

Part I
Legal Risks in Developement of EU Law

Reframing Legal Risk in EU Law

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Contents

1	Introduction	4
2	Looking for a Definition of Legal Risks in EU Law	6
2.1	Legal Risks Through EU Law Principles	7
2.2	Identification of EU Legal Risks	12
3	From Impact Assessment to Allocation of Liabilities in EU Law	14
3.1	Impact Assessment as Public Legal Risk Management	15
3.2	Allocation of Liabilities in Legal Risk Management	17
	References	21

Abstract Legal risk is an oxymora. Law creates predictable duties and rights protecting human relations and justice conciliates disagreements on law's interpretation. The high production of international, European and national legislations increases legal protection and thus legitimate expectations but paradoxically (or logically) makes interpretation more complex for three reasons. Firstly, legal provisions may be imprecise, unclear or uncertain. Secondly individuals, companies or even public authorities may not have the necessary knowledge. Thirdly, the concerned bodies may not have the structural and financial capabilities to fulfil their obligations. Due to its inherent complexity, EU law faces many legal risks. The Better Regulation policy has thus introduced risk management in the EU law making process. However, the Impact Assessments focus on economic, social and environmental hypothetic consequences and the legal ones remain subsidiary as long as fall into the national competences. For that purpose, the European Commission has recently adopted a culture of evaluation monitoring the implementation of EU law. However, it doesn't prevent against any infringement relating to legal uncertainty. The Court of Justice of the European Union plays a major role to stabilise the interpretation and to allocate the liabilities. This chapter aims at presenting an exhaustive review of the doctrine relating to legal risk management

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and to connect it with the European Union in order to sketch few first elements of definition of what can be considered as legal risk in EU law.

1 Introduction

The European legal doctrine agrees that there is no common definition of legal risk.¹ From the point of view of legal science, there is no legal risk because the core of the law has to be predictable. Introducing risk in law would imply a value judgement opposing threats and security. In other words, it would introduce a subjective opinion on negative and positive consequences of the law, which is not the purpose of legal science. Thus, legal risks may be researched from economic, political, sociological or social perspectives, not from a legal one.

However, legal science may reframe legal risk as a metalanguage to describe and analyse the purpose as well as the impact of law on different components of society. In that sense, legal scientists participate in the interdisciplinary approach of social sciences, which is driven by the European Commission. It may help to explain how the EU legislative process anticipates the implementation of EU law and what the risks faced by public authorities, companies and individuals when they apply EU law are.

Risk has been taken into consideration as a scientific tool since the sociological studies of Ulrich Beck in the eighties.² He supports the idea that there is a plurality of risk definitions linked to our civilisation. Social modernity produces wide categories of risks, which may be identified by social science. He states that modernity is the cause of many damages to the environment (soils, forests, air, water, waste management, animals...), human health (new diseases caused by pollution, industrial foods, chemicals, pharmaceuticals...), private life (divorces, access to education, poverty...), economy (financial markets, exchange rates, liquidity, crises, unemployment...). In that sense, any social activity may create a risk of damages to certain people. According to Ulrich Beck, the new role of social sciences is to rationalise the objective constraints of each policy in order to manage their impacts on society.³ Since these works, theories of risk management exist in natural and social sciences to identify, assess, anticipate as well as prioritise the risks before catastrophes happen. However, methods, definitions and objectives vary widely between the sciences.

The International Organization for Standardization (ISO) gives a standard definition of risk management as “risks affecting organizations can have consequences

¹ Mahler (2007), pp. 10–31; Moorhead and Vaughan (2015), p. 36; available at: <http://www.ucl.ac.uk/laws/law-ethics/research/papers/erc-executive-report-legal-risk-definition-management-ethics.pdf>.

² Beck (1986, 1988, 1991a, b, c, 1995a, b, 1999).

³ Beck (1991a, b, c), pp. 155–182.

in terms of economic performance and professional reputation, as well as environmental, safety and societal outcomes. Therefore, managing risk effectively helps organizations to perform well in an environment full of uncertainty”.⁴ This international standard provides also principles and guidelines helping organisations to identify opportunities as well as threats in order to improve risk management. This approach has been already applied to companies,⁵ legal firms⁶ and EU institutions themselves⁷ to organise their own internal structure as well as analysis. However, ISO is a non-governmental organisation setting international standards, not legal sources.

