Crossing Bridges at High Speed. On the Future of Risk Research

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I. Our risk regulation story

In Chapter XXVIII of Jules Verne's *Around the World in Eighty Days*, the train driver, egged on by enthusiastic US passengers and despite objections by Passepartout, reverses his train to cross a wobbly bridge (successfully) at high speed. With all passengers on board. It is a favourite chapter of ours and one which comes in handy in risk management classes. Passepartout did not suggest that the driver not try to cross the bridge. Rather, he wanted to minimise risk exposure to the passengers. Why put the whole train at risk if the passengers could disembark and the driver could later carry out the tricky manoeuvre? (The passengers could walk around the gorge.)

In classes we use this chapter as an example of the different approach in risk management between the EU (Passepartout; he's French) and the US (the train driver, conductor and most of the passengers are North Americans). In the end, both the Europeans and the Americans tend to cross the bridge. Yet they often have a different route to get there.

Neither of the authors can claim that when we read *Around the World*… as children, we dreamed of a career in the study of risk. Our interest in risk arose initially as a result of our background in trade law (in the case of first author) and general EU law and policy (second author). Representing a client in the biotech sector, we were asked in the mid 1990s to monitor and advise on the evolving EU regulatory landscape for biotechnology. One fairly quickly realises that unless one can call upon the talents and skills of a multidisciplinary team, it is very challenging truly to appreciate the detail of risk identification, management and communication.

II. The past and the present of risk research

At the time when we entered the risk arena, risk research was very unifocal. One zoomed in on a particular technology, and one assessed the approach to its risk in various jurisdictions across the world, often – especially of course if one was a practitioner – with a view to evaluating the impact on marketability. We were, of course, aware of the impact of the precautionary principle as an overall risk management principle in the EU. Yet most of us failed to look beyond the regulator's take on risk analysis, and into the psyche of the society in which the regulator operated. This approach was often

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also reactive. Even if one acted "upstream" in order to try and influence the law, one was nevertheless responding to an announced or mooted risk management measure.

This approach changed with the introduction of "new" technologies such as nanotechnology, synthetic biology and the like. Having run behind the facts, both the business and the NGO communities now look to regulate a technology proactively: business has no interest in spending lots of funds on research and development on a particular technology, if it turns out that society has no taste for it. Self-fulfilling prophecies are an inherent risk in this respect. A regulator's legal regime for a new technology in and of itself may turn consumers away from it, for they assume that where there is smoke, there is fire. It is crucial therefore for industry to be in charge of the narrative from the moment of conception of the technology. In turn this, of course, obliges NGOs to ensure that the narrative takes on board any public health, safety or environmental concerns which the technology triggers.

III. The future of risk research

The current societal debate points to a number of issues which, in our view, will, could and /or should dominate the immediate research agenda of the risk management community.

1. The 'post-truth' and post-expert era

This is better described, we would suggest, as the era of lies and dismissal of informed opinion. Especially in jurisdictions where the executive has a large impact on the action of regulatory agencies (including the United States), politicians responding in knee-jerk fashion to the popular mood will inevitably impact on risk management. Both the academic and the expert community face a persistent struggle in the near future to return the debate to informed decision-making.

2. Challenges for international harmonisation

Further trade integration requires regulatory co-operation. That is not a new insight. Anyone who half decently looked into "Trade ands" issues in the 1990s came to that conclusion. The recent turbulence, however, hitting such attempts at further harmonisation (TTIP and CETA chiefly among them) suggest that we have a long way to go in assisting with the levelling of the playing field required by international trade. Particularly since we, rightly, have to ensure that the playing field is levelled at a height which satisfies jurisdictions with high standards of protection in consumer law, environmental law etc.

Working out an acceptable method of international harmonisation or co-operation, which respects different approaches to risk management whilst ruling out protectionism, is an important ask for the scholarly and political community alike. Without it, we might see a retreat into further localism which is not always justified or desirable.

3. The innovation principle and principles generally

This, we believe, will be a crucial theme for future research. Innovations often present regulators with challenges they have not yet encountered, particularly with regard to

unforeseen risks and harm. This is reflected in the existing body of EU law on regulating innovation, which is currently piecemeal and fragmented. In recent months, the innovation principle has emerged as a key contender for inclusion in the EU Treaties or at the very least for use as an overall principle in the EU's regulatory approach.

Although much has been written on **innovation**, and despite the European Commission (EC) having assigned it its own Twitter account,[1] there is no definitive, legal definition of the word "innovation". For example, in one EC document innovation is defined as "change that speeds up and improves the way we conceive, develop, produce and access new products, industrial processes and services. Changes that create more jobs, improve people's lives and build greener and better societies".[2] In another paper, written by the EC's European Political Strategy Centre, innovation was recently defined as "anything new that changes the society adopting it".[3]

Of note is that in both papers the definition refers to "improvement" as well as "better" societies. This clearly indicates that in the European mind at least, innovation in and of itself is not a policy goal. Only qualified innovation is being pursued – innovation that assists growth, employment, improves peoples' lives and builds greener and better societies. Those speaking or publishing about innovation generally prefer not to define it. In and of itself this is not necessarily problematic: the precautionary principle, for instance is not defined at all in the European Treaties, although it is in the accompanying EC documents.

Scholarship, case law and policy documents on an **innovation principle**, on the other hand, are limited due to the relative newness of the proposed principle. This is not to suggest that the concept has not been seriously considered by various stakeholders at the EU level. The innovation principle itself was suggested by the European Risk Forum[4] in 2013 in a policy document presented by the CEOs of 12 major multinational companies. The Forum argues that the principle is needed to "provide a new and positive way of ensuring that policy makers fully recognise social and economic needs for both precaution and innovation".[5] Further, the EC, conscious that new technologies based on innovation might present risks to the public interest, has recently coined the idea of Responsible Research and Innovation. Thus one sees tentative movements from both industry and policy makers towards shaping a new regulatory approach towards innovation.

To our mind it will be crucial to ensure that an innovation principle, whatever its formulation and status, be not employed simply to discredit the achievements of the precautionary principle in particular. Particularly in industry, an introduction of an innovation principle would seem to be greeted as an antidote to precaution. Precaution and innovation are far from mutually exclusive. The European Environment Agency's

[1] @EUScienceInnov, having replaced the earlier @innovationunion on 8 November 2016.

[2] European Commission, "Turning Europe into a true Innovation Union", Memo 10/473 accompanying the Innovation Union Communication, 6 October 2010.

[3] European Political Strategy Centre, "Opportunity now: Europe's mission to innovate", 5 July 2016, available at <https://ec.europa.eu/epsc/file/strategic-note-15-opportunity-now-europe%E2%80%99s-mission-innovate_en>, last accessed 2 January 2017.

[4] See European Risk Forum, The Innovation Principle – Overview, available at <http://www.riskforum.eu/uploads/2/5/7/1/25710097/innovation_principle_one_pager_5_march_2015.pdf>, last accessed 2 January 2017.

[5] Ibid.

two reports "Late Lessons from Early Warnings"[6] are a reminder that the introduction of new technologies sometimes can and does go spectacularly wrong.

Finally, all contributors to this issue are, academically speaking, risk averse: for we can be certain that this discipline that we study will yield plenty of topics in and out of the boxes which we have outlined above.

[6] European Environment Agency, *Late Lessons from early warnings: the precautionary principle 1896–2000* (Environmental Issue Report No 22/2001), as well as European Environment Agency, *Late lessons from early warnings: science, precaution, innovation* (European Environment Agency, Report No 1/2013).