

## **PRECAUTIONARY PRINCIPLE IN THE EU LAW AND THE ITALIAN LAW<sup>2</sup>**

**ABSTRACT:** Precautionary principle is one of those often recurring in environmental policy, but without a univocal definition. The analysis on its application in Europe and in Italy carried out in this paper highlights as this principle, linked to the risk concept, has become one of the main tenets of the overall EU and its member states' policy. It is in fact often mentioned in EU and national regulations, but an important role when deciding on its application is given to Courts, as they are called to judge if it is appropriate or it hides protectionist measures instead.

*Key words: Environmental Law; Precautionary Principle; Risk Management; Community Law; Italian Environmental Law.*

### **I. The precautionary principle – Origin and International Law**

The precautionary principle as underlined by Ferrara<sup>3</sup> and recalled by Butti<sup>4</sup>, is a typical example of that descending process that starts with International Law and overflows into Community Law, and continues down into national legal orders, rules and principles of Environmental Law, which thus find their real multilevel allocation.

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<sup>3</sup> Ferrara R. (2005), pp. 509–555.

<sup>4</sup> Butti L. (2007), p. 15.

The precautionary principle was first recognised in relation to environment protection<sup>5</sup>. The very first legal use of the principle<sup>6</sup> is generally traced back to 1969 Swedish Environment Protection Act<sup>7</sup>. This Act stated that environmentally hazardous activities had to be proved innocent rather than guilty.

At international level, the precautionary principle was first recognised in the World Charter for Nature<sup>8</sup>, adopted by the UN General Assembly in 1982. However, a fundamental step for the universal recognition of the precautionary principle at international level was its incorporation in the principle 15 of the Rio Declaration<sup>9</sup>.

After that, several important UN conventions enshrined the principle, such as United Nations' Framework Convention on Climate Change<sup>10</sup>, the Convention on Biological Diversity<sup>11</sup>, the Cartagena Protocol on Bio-safety<sup>12</sup> and the Stockholm Convention on Persistent Organic Pollutants<sup>13</sup>.

The consolidation of the precautionary principle in international environmental law as a full-fledged and general principle is confirmed by its presence in the World Trade Organisation (WTO) Agreements. The preamble to the WTO Agreements highlights the close links between international trade and environmental protection, recognising to each Member of the WTO the independent right to determine the level of environmental or health protection they consider appropriate and to apply measures based on the precautionary principle, which lead to a higher level of protection than that provided for in the relevant international standards or recommendations<sup>14</sup>.

The precautionary principle is taken into account in the WTO Agreements, i.e. in the Agreement on Sanitary and Phytosanitary Measures (SPS)<sup>15</sup> and the Agreement on Technical Barriers to Trade (TBT)<sup>16</sup>. In particular, the

<sup>5</sup> Common M., Stagl S. (2005), p. 389.

<sup>6</sup> Trouwborst A. (2002), p. 378.

<sup>7</sup> Environment Protection Act, 1969.

<sup>8</sup> UN (1982).

<sup>9</sup> UN (1992). The United Nation Conference on Environment and Development (UNCED) (also known as the Earth Summit) was held in 1992 in Rio, in order to evaluate the progresses made toward sustainable development. It was the largest international conference to date and produced several outcomes, among which the Rio Declaration on Environment and Development, containing 27 non binding statements.

<sup>10</sup> UN (1992).

<sup>11</sup> UN (1992).

<sup>12</sup> UN (2000).

<sup>13</sup> UN (2001).

<sup>14</sup> Source: EC (2000).

<sup>15</sup> WTO. Agreement on Sanitary and Phytosanitary Measures (SPS).

<sup>16</sup> WTO. Agreement on Technical Barriers to Trade (TBT).

Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)<sup>17</sup> clearly sanctions in Article 5(7) the use of the precautionary principle, although the term itself is not explicitly used. This Article states the provisional nature of measures adopted in application of a precautionary principle when the scientific data are inadequate, indicating however that efforts have to be undertaken to find the necessary scientific data. It is important to stress that this provisional nature is not linked to a time limit but to the development of scientific knowledge. Moreover, this Article clarifies the link of the precautionary principle to risk evaluation, leaving however freedom for interpretation of what could be used as a basis for a precautionary principle.<sup>18</sup>

## **II. The EU law and the precautionary principle**

The EU Commission considers that, following the example set by other Members of the WTO, the Community is entitled to prescribe the level of protection, notably as regards the environment and human, animal and plant health, which it considers appropriate. To this end, reliance on the precautionary principle constitutes an essential tenet of the Community policy<sup>19</sup>.

