

Briefing on the precautionary principle

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The precautionary principle is a central component of good environmental law and sensible risk management. It provides that when there is a risk of harm, we should act with care and caution. The legal principle is well established in EU and international environmental law. The underlying rationale has its roots in common sense, prudent thinking and scientific pedigree.

The benefits of the precautionary principle can be seen by considering a number of occasions in the past where precaution either was or was not exercised. For example, precaution was instrumental in reducing CFC usage (and so arresting precipitous damage to the ozone layer) and also supported elements of the neonicotinoid ban. A more thoroughly precautionary approach would have reduced the damage caused by asbestos, DDT and invasive species.

Despite this, the precautionary principle is under attack from a number of angles by those who seek deregulation and apparently gung-ho attitudes towards environmental hazards. Its opponents are trying to weaken it in three ways: by misrepresenting its scientific credentials, by redefining its 'proportionate' application and by adopting a principle of 'innovation' to counter it.

The precautionary principle is complex and it is impossible to fully explore all its contours and applications in a few sentences. It is possible that its precise application will vary in different policy areas. There is, therefore, value in a Principles Policy Statement that provides greater detail and clarity for decision makers as to what is required in various situations. This policy statement must be consistent with existing EU and international law, including retained case law. This briefing sets out some further parameters that the policy statement must also lie within.

Precaution, uncertainty and science

Precaution is not the same as prevention. Prevention arises when risks are well understood and it is unambiguous what action can be taken to prevent unacceptable environmental harm. Precaution is activated when there is enough uncertainty, complexity or ignorance that it is relatively unclear what (if any) action (including preventative action) should be taken.

A consequence of this difference is that precaution, as a principle, allows greater anticipation of potential risk than prevention. But it also requires a more nuanced consideration of scientific evidence and of what actions to take. Thus, while precaution clearly does mean that a public authority can (at times) be required to act before any adverse effects have become apparent, it does not mean that all activity affecting the environment must be banned.¹

A sound approach to scientific knowledge and its utilisation is thus central to precaution. We must endeavour to further our understanding of complex ecological pathways, and we must also be honest and pragmatic about scientific uncertainty and limitation. 'Limited evidence of harm' must not be misinterpreted as 'evidence of limited harm'.

There are some who claim that the precautionary principle needs to be more 'science-led'. However, those who decry the precautionary principle as 'unscientific' are misunderstanding the role that science plays in both policy making in general, and with respect to precaution in particular. Robust scientific research cannot always prove actual or potential harm one way or another: in such cases results are uncertain (or not yet available), they are not unscientific.

Independent, objective and transparent scientific evaluation must be undertaken to the highest standard so that both risks and uncertainty about those risks can be openly identified. The need for good quality scientific knowledge is indisputable. But science (and its interpretation) cannot be the sole guide to public policy. Once a potential harm has been identified, deciding on the response hinges also on political and legal considerations. This self evident truth has been recognised by the Court of Justice of the European Union (CJEU) in noting that there is both a 'scientific component' and a 'political component' to public authority decision-making.^{2,3}

The precautionary principle guides decisions of law and policy, not of scientific research and analysis. It requires good science to be effective, but it also requires sound legal and political judgement in order to function. It is simply a category error to think that science as an independent domain could be relied on to make those latter judgements.

Framing precaution acting proportionately

Proportionality is a general principle of EU law requiring that action taken does not go beyond what is necessary to achieve the objective(s) aimed for. In particular, action must not pose an unnecessary burden on those affected by it or interfere too extremely with fundamental rights. Proportionality provides a framework to guide action when there are competing demands on decisions being made by public bodies.

