Is the goddess of justice really blind or just short sighted?

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Introduction

- The Icelandic Supreme Court has been busy dealing with various cases on economic crimes in the aftermath of the banking crisis in 2008.
- In addition the Supreme Court handed out, in December 2016, its first judgement on individual criminal liability in a competition law case.
- These developments shed light on various difficulties and challenges in bringing about criminal liability in cases on complex economic crimes.

Background on criminal liability in Icelandic competition law

- Criminal liability in place since 1994.
  - Liability towards individuals and undertakings
  - Art. 10 (Art. 101.1 EU) and Art. 11 (Art. 102 EU)
- First criminal case in oil cartel 2004 but dismissed from the court in 2007 due to irregularities in procedure (privilege against self incrimination)
- The law amended in 2007 with the aim to simplify the law and make only the most serious offences criminally liable.

General thoughts on criminal liabilty in competition law cases

- Arguments for and against.
  - Deterrance
  - Difficult to combine robust criminal liability and rights of defendants?
- Local Competition law in Iceland are construed along EU lines.
- Meaning the law is interpreted to mean what it has to mean to fulfill its purpose – at least one will often see broad interpretations and competition and the consumer will enjoy benefit of doubt.
- Criminal law is construed narrowly and defendant enjoys or shoud enjoy benefit of doubt.

Criminal liability in various jurisdictions

- USA and the Sherman Act
  - Limited criminal liability
- Narrow criminal liability
  - France, Greece, Rumenia
- Only bid rigging is criminal
  - Germany, Austria, Hungary, Poland, Italy
- Very little case law and fragmented legal framework.

Criminal liability according to the Icelandic Competiton Act

- Art. 41.a.:
- 1. Any employee or director of an undertaking or association of undertakings who carries out, incites or gives instructions on collusion which violates Art. 10 and/or 12 and relates to the issues specified in para 2 and 3 shall be subject to fines or imprisonment up to six years.
- 2. The provisions of para 1 apply to the following violations of Art. 10 or 12 by undertakings or associations of undertakings operating at the same sales stage:
  - A. Collusion on prices, discounts, margins or other trading conditions;
  - B. Collusion on restriction or control of supply, production, markets or sales;
  - C. Collusion on sharing out sources of supply or markets, e.g. by region or customer;
  - D. Collusion on the preparation of tenders;
  - E. Collusion on avoiding business with specific undertakings or consumers;
  - F. Provision of information on the matters in subsections A to E.
- 3. The provision in para 1 also applies to collusion between undertakings which has the purpose of avoiding the commencement of competition between undertakings.

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The Supreme Courts Judgement – background facts

- Judgement in December 2016.
- Undertakings H and B are large retailers for building material.
- For 6 months between 2010 and 2011, employees from H and B engaged in regular contact to obtain information on current price of various goods.
- Other conduct also at stake but lets focus on this issue.
- The conduct is therefore information exchange on current prices between direct competitors.

The findings

- The Competition Authority concluded that this information exchange, due to its frequency and scope, had the effect of lessening competition between H and B and so handed out hefty fines.
- Criminal charges where brought against 14 individuals (low level staff, service center, but also sales managers. Not high level management).
- District Court aquitted all defendants but one!
- Supreme Court convicted all defendants but two.

The courts reasoning

- The defendants conduct was deemed to amount to price fixing in the meaning of Art. 41.a. Para 2a.
- Wait a minute ...
- Undertakings conduct that is unlawful according to Art. 10 (Art. 101.1 EU) must either fall in the object box or effect box. Collusion to fix future prices, and information exchange as a means to bring such collusion about, is in the object box.
- But the conduct in question did not evolve around future prices but current prices. Information exchange on current prices falls in the effects box.

Cont.

- In order to establish if information exchange on current prices is anti competitive and hence unlawful you need some economic analysis.
- The undertaking is liable if there are anti competitive effects without any need to prove culpability.
- How is an employee ”on the floor”, who is asked to make several phonecalls to find out current prices from a competitor, able to know that these phonecalls might be viewed as having detrimental effects on competition?

Cont.

- The Supreme court reasoned that according to preparatory notes from parliament, Art. 10 of the Competition Act is to be construed broadly.
- And since Art. 41.a makes a reference to Art. 10, all conduct that has in competition law practice by the Competition Authority been held unlawful, so such conduct is to be held criminally liable.
- The outcome seems to be that instead of only the most serious competition law offences are criminally liable, all conduct can be criminally liable as construed broadly by the Competition Authority.

Final thoughts

- The Supreme Courts reasoning does not hold.
- We have reached a milestone in having the first jugdement on criminal liability in a competition law case.
- But we are left with more questions than answers.
- At the same time the Supreme Court has handed out several convictions to bankers in cases on various economic crimes.
- Many feel that a new line has been drawn where criminal law is construed much more broadly than before.
- Example on “mandatsvig” and “krav om berigelse”