Slide 1
This is the closing session on the prevention and precaution principles
Outline

- Precaution in consumer law / health law
- Prevention of major accidents (Seveso Directive)
- Interference with WTO law

Slide 2
Content of the session (just three areas – most important in the environmental field: Seveso Directive)
Slide 3

This case is dealing with a decision of the EU Commission and national measures based on this Decision to protect against BSE.
Consumer law

C-157/96 and C-180/96 of 5 May 1998
- Mad cow disease

Facts of the Case II:
The decision was adopted by the Commission following the issue on 20 and 24 March 1996 of two statements by the Spongiform Encephalopathy Advisory Committee (‘SEAC’), an independent scientific body which advises the United Kingdom Government, concerning the existence of a possible link between bovine spongiform encephalopathy (‘BSE’) and Creutzfeldt-Jakob disease.
The preamble to the decision refers to the publication of new scientific information and reads as follows:
Slide 5
The decision refers to a typical situation where the precautionary principle applies: risk to human health “cannot be excluded” but “a definitive stance on the transmissibility of BSE to humans” is also not possible.
Slide 6

It is interesting to note, that the Court does not make an explicit reference to the precautionary principle, but to the preventive principle here, although the situation described in para. 63 is exactly the “uncertainty” situation where the precautionary principle should apply. Thus, the decision also shows, that there is not always a coherent use of both principles in the jurisprudence of the ECJ.
In the cases C-157/96 and C-180/96, the precautionary principle was used to justify the proportionality of the measures at issue.

See also: Order of 30 June 1999 (Case T-70/99) of the President of the Court of First Instance: “requirements linked to the protection of public health should undoubtedly be given greater weight than economic considerations.”

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**Slide 7**

This slide is not so important and could also be left aside.

In the case T 70/99 it was about Regulation No 2821/98 withdrawing antibiotics such as bacitran zinc from the list of additives the incorporation of which in feedingstuffs is authorised at Community level. Interim order for suspension of operation of the Regulation. The Court dismissed the application.
Slides 8 - 10
The animation shows (first picture) the accident in Seveso 1975 (the picture is from a newspaper 20 years later, 1995, when the site was re-opened for the public after 20 years of decontamination works).

The second picture shows the very heavy accident in Toulouse, France, in 2001 where about 30 people came to death. This accident was not very much realised by the public debate, because it happened just one week after 2001/9/11. But it had the effect that a further revision of the Directive was adopted in 2003.

The next pictures – alle available on the Internet – give an impression of the amplitude of the accident.
Slide 9
See text before
Slide 10
See text before
Slide 11
This picture has been published in a German Newspaper because of the tenth „Anniversary“ of the Sandoz accident in Bale, Switzerland.
A fire in a chemical factory producing pesticides lead to a pollution of the Rhine River; as a consequence the aquatic fauna was totally destroyed.
This slide shows the legal evolution from the first Directive to the Directive currently in force.
This and the following slides show some major articles of the Directive.
The Seveso Directive

Seveso I

Industrial activity: Any operation carried out in an industrial installation

Seveso II

The scope of the directive was extended: It now applies to "establishments".

‘establishment’ shall mean the whole area under the control of an operator where dangerous substances are present in one or more installations, including common or related infra-structures or activities;

Slide 13

The slide explains why the Seveso II Directive replaced the notion „installation“ by „establishment“. Establishment is much wider and includes all activities on the site. If there are a number of installations using dangerous substances they have to be considered in a cumulative way. Thus an important loophole to circumvent the scope of the Directive had been closed.
Slide 14

Definition of „risk“ may not be the best definition, at least there should be added the likelihood of a specific „negative“ effect. If the effect is positive we would rather talk about „opportunities“ than about „risk“. 
Slide 15

On dangerous substance

It is not important to go into detail here, just note, that the principle of the Directive is that such establishments are covered that are using "dangerous substances". These substances are listed in an Annex. It is sufficient, that the substance may be present at the site (even if generated in the event of an accident (synergistic effects!)).

On main obligation

Two fold approach: First of all, accidents shall be prevented. As we all know, that this is unfortunately not always possible, in the second stage the consequences of accidents, if they happen, shall be limited (one option are distances for instance, see the following case!).
Slide 16

This article is a typical implementation of the preventive principle. The risk should be already considered in the planning phase in order to avoid any conflict between different land-use interests.

“appropriate distances” are one instruments to reach this aim.
The Mücksch case was recently decided by the Court of Justice, based on a preliminary ruling.

Facts of the Case
Franz Mücksch plans to build a garden centre on a plot of land belonging to him in the industrial estate northwest of the city of Darmstadt (Germany). That area is not covered by a land-use development plan. In this case, section 34(1) of the German Building Code applies:
The important point to stress here is, that in this case no land-use plan existed. In such a case, the decision whether or not to grant building licence is solely based on Art. 34 of the Building code. The main requirement is, that the new building is in keeping with the features of its immediate surroundings and the provision of utilities has been secured. The requirements relating to healthy living and working conditions must be satisfied; the overall appearance of the locality may not be impaired."

(Article 34 German Building Code)

Slide 18
The important point to stress here is, that in this case no land-use plan existed. In such a case, the decision whether or not to grant building licence is solely based on Art. 34 of the Building code. The main requirement is, that the new building is in keeping with the features of its immediate surroundings.
(The picture on the right has nothing to do with the case – but one could explain what a “build up area” is.
The Seveso Directive

- Based on this provision of the law, without carrying out an assessment of the need to maintain appropriate distances, the city of Darmstadt gave Müksch preliminary planning permission.
The Seveso Directive

Merck is a company situated at around 250 m from Müksch’s land. It operates installations in which chemical substances are used, inter alia chlorine, which is covered by Directive 96/82 and the relevant national implementing provisions. Merck successfully lodged an administrative objection opposing the preliminary planning permission.