Proportionality applies broadly to many areas of law, including environmental law. For example, it is also of relevance to the 'polluter pays principle'. However, the relationship between precaution and proportionality will be considered here, noting that they interact rather than compete.⁴

First, it is essential to establish when proportionality bites. Decision makers cannot decline to apply the precautionary principle because of proportionality. Rather, they must always apply precaution: it is the decisions they take as a result that must be proportionate. Proportionality informs what actions should be taken once a

potential hazard has been identified. In this sense, its effect is that precaution means neither a zero risk approach nor ignoring early warnings, as recognised by the European Commission:⁵

In some cases a total ban may not be a proportional response to a potential risk. In other cases, it may be the sole possible response to a potential risk.⁶

Determining a proportionate response requires a more holistic approach than narrow economic cost-benefit analyses. Indeed, the 'cost effective' language found in some versions of the precautionary principle is misleading as it is unnecessary: the drive for cost effectiveness has no special meaning to be elucidated within precautionary action.⁷

The second framing issue is that of objectives. Proportionality works as a means of assessing action with respect to a defined objective, meaning that the establishment of environmental protection as a clear and legitimate objective of EU law and policy is key. Because it has been so established, environmental protection (including taking precautionary measures) takes precedence over economic considerations, when doing so is proportionate to the environmental objective pursued.

The importance of the objectives can be seen by considering the application of precaution to specific legal requirements such as those in the Habitats Directive. Here, the strict environmental objective found in the preamble and Article 2(1) of the directive requires and has resulted in a stricter approach to the precautionary principle than in other policy areas. In addition, the legislation only allows certain other considerations to be taken account of after all possible harm has been considered, making it clear when and how proportionality is relevant.^{8,9,10,11}

To retain current legal structures and to promulgate environmentally sound law, the Environment Bill must specifically enshrine a high level of environmental protection as a legitimate formal objective of government action. Furthermore, it should enshrine additional appropriate environmental aims, objectives, principles and rights and insist that action by public bodies be compatible with them.

A developed version of proportionality will render it possible for action by public authorities to be deemed disproportionate if it has too great a negative impact on the environment or if it fails to be consistent with environmental aims, objectives, principles and rights.

Without the right legal framework, it would be possible for proportionality to be idly deployed as a tool to deprioritise environmental measures by declaring them disproportionate. Instead, it must be used to ensure that environmental matters are properly accounted for in decision making.

It is, therefore, possible and, indeed, desirable for a sensible and workable version of proportionality to be continued in domestic law. It can help frame difficult and complex decisions of prioritisation and legitimacy, but cannot (must not) be used as an excuse for ditching or diluting the precautionary principle.

Undermining precaution: the innovation principle

Calls have been made recently for a new principle to be adopted: another one that interacts with and defines some limits to the precautionary principle. This is the so-called 'innovation principle', which is normally stated as:

'Whenever legislation is under consideration its impact on innovation should be assessed and addressed.'

Worthwhile innovation itself is, of course, a valuable objective. However, the idea that an innovation principle is needed to counter the precautionary principle is both misguided and highly dangerous. Properly applied, the precautionary principle simply assures that proper weight is given to environmental risks and concerns.¹²

Precaution does not stifle innovation, but rather guards against damage being caused by new products or processes before it is too late to fix. Despite the numerous claims otherwise, there are only four well documented examples (all from the USA) of precautionary action being taken which later turned out to be unnecessary. This compares with 88 cases being claimed as 'false positives' and the dozens of examples when hindsight shows a more precautionary approach would have been beneficial. Furthermore, the European Environment Agency found that these four false positives "actually sparked innovation within industry and within government".^{13,14,15}

Precaution, in fact, drives innovation: newer, safer, better products are developed thanks to the precautionary principle.

Sound and sensible science – and realism about uncertainty – are central to the proper exercise of the precautionary principle. As is clear from EU guidance and global application of the precautionary principle, it does not aim at zero risk. Rather, it provides a framework for guiding action in the light of the unavoidable risks and uncertainty that exist in reality. Again, it is clear that precaution is far from 'unscientific', but instead deftly locates the proper role of science in decision making.

Finally, it should be clear that an 'innovation principle' is not an environmental principle: its aim is not to contribute to the improvement of environmental protection. Its inclusion within a set of environmental principles is, therefore, unwelcome. A poorly designed 'innovation principle' risks undermining the health of people and nature by weakening and confusing well established and highly

regarded principles such as the precautionary principle and conflating the purpose of environmental protection measures.

Deploying precaution: relevant actors

Precaution is relevant to both the formation and implementation of law and policy. A wide range of actors are involved in these different stages: it is, therefore, important that all public bodies are required to act with precaution, when it is relevant to do so.