The Anglo-Saxon doctrines also adopted these theories to develop prospective studies. European doctrines are basically reluctant to those studies which are based on a hypothetical uncertain future that rarely happens. It explains why each social science opposes two schools: one presenting a new theory based on risk management,⁸ and the other criticising the unrealistic purpose of prospective scientific studies.⁹ Each social science tends, indeed, to define the risk(s) to justify its own scientific purpose.

Legal science has remained mostly apart from these developments. Consequently, there is neither a standard definition of legal risk, nor a clear definition of risk. Legal studies on risk management are only realised with corporate and business issues, mostly led by the Anglo-Saxon (overall American) doctrine.¹⁰ The Basel Accords on banking supervision include many aspects of credit risk, operational risk and market risk.¹¹ The International Bar Association tried to define risk management for law firms as a result of a defective transaction, a claim, a legal failure or a change in law.¹² A few isolated German,¹³ French¹⁴ and Scandinavian¹⁵ publications also relate to regulatory and liability risks. The recent works led by

⁴ ISO, No. 31000, available at: <http://www.iso.org/iso/home/standards/iso31000.htm>.

⁵ Baranoff (2003), p. 639; Collard et al. (2011), p. 285.

⁶ Hopkins (2013), p. 2; Anderson and Black (2013); Whittaker (2003), pp. 5–7.

⁷ Tracol (2014), pp. 711–744. See Communication of the European Commission on Customs Risk Management and Security of the Supply Chain, COM(2012)793 final.

⁸ Dowd (2002), p. 274.

⁹ Elliot (2002); Meric et al. (2009), p. 277; Grimaldi (2006), p. 996.

¹⁰ Terblanché (2012); McCormick (2008); Howard (2007–2008), p. 505; Viscuki (2000).

¹¹ Since 1988, the Basel Committee on Banking Supervision has adopted 3 major accords setting capital requirements for banks: Basel III: International framework for liquidity risk measurement, standards and monitoring, 2010; Basel II: International convergence of capital measurement and capital standards; Basel I: International convergence of capital measurement and capital standards, 1988. Hull (2012), pp. 257–278.

¹² International Bar Association, *The Management of Legal Risk by Financial Institutions*, Draft Discussion Paper, Working Party on Legal Risk, 2003.

¹³ Wyss (2005); Pfohl (2002).

¹⁴ Dekeuwer-Defossez (2015), p. 5; Moury (2012), p. 1020; Lasserre (2011), p. 1632; Barbier (2011); Millet (2001).

¹⁵ Mahler (2007).

Alberto Alemanno in the *European Journal of Risk Regulation*¹⁶ tend to approximate these interdisciplinary movements through the concept of risk regulation.¹⁷ In these studies, legal risk management is seen through different steps: risks identification, risks classification, impact assessment, EU law-making process, risk regulation, risk management, legal monitoring, legal liabilities and sanctions.

EU law may paradoxically create threats to national public authorities, companies or individuals that shall be managed by competent authorities. Using legal science as a tool for risk management may help to be aware of the legal consequences. For that purpose, this chapter aims to define and identify the legal risks resulting from EU law (I) and then demonstrate how the legal risks are managed by EU law (II).

2 Looking for a Definition of Legal Risks in EU Law

In 2005, the European Central Bank (ECB) expressed its will to develop a legal risk definition as part of operational risk and the Bank considers that “a general definition of legal risk would facilitate proper risk assessment and risk management, as well as ensure a consistent approach between EU credit institutions. It would also be worthwhile examining the extent to which one should take into account the fact that legal risks are inherently unpredictable and do not generally conform to a pattern. In addition, the management of legal risk would have to be consistent with the management of operational risk as a whole. For these reasons, the ECB suggest that CEBS should carry out further work to clarify the definition of legal risk”.¹⁸ However, the final Directive only mentions legal risk as part of the operational risk relating to credit institutions, but does not define it properly.¹⁹

¹⁶ European Journal of Risk Regulation, since 2010, 4 issues a year, available at: <http://www.lexxion.de/en/zeitschriften/fachzeitschriften-englisch/ejrr/about-ejrr.html>.

