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## ***Between European Precaution and National Compensation : The Discourses of Risk Management***

### ***A Critical Analysis of Giovanni Pesce and Others v. Presidenza del Consiglio dei Ministri – Dipartimento della Protezione Civile and Others***

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#### Abstract

Contemporary society can undisputably be characterized, following Ulrich Beck, as a *risk society*. Since catastrophic risks are endlessly multiplying, the scope of risk management is broader than ever. This paper addresses more generally the question of how and by whom decision making regarding risk management is made in the European Union. More precisely, it provides a critical analysis of the legal discourse, on the one hand, on the use of the precautionary principle in risk management, and, on the other hand, on compensation for individuals who suffer financial losses related to decisions that are taken based on this principle. This critique will here be illustrated through an analysis of the *Giovanni Pesce and Others v. Presidenza del Consiglio dei Ministri – Dipartimento della Protezione Civile and Others* case.

#### Résumé

La société contemporaine peut sans contredit être caractérisée, suivant Ulrich Beck, de *société du risque*. Puisque les risques catastrophiques s'y multiplient sans cesse, la gestion de risque a une portée plus vaste que jamais. Cet article concerne de manière plus générale la question de savoir comment et par qui les décisions concernant la gestion des risques sont prises dans l'Union Européenne. De manière plus particulière, il suggère une analyse critique du discours juridique concernant le recours au principe de précaution dans la gestion des risques d'une part, et, d'autre part, concernant l'indemnisation des individus subissant des pertes financières en lien avec les décisions prises en vertu de ce principe. Cette critique sera ici illustrée à travers une analyse de la décision *Giovanni Pesce and Others v. Presidenza del Consiglio dei Ministri – Dipartimento della Protezione Civile and Others*.

May they concern food safety, environment, economic and financial activities, or even terrorism, a whole range of catastrophic risks, more than often related to human activities and to the industrialization of occidental societies, have been unsettling contemporary society for now quite a while<sup>1</sup>. The issues they have been raising have led jurists to question the form and nature of Law itself<sup>2</sup>; but above all, they have accentuated the importance of a world-wide cooperation to rethink the legal discourse about risk management from a supranational point of view<sup>3</sup>.

In Europe, risks linked to health and environment matters fall under the scope of the precautionary principle as recognized by European Union (hereafter EU)<sup>4</sup>. Still, the aim of EU Law is not primarily, or let's say, exclusively, directed to risk management; one of its major objective being to promote development through the good functioning of the single market throughout the European Union<sup>5</sup>. However, this does not mean that the EU does not consider risk management in pursuing its objectives; it has indeed a shared competence with Member States (hereafter MS) in the fields of environment and common safety concerns in public health matters for example<sup>6</sup>. To some extent, the EU may also intervene in social policies; and in their broad understanding, social policies are intertwined with risk management, as it will be argued<sup>7</sup>.

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<sup>1</sup> This is not to say that the dangers which are apprehended through catastrophic risks did not exist earlier; only, it is our conceptual way of thinking that came to acknowledge their existence through the 20<sup>th</sup> century, with major catastrophes such as Chernobyl. Around the years 1970, there would therefore have been a shift from a mostly *wealth distributive* society to a *risk distributive* society. See U. BECK, *La société du risque. Sur la voie d'une autre modernité*, Paris, Aubier, 2001, p. 38.

<sup>2</sup> We can think for example at the way some authors argue in favor of legal pluralism or legal postmodernism, which are also subject to many relevant and convincing criticism. On these legal theories, see for example B. MELKEVIK, "Une approche critique de l'idéologie du « pluralisme juridique »", 2016, [online]: <http://www.rivistapolitica.eu/une-approche-critique-de-lideologie-du-pluralisme-juridique/>; J. CHEVALIER, "Vers un droit postmoderne", in J. CLAM & G. MARIN (ed.), *Les transformations de la régulation juridique*, Paris, LGDJ, 1998, p. 23-24.

<sup>3</sup> See U. BECK & E. GRANDE, "Varieties of Second Modernity: The Cosmopolitan Turn in Social and Political Theory and Research", (2010) 61-3 *Br. J. Sociol.* 409.

<sup>4</sup> See article 191(2) of the *Treaty Establishing the European Union* (2002). See also COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission on the Precautionary Principle*, Brussels, 2000, p. 2, where it is specified that even if the *Treaty* only refers to it when it comes to environment, "[...] *in practice*, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the *environment, human animal or plant health* may be inconsistent with the high level of protection chosen for the Community". The precautionary principle can also be found in many national legal systems. For example, in France it has a constitutional character. See article 5 of *Loi constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement*. It shall also be underlined that not every kind of risk fall upon the scope of the precautionary principle; in each situation, it shall be referred to the legal frame that applies to define exactly which ones might.

<sup>5</sup> See article 2 of the *Treaty establishing the European Union* of 2002: "The Union shall set itself the following objectives: to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty [...]."

<sup>6</sup> See the second paragraph of the article 4, sections (e) and (k), of the *Treaty on the Functioning of European Union* of 2012. As for the competence regarding the protection and improvement of health, it is generally a supporting competence rather than a shared one, as provided by article 6 and 168 of the *Treaty on the Functioning of European Union* of 2012. Some exceptions are however provided in the paragraph 4 of article 168.

<sup>7</sup> See Title X of the *Treaty on the Functioning of European Union* of 2012.

For a non-EU citizen – which the reader might keep in mind is my case –, it is thus more than interesting to get acquainted with how decision making regarding risks falls either to MS or EU Institutions, and to analyze the situation in relation with broader economic and social concerns concerning risk management. This being said, this paper does not mean to draw conclusions about positive EU Law; rather, I would like to illustrate how the specific case I have presented last spring in a PhD Seminar<sup>8</sup>, *Giovanni Pesce and Others v. Presidenza del Consiglio dei Ministri – Dipartimento della Protezione Civile and Others* (hereafter *Giovanni Pesce case*)<sup>9</sup>, can support a critical analysis of the legal discourse, on the one hand, on risk management and notably on the use of the precautionary principle, and, on the other hand, on financial compensation of individuals that suffer financial losses, either because they are affected by the consequences following the concretization of the risk or by the measures taken to limit it.

