

Reinterpreting the Precautionary Principle

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ORIGINAL PAPER

The Behavioural Law and Economics of the Precautionary Principle in the EU and Its Impact on Internal Market Regulation

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Abstract The precautionary principle contributes to “the social” of internal market regulation as it counterbalances the loss aversion and availability bias of regulators who may too hastily endorse measures based to further the fundamental freedoms instead of fundamental rights and environmental protection. The precautionary principle also enhances the regulatory power of the European Union. By way of regulating via the precautionary principle, EU institutions pretend to have answers to citizen’s fears. These fears result from a crisis of causality, as society is trying to find a meaning to what sometimes appears as a series of patternless events. The EU legal order takes advantage of these effects. It creates an image of being able to cope with these fears, although it is rather questionable whether they really can live up to these expectations.

Keywords Precautionary principle · Internal market regulation · Behavioural law and economics · EU law

Introduction

Despite its character was described as “paralysing” (Sunstein 2002–2003, p. 32) and “senseless” (Sunstein 2003, p. 1008), the precautionary principle has been very influential on EU internal market law in the books. As stipulated in primary law in Art. 191 (2) sentence 2 TFEU, Union action in environmental law “shall be based on the precautionary principle and on the principle that preventive action should be taken.”

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