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# Privacy and the precautionary principle

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## ABSTRACT

### Keywords:

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The precautionary principle – which implies that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing protective measures – has been adopted as a standard of environmental and health protection in international and European legislation. This article offers an overview of the precautionary principle as a legal standard applicable to European privacy and data protection legislation. For this reason, it takes particularly into account the guidelines of this legislation as well as the privacy impact assessment framework, raised by the European Commission through the Recommendation on Radio-Frequency Identification applications. In brief, the article stresses the role of the precautionary principle in improving privacy protection through liability, prudence and transparency.

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## 1. Introduction

From a philosophical point-of-view, the ethical foundation of precaution can be based alternatively on either fear or prudence. Anticipating danger and sensing fear of it would be the basis for human action according to some authors.<sup>1</sup> In contrast, its ethical basis can be established on prudence. Prudence, in this context is the basis of a preventive moral responsibility that demands avoiding future damages. Therefore, precaution implies an active role before challenges, it “does not mean prostration in front of fear, and does not eliminate healthy audacity but is equivalent to environmental security, necessary to give continuity to life”.<sup>2</sup>

From a practical point-of-view, precaution can be interpreted as an attitude justified by the desire of political participation as well as a reaction against the dilution of liability. In return, citizens want to take part in some decision mechanisms, chiefly those that create risks. In this case, it is expected that people should be aware of these risks before giving their consent to decisions.<sup>3</sup> Moreover, promoting precaution as a means to enforce responsibility where multiple actors and causes harden its clarification.

There are good reasons to look for the objectives in enhancing political participation and avoiding the dilution of responsibility in privacy and data protection law. Since relations between citizen–governments and citizen–industry are obviously asymmetric, legislation protects citizens

<sup>1</sup> I acknowledge Yves Poulet for our invaluable talks and his patient revision of this work. I also acknowledge Xavier Thunis for his important remarks about the precautionary principle. Kourilsky and Viney observe that fear could be the foundation of a method: ‘elle devient une méthode, dite « heuristique de la peur ». C’est l’anticipation de la menace et la peur du danger qui vont permettre de prévoir les effets à long terme de l’action technique, et de déterminer ce qui a besoin d’être sauvegardé. Cette méthode aboutira à définir les risques qui ne devront jamais être courus’. Philippe Kourilsky and Geneviève Viney, *Le principe de précaution* (France, August 15, 1999), 34, <http://lesrapports.ladocumentationfrancaise.fr/BRP/004000402/0000.pdf>.

<sup>2</sup> Paulo Affonso Leme Machado, *Direito Ambiental Brasileiro*, 12th ed. (São Paulo: Malheiros Editores, 2004), 76. In a similar manner Kourilsky and Viney affirms that ‘à la diction ‘Dans le doute abstiens-toi’, le principe de précaution substitue l’impératif: ‘Dans le doute, mets tout en oeuvre pour agir au mieux’. Kourilsky and Viney, *Le principe de précaution*, 5.

<sup>3</sup> Regarding environmental law see Philippe Kourilsky and Geneviève Viney, *Le principe de précaution* (France, August 15, 1999), 15, <http://lesrapports.ladocumentationfrancaise.fr/BRP/004000402/0000.pdf>.

counterbalancing the strength of governments and industry. One mechanism of doing that is precisely the aim of the precautionary principle<sup>4</sup> in order to avoid risk-taking without a larger public discussion. The promotion of this principle is therefore a way to involve citizens in decision-making. Furthermore, dilution of liability is a problem faced also in the mentioned domain. Violations of personal data can take place in a context with multiple actors and causes, which produce a scenario where causality is complex and, for that reason, it is hard to assign responsibility.

Precautionary principle and risk assessment are both philosophies of a society that poses itself the question of how to allocate the costs of risks and damages caused by producers of goods and services. Both orbit the idea of risk, which “may be defined as a systematic way of dealing with hazards and insecurities induced and introduced by modernization itself. Risks, as opposed to previous dangers, are consequences that relate to the threatening force of modernization and to its globalization of doubt”.<sup>5</sup> These two philosophies overlap, as we will see further on.