## 1. An overview of the *Giovanni Pesce case*

The *Giovanni Pesce case* concerns the management of a risk that has received a lot of media coverage in Europe for the last few years: the risk of spreading of some bacteria called *Xylella fastidiosa* (hereafter *Xylella*). Though it has been present in America for many decades now, as far as we know, it would only have reached Europe in 2013 in the south Italy, and has since spread quickly<sup>10</sup>. The health of certain plants types, as mainly olive trees in the south of Italy, but also other plants harvested for agriculture purposes in other regions and countries, is put in danger by *Xylella*. More precisely, it affects such plants by colonizing their xylem tissue, that is formed of the tubes through which sap runs. Once a plant is infected, the bacteria comes to block those tubes, which causes its leaves to brownish and ultimately, to its death. The main vector of the bacteria is said amongst the scientific community to be the flying insects that nourish themselves from infected plants' xylem and sap, since they might as well transport *Xylella* with them to other plants afterwards.

As regarding the legal framework in EU law, the *Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community* had already listed *Xylella* as a harmful organism before *Xylella* even reached the European continent<sup>11</sup>. Under this directive, the MS have an obligation to notify immediately the presence of *Xylella* to the Commission and other MS, and have the power to take necessary measures to eradicate or inhibit the spread. The Commission also has the power to adopt necessary measures to contain or eradicate such a spread, measures which might rescind or amend the ones having been taken by a MS. Moreover, the Commission has the obligation to follow the evolution of the situation, and to adjust the measures in consequence<sup>12</sup>.

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<sup>8</sup> “Recent Developments in Theory and Practice of EU Law”, University of Luxembourg, April 4<sup>th</sup>, 2017.

<sup>9</sup> *Giovanni Pesce and Others v. Presidenza del Consiglio dei Ministri – Dipartimento della Protezione Civile and Others*, joined Cases C-78/16 and C-79/16, Judgement of the Court (First Chamber) of 9 June 2016. Because the paper does not aim to discuss extensively the case from a EU Law perspective, some aspects of the judgement that are less relevant to the proposed argumentation might not be reviewed here.

<sup>10</sup> Its presence has been nowadays noted in other countries such as Corsica and in some regions of France and Spain for example.

<sup>11</sup> See Annex 1, Part A, Section I(b).

<sup>12</sup> See the art. 16 of the directive, especially paragraph 1 for the MS, and par. 3 for the Commission.

In accordance with this directive, the Commission issued four decisions following the notification by Italy of the presence of *Xyllela*; we will only consider the first three since the last one was issued afterwards the *Giovanni Pesce* case. In the first decision of 2014, the Commission adopted emergency measures, and especially prohibited the movements of any “plants for planting” in the EU to prevent the spreading<sup>13</sup>. The second decision of 2014 contained more details, and especially introduced measures for the removal of infected plants and of those showing symptoms in demarcated areas<sup>14</sup>. In the decision issued in 2015, the Commission now stated that all host plants shall be removed in certain zones, regardless of their health status, or to say it otherwise, regardless of if they appeared or not to have symptoms of an infection by *Xyllela*<sup>15</sup>. The growing severity in the measures taken is correlative to the development of scientific knowledge about *Xyllela*<sup>16</sup>, and to the fact its spreading had continued at a quick pace; the Commission was reaching further to make sure it could limit the spread.

On the grounds of this third decision of the Commission of 2015, a decree was issued in Italy<sup>17</sup>. Substantially, it was mostly an application of the decision of 2015. It globally stated that as soon as a tree was infected by *Xyllela*, all host plants within 100 meters of it had to be cut down by the owners. Some exceptions were however provided in some regions, where the removal was not mandatory<sup>18</sup>. In application of that decree, several Italian national decisions notified in July and October 2015 by the *Servizio Agricoltura della Regione Puglia* ordered some specific tree owners where infected trees were found to cut a portion of their olive trees, as they are known as “host plants” of *Xyllela*. The removal had to be done at their own fee, or else the decision stated that the trees could be removed by the authorities and charged to the owners who did not comply with the decisions.

Since many olive tree owners did not agree with the cutting of olive trees that might not even show to be infected by *Xyllela*, some of them asked the *Tribunale amministrativo regionale per il Lazio*, a regional administrative court, for the decisions and the decree to be cancelled, on the ground the decision of 2015 which they implemented was inconsistent with the principle of proportionality and the precautionary principle. But before going forward in that case, and because the validity of the EU decision of 2015 was concerned, the administrative tribunal suspended the national Italian decisions, while it referred to the Court of Justice for a preliminary ruling on the validity of article 6(2)a) of the 2015 Directive under EU Law. The question has been summarized by the Court of Justice as follows:

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<sup>13</sup> *Commission implementing decision of 13 February 2014 as regards measures to prevent the spread within the Union of Xyllela Fastidiosa* (2014/87/EU). Some exception were provided, for example to seeds, and specific type of plans having obtained some kind scientific testing.

<sup>14</sup> *Commission implementing decision of 23 July 2014 as regards measures to prevent the introduction into and the spread within the Union of Xyllela Fastidiosa* (2014/497/EU), especially art. 7 and Annex III.

<sup>15</sup> *Commission implementing decision (EU) 2015/789 of 18 May 2015 as regards measures to prevent the introduction into and the spread within the Union of Xyllela Fastidiosa*. See especially art. 6.

<sup>16</sup> For instance, the decision of 2015 referred itself to a detailed scientific study published by the *European Food Safety Authority* (EFSA). See EFSA PLH Panel (EFSA Panel on Plant Health), 2015. Scientific Opinion on the risk to plant health posed by *Xyllela Fastidiosa* in the EU territory, with the identification and evaluation of risk reduction options. *EFSA Journal* 2015; 13(1): 3989, 262 p.

<sup>17</sup> *Decreto del Ministero delle Politiche Agricole Alimentari e Forestali n. 2180 con cui sono state disposte nuove misure di emergenza per la prevenzione, il controllo e l'eradicazione di Xyllela fastidiosa*, 19 June 2015.

<sup>18</sup> The decision of 2015 itself also included exceptions for the province of Lecce, were only containment measures had to be taken. See the art. 7 of the Decision 2015/789.

“[...] the referring court asks, in essence, whether the obligation imposed on the Member State concerned, by Article 6(2)(a) of Implementing Decision 2015/789, to remove host plants immediately, regardless of their health status, within a radius of 100 metres [sic.] around the plants which have been tested and found to be infected by [...] *Xyllela*, without that obligation being accompanied by a compensation scheme, is invalid on the ground of inconsistency with EU law, and, inter alia, with Directive 2000/29 [...], read in light of the precautionary principle [...] and the principle of proportionality [...]”<sup>19</sup>

In its conclusions, the Court of Justice did not find the decision of 2015 to be invalid<sup>20</sup>.