At Community level the first explicit reference to the precautionary principle is in the EC Treaty<sup>20</sup>, and more specifically in Article 174(2). This Article, beside the acknowledgement of the precautionary principle as a pillar of Community policy, also indicates the right of member States to take measures for environmental protection on the basis of this principle, even if provisional and subject to a Community inspection. Moreover, as underlined by Caranta<sup>21</sup>, this Article strikes a delicate balance between economic development and the environment, that can be kept through the precautionary principle.

Relevant as regards the precautionary principle is also Article 95(3) of the EC Treaty, indicating the concerns of the Commission for human health, acknowledged as one of the aim of all Community policies and activities. While in the Article 95(5) it is resumed the right of the member States, already seen in Article 174, to take provisional measures on the basis of the precautionary principle, as well as the due to notify them to the Commission. This last aspect is related, as highlighted by Caranta<sup>22</sup>, to the “Community

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<sup>17</sup> WTO SPS.

<sup>18</sup> Source: EC (2000).

<sup>19</sup> WTO SPS.

<sup>20</sup> EC (2006).

<sup>21</sup> Caranta R. (2007), p. 199.

<sup>22</sup> *Id.*

law ancestral fear of national measures taken for protectionist reasons disguised in public health or similar considerations”. This is well expressed in Article 95(6), establishing that it is up to the Commission to allow – or not allow – derogations to harmonisation measures.

Although the precautionary principle is explicitly mentioned in the Treaty only in the environmental field,

its scope has to be considered much wider and covers those specific circumstances where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection.

In fact the Commission considers that the precautionary principle is a general one which should in particular be taken into consideration in the fields of environmental protection and human, animal and plant health as emerges from EU policy orientations expressed in several documents.<sup>23</sup>

This vision is clearly expressed by the Commission in the Communication on precautionary principle<sup>24</sup>, indicated by Butti<sup>25</sup> as “the most incisive provision of Community Law on this subject”. This Communication, released in 2000, represents an important step in the application of the precautionary principle in the EU, even if this principle has been adopted in the Community even before, inspiring many environmental measures, e.g. those to protect the ozone layer or concerning climate change.

The Commission Communication on the precautionary principle declares four aims: it outlines the Commission’s approach in the use of the precautionary principle, it provides guidelines for applying it, builds a common understanding of how to assess, appraise, manage and communicate risks that science is not yet able to fully evaluate, and is also meant to avoid unwarranted recourse to the precautionary principle, as a justification for disguised protectionism. The Communication also underlines that that expressed in this document is not to be considered the last Commission’s word on the topic, whereas it tries to provide an input to the ongoing debate on this issue, both within the Community and internationally.

What is interesting to note is that, despite the just mentioned declared Communication aims, one of the reasons to apply the precautionary principle, clearly expressed by the Commission in the introduction of the document, is

<sup>23</sup> EC (2000).

<sup>24</sup> *Id.*

<sup>25</sup> Butti L. (2007), p. 19.

the rising public awareness of the potential risks to which the population or their environment are potentially exposed, but in many cases before the scientific research is able to fully illuminate the problems. This new awareness demands the decision-makers to put in place preventive measures to eliminate the risk or at least reduce it to the minimum acceptable level. As underlined by Caranta<sup>26</sup> this sentence could be interpreted as if the Commission were lamenting the rise in public awareness as reason why to apply the precautionary principle.

But, when to apply the Precautionary Principle?

The Communication clarifies that recourse to the principle presupposes first of all the identification of potentially negative effects on the environment, the human, animal or plant health, resulting from a phenomenon, product or process. The identification of these negative impacts has to be followed by a scientific evaluation of the risk which because of the insufficiency of the data, their inconclusive or imprecise nature, makes it impossible to determine with sufficient certainty the risk in question. According to this, we can say that, as expressed by Tallacchini<sup>27</sup> and recalled by Butti<sup>28</sup>, “the precautionary principle brings environmental law to regulation of inexact science”.

In other words, the precautionary principle is relevant only in the event of a potential risk, even if this risk cannot be fully demonstrated or quantified or its effects determined, aspect that can under no circumstances be used to justify the adoption of arbitrary decisions, as clearly stated in the Communication itself<sup>29</sup>.

