Opinion of the Economic and Social Committee on 'Use of the precautionary principle'

(2000/C 268/04)

On 2 March 2000 the Economic and Social Committee decided to draw up an opinion, under Rule 23(3) of its Rules of Procedure, on 'Use of the precautionary principle'.

The Section for Agriculture, Rural Development and the Environment, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 21 June 2000. The rapporteur was Mr Bedossa.

At its 374th plenary session (meeting of 12 July 2000) the Economic and Social Committee adopted the following opinion by 101 votes to two, with one abstention.

1. The Commission communication

1.1. Summary

1.1.1. On 13 April 1999, the Council asked the Commission 'to be in the future even more determined to be guided by the precautionary principle in preparing proposals for legislation and in its other consumer-related activities and develop as priority clear and effective guidelines for the application of this principle'. Among other things, this Commission communication responds to that request.

1.1.2. The purpose of the communication is to set out the Commission's intended approach to the application of this principle, both within the European Union and internationally. It also seeks to provide an input to the ongoing debate on the principle, both within the Community and at international level.

1.1.3. The precautionary principle must be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management, risk communication. In the Commission's view, the precautionary principle is particularly relevant to the management of risk. Faced with a situation in which potentially dangerous effects deriving from a phenomenon, product or process have been identified, and preliminary scientific evaluation does not allow the risk to be determined with sufficient certainty, it is up to political decision-makers to judge what is an acceptable level of risk for society. In such situations, decision-makers may invoke the precautionary principle, which may involve a decision to act or a decision not to act.

1.1.4. Where action is deemed necessary, measures based on the precautionary principle must meet a series of conditions, including, among others, proportionality, non-discrimination, consistency and an examination of benefits and costs and of scientific developments.

1.1.5. At Community level, the only legal reference to the precautionary principle is to be found in Article 174 of the Treaty (environment). However, the Commission considers this a more general principle which should be taken into consideration in risk management in the fields of health and consumer safety.

1.1.6. There are more legal references at international level. They are to be found inter alia in the Rio Declaration, the United Nations' Framework Convention on Climate Change, the Convention on Biological Diversity and the Protocol on Biodiversity. Within the WTO, the principle is given practical expression in the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT).

1.1.6.1. In connection with the Codex Alimentarius, a debate is under way, with the active involvement of the Commission, on laying down risk analysis criteria in the food sector, including, among other things, arrangements for use of the precautionary principle.

2. Preliminary comments

2.1. On the eve of the 21st century, risk acceptability requires new types of rules. Fear is generated by danger, but risk is not the same thing as danger. We take a risk, while we can avoid danger. In western culture, the emergence of the risk concept testifies to a profound change in the relationship with danger. We can decide in a completely rational way to expose ourselves to danger or certain dangerous situations. Risk does not equate with fear, but with courage.

2.2. The current situation may be considered in two ways. The contemporary risk indicator is the notion of disaster. The 19th and 20th centuries were preoccupied with the idea of accident. Today, the nature of risks has changed, with a shift from accident to disaster. These include natural and climate-related disasters, technological disasters and, increasingly, disasters with an impact on health.
2.3. It is remarkable to note how far environmental issues now focus on health concerns rather than the defence of nature.

2.4. The change in the nature of risk also has an impact on the nature of damage. Not only is disaster-level damage now uninsurable, but, above all, it is not subject to compensation. This calls into question the principle underpinning the major social pact of the 20th century, namely that an acceptable risk is a risk which can be compensated.

2.5. Risks go beyond the bounds of compensation, but also involve an element of irreversibility. The concept of sustainable development stipulates that nothing should be done which cannot be undone. Nothing we do should be definitively binding on future generations.

2.6. Fear raises the question of social relationships in a society experiencing severe asymmetry in the technologies it deploys. Technology makes relationships unequal; that means that a system of collective bargaining cannot be the point of reference for the technological society. We live in an unequal society in which risk creates asymmetry. The issue of the responsibility — and trustworthiness — of those who handle risk is thus particularly acute.

2.7. The first point to be made here concerns decision-making. The Commission communication asks what constitutes acceptable risk and when a risk can be taken. The key term here is now precaution. Precaution is not the same thing as prevention. A preventive stance requires a measurable risk; prevention relates only to measurable or controllable risks.

2.8. People are asked to exercise precaution when, over and above risks which have to be controlled and measured, they are required to take risks which they cannot yet comprehend but which are likely to be revealed at some future stage of scientific development. Contemporary risk has an extraordinarily long timeframe. Technical safety issues thus give way to issues of ethical security.

2.9. The quest to find an ethical and legal framework for the emerging new world of the 21st century is being conducted — in more and more cases — through the courts, as well as via contemporary attitudes to the risk issue and debates which would benefit from a little scientific rigour.