In its judgement, the Court of Justice begins the validity exam of the decision of 2015 by acknowledging that the Commission had a valid power to adopt protective measures under the Directive of 2000, as long as it did not amend or supplement the act by doing so<sup>21</sup>, which does not show to be the case here. Moreover, the Commission had to take into consideration the precautionary principle, and the adoption of restrictive measures was to be found justified if there was a likelihood of the existence of a risk<sup>22</sup>. The measures adopted also had to be proportionate<sup>23</sup>. However, since a broad discretion is granted to the Commission, the criteria to invalidate a decision on the proportionality basis is high; it should be manifestly inappropriate, with regards to the scientific information available at the time the decision was taken<sup>24</sup>.

The Court of Justice continues by underlining that in implementing the decision of 2015, the Commission pursued the same objective that the one of the Directive of 2000, that is to “ensure a high level of phytosanitary protection against the bringing into European Union of harmful organisms”<sup>25</sup>. About the legitimacy of the objective thereby pursued, it declares that “[i]t is common ground that health protection and the completion in the sector concerned of the agricultural internal market constitute legitimate objectives in the public interest pursued

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<sup>19</sup> A possible internal inconsistency of the provisions contained in its article 6(2) to (4) was also raised, but will not be discussed as is it less relevant for the argumentation developed in this paper. See par. 30 and 31 of the judgement of 9 June 2016 on the *Giovanni Pesce* case.

<sup>20</sup> Par. 94 of the judgement of 9 June 2016.

<sup>21</sup> Par. 44 to 46 of the judgement of 9 June 2016. The Court of Justice refers to judgement of 15 October 2014, *Parliament v. Commission*, C-65/13, EU:C:2014:2289, par. 44 and 45).

<sup>22</sup> Par. 47 of the judgement of 9 June 2016. The Court of Justice refers to judgement of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, par. 81 and 82.

<sup>23</sup> Par. 48 of the judgement of 9 June 2016. The Court of Justice refers to judgement of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, par. 29.

<sup>24</sup> Par. 49-50 of the judgement of 9 June 2016. The Court of Justice refers to judgement of 22 December 2010, *Gowan Comércio Internacional e Serviços*, C-77/09, EU:C:2010:803, par. 82. On that argument, however, Advocate General Bot proposes another approach: “That approach consists in considering that new circumstances subsequent to the adoption of an act may not justify its retroactive invalidation but may, if appropriate, preclude the lawful execution of measures taken in implementation of that act”. See *Opinion of Advocate General Bot delivered on 12 May 2016*, par. 106. The Court of justice does not mention or especially argue on the value of this approach. It does however underlines in par. 51 of the judgement of 9 June 2016 that any new information should at least be considered and lead to possible amendments of the measures, referring to judgement of 12 January 2006, *Agrarproduktion Staebelow*, C-504/04, EU:C:2006:30, par. 40.

<sup>25</sup> Par. 53 of the judgement of 9 June 2016. The Court of Justice refers to judgement of 30 September 2003, *Anastasiou and Others*, C-140/02, EU:C:2003:520, par. 45.

by EU legislation”<sup>26</sup>. The question is then rather to see if the decision was appropriate and necessary to attain those objectives.

The causal link between *Xyllela* and the rapid dying of a high quantity of olive trees in the Puglia region in Italy has then been analyzed. The Court concludes that the validity of the disposition is not affected by such matter, since it is not contested that olive trees are host plants, and since there is at least a significant correlation between *Xyllela* and the pathology that olive trees show, and finally because the precautionary principle justifies taking measures even when the causal link is not clear<sup>27</sup>. Hence, the Commission decision to enforce removal of host plants was, in the opinion of the court, appropriate, necessary, and proportional, especially since there would not have been less restrictive measures.

In a second time, the validity exam is drawn towards the obligation to remove all host plants located within a radius of 100 meters around an infected plant regardless of their health status. In looking at the reasonable character of the radius, the Court of Justice takes on that scientific data available at the time of the decision of 2015 showed uncertainty about what other factors than flying insects were indeed influencing the transportation of *Xyllela*, as man and wind could also be vectors. It was also unclear if flying insects could fly further than 100 meters from an infected plant. To restrict the radius of removal to 100 meters however seemed in the circumstances to be effective, without being over cautious in reaction of the many uncertainties. With that in mind, the Court of justice agrees that the radius of 100 meters is appropriate and proportionate, since it “was limited to what is necessary for attaining the objective sought”<sup>28</sup>.

Then, regarding the fact that obligation to remove host plants exists regardless of the plants health status, the Court of Justice first clarifies the interpretation of the notion of “eradication”, and chooses a broad interpretation, in accordance with the scope of the directive. This interpretation considers that not only the bacteria, but also the non-infected hosts’ plants, can be objects of the measures adopted by the Commission. At that time, it must be said that the scientific evidence had suggested that a plant could be infected even if it did not show symptoms, or even if the tests came back negative. In that context, the Court of justice agrees that the measure is appropriate<sup>29</sup>. The proportionality test nonetheless considers the balance of the different interests:

“[...] EU legislator was obliged to reconcile the various interests at stake, namely, first, inter alia, the right to property of the owners of olive trees in the Puglia Region and the economic, social and environmental consequences for that region following the removal of the affected plants and, second, the importance of plant production in the European Union and the public interest in safeguarding effective protection of EU territory, including Italian territory beyond

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<sup>26</sup> Par. 55 of the judgement of 9 June 2016. The Court of Justice refers to judgement of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, par. 35 and the case-law cited.

<sup>27</sup> Par. 57-60 of the judgement of 9 June 2016. Moreover, the Court of Justice specifies that no evidence has been given to support any allegation of a lack of causal link. See par. 61.

<sup>28</sup> Par. 64-68 of the judgement of 9 June 2016. The Court of Justice refers by analogy to judgement of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420, par. 120.

<sup>29</sup> Par. 69-73 of the judgement of 9 June 2016.

the province of Lecce, against the spread of the bacterium *Xyllela* throughout the European Union.”<sup>30</sup>

To assess how the interests were taken into consideration, the Court of Justice acknowledges that the obligation to remove trees has come only after less restrictive measures had been taken in previous decisions. First there was the simple prohibition of movement, and then the removal of only the known-to-be-infected plants<sup>31</sup>. This let us think that the right of property and the economic interests of the owners of olive trees have been taken into consideration, and that it was only after that the situation showed to be out of control that they have been more violated. Also, the fact that there was still a rapid spread of *Xyllela* seems to have made the balance lean towards the general interests of the European Union rather than the ones of Italy only. Furthermore, the Court has acknowledged that special measures have been put into place in the province of Lecce, where eradication did no longer seem possible. Hence, the removal measures of all host plants regardless of their health status would only concerns regions where scientific data have shown there were still chances of success in the eradication of *Xyllela*<sup>32</sup>. And since scientific did not see at the moment any less restrictive measures available, the removal was therefore the only one that seemed to provide an effective limit to the spread of *Xyllela*, and seems proportionate in the opinion of the Court<sup>33</sup>.