Hence, according to the Communication, application of the precautionary principle is part of risk management when scientific uncertainty precludes a full assessment of the risk and when decision-makers consider that the chosen level of human, animal and plant health protection may be in danger. However, the Communication also underlines as reliance on the precautionary principle does not mean searching for zero risk, but for a high level of health and safety and environmental and consumer protection. This clarification is given to avoid that the principle of precaution were seen as a tool to stop all innovations.

Beside, the Commission acknowledges that assessment of risk is not always possible, but it establishes that all effort should be made to evaluate the available scientific information. The EC Communication faces also

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<sup>26</sup> Caranta R. (2007). p. 199.

<sup>27</sup> Tallacchini M. (1999), pp. 57–100.

<sup>28</sup> Butti L. (2007), p. 19.

<sup>29</sup> EC (2000).

the uncertainty issue, establishing that an assessment of the potential consequences of inaction and of the uncertainties of the scientific evaluation should be considered by decision-makers when determining whether to trigger action based on the precautionary principle.<sup>30</sup> The Commission also invokes transparency for the analysis procedure as well as the involvement of all interested parties to the fullest extent possible in the study of the various risk management options that may be adopted.

Moreover, the Communication establishes the general principles for the application of the precautionary principle, clarifying that they should be applied to all risk management measures. These general principles include proportionality, non-discrimination, consistency, examination of the benefits and costs of action or lack of action and examination of scientific developments.

As stated by Mangano<sup>31</sup> and recalled by Caranta<sup>32</sup>, these are some general principles of Community law, all of them in principle capable of restricting the scope or the effects of the same measures.

The first principle, *proportionality*, implies that measures should be proportional to the desired level of protection. The Communication also underlines that risk reduction measures should include less restrictive alternatives which make it possible to achieve an equivalent level of protection. Again the purpose of this specification is to avoid stopping innovations as well as to promote economic development. The measures should also be *non discriminatory* in their application, *i.e.* comparable situations should not be treated differently and different situations should not be treated in the same way, unless there are objective reasons for doing so. Moreover the measures should be *consistent* with those already adopted in similar circumstances or using similar approaches. Finally, the measures adopted presuppose *examination of the benefits and costs* of action and lack of action. This examination should include not only an economic cost/benefit analysis, but also other analysis methods, such as those concerning efficacy and the socio-economic impact of the various options. In fact, the decision-maker should be guided not only by economic considerations, but by all those considered as priority ones by the population.

This overview of the Communication contents highlights that even in this document a definition of the precautionary principle is not given, but this is because, as stated in the Communication itself, it is for the decision-makers and ultimately the courts to flesh out the principle. In other words,

<sup>30</sup> *Id.*

<sup>31</sup> Mangano R. (2003), p. 401.

<sup>32</sup> Caranta R. (2007), p. 199.

the scope of the precautionary principle also depends on trends in case law, which to some degree are influenced by prevailing social and political values. The Communication however underlines that this situation does not lead to legal uncertainty, as the Community authorities' practical experience with the precautionary principle and its judicial review make it possible to get an ever-better handle on the precautionary principle. This means that, in order to fully understand the use of the principle in the EU, it is necessary to also consider the case law of the Court of Justice and the Court of First Instance, and the policy approaches that have emerged.

As established in the EC Treaty, it is for the Court of Justice to pronounce on the legality of any measures taken by the Community institutions. Review by the Court must be limited to examining whether the institution committed a manifest error or misuse of power or manifestly exceed the limits of its powers of appraisal.

The precautionary principle has been at issue in some judgements by both the Court of justice and the Court of first instance, being invoked in cases testing the legality of both Community and national decisions.

Several cases were reviewed by Caranta<sup>33</sup> that noticed that the precautionary principle is often the ground upon which intervention by Community institutions is justified. In particular, "in the cases where the legality of Community decisions is tested it emerges that the principle of precaution is not a principle against which the validity of a rule or a decision affecting the environment is challenged. Rather, it is an argument to uphold a Community measure which is under challenge." Moreover, "in several cases the precautionary principle has been used as a shield for Community measures rather than a sword against them".

The same review highlights as attempts to challenge Community legislation *inter alia* for infringement of the precautionary principle have failed so far. Here again, the precautionary principle does not fare well as an effective tool for reviewing Community measures and the Community courts are not ready to go beyond marginal review when faced with decisions based on the precautionary principle.

