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Communication on the Precautionary Principle: Is It Really Necessary?

From The Board

Several weeks ago the European Commission published a Communication on the precautionary principle.[1] Although this principle is only mentioned in the EC Treaty in the context of the environment paragraph (Article 175, para. 2 states that Community policy on the environment shall be based on the precautionary principle) it has a broader significance in Community law. It means that if there is a strong suspicion that a certain activity may have harmful consequences, it is better to act before it is too late rather than wait until scientific evidence is available which incontrovertibly shows the causal connection. In other words the principle of precaution may therefore justify action to prevent damage in some cases even though the causal link can be established only upon the basis of preliminary and tentative scientific evidence.

The significance of this principle in the area of the protection of health and life became apparent during the BSE crisis. The ECJ then ruled on Community measures restricting trade of British beef by arguing that, 'where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent'.[2] The ECJ allowed the Community institutions to exert their policy discretion to regulate the issue and is only willing to intervene if it can be proven that 'the measure is *manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue'. More recent case law of the CFI regarding the legality of a directive prohibiting the use of beta-agonists in stockfarming (clenbutorol) underlined the significance of the precautionary principle, even without mentioning the principle in so many words.[3]

The precautionary principle is not only reflected in the case law of the ECJ, but examples of it can be traced in Community legislation also. An excellent example of the precautionary principle in secondary Community law can be found in Directive 98/81 on the contained use of genetically modified

1. COM (2000) 1, 2 February 2000.
2. Case C-180/96 *United Kingdom* v. *Commission* [1998] ECR I-2265, paragraph 99.
3. Joined cases T-125/96 *Boehringer*, n.y.o.r.

microorganisms (GMMs).[4] Article 5(4) states that where there is doubt as to the appropriate classification of GMMs, the more stringent protective measures shall be applied unless sufficient evidence, in agreement with the competent authority, justifies the application of less stringent measures.

It is quite clear that the precautionary principle plays an important role in balancing trade objectives against the wish to protect health, life and the environment. *In dubio*, community legislation restricting trade with the aim of pursuing those objectives must be regarded lawful.

The precautionary principle does not only allow the Community institutions to take the necessary precautionary measures: to a large extent, and in absence of Community legislation, the Member States are allowed to do the same thing. It has been steady case law of the ECJ that the national authorities are allowed to decide on the level of protection that they deem necessary to protect public health.[5] Internationally the precautionary principle seems to be getting more acceptance also. Just a few days before the Commission published its communication, the EC concluded the so-called 'Cartagena Protocol on Biosafety' in which the precautionary principle plays a very important role indeed.[6]

The Commission's Communication on the precautionary principle does not contain many surprising elements. According to the Commission, where action is deemed necessary, measures based on the precautionary principle should be,

- proportional to the chosen level of protection,
- non-discriminatory in their application,
- consistent with similar measures already taken,
- based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis),
- subject to review in the light of new scientific data; and,
- capable of assigning responsibility for producing the scientific evidence necessary for a more comprehensive risk assessment.

The most interesting part of the communication deals however with this all-important question of who is competent to decide on the level of protection necessary? As said before: *internally* within the Community it is accepted that in absence of Community legislation, this decision, which is

4. OJ 1998 L 330/13. Cf. also *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* Case No. C-6/99, n.y.o.r, in which the French Conseil d'Etat has asked the Court for a ruling on whether the precautionary principle permits national authorities to refuse market access for transgenic products, where the Commission has already approved the grant of such an authorisation. The Court said they could not, stating that observance of the precautionary principle was observed in Directive 90/220 itself. Cf. also the Cartagena Protocol on Biosafety, adopted by the EC on 29 January 2000.
5. Cf. for instance Case No. C-395/90 *Commission* v. *Greece* [1993] ECR I-2055.
6. Adopted by the EC on 29 January 2000.

in essence one of a political nature, is to be taken at the national level and not the ECJ. The Commission takes the view that this approach is also to be followed externally; in other words *vis-à-vis* the Community's trading partners in general and WTO members in particular. The Communication states,

> '(T)he Commission considers that the Community, like other WTO members, has the right to establish the level of protection – particularly of the environment, human, animal and plant health, – that it deems appropriate. Applying the precautionary principle is a key tenet of its policy, and the choices it makes to this end will continue to affect the views it defends internationally, on how this principle should be applied' and 'judging what is an "acceptable" level of risk for society is an eminently political responsibility'.

These statements make it quite clear that the Commission has not accepted defeat in the Hormones debate yet! To be continued.

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