2.10. Precaution is essential to any risk analysis ‘process’. As part of this process, the precautionary principle is an approach to risk management applied in cases where there is an unknown and potentially highly dangerous risk — pending scientific research findings at a later stage.

2.11. The precautionary principle has three substantive elements:

— Firstly, precaution involves stepping up the drive to boost knowledge.

— Secondly, it means establishing scientific and technological monitoring schemes to identify new knowledge and understand its implications.

— Thirdly, precaution means staging a wide-ranging social debate on what is desirable and what is feasible.

2.12. Confidence can be restored by setting up a watertight system for monitoring knowledge. Scientific-monitoring schemes must seek to identify weak signals. Without the capacity to deal with weak signals, decision-makers can offer only an ‘all-or-nothing’ response. This means, in the current public health climate, that they are likely to take action, since the public, while not calling for zero risk, does demand that information on risk factors be taken into account without delay.

2.13. It is up to the public authorities to create an environment for debate in which the social players can address (i) objective health risk data, (ii) forecasts of the effectiveness of preventive action and (iii) the concerns of the public at large. This social dimension is an integral part of any sound application of the precautionary principle. It is here that the ‘consensus conferences’ come in.

2.14. The value of quantitative risk analysis and cost-benefit analysis schemes must not be overrated. Nor must the figures involved be exaggerated. Risk assessment must be fostered as part of the negotiation mechanism on social issues. Its actual role in society is to provide the bases for dialogue.

2.15. The public needs to know exactly whom to contact on perceived threats. To build up confidence, arrangements must be set in place for this purpose as part of a European mechanism. Such a mechanism — which is social, organisational and scientific — is subsumed in the precautionary principle.

2.16. The advancement of democracy requires new decision-making processes. Decisions will have to be taken on the basis of uncertain and extremely complex data rather than scientific certainties. This is a major volte-face. Subject to this condition, the demand for health security, far from nurturing totalitarian ideas, will help promote democracy.
3. General comments

3.1. The precautionary principle extends what is known under public law as the ‘policing powers’ of the authorities. To this end, the State, which is traditionally in charge of health, safety and order, can and must take measures which run counter to, curb, limit and suspend the right to free expression, demonstration and trade and the freedom to engage in entrepreneurial activity. The precautionary principle seeks to extend these powers of intervention, not as a target per se, but in their practical application.

3.2. This new responsibility has major implications at international level. It enables countries to temporarily suspend their free trade commitments. The precautionary principle gives countries a sovereign right — and makes them the sole arbiter — on matters affecting the safety of their nationals. There is thus a stark contradiction with the EC Treaty.

3.3. The purpose of the Commission communication is to iron out that contradiction: once the principle is recognised as applying in a European and international context, the Commission is seeking to lay down a common definition, so that each country is no longer able to prescribe a definition of its own. It is a way of invoking a public policy exception.

3.4. The precautionary principle is only the State’s responsibility. Under this principle, the State must act in line with certain hypotheses. The precautionary principle also makes the State responsible for abstention from action. Such failure to act jeopardises the State’s own national producers in relation to other EU and non-EU countries, which can then take advantage of the situation. The precautionary principle is a principle of action, not inaction.

3.5. State action will apply to the decision-makers concerned, but it is not up to them to make the first move. That is in any case impossible given the vagueness of the precautionary principle. How can a decision-maker reasonably determine what constitutes a risk of serious damage, an effective and proportional measure or economically viable cost?

4. Legal bases

4.1.1. At European level, the Economic and Social Committee notes that there are as yet few legal bases for a precautionary principle and that case law is still in its infancy.

4.1.2. Explicit and implicit allusion to this principle does not provide a solid base, and the Economic and Social Committee would ask the Commission to submit a concrete, viable case soon.

4.1.3. The Economic and Social Committee agrees that the policy framework is now a matter for political decision-makers and ultimately the courts.

4.1.4. At international level, recognition of the precautionary principle has been a long process, starting with the 1982 World Charter for Nature. Recognition has continued apace in various different conventions, leading to the progressive consolidation of the principle in international environmental law. It has thus become a fully-fledged and general principle of international law.

4.1.5. Under WTO agreements, this law is adapted to the needs of international trade, linking it to environmental protection.

4.1.6. In terms of WTO agreements, the SPS and TBT agreements make it possible to regulate trade in the light of the aims of protection of the public. The SPS agreement covers sanitary and phytosanitary measures to protect human, animal and plant health based purely on scientific grounds. The TBT agreement covers all technical barriers to trade (labelling, standards, composition etc.) Its purpose is to reduce un warranted technical obstacles to trade. The SPS and TBT agreements ensure that the precautionary principle is appropriately enforced in this legal order (WTO) without, however, mentioning it specifically.