Caranta also notes that the precautionary principle has been used by the Court of Justice as a tool to rebut arguments by Member States claiming they were not infringing the Community law provisions.<sup>34</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Finally, it seems that Member States have not been successful even when they themselves have invoked the precautionary principle to uphold measures which provided for stronger environmental protection. Community courts, probably fearing that national measures taken under the appearance of the principle of precaution may actually disguise protectionist ends, insist that the precautionary principle may be invoked only when there are scientific grounds to doubt of the safety of a given product, such as a GMO<sup>35</sup>.

### III. Italian law and the precautionary principle

The Italian Constitution<sup>36</sup>, entered into force in 1948, has no provision laying down general principles on environmental law, even if in Article 10 it says that “the legal system of Italy conforms to the generally recognized principles of international law”. Only in the Article 9 we find a reference to the need to preserve the landscape<sup>37</sup>, and, in the Article 32, the need to preserve the historical heritage of the country, and to health as a fundamental human right. The need to protect the environment through legal rules was first perceived only in the late '60<sup>38</sup>, but the very big change as concerns environmental law in Italy came from the Community Law.

Italy was one of the six states – the founders of the European Community and it is now a part of the European Union. Therefore, Community provisions represent the higher law in Italy and the Community law must take precedence over domestic law<sup>39</sup>. The 2001 Constitution reform expressly recognised the supremacy of the European law over domestic law and adopted a kind of federal model of distribution of competences among the different government bodies. As clarified by Caranta<sup>40</sup>, under the new Article 117, the competencies of the different governmental authorities are defined. In particular, the national parliament has competence with a reference to a list of subject matters (State exclusive competence); further, it has the power to lay down general principle, to be specified by Regional statutes, in other matters (concurrent State and Regional); the Regions alone have legislative competence in all matters which are not listed as exclusive State or concurrent State

<sup>35</sup> Case C-236/01.

<sup>36</sup> Costituzione italiana, 1948.

<sup>37</sup> Landscape protection have a long tradition in Italy, we find the first laws already at the beginning of the XX century, even if the first one facing the issue systematically is Law n. 1497 of 1939.

<sup>38</sup> Sgubbi F. (1978), p. 739 ff.

<sup>39</sup> Caranta R. (2007), p. 199.

<sup>40</sup> Butti L. (2007), p. 19.



and Regional matters (Regional exclusive competence). The same distribution of competences is established for the implementation of the Community law, with each body appointed to implement directives falling in the area of their legislative competence.

The protection of the environment is listed among the State exclusive competence by the Article 117(2) (s), whereas human health and food regulation are under concurrent State and Regional competences. The problem is that, as highlighted by Caranta<sup>41</sup>, the protection of the environment, given its nature, may lead to rules influencing the most various fields of human activity. For this reason the Constitutional Court has dubbed the protection of the environment as one of the matters of 'diagonal competence'. That is to say that, in principle, the State should set minimal standards for environment protection, each Region being free to enforce higher standards in their jurisdiction. However, in some cases, according to the Constitutional Court, there may exist a compelling need for uniform standards at the national level overriding the power of Regions to set higher standards, and it is up to the Constitutional Court to say when this need is present, and when it is not. This means that, in the end, the level of environmental protection is decided neither by the State nor by the Regions, but by the Court itself<sup>42</sup>.

The Precautionary Principle, as a general principle of the Community law, has entered in both State and Regional legislation. There have been some purely Italian litigations concerning this principle, mainly centred on the minimal distance of sources of electro-magnetic pollution coming from houses, hospitals and schools. This is one of the cases in which the Constitutional Court firmly shuts the door to any application of the precautionary principle by local authorities, stating that this is one of those cases for which there exists a compelling need for uniform standards at the national level overriding the power of Regions to set higher standards<sup>43</sup>. This position reminds those of the EU Court observed in the litigations between Member States and the EU.

Coming to the use of the precautionary principle in the Italian regulation, it has expressly been cited in some sectors for several years. In particular, as reported by Merusi and Manfredi<sup>44</sup>, the principle was mentioned for the first time in the Italian law in the Law of 23rd February 2001, No. 36, on electro-magnetic pollution<sup>45</sup>. This law includes, among its objectives, the one

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<sup>41</sup> *Id.*

<sup>42</sup> Colavecchio A. (2005), p. 109.

<sup>43</sup> Caranta R. (2007), p. 199.

<sup>44</sup> Merusi (2001), p. 221; Manfredi G. (2001), p. 164.

<sup>45</sup> Legge quadro sulla protezione dalle esposizioni a campi elettrici, magnetici ed elettromagnetici

concerning of “promoting scientific research for the assessment of long term effects and for activating precautionary measures to be adopted when applying the precautionary principle”.

