prevented the indictment of two corporations and an individual. *Stolt-Nielsen S.A. et al. v. United States*, 352 F. Supp. 2d 553 (E.D. Pa. 2005). This is the first time the U.S. government has attempted to withdraw from an amnesty agreement.

The amnesty policy of the Antitrust Division of the U.S. Department of Justice has proven to be an effective tool for uncovering illegal cartel conduct. Under the policy, the government will agree to refrain from prosecuting the first company to disclose evidence of an illegal conspiracy, and this protection extends to all of the cooperating corporate representatives. The company must meet several other requirements including termination of the illegal conduct. Typically, the formal amnesty agreement is reflected in a letter from the government to the applicant under the policy.

Stolt-Nielsen Transportation Group Ltd. is a division of Stolt-Nielsen S.A., a Luxembourg company. It is engaged in the worldwide transportation of bulk liquids in parcel tanker ships. In late 2002, it disclosed to defense counsel concern that some of its representatives might have agreed with competitors to allocate customers. The company began negotiations with the Antitrust Division for amnesty in exchange for disclosure of this evidence and cooperation in the investigation. During those negotiations, the company's lawyers represented that senior executives learned of participation in the cartel in March 2002, and that the company had taken remedial steps to enhance its antitrust compliance program.

On January 15, 2003, the government issued a letter reflecting the formal amnesty agreement. Stolt-Nielsen and its employees provided extensive cooperation in reliance on the agreement, and that cooperation resulted in guilty pleas by two other companies and several individuals. The government reaped criminal fines totaling more than \$62 million.

In March 2004, the government informed Stolt-Nielsen of its intentions to void the amnesty agreement and indict the company, its parent, and one of its senior executives. The information that had been provided under the cooperation agreement would be used to prosecute these defendants. The government had concluded that the company misrepresented when it terminated its participation in the conspiracy.

The putative defendants took the unusual step of asking a court to enjoin the return of the indictment. They argued that there was no specific representation of when they had withdrawn from the conspiracy, and a withdrawal date was not an express part of the agreement. The court held an

evidentiary hearing which included testimony from the lawyers who negotiated the agreement. It found that the cooperation agreement was a binding contract that the government must adhere to scrupulously. Because of the important due process rights involved, the government could not unilaterally void the agreement. The court found there was no basis to conclude there had been a misrepresentation.

Also, the court addressed the government's contention that this issue should be resolved only after an indictment had been returned. The court described the dire consequences that result from a criminal charge irrespective of the eventual disposition and held that due process requires the government be prevented from returning the indictment. Accordingly, the court granted the injunction. The government has appealed the ruling.

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