4.1.7. The Economic and Social Committee shares the Commission’s view that the EU must be entitled to prescribe an appropriate level of protection within a suitable framework — when this is justified — in all areas, i.e. the environment as well as human, animal and plant health. The EU will thus be widening the stance which it will have to defend at international and multilateral level.

5. Specific comments on the guidelines set out in the communication

5.1. Why the need for guidelines?

5.2. Guidelines are needed in an attempt to provide a fuller picture of this principle. Its application must be dynamic and subject to variation over time and in accordance with circumstances. It is necessary to try (i) to identify the main features of the principle needed to establish increasingly objective data, based on the broadest possible legal information, (ii) to derive, if possible, sound case law and (iii) to arrive at policy orientations.

5.3. The Economic and Social Committee shares the Commission’s view that the precautionary principle has become a general axiom applying, in particular to environmental protection, and gradually being extended to human, animal and plant health.
5.4. Noting that the precautionary principle originated at both national and international level, not least in the WTO agreements, the Economic and Social Committee agrees with the Commission that the European Community has the absolute right to establish whichever level of protection it wishes in the areas covered by this principle. It is particularly important to have arrangements in place for applying the precautionary principle, since this principle will have repercussions on the EU's room for manoeuvre and on the stances it defends at international and/or multilateral level in relation to risk management.

5.5. Two kinds of measures arise out of the use of the precautionary principle:

5.5.1. Decision-makers alone — in this case the appropriate political and/or administrative authority — chose whether or not to act.

5.5.2. The Economic and Social Committee also considers that the precautionary principle can be applied in various different ways, in response, among other things, to sectoral difficulties, without necessarily going as far as to involve the adoption of legal instruments, which may always be subject to judicial review.

6. Implementation

6.1. The communication states that the implementation of an approach based on the precautionary principle should start with an objective assessment of the risks, identifying wherever possible the degree of scientific uncertainty at each stage.

6.2. There is however a fundamental difference between risk assessment and risk management. Risk assessment must be conducted by independent specialist scientists or must at least be open to independent examination. Risk management, on the other hand, is a matter for decision-makers, and it is also up to them to decide whether there is a need for recourse to the precautionary principle and how that principle is to be applied.

6.3. The preventive element of this principle can be reinforced only by:

— making the decision-making process as open and transparent as possible

— educating and communicating in the clearest of terms by way of extremely broad-based consultation.

6.4. In the absence of certainty, the precautionary principle must provide guidance for the decision-making process: in the interests of efficiency and utility, formal risk assessment — together with the analysis of scientific uncertainties — should have a timeframe and be subject to deadlines.

7. The triggering factor

7.1. The communication states that all partners should be involved in the study of various risk management options which may come to light once the results of risk assessment are available and that the procedure must also be as transparent as possible.

7.2. In this way, risk assessment can be made more transparent and assessment quality can be improved by gathering additional knowledge and/or information. It can also help reinforce the credibility and acceptance of risk assessment.

7.3. The triggering factor is likely to be scientific uncertainty, rather than certainty.

7.4. Decision-makers alone determine whether action is to be triggered.

7.5. In the interests of transparency, the options proposed must be clear, accessible and generally understandable; the complete file must be available (risk assessment, scientific data, options taken into account). There must be complete openness except in duly clarified individual cases.

8. Proportionality

8.1. The Commission states that measures based on the precautionary principle must be proportional to the desired level of protection and to the risk to be reduced or eliminated.

8.2. The fact that negative impact often comes to light only after long exposure makes it more difficult to establish cause and effect. Consequently, the precautionary principle must be invoked and applied all the more frequently, not least in cases where the risk is not directly perceptible. In such cases, consideration must be given to the proportionality of measures taken in respect of a risk the potential impact of which may lie in the distant future.

9. Non-discrimination

9.1. The communication states that measures should not be discriminatory in their application.

9.2. The Economic and Social Committee endorses this point on the basis of the objectively warranted principle of treating comparable situations in a comparable way.

10. Consistency

10.1. The communication states that measures should be consistent with the measures already adopted in similar situations or using similar approaches.
10.2. The Economic and Social Committee naturally endorses this point. Precautionary measures must be comparable in type and scope with the measures taken in equivalent fields in which all the scientific data are available.

11. Examination of the benefits and costs

11.1. The communication states that measures based on the precautionary principle must include a cost-benefit analysis in order to reduce the risk to a level acceptable to all concerned.

11.2. It is not possible to quantify adverse consequences for society, human health and the environment in exclusively financial terms or to assess economic and moral impact purely on the basis of a cost-benefit analysis.