¹⁷ Alemanno (2016), p. 224; Alemanno (2014); Alemanno et al. (2014), p. 338; Alemanno and Spina (2014); Alemanno (2012); Alemanno (2011), p. 320; Alemanno (2008), Series No. 6; Alemanno (2007).

¹⁸ European Central Bank, Opinion of 17 February 2005 on a proposal for Directives recasting Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions (2005/C 52/10).

¹⁹ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177, 30.6.2006, pp. 1–200.

Indeed, neither the EU Treaties and Legislations, nor the European institutions and the Court of Justice²⁰ expressively refer, use or define “legal risk”. The Treaties refer 14 times to the word “risk”.²¹ Every reference to risk in the Treaties is tied to respective liabilities of the European institutions and Member States. However, risk is taken into consideration in many EU Regulations and Directives as well as in many soft law documents.

The first purpose of this chapter is to reframe the concept of legal risk through existing general principles of EU law (Sect. 2.1) and then to identify which threats may be seen as “legal risks” (Sect. 2.2).

2.1 Legal Risks Through EU Law Principles

If the expression of “legal risk” is not expressively used in EU law, its concept is already implemented through a few general principles of EU law. Legal risk can be considered as already partly managed by existing EU law.

²⁰ The General Court mentioned it in two Judgments only to express the binding effect of EU Law in national legal orders and the consequence of an agreement between two Parties: Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04, *France, France Télécom vs Bouygues e. a.* [2010] ECR II-02099, para. 187; Case T-271/04, *Citymo SA vs European Commission* [2007] ECR II-01375, para. 152.

²¹ Art. 7, para 1 EU in case of “clear risk of serious breach by a MS of the [European] values”; Art. 121, para 4 TFEU provides a possibility for the European Commission to address a warning to a MS if its economic policies risk to jeopardise “the proper functioning of economic and monetary union”; Art. 126, para 3 TFEU permits the European Commission to prepare a report if “there is a risk of an excessive deficit in a Member State”; under Art. 196, para 1 a) TFEU, the Union supports the MS’ action in risk prevention relating to civil protection; Art. 207, para 4 a) relating to the common commercial policy foresees (Who?), in case the agreements in the field of trade in cultural and audiovisual services risk prejudicing the Union’s cultural and linguistic diversity, the Council shall also act unanimously, as well as, under b) in the field of trade in social, education and health services; Art. 256, para 2 TFEU provides Decisions given by the General Court in proceedings brought against Decisions of the specialised courts which may be subject to review by the Court of Justice “*where there is a serious risk of the unity or consistency of Union law being affected*”, as well as for a preliminary ruling and in general the First Advocate General may propose it, on the basis of Art. 62 of the Protocol (No. 3) of the Statute of the Court of Justice of the European Union; Art. 7, para 3 of the Protocol (No. 5) of the Statute of the European Investment Bank specifying that “the Board of Directors shall [...] lay down the terms and conditions of any financing operation presenting a specific risk profile” and under para 6 “the Bank shall protect itself against exchange risks by including in contracts for loans and guarantees such clauses as it considers appropriate” and Art. 7 provides the same protection in referring to the risks. Finally Art. 19, para 2 states that “*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*”.

EU law *firstly* refers to risk management using the precautionary principle,²² especially in the fields of environment,²³ public health²⁴ and food safety.²⁵ The European Commission itself expressively structures the precautionary principle around the analysis of risk “which comprises three elements: risk assessment, risk management, risk communication”.²⁶ In the first Case relating to the Bovine Spongiform Encephalopathy (BSE), the Court first stated that “where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent”.²⁷ This was confirmed in the other CJEU Cases for the refusal to end the ban on British beef and veal²⁸ and for emergency measures to combat BSE.²⁹ The precautionary principle then became a general principle of EU law which applies to any EU policy.³⁰

In the area of food safety, the concept of risk has also been introduced to anticipate the potential negative impacts on human health.³¹ The Regulation No. 178/2002 on Food Safety is, therefore, articulated around risk assessment, management and communication.³² “Risk” is defined as “a function of the probability of an adverse health effect and the severity of that effect, consequential to a

²² Craig and de Burca (2011), p. 549.