The Court of Justice also had been asked to consider the absence of a compensation scheme to the benefit of the owners who would have to cut down their olive trees. When the measures adopted are likely to cause some losses, EU legislator actually has a power to attribute full or partial compensation, which was not done in the decision of 2015. This power is however discretionary, and the EU jurisprudence shows no existing general principle according to which compensation would always have to be attributed to owners as soon as their property is damaged<sup>34</sup>. If there is no such general right to compensation in EU Law, the Court of Justice nonetheless considers if article 17(1) of the *Charter of Fundamental Rights*, which states a right to compensation for the loss of property, shall apply<sup>35</sup>. In its opinion, this article of the *Charter* would not impose an obligation to the Commission to adopt compensation measures whenever one of its decisions might lead to a loss of private property. In addition, the Court of Justice specifies that the absence of a compensation scheme in a decision of the Commission does not infringe the individual right to compensation under the *Charter*, without arguing whether they would have a well-founded claim on the basis of art. 17(1)<sup>36</sup>.

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<sup>30</sup> Par. 74 of the judgement of 9 June 2016.

<sup>31</sup> Par. 75-76 of the judgement of 9 June 2016.

<sup>32</sup> Par. 78-79 of the judgement of 9 June 2016.

<sup>33</sup> Par. 80 of the judgement of 9 June 2016.

<sup>34</sup> Par. 84 of the judgement of 9 June 2016. The court of Justice refers to judgement of 10 July 2003, *Booker Aquaculture and Hydro Seafood*, C-20/00 and C-64/00, EU:C:2003:397, par. 85.

<sup>35</sup> This provision states that “no one may be deprived of his and her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss” and that “the uses of property may be regulated by law in so far as is necessary for the general interest”. Those excerpts of the *Charter* are cited by the Court of Justice in par. 85 of the judgement of 9 June 2016.

<sup>36</sup> Par. 86 of the judgement of 9 June 2016. It shall be underlined that the Advocate General Bot goes much further about the effective right of the owners to be compensated. Must we remember however that the question asked to the court concerns the validity of the decision of 2015; it is not asked to rule on whether the olive tree owners have a valid claim against the Member States. However, the Court of Justice’s opinion does not go



Finally, the observance of the obligation of the Commission to state reasons is analyzed<sup>37</sup>. In the opinion of the Court, such an obligation does not imply that the Commission had to state “every relevant point of fact and law”, especially “where the Member States have been closely associated with the process of drafting that measure and are thus aware of the reasons underlying it”<sup>38</sup>. The Court of Justice continues by specifying that to state the essential objective pursued is sufficient, and that to state reasons for every technical choice would represent an excessive burden for the Commission<sup>39</sup>. Hence, the Commission would have stated its main objective that was to strengthen the eradicating measures because of new spreading of *Xyllela*, with consideration of new scientific data provided, while keeping the measures proportionate by limiting them to only host plants. Therefore, it did not have to present additional reasoning for the adoption of measures in the decision of 2015<sup>40</sup>.

## 2. A critical discussion around the *Giovanni Pesce* case and risk management

To criticize the legal discourse about risk management represents an enormous task, that is without any doubt beyond the scope of this paper. For that matter, the discussion will be limited to only bring up, in a non-exhaustive manner, some possible arguments and questions that would be relevant for a critic of the precautionary principle, and of the compartmentation of precautionary measures and compensation schemes<sup>41</sup>; the whole shall be seen being part of a wider societal critic, about the democratic character of today’s societies<sup>42</sup>.

### *The precautionary principle – a legal procedural tool for legitimising precautionary measures*

As most of the literature underlines, the content of the precautionary principle has been subject to many debates<sup>43</sup>, and what it really implies has often been a source of confusion<sup>44</sup>.

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against the one Advocate General Bot, and even makes use of some of the points he has brought up. See *Opinion of Advocate General Bot delivered on 12 May 2016*, par. 126-141.

<sup>37</sup> Under the article 296 of the *Treaty*, “[...] Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties. [...]”

<sup>38</sup> Par. 88 of the judgement of 9 June 2016. The Court of Justice refers to judgement of 18 June 2015 in *Estonia v. Parliament and Council*, C-508/13, EU:C:2015:403, par. 58, and to judgement of 9 September 2004, *Spain v. Commission*, C-304/01, EU:C:2004:495, par. 50.

<sup>39</sup> Par. 90 of the judgement of 9 June 2016. The Court of Justice refers to judgement of 18 June 2015, *Estonia v Parliament and Council*, C-508/13, EU:C:2015:403, par. 60.

<sup>40</sup> Par. 91-92 of the judgement of 9 June 2016.

<sup>41</sup> For a more extensive study on this subject, in relation to Canada and Quebec’s Law, see P. DUFOUR, “Le discours juridique dans la “société du risque”. Regard réflexif sur l’évolution de l’assurance et du principe de précaution en droit”, master thesis, Québec, Université Laval, 2016 [Online]: <http://theses.ulaval.ca/archimede/?wicket:interface=:2:::>

<sup>42</sup> Of course, one could ask why we should see in democracy the ultimate sociopolitical form of society; that is, however, not a question we shall discuss here. Let’s just say the democratic ideal indeed has become a common ground, at least in the Western countries. About the rise of democracy as the ultimate political way of organization, and although its leading thesis about the consequences and its conception of democracy might have been criticized, see F. FUKUYAMA, *The End of History and the Last Man*, London, Penguin, 2012.

<sup>43</sup> The Commission acknowledges the indeterminateness surrounding the precautionary principle. See COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission on the Precautionary Principle*, Brussels, 2000, p. 2.

Even though no legislative definition is provided in EU law<sup>45</sup>, the Court of Justice gives one that is generally accepted: “where there is uncertainty as to the existence or extent to risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent”<sup>46</sup>. Still, that “definition” does not help to circumscribe the scope of the principle, and if it has a specific content.