In 2004, Italian Parliament introduced a Law giving the government the power to adapt, streamline and bring together all existing legislation in environmental matter<sup>46</sup>. The Article 1 (8) (f) 1 of 15th December 2004, No. 308, lists the Precautionary Principle as one of many Community law principles – along with the Principle of Prevention and the rule Polluter Pays – which the government has to abide to when drafting the “code”<sup>47</sup>. This Law was implemented by the Decree No. 152/2006, containing provisions on environmental matters. As underlined by Butti<sup>48</sup> in this decree the precautionary principle was solemnly upheld by the Italian legislation for the first time (Art. 3-ter).

The Decree is divided into six parts; first comes a very short part containing several general provisions, one of them claiming the code was drafted according to the Community law. The following five parts provide for procedures to measure environmental impact, to the protection of land and water, to waste control, to air pollution, and finally to liability for environmental damages respectively. In general, the Decree mentions the precautionary principle repeatedly and expressly, and not only referred to regulations concerning environmental damage. The Art. 301 is specifically devoted to the implementation of the precautionary principle, defining limits and conditions of the application of this principle, providing, as noted by Butti<sup>49</sup>, indications that largely agree with the Commission Communication. In particular, “the application of the principles concerns such a risk that can be identified after a preliminary objective scientific evaluation” and the measures have to be “proportional to the chosen level of protection”, “based on examination of the potential benefits and costs”, and “subject to review in the light of new scientific data”. The Precautionary Principle is also expressly mentioned within the regulations on waste, when it refers to waste management.

In the same Decree, the principle is implicitly invoked in other regulations, e.g. those which generally refer to Community principles in environmental

<sup>46</sup> Legge 15 dicembre 2004, n. 308, “Delega al Governo per il riordino, il coordinamento e l’integrazione della legislazione in materia ambientale e misure di diretta applicazione”.

<sup>47</sup> Art. 1 (8) (f) 1. 15 dicembre 2004, n. 308 “affermazione dei principi comunitari di prevenzione, di precauzione, di correzione e riduzione degli inquinamenti e dei danni ambientali e del principio “chi inquina paga”.

<sup>48</sup> Butti L. (2007). p. 19.

<sup>49</sup> *Ibid.*

laws as well as in those which apply to situations likely to generate a “significant risk of harmful effects”<sup>50</sup>.

From this brief overview appears quite clear that the direction of recent Italian legislation with reference to the precautionary principle seems to be inspired by a substantial conformity to the criteria indicated in the Commission Communication. It is also true that in Italy too the precautionary principle is without a doubt one of the fundamental criteria for the interpretation and application of all national sectoral legislation in environmental matters today, as well as in regional legislation.

#### **IV. Conclusions**

The Precautionary Principle has become one of the main tenets of environmental law and policies. This is also true in the EU and its Member States’, where we can find the principle explicitly or implicitly expressed in several directives and in their implementation in national regulations. However, there is not a univocal definition of the principle, the task to flesh out the principle is given to decision-makers and ultimately the courts. The latter are asked to judge about the appropriateness of the application of the principle both at the EU and national level, so playing an important role. The main fear of the Community seems to be that this principle could be used to justify protectionist measures and the decisions made by the Courts in some cases seem to be linked to it.

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### ***Princip predostrožnosti u pravu EU i u italijanskom pravu***

#### ***R e z i m e***

Princip predostrožnosti je jedan od onih principa koji se često pojavljuju u politici zaštite životne sredine, ali bez opšteprihvaćene definicije. Analiza primene principa predostrožnosti u EU i Italiji načinjena u ovom radu ukazuje na to da ovaj princip, koji je povezan sa konceptom procene rizika, postaje nezaobilazan u svim politkama zaštite životne sredine EU i njenih država članica. Činjenica je da se princip predostrožnosti često pominje u propisima

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<sup>50</sup> *Id.*

EU i u nacionalnim propisima država članica EU, ali, kad je reč o primeni tog principa u praksi, odlučujuća je ipak uloga sudova jer su oni pozvani da donesu konačnu odluku o tome da li je njegova primena odgovarajuća ili, umesto toga, krije u sebi protekcionističke mere.

*Ključne reči: Zakon o zaštiti životne sredine; princip predostrožnosti; upravljanje rizikom; Zakon Evropske zajednice; Zakon o zaštiti životne sredine koji se primenjuje u Italiji*

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