Defra's recent consultation document, and the Withdrawal Act, suppose that the environmental principles need only apply to government ministers. This restrictive vision of the role of the environmental principles is problematic and confusing, especially as government has signalled that its intention is for the principles to 'trickle down' to other public bodies.

Given the consultation's own acknowledgement that the actual delivery of policy measures is more commonly performed by arm's length bodies, the simplest way to assure that the principles retain their function is by placing a duty on them in the Environment Bill.¹⁶

This would not be radical and would ensure that the current position is replicated. As long ago as 1994, the government recognised that "the principle can be applicable to all forms of environmental damage that might arise; nor should it apply only to actions of government". Numerous domestic bodies in the UK currently rely on the precautionary principle to help guide their decision making. From Environment Agency [guidance](#) on groundwater protection to a Forestry Commission [policy statement](#) on enforcement to Natural England's [standards](#) for habitats assessments, the precautionary principle is used to guide the activities of public authorities.¹⁷

The forthcoming Principles Policy Statement is the place to give clarity to these authorities by confirming how they should be acting in various situations. A clear and detailed policy statement will help provide certainty, clarity and even application of the law.

Conclusion

Precaution is one of the most important environmental principles: it is integral to good environmental management, based on respect for robust scientific methodologies. But it is also subject to frequent misrepresentation and challenge.

The Environment Bill and accompanying Principles Policy Statement create an opportunity for the government to demonstrate its green claims by legislating a strong and meaningful precautionary principle that is not subject to watering down

in its definition or application. Creating a proper legal framework for precaution to operate in requires:

- a strong, but appropriately flexible, definition of the precautionary principle in the Principles Policy Statement;
- proper understanding of the valuable role science plays in public decision making, including deploying science correctly in the Principles Policy Statement;
- correct application of proportionality that is not simply an excuse to dismiss environmental protection;
- strong environmental aims, objectives, principles and rights in legislation;
- duties on all public bodies to act with precaution; and
- setting aside calls to create an unnecessary and dubious innovation principle.

For more information, please contact

Ruth Chambers, senior parliamentary affairs associate, Greener UK Unit

e: rchambers@green-alliance.org.uk

t: 020 7630 4524

Endnotes

1. Pfizer v Council Case (T-13/99) [139], [444]
2. Nor does science alone determine how people and businesses act with caution: see Nigel Haigh, 2016, *EU Environmental Policy*, Routledge-Earthscan, 156, 159
3. See press release No 71/02, 'Judgments of the Court of First Instance in Cases T-13/99 and T-70/99', <https://curia.europa.eu/en/actu/communiqués/cp02/aff/cp0271en.htm>
4. Futura Immobiliare v Comune di Casoria (C-254/08). See Maria Lee, *EU Environmental Law, Governance and Decision-Making* (2nd edn, Hart 2014) 13
5. When its trigger is met (ie when there is a possibility that a product or activity will harm the environment and/or human health)
6. Communication from the Commission on the precautionary principle COM(2000) 1, p17
7. Bayer Syngenta v Commission (T-429/13 and T-451/13) [458-460]
8. As done by Articles 114(3) and 191 TFEU
9. Bayer Syngenta (n7) [106], [323], [505]
10. Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (C-127/02) [39-45]
11. See Articles 6(3) and 6(4) Habitats Directive and Regulations 63, 64 and 68 Conservation of Habitats and Species Regulation 2017
12. Though the merits of innovation per se with no reference to benefits is far from clear.
13. These cases involved Southern corn leaf blight (1971), saccharin (1977), swine flu (1976) and food irradiation (1981). EEA, 'Late lessons from early warnings: science, precaution, innovation' (2nd edn, 2013) 25ff
14. Ibid (see also the first edition)
15. Ibid 32
16. Defra, May 2018 'Environmental Principles and Governance after the United Kingdom leaves the European Union', [144]
17. Cited in Nigel Haigh 'The Introduction of the Precautionary Principle in the UK' in Timothy O'Riordan and James Cameron (eds), 1994, *Interpreting the Precautionary Principle*, Earthscan, 229, 240

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