Some authors have talked about the existence of two contradictory conceptions of the precautionary principle<sup>47</sup>. In that sense, on one hand, the principle would be in some jurisdictions interpreted in a “strong” way, as meaning that a technology or a practice should not be taken until the absence of risk is proven, and that strong actions shall be taken to prevent the risk. This could be said to represent a kind of protectionism that would prevent economic development and technological innovations. On the other hand, there would also be what is known as a “soft” conception of the principle, a more utilitarian one, that would give more importance to the economic criteria in the analysis of the situation, in the broad sense. On the contrary to the first conception, this one would therefore promote the taking of action even in risky contexts; still, it should be worth pursuing the activity in regards of the specific risks it may involve. In the *Giovanni Pesce* case, the advocate general seems to go forth with this last and “soft” conception, when he addresses the applicant’s argument based on the precautionary principle:

“It must be stated that that plea is based on an incorrect interpretation of the precautionary principle which, far from precluding any measure in the absence of scientific certainty, on the contrary, legitimises the action of the EU institutions, even though they face a situation of scientific uncertainty. That principle is, according to the classic formula, not a principle of abstention, but the principle of action in the situation of uncertainty.”<sup>48</sup>

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<sup>44</sup> Facing this blurriness, the Commission issued a communication that “seeks to establish a common understanding of the factors leading recourse to the precautionary principle and its place in decision making, and to establish guidelines for its application based on reasoned and coherent principles”. See COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission on the Precautionary Principle*, Brussels, 2000, p. 8.

<sup>45</sup> Although no general definition is provided in EU law of the precautionary principle, there is however a definition in the specific context of food law. See the first paragraph of article 7 of the *Regulation no. 178/200 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*: “1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment”.

<sup>46</sup> Par. 47 of the judgement of 9 June 2016. The Court of Justice refers to judgement of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, par. 81 and 82.

<sup>47</sup> This dichotomy is often described as seeing the precautionary principle either by a rule of action or a rule of abstention. See O. GODARD, “Le principe de précaution, une nouvelle logique de l’action entre science et démocratie”, (2000) 11 *Philosophie politique* 17, 29 and following. In addition, it shall be underlined that a multitude of intermediary position can be found, sometimes because of different formulations in the principle, because different type of measures might be promoted, etc. In other words, there are different degrees of precaution: “Il y a des degrés dans la précaution”. Voir F. EWALD, “Philosophie politique du principe de précaution”, in F. EWALD, G. GOLLIER & N. DE SADELEER, *Le principe de précaution, Que-sais-je?*, Paris, Presses de l’Université de France, 2008, p. 25.

<sup>48</sup> *Opinion of Advocate General Bot delivered on 12 May 2016*, par. 115.

One could argue that the adoption of such a “soft” conception also results from the way the measures were adopted so gradually, instead of ordering a radical mass eradication to protect the more possible from a spread of *Xyllela*. Besides, this gradation in the measures taken by the Commission was one of the reasons which led the Court of Justice to say they respected the principle of proportionality<sup>49</sup>.

Still, whichever interpretation or “strength” one might give to the precautionary principle, which might reveal moral or ethical orientations<sup>50</sup>, it all comes down to how the institutional decision making about if and how to manage a risk should be framed<sup>51</sup>. Because of the scientific uncertainty that characterizes the types of risks to which the precautionary principle applies, the decisions that must be made cannot rest solely on scientific data; rather, they have a fundamentally political character, since they refer to the level of social acceptability of a risk<sup>52</sup>. Therefore, any decision on if a risk should be taken or not, and which measures should be put into place to contain it, finds its legitimacy whenever the precautionary principle has been “followed”, as Advocate General Bot has underlined.

It should also be remembered that the emergence of the precautionary principle relates to something broader than only dealing with the concretization of catastrophic risks; above having developed an higher acuity to dangers that might be surrounding us, catastrophes brought Western societies to realize that contrary to what might have been thought throughout the early modernity, human kind could not control nature, and that all innovations of industrial societies have effects that we might either not be able to limit, or plainly not be able to acknowledge due to the limits of scientific models<sup>53</sup>. In this sense, the delimitation of what constitutes the *risk* through the application of the precautionary principle, but also the possible broad causal links – not in the legal sense of causality – and the potential responsible actors, are crucial<sup>54</sup>. Hence, this explains why the precautionary principle has traditionally been used

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<sup>49</sup> Regarding proportionality: “*Proportionality* means tailoring measures to the chosen level of protection. Risk can rarely be reduced to zero, but incomplete risk assessments may greatly reduce the range of options open to risk managers. A total ban may not be a proportional response to a potential risk in all cases. However, in certain cases, it is the sole possible response to a given risk”. See COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission on the Precautionary Principle*, Brussels, 2000, p. 3.

<sup>50</sup> In any case, when an orientation in applying the precautionary principle is given beforehand, one could see it would rather consist in precautionary ethics, or in the adoption of a precise conception of what is *right*; such positive shall be distinguished from the precautionary principle itself, and its essentially procedural character. See F. EWALD, “Philosophie politique du principe de précaution”, in F. EWALD, G. GOLLIER & N. DE SADELEER, *Le principe de précaution*, Que-sais-je?, Paris, Presses de l’Université de France, 2008, p. 27; M. BOUTONNET, *Le principe de précaution en droit de la responsabilité civile*, Paris, LGDJ, 2005, p. 252; C. KERMISCH, *Le concept de risque. De l’épistémologie à l’éthique*, Paris, Tic & Toc, 2011.

<sup>51</sup> There would indeed be at least two steps, the first being to decide if any action shall be taken at all regarding a risk, and the second being to decide which measures should be taken if it is decided to act. See COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission on the Precautionary Principle*, Brussels, 2000, p. 12.

<sup>52</sup> See COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission on the Precautionary Principle*, Brussels, 2000, p. 15.

<sup>53</sup> The lack of knowledge about contemporary risk can be pictured in three ways: he *conscious inability-to-know*, the *repressed or unconscious non-knowing*, and the *unknown inability to know*. See U. BECK, *World at Risk*, Cambridge, Polity Press, 2009, p. 126-127.

