

Please Be Careful

The spread of Europe's precautionary principle could wreak havoc on economies, public health, and plain old common sense.

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Killer cranberry juice? Toxic corn flakes? Hazardous energy drinks? Only under a loose concept known as the precautionary principle, which has swept across Europe.

This precautionary principle gives regulators broad authority to err on the side of safety and puts the burden of proof on the proponents of a technology to prove its safety. The European Union officially adopted the precautionary principle in 1992 as a binding legal requirement for all health, safety, and environmental regulatory decisions. Most recently, the French Parliament in February incorporated it into the French national constitution.

The concept of the precautionary principle may sound relatively innocuous. Who can argue against being safe rather than sorry? But the idea is flawed in theory and practice, and the enshrinement of the precautionary principle sets Europe down a path that will wreak havoc on the economy and public health of not only itself but also its trading partners.

For example, the European Union and its member nations for the past six years relied on the precautionary principle to justify a de facto moratorium on the approval of any new genetically modified foods—a moratorium that has only recently, slowly, and grudgingly begun to be relaxed. Even though its own scientific advisers had found that genetically modified foods have no

known risks and are probably safer than conventional foods, the European Union prohibited genetically modified foods based on the precautionary principle.

The U.S. government says that this EU ban costs the United States \$300 million per year in lost food exports, and it has filed a legal action against the moratorium under international trade laws. The World Trade Organization is expected to issue an initial ruling by the end of this year.

FLAWED BY DEFINITION

More generally, the precautionary principle suffers from at least three major intellectual flaws.

First, there are dozens of formulations of the principle promulgated by regulators, courts, academics, and nongovernmental organizations in the European Union and elsewhere. These formulations differ in important details, such as whether and how costs should be considered, whether all risks or only “serious and irreversible” risks raise concerns, and what steps a product manufacturer must undertake to satisfy the principle. There is no single or official version of the precautionary principle.

Yet the European Union purports to apply “the” precautionary principle. The Treaty of the European Union, as amended in 1992, states simply that “community policy on the environment . . . shall be based on the precautionary principle.” The ambiguity resulting from this failure to specify which version of the principle is to be applied opens the door to its arbitrary application.

Second, most versions of the precautionary principle fail to give adequate weight to scientific evidence or consideration of costs and trade-offs. Some precaution is prudent and indeed essential for all environmental, health, and safety regulation. But too much precaution, especially if it ignores the financial costs, opportunity costs, and risk trade-offs of excessive regulation, can result in unreasonable decisions that do more harm than good.

Finally, the precautionary principle provides no limits on the application of precaution, in that it provides no risk targets or safe harbors that could exempt a product from further precautionary action. As such, the principle could theoretically be applied to prohibit any or every product or activity, since it is impossible to prove zero risk for anything. Yet, obviously, the precautionary principle will not be invoked to ban every product.

So it ends up being applied in an unprincipled and arbitrary manner. In some cases, economic protectionism seems to be the deciding factor; in others, officials appear to be bowing to irrational public fears.

ARBITRARY AND CAPRICIOUS

The precautionary principle has already unleashed a wave of absurd and arbitrary risk decisions since the European Union adopted it in 1992.

We recently analyzed more than 60 decisions by EU courts in the 1995-2004 period, in which the precautionary principle was cited. (The results are explained more fully in our 2004 book, *Arbitrary and Capricious: The Precautionary Principle in the European Courts*.) We found that despite using the precautionary principle to decide several important cases, the EU courts failed to define or articulate the specific requirements or meaning of this principle. They simply invoked it as a wild card that justified whatever decision they wanted to make.

In some cases the courts acted quite sensibly to overturn regulatory decisions by individual nations where the precautionary principle lacked any scientific justification. For example, Denmark relied on the precautionary principle to ban cranberry-juice drinks because the added vitamin C could potentially be harmful to some unusually susceptible individuals. The EU Court of First Instance initially upheld this ban, writing that “a plausible public-health risk is enough, according to the precautionary principle.” But the appellate European Court of Justice overturned the ban in 2003, holding that, notwithstanding the precautionary principle, an EU member nation that seeks to ban a product must demonstrate a “real risk” that is “sufficiently established on the basis of the latest scientific data.”