Müksch appealed against that objection. Both, Administrative and Higher Administrative Court decided in favor of Müksch and ordered Land Hessen to reject Merck’s objection. Next, the Federal Administrative Court decided to stay the proceedings and to refer the following questions to the ECJ for a preliminary ruling. There was no doubt, that in planning procedures Art. 12 of the Seveso Directive had to be respected. But the question was...

Slide 20
Still the facts of the case.
The first point is the main question raised by the Federal Administrative Court (Bundesverwaltungsgericht).

The answer of the Court is clear: Art. 12 has to be respected also in cases, where no land-use plan exists.

\[\text{The Seveso Directive}\]

- Are these obligations “imposed also on the planning permission authorities that have to take a non-discretionary decision on the authorisation of a project in an already built-up area?” (which means, that there exists no land-use plan)

- The ECJ held that “under that provision (Art 12(1) of the Directive), Member States also have the same obligation in relation to other relevant policies and ‘procedures for implementing those policies’ (…)”.

  “It follows that the absence (…) of a land-use development plan cannot exempt those authorities from the obligation of taking into consideration, when assessing applications for planning permission, the need to maintain appropriate distances between establishments covered by Directive 96/82 and adjacent areas”.
The reasoning of the Court – very convincing to my mind. The Court does not make reference directly to the preventive principle, but indirectly in quoting the objective of the directive that is to “prevent major accidents”
This para in the decision is interesting because it clearly states what are the parameter to be considered in the risk assessment. The two criteria of Risk – as already explained in the presentation on the preventive and precautionary principle – are the likelihood (probability) of the accident and the dimension of the damage (Eintrittswahrscheinlichkeit und Schadensausmaß; rechnerisch kann das Risiko als Produkt aus Eintrittswahrscheinlichkeit und Schadensausmaß bestimmt werden, so auch in der Versicherungswirtschaft).

„socio-economic factors“? Maybe the cost-effectiveness, proportionality of the measures
WTO law has an important impact on EU law: In the last years, a number of conflicts raised between Environmental law and the rules of free trade law. The hormone case is an interesting example.
The following two slides show the long-lasting procedure in the EC hormones cases. More than twenty years the United States and Canada on the one hand and the European Union on the other hand were in conflict upon the question if hormone treated beef creates a risk for consumer health. The first EU ban of hormone treated beef was already enacted in 1981 and then re-affirmed in 1988. After WTO was established in 1995 Directive 96/22/EC maintained the import ban. In 1996 a panel was established under the new procedure of WTO law, a quasi judicial body to decide upon the conflict. The first panel decision was taken at 15/7/1996 – against the EU.
On the appeal by the EC the Appellate Body took a decision in 1998. In this decision the existence of a precautionary principle was accepted. But according to the appellate body, the EC could not give sufficient evidence to proof a risk. After the delay for presenting such evidence expired, the US and Canada were allowed to impose financial sanctions on EU imports.

A new legal round was started by the EU in 2008, arguing that the maintenance of the sanctions would be no more justified. Finally after 30 years of dispute, the parties came to a memorandum of understanding to solve the conflict in 2011.
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The following slides summarize the relevant law and key arguments of the Appellate Body in its 1988 decision.
Slide 28

The relevant law in this case is not the GATT, but the Agreement on “Sanitary and phytosanitary measures”, the so-called SPS agreement.

In its Art. 5 this agreement obliges Members to carry out an appropriate risk-assessment, when taking sanitary or phytosanitary measures.

The second paragraph provides, that “available scientific evidence” shall be taken into account.
The most important provision in our case is para 7 of Art. 5. In cases, where “relevant scientific evidence is insufficient” – and this was exactly the case in the hormone case - the State may adopt “provisionally” measures. However, in this case, the Member state has, as laid down in the second phrase, to “seek to obtain the additional information (…) within a reasonable period of time”. But how to proceed, if this additional information does not give clear evidence, but, nevertheless, indicates that a risk may exist? It is in the end the question of the level of certainty that has to be reached – or, the other way around, the level of uncertainty, that we are ready to accept when taking precautionary measures, - that is determining the decision.

In the hormones case, the EU was not able to convince the appellate body that the evidence for the risk to human health was sufficient.
Precaution in WTO law: The hormones case

- “Furthermore, the Appellate Body agreed with the panel that the precautionary principle would not override Articles 5.1 and 5.2 and that it had been incorporated in, inter alia, Article 5.7 of the SPS Agreement” (p. 3) → Appellate Body 16/1/1998 EC Hormones

- These four conditions set out in Article 5.7, however, must be interpreted keeping in mind that the precautionary principle finds reflection in this provision. As the Appellate Body has emphasized:

A panel charged with determining, for instance, whether ‘sufficient scientific evidence’ exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from the perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.” (p. 285 -286).

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A positive outcome was, that the panel and the appellate body accepted the existence of the precautionary principle in the form laid down in Art. 5.7. The interpretation of this article should take account of the principle.
Precaution in WTO law: The hormones case

Directive 2003/74/EC specifies that, even though the scientific information available showed the existence of risks associated with these substances, “the current state of knowledge does not make it possible to give a quantitative estimate of the risk to consumers”.


Slide 31
Recital 7 of the directive clearly points out the problem the EU was faced with in the hormones case.