<sup>54</sup> Some scholar has argued that the legal discourse would mostly be impermeable to the constructive nature of risks, and use the term “risk” in a superficial manner. This would in his opinion be in relation with the dominant positivism in Law. This might, as he underlines, not help the scientific and political spheres to communicate in risk management matters. See J. PIERET, “Épistémologie du risque: la troisième voie d’Ulrich Beck et son

as a legitimization procedural tool in relation to new technologies, scientific innovations or some other kind of “human activities”; we can think of GMO’s, nanotechnologies, new medical treatments, pesticides, etc.<sup>55</sup>

However, in the *Giovanni Pesce* case, a first level reading leads to the understanding that the precautionary principle is used purely to legitimize taking measures to prevent nature – some bacteria – from harming nature – plants. To say it otherwise, the only aspect of the risk that is assessed is the one of the spreading of *Xyllela*. What might be surprising about this is that the role of human activities is nowhere really discussed in the judgement regarding the application of the precautionary principle, whereas the latter *should* precisely aim at questioning our own contribution to such risks as the spread of *Xyllela*. It should bring us to question our way of using nature, and in this case, our agricultural methods, which are influenced by the globalization of the market.

Indeed, as a study of 2013 suggests<sup>56</sup>, big monocultures, vast fields where just one type of plant as olive trees are harbored, could amplify drastically the spreading of the infection. For instance, in the South of Italy, the study argues that cultivated olive trees have shown to have a less complex relationship with the ecosystem, with mushrooms, the ground, and insects for example, than savage type of olive trees. Such a less complex relationship would increase the vulnerability of olive trees to *Xyllela* infections. The authors of the studies also suggest that to mix savage and cultivated olive trees would then help to fight against infections, as the savage trees would be more resistant to *Xyllela*.

This is obviously not to say that the EFSA’s opinion was right or wrong<sup>57</sup>, but to wonder what were the specific orientations of the questions that were asked before collecting data, and the impact on the conclusions of the study. In the management of contemporary risks, the orientation of scientific research, of the questions that we think should be answered, and of the delimitation of what is the risk is indeed crucial, and especially delicate tasks<sup>58</sup>. And

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influence sur la doctrine environnementaliste”, (2012) 17 *Lex electronica* 1, 9-11. Risks are, however, not exclusively a social construction, and still have a certain dimension that relates to reality; Beck would say they are a *scientific construction of reality*. See U. BECK, *World at Risk*, Cambridge, Polity Press, 2009, p. 26.

<sup>55</sup> Indeed, the precautionary principle provides mainly a procedure that must be followed before going forward with any of those kinds of situations which give rise to such undefined risks. More than often, the procedure will put into balance different interests, and even give the opportunity to different social actors and groups to submit their position about the envisaged situation. Once the procedure has been followed, if the conclusion is that the technology, innovation or activity is not prohibited, because of the legal procedure, the risk taking it implies acquires some kind of legitimization. However, to ask if this legitimization has a deep democratic character or not is another question.

<sup>56</sup> G. BESNARD *et al.*, “The complex history of the olive tree: From late quaternary diversification of Mediterranean lineages to primary domestication in the northern Levant”, (2013) 280(1756) *Proceedings of the Royal Society B*, as cited in [http://www.lemonde.fr/idees/article/2015/04/27/xyllela-fastidiosa-accident-industriel\\_4623366\\_3232.html](http://www.lemonde.fr/idees/article/2015/04/27/xyllela-fastidiosa-accident-industriel_4623366_3232.html).

<sup>57</sup> It must be disclaimed that the EFSA study has not been read and hence, it cannot be said that it does not consider similar information. However, the Court of Justice still did not appear to look for that kind of scientific data especially, nor was it directly invited to do so in the questions that has been brought before it. Should it have a broad competence to bring up such matters *ex officio*? Should third parties, scientific or social groups for instance, have the right to intervene in such cases? No research has been made for this paper to see what is the current state of EU law about these matters.

<sup>58</sup> “But not only can real uncertainties *not* be resolved through more and better knowledge, when we are dealing with what Anthony Giddens calls *manufactured uncertainties*, more knowledge can actually produce more uncertainty”. See. U. BECK & J. WILLMS, *Conversations with Ulrich Beck*, Cambridge, Polity Press, 2004, p.

taking position about such matters has consequences on the way social and economic interests can be weighed while decisions are being made about risk management, and to the width of the measures that should be considered. In the *Giovanni Pesce* case for example, and in a purely speculative way, we could think that if the agricultural methods used had been included as a component of the risk, then the measures might have been different. It might have been considered to gradually prevent monocultures through the EU, to develop some certifications that assess a plant harvested in a region has an adequate relation with its environment, etc.<sup>59</sup>

In addition to the legitimization of the measures themselves, it must be underlined that the precautionary principle, as it has been mobilised in the *Giovanni Pesce* case, also shows to be a tool that legitimises the harm to private property that is caused by the eradication of olive trees, which has been characterised as an expropriation under the article 17 of the *Charter of fundamental rights*. Indeed, only public or general interests can justify an expropriation<sup>60</sup>. Measures adopted on the behalf of the precautionary precaution, if the procedure is rightly followed, could seem to benefit from a “presumption” of promoting such public interest. The precautionary principle would therefore also justify that individuals without a general “right” to compensation have to support lots of inconvenient (economic loss, having to replant olive trees or change their source of income, claim damages or compensation for loss before tribunals, etc.) for the sake of public interest, which scope is hard to measure with exactitude<sup>61</sup>.

### *The compensation schemes*

The second topic that I meant to address in this paper is the kind of critical arguments which can be withdrawn from the way compensation matters were treated in the *Giovanni Pesce* case. To ensure a link with the emergence of contemporary risks and of the precautionary principle that we’ve just discussed, a short contextual reminder is useful.

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127. Regarding such *manufactured uncertainties*: “[t]hese types of internal risks and dangers presume a threefold participation of scientific experts, in the roles of producers, analysts and profiteers from risk definitions. Under these conditions, many attempts to confine and control risks turn into a broadening of the uncertainties and dangers”. See U. BECK, *World Risk Society*, Cambridge, Polity Press, 1999, p. 140.

<sup>59</sup> These considerations are of course more important from a long-term perspective of risk management, and might therefore not have been of a crucial importance in the establishment of emergency measures to limit the risk of spreading of the infection, nor in the subsequent ones. This shall not mean, however, that such information was not relevant at all, since it could have lead to different recommendations for the measures to be taken. Moreover, it would be interesting to address the question of how the proportionality of a measure could be influenced by the lack to acknowledge the need of taking long-term measures, even in an emergency context.

<sup>60</sup> “[...] modern constitutional States allow for expropriations only for the satisfaction of a public or general interest [...]”. See D. U. FERNÁNDEZ-BERMEJO, « A Theory on Private Takings: Rule of Law, Democracy and Social State », (2016) 28-3 *European Review of Public Law* 881-905, 885.