11.3. This examination of benefits and costs takes place between the scientific evaluation and the choice of risk management. It comprises cost-benefit analyses and must take account of related non-economic considerations (social and cultural acceptability, organoleptic properties etc.). This examination must in no way impact on the level of protection set by society for its citizens but must be an aid in selecting the best form of risk management for society as a whole.

11.4. Economic cost-benefit analyses must reflect the costs and benefits of risk management arrangements for the European Union as a whole and for each individual socio-economic sector involved in risk management. Costs and benefits must not thereby be measured solely in budgetary terms but must take account of a range of indicators such as employment, competitiveness and markets.

11.5. At the end of this process, the appropriate authority will be in a position to select the risk management option most suited to its political priorities and obligations. The authority should also be aware of the impact of its decision on all the socio-economic players (stakeholders) involved so that, where appropriate, they can be offered compensatory measures under the risk management scheme.

12. The burden of proof

12.1. The Commission states that measures based on the precautionary principle must assign responsibility to the party who must produce the scientific evidence necessary for full risk evaluation.

12.2. The Economic and Social Committee shares the Commission’s view that the clause reversing the burden of proof and placing it on the producer, manufacturer and importer cannot be turned into a general principle. However, the ESC feels that such a reversal of the burden of proof is possible where a predetermined ‘positive’ list is available, inter alia in the case of substances deemed a priori to be dangerous or which may be dangerous at certain absorption levels.

13. Examination of scientific developments

13.1. The communication states that measures based on the precautionary principle must be provisional pending the outcome of research designed to provide missing information and achieve more objective risk assessment.

13.2. The Economic and Social Committee endorses this principle, particularly where more complete scientific research is required to provide the fresh results needed to ensure ongoing objective risk assessment. As it is, further periods of research and development are often needed without entailing long and complicated legal and political procedures.

14. Conclusion

14.1. The Economic and Social Committee is pleased that the Commission intends to establish specific guidelines for the application of the precautionary principle.

14.2. The Economic and Social Committee shares the Commission’s view that it is a matter for political decision-makers to determine whether or not to act, and that action must be triggered on the basis of a codex (set of rules) as described above. The Committee would ask the Commission to clarify the risk analysis procedures and to ensure that the guidelines for applying the precautionary principle fall within a framework which incorporates management systems, interaction among the appropriate institutions and, in particular, the involvement of all the players concerned (stakeholders).
14.3. In conclusion, the Economic and Social Committee feels it is essential for the European Union to reach, if possible, an international consensus on arrangements for applying the precautionary principle.


The President
of the Economic and Social Committee
Beatrice RANGONI MACHIAVELLI

Opinion of the Economic and Social Committee on the ‘Proposal for a European Parliament and Council Decision establishing the list of priority substances in the field of water policy’

(2000/C 268/05)

On 13 March 2000 the Council decided to consult the Economic and Social Committee, under Article 175 of the Treaty establishing the European Economic Community, on the above-mentioned proposal.

The Section for Agriculture, Rural Development and the Environment, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 21 June 2000. The rapporteur was Mrs Sánchez Miguel.

At its 374th plenary session (meeting of 12 July) the Economic and Social Committee adopted the following opinion by 114 votes to one with one abstention.

1. Introduction

1.1. One of the main obstacles to achieving the objectives set out in the WFD (Water Framework Directive) is the presence of increasing quantities of — and ever more diverse — chemical substances in water, posing a serious risk to the balance of eco-systems, the environment and human health. The European Inventory of Existing Commercial Chemical Substances (EINECS) has more than 100 000 entries and is growing yearly.

1.2. Despite the slowness with which risks are assessed, there is increasingly firm evidence that exposure to even small quantities of these substances is dangerous. At the moment there is considerable concern over those substances which act as endocrine disrupters and affect, among other functions, the reproductive capacity of living species, including human beings.

1.3. Accordingly the primary objective of the Commission proposal is to establish a new list of priority substances to replace the list established under Directive 76/464/EEC, in accordance with the proposed WFD.

1.4. The method used for establishing this list combines a procedure known under the abbreviated title COMPPS (combined monitoring-based and modelling-based priority setting) and an open and transparent discussion of the substances or groups of substances selected, culminating in the list of priority substances.

1.5. The objective of establishing a new list is totally justified on account of the crucial role in future monitoring to be played by the WFD, basically because:

1.5.1. In the considerable time which has elapsed since the adoption of Directive 76/464/EEC we have become more knowledgeable — and socially concerned — about the effects of new and historic substances in the aquatic environment, especially those regarded as endocrine disrupters, which are currently being regulated (including the UNEP-POP Convention).

1.5.2. The WFD establishes a ‘combined approach’ requiring harmonised quality standards and substance emission limits to tackle the problems arising from point and diffuse pollution of water bodies. This approach increases the number of substances or groups of substances requiring more inspections and monitoring.