The precautionary principle talks about prudence, transparency and strong decision-making. As we will see further on, European legislation establishes the precautionary principle as a means to protect the environment and human health<sup>6</sup>; we speculate that it can be also a means to enhance public awareness of privacy and data protection. We believe that the precautionary principle is a legal standard, applicable to European privacy and data protection legislation; this is our hypothesis and we will examine it through the lens of the European legislation on precautionary principle and privacy impact assessment.

## 2. Part one – the precautionary principle

### 2.1. A principle on international environmental law

The precautionary principle has been adopted in some international documents, mainly in the environmental protection domain.

Its first appearance in an international text was in 1987 at the Second International Conference on the Protection of the North Sea (1987), which established that “a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence”. In the late

<sup>4</sup> We use the expression ‘precautionary principle’ since we consider it as a standard with legal implications. For further discussion on the use of the terms ‘precautionary principle’ and ‘precautionary approach’ see Sonia Elise Rolland, ‘The Precautionary Principle: Development of an International Standard,’ SSRN eLibrary (2010): 434, Jacqueline Peel, ‘Precaution - A Matter of Principle, Approach or Process?’, *Melbourne Journal of International Law* 5, no. 2 (2004), <http://www.austlii.edu.au/au/journals/MelbJlntLaw/2004/19.html> and Nicolas de Sadeleer, ‘Le statut juridique du principe de précaution en droit communautaire: du slogan à la règle’ (n.d.), <http://dialnet.unirioja.es/servlet/articulo?codigo=732699>.

<sup>5</sup> Kourilsky and Viney, 21.

<sup>6</sup> Article 174, 2 of the Treaty of Amsterdam.

1980’s we saw the beginning of the sustainable development vision, which aims at protecting natural resources and taking in consideration future generations. In regards to international environmental law this vision culminated in the United Nations Conference on Environment and Development, which took place in Rio de Janeiro in June 1992 and was guided by the values of the global environmental and developmental system protection. The Rio Declaration on Environment and Development is one of the outcomes of this Conference and its Principle 15 establishes that “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.<sup>7</sup>

Also, a considerable number of environmental conventions previewed the precautionary principle throughout the last twenty years. As in the Rio Declaration of 1992, these international treaties introduced the point that *preventive measures shall be taken to avoid damages even if there is no conclusive evidence of causality between the inputs and the alleged effects*. We can refer to the examples in Article 3, 2 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992),<sup>8</sup> Article 14 of the Convention on Biological Diversity (1992)<sup>9</sup> and Article 2 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (1992)<sup>10</sup>.

### 2.2. A European legal principle

In Europe, the precautionary principle was first formalized by Germany during the 1970’s as the *Vorsorgeprinzip*.<sup>11</sup> Similarly, European legislation previewed the precautionary principle as a way to protect not only the *environment* but also *human health* as in Article 174, 2 in Treaty of Amsterdam: “The Contracting Parties shall apply the precautionary principle, i.e., to take

<sup>7</sup> ‘Rio Declaration on Environment and Development’, [www.un.org/documents/ga/conf151/aconf15126-1annex1.htm](http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm), April 8 2011.

<sup>8</sup> ‘The Contracting Parties shall apply the precautionary principle, i.e., to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects’.

<sup>9</sup> Which establishes countries’ obligations related to the adoption of impact assessment and the minimization of adverse impacts.

<sup>10</sup> As stated by the Convention ‘preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects’.

<sup>11</sup> Olivier Godard, ‘Introduction générale,’ in *Le principe de précaution dans la conduite des affaires humaines* (Paris: Editions de la Maison des sciences de l’homme Institut National de Recherche Agronomique, 1994), 25.

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