Skating on thin ice: a misleading metaphor

Posted on www.leidenlawblog.nl on June 7, 2013 in Criminal Law and Criminology

The 'thin ice' principle is coined by Andrew Ashworth, based on a quote by Lord Morris stating that "those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he [sic] will fall in." It is used to argue – but not by Ashworth – that individuals who do not know whether their behaviour will be labelled as criminal but who nonetheless take the risk of prosecution, cannot escape liability by pointing at the vagueness of the law. If you knew the ice was thin, it was your own fault if you fell through it. If you didn't know the ice was thin, by the way, it is still your own fault because you could have known. This is the reasoning followed by the European Court of Human Rights and it is one of the reasons complaints about the legality principle are hardly ever successful. Yet in my opinion, the metaphor makes the mechanism sound more reasonable than it really is.

For why is the ice so thin? In the metaphor, thick or thin ice is a neutral, natural state of things, whereas a clear demarcation of what behaviour is tolerated and what not in society is not a random condition, but the responsibility of the legislator. Rules must be drafted that are clear enough to make the imposition of a sanction at least objectively foreseeable. Admittedly, demarcation problems cannot entirely be eradicated as the use of language comes with vagueness and ambiguities. But the individual bears no responsibility for legislation, nor can he exert direct influence on its formulation. If even with the help of lawyers, he is unable to determine whether certain conduct is forbidden under the law, the law cannot guide his conduct. Passing the risk of vagueness on to the citizen causes a chilling effect, as in cases of uncertainty he may not act. This may contribute to general deterrence, but it also reduces liberty more than is necessary. If the legislator creates thin ice, then there will be less room for skating.

It might be undesirable to state that all conduct of which it is uncertain whether it might lead to the imposition of a penalty, is permissible. If the first one to fall through the ice is rescued, i.e. is acquitted because of the lack of clear provision prohibiting the behaviour, others will no longer be deterred by the law. Either it should be possible to obtain an authoritative interpretation of the provision from a court beforehand, or it should be possible to excuse the individual because of a mistake of law. The first one who falls through will be rescued, from there on there will be a sign denoting the exact spot where skaters will fall in.

The European Court of Justice might decide in its expected judgment in the Schenker case (C-681/11) whether such thin ice principle applies in EU competition law. Advocate General Kokott, always keen to take op some fundamental issues, argues in her conclusion for the acknowledgment of the principle of guilt in the context of competition law. Enterprises can make an excusable mistake of law. But, in the case where specialised lawyers, informed on all the relevant facts, giving a detailed legal advice cannot reach a conclusion whether conduct is permissible or not, the enterprise acts at its own risk. I hope that if the CJEU is to accept a guilt principle underlying competition law, it will show the virtue of self-

restriction. Clear legislation is not an individual right that can be forfeited, a legal basis for the impositions of sanctions is no less than the core of the Rechtsstaat.