<sup>61</sup> On the notion of the evolution of the “public necessity” criterium legitimising the destruction of private property without having to compensate for it in common law, and its potential abuses, see O. M. REYNOLDS, « Is “public necessity” necessary? », (1976) 29 *Oklahoma Law Review* 861-881. For an example of a case in which an American court refused any compensation to the owner of trees that had been destroyed to prevent the spread of a disease, claiming the protection of the trees of nearby owners were more important according to public interest, see J. A. COHAN, « Private and Public Necessity and the Violation of Property Rights », (2007) 83 *North Dakota Law Review* 651-725, 726.

During the 19<sup>th</sup> century, with pauperism caused by the new working conditions provided with industrialisation, nation-states have come to provide social insurances to its citizens, and gradually developed as what is known to be the Welfare State model. This model that provided through “social Law” financial compensation to individuals regarding the direct harms of industrialization they had to deal with. The risks that were managed by such social laws, as work accidents insurances and health care, could still be “measured” or “calculated”, and could be evaluated in reference to what sociological laws would point at being a “normal” state or situation<sup>62</sup>. This *insurantial society*<sup>63</sup> was essential to the pursuing of modernity’s project of industrialization, mainly because economic actors would not have to be found socially and legally responsible for poverty, diseases or employment instability which was becoming the current state of the capitalist market economy organization.

With the globalization of the markets, and with the emergence of catastrophic risks that have been discussed above, the relation between risk management and the nation-state became less self-evident. On one hand, risks could not be calculated as before, and on the other hand, the consequences were neither geographically limited to a state, nor could its causality be attributed to only one activity performed by a specific actor. Moreover, the foreseen consequences of contemporary risks can hardly be repaired financially<sup>64</sup>. In this sense, U. Beck argues that the risks of the *risk society* go beyond the scope of insurability, may it be public or private insurances<sup>65</sup>. To say it otherwise, risk management cannot proceed by only providing social security through insurances, it cannot mean only to minimize financially the consequences:

“Insurance protection (whether private or state organized) had a twofold function from the perspective of social theory, namely *neutralizing damage* and thereby *neutralizing fear*. To the extent that the expansion of risk outstrips insurance protection, the latter loses its function of neutralizing fear at both the social and the political level, behind the still intact Potemkin façade of insurance protection. Free-floating fears are being set free, especially within the (full coverage) milieu of the European welfare states, which are open to political instrumentalization by all kind of actors and groups.”<sup>66</sup>

In the *Giovanni Pesce* case, we saw that the Commission, through an application of the precautionary principle, took measures in several decisions to respond to the possible spread

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<sup>62</sup> See F. EWALD, *L’État providence*, Paris, Bernard Grasset, 1986, p. 161-167. See also A. SUPLOT, *La gouvernance par les nombres. Cours au Collège de France (2012-2014)*, Paris, Fayard, 2015, p. 135.

<sup>63</sup> The expression *Insurantial society* is used here as a translation of the expression *Société assurantielle* as used by the French philosopher François Ewald. It refers mainly to a society which the political diagram is inspired by insurance, that thinks itself through insurance patterns and whose juridical system is based on an *insurantial imaginary*. See F. EWALD, *L’État providence*, Paris, Bernard Grasset, 1986.

<sup>64</sup> On the characteristics of contemporary risks, see U. BECK, “Living in the World Risk Society”, (2006) 35(3) *Economy and Society* 329, p. 333-334.

<sup>65</sup> The *Risk Society* is a concept that has mainly been thought by the German sociologist Ulrich Beck. For Beck, the *Risk Society* is to be found whenever the catastrophic nature of risks make them uninsurable. The threshold he proposes is therefore closely linked to the ability to calculate risks or not. See for example U. BECK, *World at Risk*, Cambridge, Polity Press, 2009, p. 132. This position has been much criticized, as some scholars argue that insurances can deal with uncalculable risks. See R. V. ERICSON & A. DOYLE, «Catastrophe risk, insurance and terrorism», (2004) 33-2 *Economy and Society* 135. Without engaging further in this discussion, let’s remind that new insurance technics to address unknowns and incalculability makes much use of elaborate financial structures; such complex use of finance does have shown its own catastrophic potential with the crisis of 2008.

<sup>66</sup> U. BECK, *World at Risk*, Cambridge, Polity Press, 2009, p. 139.

of *Xyllela*, measures that lead the Italian authorities, that implemented those measures, to impose the eradication of a large amount of olive trees. The owners had not only to eradicate at their own fee, but were practically offered no special compensation from the EU level, or from Italian state, at least from what we can learn in the judgement. This means, from a global perspective, that financial impacts of the measures meant to protect agriculture in the whole EU community against a possible *Xyllela* spread, if any kind of compensation is indeed offered, should be supported by the state of Italy.

At first sight, it could therefore look, from a totally external reading of the situation, as if the state of Italy were, or were made, *responsible* – in the broad general sense, and not meaning legally liable – for supporting financially the risk management of *Xyllela* infection. It is true that the infection has spread over its territory first, and has brought up an European-wide risk to the environment and to the European economy. To put it otherwise, Italy would appear as the “guilty” state because it is the epicenter of the risk. However, underneath, we do learn that Italy could have made a request to get a co-funding from the EU<sup>67</sup>, which shows a certain level of solidarity between MS, though an “underground” solidarity<sup>68</sup>. This possible co-funding covers generally up to a maximum of 50% of eligible costs<sup>69</sup>, such as the “costs of compensating the operators or owners for the treatment, the destruction and subsequent removal of plants, of plant products and of other objects [...]” and for the “costs of compensating the owners concerned for the value of the destroyed plants, plant products or other objects subject to the measures referred to in Article 16 of Directive 2000/29/EC, limited to the market value of such plants, plant products and other objects as if they had not been affected by those measures [...]”<sup>70</sup>. Still, the proportions of the amount that would be left to Italy to support makes us question about the beneficiary of the expropriation measures that constitute the eradication of olive trees: is it Italy, or more broadly the EU? Because indeed, “[s]ince modern constitutional States allow for expropriation only for the satisfaction of a public or general interest, it may be assumed that [...] there will always be a collective or diffuse beneficiary: the community to which that public or general interest refers”<sup>71</sup>. Hence, to the extent to which the eradication measures were meant to tame the risk of the infection

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<sup>67</sup> See *Regulation (EU) No 652/2014 of the European Parliament and the Council of 15 May 2014 laying down provisions for the management of the expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material, amending Council Directives 98/56/EC, 2000/29/EC and 2008/90/EC, Regulations (EC) No 178/2002, (EC) No 882/2004 and (EC) No 396/2005 of the European Parliament and of the Council, Directive 2009/128/EC of the European Parliament and of the Council and Regulation (EC) No 1107/2009 of the European Parliament and of the Council and repealing Council Decisions 66/399/EEC, 76/894/EEC and 2009/470/EC*, which is referred to in *Opinion of Advocate General Bot delivered on 12 May 2016*, par. 140.