²³ Art. 191, para 2 TFEU refers to the precautionary principle. European Commission, Communication of 2 February 2000 on the Precautionary Principle, COM/2000/0001 final. Case C-246/07, *European Commission v. Sweden* [2010] (Sometimes you use vs and sometimes v. when referring to the different Cases and I think you should choose one so it is consistent.) applying the Stockholm Convention on Persistent Organic Pollutants.

²⁴ The 1st Case mentioning risk management was Case T-13/99, *Pfizer Animal Health SA v. Council* [2002], ECR II-3318 relating to risk assessment and management of transfer of resistance to antibiotics from animals to humans. See the website of the DG Public Health relating to risk management:

http://ec.europa.eu/health/preparedness_response/risk_management/index_en.htm.

²⁵ Case C-601/11 P, *France v. European Commission* [2013] EU:C:2013:465 relating to risk management of the transmissible spongiform encephalopathies; Joined Cases C-58/10 to C-68/10, *Monsanto SA v. Ministre de l'Agriculture et de la Pêche* [2011] ECR I-07763 relating to the risks of GMO dissemination; Case C-558/07, *S. P. C. M. SA e. a. v. Secretary of State for the Environment, Food and Rural Affairs* [2009] ECR I-05783 concerning the REACH Regulation; Case C-66/04, *UK v. EP and Council* [2005] ECR I-10553 concerning the Regulation on Smoke Flavours; Case C-198/03 P, *European Commission v. CEVA Santé Animale SA e. a.* [2005] ECR I-06357.

²⁶ Communication on the Precautionary Principle, Brussels, 2 February 2000, COM(2000)1 final.

²⁷ Case C-180/96 *UK v. Commission* [1998] ECR I-2265, para. 99.

²⁸ Case C-1/00, *European Commission v. France* [2001] ECR I-09989.

²⁹ Case C-393/01, *France v. European Commission* [2003] ECR I-5405.

³⁰ Case T-13/99 *Pfizer Animal Health SA v. Council* [2002] ECR I-3305; Case T-74, 76, 83–85, 132, 137 and 141/00, *Artegoda GmbH v. Commission* [2002] ECR II-4945.

³¹ Serratos (2011), Weimer (2010), pp. 31–39.

³² Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of Food Law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

hazard” and “risk management” as “the process, distinct from risk assessment, of weighing policy alternatives in consultation with interested parties, considering risk assessment and other legitimate factors, and, if need be, selecting appropriate prevention and control options”.³³ In 2010, France has failed to fulfil its obligations by laying down prior authorisation for processing aids and foodstuffs qualified as a measure having equivalent effect to a quantitative restriction on imports.³⁴ The Court connected the risk management of food safety and the legal uncertainty resulting from the contradiction between the European regulation as well as the national measures.

However, the precautionary principle is not a proper legal risk management tool, but rather a social or environmental risk management tool through the law. In this case, the law appears much more as a form of medicine than a threat. The threats are here produced by social behaviours (overproduction of food, environmental pollution, human diseases. . .) managed by EU law.

Secondly, the most appropriate general principle of legal certainty has been recognised as the constitutional principle in most European States as well as in ECHR law³⁵ and in EU law.³⁶ According to the settled CJEU case law, “the principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law”.³⁷ In other words, the EU legal interpretation shall protect, in particular, public authorities, companies and individuals against uncertain EU law.³⁸ Those concerned by EU law shall know precisely their obligations and the overall financial consequences.³⁹

In a Case relating to the protection of the financial interests of the European Union, the Court underlined that an EU Regulation can’t apply “until the administration has discovered those irregularities could encourage inertia on the part of the national authorities in bringing proceedings in respect of irregularities, whilst exposing operators, firstly, to a long period of legal uncertainty”.⁴⁰ The uncertainty of a legal provision shall in principle benefit the exposing operators.

³³ Art. 3, 9 of Regulation No. 178/2002.

³⁴ Case C-333/08, *European Commission v. France* [2010] ECR I-757.

³⁵ ECHR Case 6833/74, *Marckx v. Belgium* [1979], para. 58.