Similarly, an EU court in 2001 overturned a decision by Norway to ban corn flakes fortified with several essential vitamins—a ban that the Norwegian government had justified under the precautionary principle because “the fortification in question might be a health hazard when eaten in uncontrollable and unforeseen amounts.” Yet another court decision in 2004 overturned a regulation by France banning caffeinated energy drinks because the caffeine could potentially harm pregnant women. The courts concluded that these regulations based on the precautionary principle were unjustified departures from reasoned decision-making that lacked any credible scientific support.

NO FAIR NOTICE

Certainly the EU courts have not always seen through weak precautionary principle arguments, choosing instead to join regulatory agencies in applying the principle in unreasonable ways.

For example, the Court of First Instance in 2002 used the pre-

cautionary principle to uphold the EU ban on using virginiamycin—an antibiotic widely sold by Pfizer—in animal feed even though the product had been used for 40 years without showing any signs of danger. The court’s opinion started reasonably, stating that even under the precautionary principle, the European Union’s proposed feed ban must be based on “as thorough a scientific risk assessment as possible” to ensure that regulations are “founded on objective and sound scientific findings.” But the court then found that the ban was justified by a risk assessment made by a scientific advisory committee, even though that committee had “firmly” concluded that there would be no risk from the continued use of virginiamycin while further studies on the safety of the antibiotic were completed.

The court held that under the precautionary principle, the European Union was justified in departing from the expert scientific opinion “on the ground that it was in the interests of human health protection.” The perplexing outcome of this case: While EU regulations require a valid, scientific risk assessment, the European Union can adopt a regulation directly contrary to the conclusions of that assessment by invoking the precautionary principle.

In another case, the European Court of Justice in 2000 held a company criminally liable for producing a hazardous waste that did not even meet the European Union’s own regulatory criteria for a hazardous waste. Although the applicable EU rules explicitly stated that a company could be held liable only for hazardous wastes that met the regulatory criteria, the court decided that the precautionary principle justified ignoring statutory construction, due process, and fair-notice concerns. The court’s decision upheld the opinion of its advocate general, who argued that “determining in advance and in a limitative manner the circumstances requiring the intervention of public authorities to avert a specific risk to the environment” would be contrary to the precautionary principle.

In still other cases, EU courts dismissed the precautionary principle as an insignificant and irrelevant provision that added nothing to the pre-existing statutory requirements. For example, in one 2001 decision rejecting France’s attempt to block imports of British beef based on fears of mad cow disease, the European Court of Justice stated that France’s invocation of the precautionary principle to justify its import ban “added nothing” to its argument.

In short, depending on the inclinations of individual judges, the precautionary principle can vary anywhere from an absolutist, extreme measure that mandates zero risk to an empty concept that has no substantive effect on decisions.

OPEN TO IRRATIONALITY

Thus, the track record of the precautionary principle in Europe is not good. Given its inherent flaws and ambiguity, the principle cannot be sustained in the long run. As the EU courts’ advocate general warned in one opinion, “The precautionary principle has a future only to the extent that, far from opening the door wide to irrationality, it establishes itself as an aspect of the rational management of risks, designed not to achieve zero risk, which everything suggests does not exist.”

Yet despite this troubling empirical record, there seems to be

no letup in the proliferation of the precautionary principle around the world. Courts in Canada, India, Australia, and New Zealand have recently endorsed this principle. Several international environmental treaties, such as the Stockholm Convention on Persistent Organic Pollutants, expressly incorporate the precautionary principle.

San Francisco recently became the first U.S. city to officially adopt the precautionary principle, requiring by ordinance that “All officers, boards, commissions, and departments of the City and County shall implement the Precautionary Principle in conducting the City and County’s affairs.” Several other U.S. cities are reportedly considering following suit.

Decisions about regulating risks involve a complex interaction of science, public policy, values, economics, incentives, precautions, and uncertainty. Attempting to replace the admittedly difficult and messy steps needed to reach the best possible risk decisions with a simplistic slogan like the precautionary principle is inconsistent with fundamental tenets of democracy. The inherent ambiguity and arbitrariness of the principle give regulators unfettered discretion to adopt unreasonable regula-

tions, contrary to the greater principle that we have a government of laws, not men.

The precautionary principle is an open invitation for nations to impose protectionist restrictions on trade, for regulators to write burdensome rules based on bias or emotion, and for companies to lobby for unfair restrictions on their competitors. Moreover, because the principle does not provide a meaningful foundation for making risk decisions, the true basis for these decisions is kept hidden, undermining the transparency and public accountability critical to democratic government. In short, the rapidly proliferating precautionary principle is bound to inflict a lot more damage around the world before it finally and inevitably collapses upon itself.

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