³⁶ Case 348/85, *Denmark v. European Commission* [1987] ECR 5225 (declaring void a Commission Decision cancelling financial compensation for agriculture).

³⁷ Case C-48/14, *EP v. Council* [2015] on protecting human health against radioactive substances in water intended for human consumption (action dismissed); Case C-147/13, *Spain v. Council* [2015] EU:C:2015:299, para. 79 (on the creation of unitary patent protection), Case C-81/10 P, *France Télécom v. Commission* [2011] ECR I-12899, para. 100; Case C-643/11, *LVK* [2013] EU: C:2013:55, para. 51; Case C-325/91, *France v. Commission* [1993] ECR I-3283, para. 26.

³⁸ Case C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft e. a. v. Hungary* [2015] EU: C:2015:386, para. 77.

³⁹ Case C-348/85, *ibid.*, para. 19.

⁴⁰ Case C-52/14, *Pfeifer & Langen GmbH & Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung* [2015] EU:C:2015:381.

For that purpose, the Court may exceptionally restrict the opportunity of relying on EU law provisions for any person concerned if two criteria are fulfilled. On the one hand, they should have acted in good faith, on the other, there should be a risk of serious economic repercussions to a large number of legal relationships entered into in good faith.⁴¹

The principle of legal certainty shall, however, not be used by interested Parties to skirt around other general principles of EU law. In the *Belgacom* Case relating to public procurements passed without call of tenders, the Court specified that “that principle may not be relied on to give an agreement an extended scope which is contrary to the principles of equal treatment and non-discrimination and the obligation of transparency deriving therefrom”.⁴² The same conciliation has been applied regarding the protection of the rights of the defence and the proper conduct procedure.⁴³ Legal certainty shall therefore be conciliated with all existing general principles of EU law. Legal risk may subsist from this conciliation.⁴⁴ In the *Belgacom* Case, municipalities and indirectly the consumers would be affected by significant financial losses. The respect of the law may not necessarily protect the weaker Parties.⁴⁵

Thirdly, qualified by the Court as corollary of the principle of legal certainty, the protection of legitimate expectations settles that a plaintiff may uphold that he acted with the belief that he got acquired rights to rely upon binding obligations.⁴⁶ In particular, it shall protect any person to which an EU institution has caused to entertain expectations, which are justified by precise assurances provided to him. The General Court defined three conditions to claim entitlement to the protection of legitimate expectations⁴⁷:

- A precise, unconditional and consistent assurance originating from authorised and reliable sources given to the person concerned;

⁴¹ Cases C-401/13 and C-432/13, *Vasiliki and Attila Balazs v. Casa Judeţeană de Pensii Cluj* [2015] EU:C:2015:26, para. 50, concerning social security for migrant workers; Case C-76/14, *Mihai Manea v. Instituţia Prefectului judeţul Braşov* [2015] EU:C:2015:216, paras. 54 and 55. Joined cases C-338/11 to C-347/11, *Santander Asset Management SGIIC and Others* [2012] EU:C:2012:286, paras. 59 and 60.

⁴² Case C-221/12, *Belgacom NV v. Integan, Inter-Media, WVEM, PBE* [2013] EU:C:2013:736, para. 40.

⁴³ Case C-662/13, *Surgicare — Unidades de Saúde SA v. Fazenda Pública* [2015] EU:C:2015:89; Case C-312/93, *Peterbroeck* [1995] ECR I-04599, para. 14; Case C-2/08, *Fallimento Olimpiclub*, [2009] ECR I-07501, para. 27.

⁴⁴ See, in that sense, Joined Cases C-270/97 and C-271/97, *Deutsche Post AG and Elisabeth Sievers, Brunhilde Schrage* [2000] ECR I-933, para. 50.

⁴⁵ In that sense, Case C-362/12, *Test Claimants in the Franked Investment Income Group Litigation* [2013] EU:C:2013:834.

⁴⁶ Chalmers et al. (2010), p. 412.

⁴⁷ Case T-549/08, *Luxembourg v. Commission* [2010] ECR II-2477, para. 71; Case T-347/03, *Branco v. Commission* [2005] ECR II-255, para. 102; Case T-282/02, *Cementbouw Handel & Industrie v. Commission* [2006] ECR II-319, para. 77.

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