<sup>68</sup> New forms of solidarity have to be explored since the acknowledgement of catastrophic risks, as environmental ones, since those risks are not the result of a specific accidents and cannot thus be measured. Still, insurances continue to develop technologies that cover such kind of risks, bringing up the question of knowing which kind of solidarity they rely on.

<sup>69</sup> Art. 5(1) of *Regulation (EU) No 652/2014*.

<sup>70</sup> Art. 18(1) d) of *Regulation (EU) No 652/2014*; *Xyllela* appears to be a “pest” in conformity with art. 17(a) of *Regulation (EU) No 652/2014*, as it is in the Annex 1, Part A, Section I(b) of *Council Directive 2000/29/EC of 8 May 2000*.

<sup>71</sup> D. U. FERNÁNDEZ-BERMEJO, « A Theory on Private Takings: Rule of Law, Democracy and Social State », (2016) 28-3 *European Review of Public Law* 881-905, 883.

spread over all the European collectivity, that the EU participate in only a 50% proportion might be criticized<sup>72</sup>.

Moreover, Advocate General Bot, as we've seen, underlined that Italy was in his opinion *required* to provide a compensation scheme in accordance with the right of the olive tree owners to get compensation for their loss of property under Article 17 and 51(1) of the *Charter of fundamental rights*, because it was implementing a EU decision<sup>73</sup>. The Court of Justice did not integrate this dimension in the judgement, may be simply because it did not affect directly the validity of the decision of 2015, which was the question it had to solve. Since it was a preliminary ruling, the Court of Justice could not really have raised the issue *ex officio*.

Without any binding legal conclusions about the responsibility of Italy in establishing a compensation scheme, the burden to obtain any compensation rests on the olive tree owners. They would therefore have to support either introducing legal procedure to enforce Italy to comply with its obligation of establishing a compensation scheme, or either turn themselves to financial aid that might be obtained through private or public insurances covering agricultural risks, if it can apply at all to their specific case<sup>74</sup>. In last resort, if they fail in succeeding in any of those avenues, the dramatic picture would be that they cannot have a sufficient income to sustain their olive business, that they go bankrupt and that they resign to rely on Italian social security for living<sup>75</sup>.

This might be, and probably is, quite an extrapolation of the situation. However, it was meant to show that even though there are legal dispositions that provide new and EU-wide solidarity for addressing the financial burden of risk management, it might not be applied in practice.

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<sup>72</sup> One might see the expropriation as a legal tool still carrying the liberal constitutional context. See D. U. FERNÁNDEZ-BERMEJO, « A Theory on Private Takings: Rule of Law, Democracy and Social State », (2016) 28-3 *European Review of Public Law* 881-905, 883. Then, we might therefore rely on the commutative justice perspective, which imply that compensation must be provided by the beneficiaries of the expropriations. If we consider that the EU is the beneficiary, to make the Member State the one to implement the compensation scheme does not seem consequent. In the Risk Society of Beck, risks must be distributed above the nation states; and shared risks means shared costs. In addition, it might be of some interest to think about which are the *real* beneficiaries of the measures under the “European collectivity” : the Member States, the Europeans residents, or the European economic actors? And what is, exactly, that benefit?

<sup>73</sup> *Opinion of Advocate General Bot delivered on 12 May 2016*, par. 139.

<sup>74</sup> Of course, one might be aware that “[t]his does not necessarily mean that common and readily available types of insurance would cover all the variety of losses that might be incurred in “public necessity” cases [...]. Destruction to prevent flood, spread of disease, or sinking of a vessel may be more difficult to bring within the terms of many policies”. See O. M. REYNOLDS, « Is “public necessity” necessary? », (1976) 29 *Oklahoma Law Review* 861-881, 880. If this was true in 1976, there is no doubt that with the growing numbers of catastrophic risks that might lead to emergency measures on the basis of public necessity, there is no doubt that insurers might have worked the insurance policies to limit the claims.

<sup>75</sup> Looking at the burden of the individuals having to claim compensation for the eradication of their olive trees, we might draw a parallel with the fact that in many jurisdictions, there is no requirement to establish a compensation scheme prior to an expropriation any expropriation. However, this is not the case in Germany, which makes the constitutional validity of an expropriation rely on such compensation scheme, which definitely relieves the burden of the victim. In EU law, as we have seen here, “[i]n contrast to article 14(3) of the German Basic Law, which requires that the law authorizing an expropriation must explicitly make provision for just compensation (*Junktim-Klausel*), EU fundamental rights law does not contain such a requirement.” See T. M. DRALLE, *Ownership Unbundling and Related Measures in the EU Energy Sector: Foundations, the Impact of WTO Law and Investment Protection*, Cham, Springer, 2018, p. 73.



So, while the EU single market gets a strong and rapid protection against the risks of the spread of *Xyllela* through measures of eradication, individuals that suffer the consequences of losing their trees, a part of their income source, must fight for compensation and protection of their interests. This again proves how the social and economic rationalities in the EU have disconnected from each other, and how the economic market got autonomous from social matters in the legal discourse<sup>76</sup>.

In any case, the purpose here was first to demonstrate that potentially catastrophic harms to environment can hardly be managed by action/reaction measures such as the ones that are relevant to the *Giovanni Pesce* case, though we must agree those might show to be necessary too to some extent; risk management should rather be “boundaryless”, in the sense it questions our ways of living in relation to our environment in a broad and whole sense, and therefore should not be partitioned in different hermetic disciplinary discourse<sup>77</sup>. On the other hand, the intention was to propose a critical interpretation of the financial aspect of risk management illustrated by the *Giovanni Pesce* case: that is, even though legal solutions might be said to exist to address contemporary risk and their management, as compensation obligations and shared competency, in practice and in a superficial treatment of the case, it is still the National Welfare State model that we first see as responsible, and it is still this same National Welfare State model that acts as a last resort insurer.

In addition, one might argue that the compartmentation of risk management in the legal discourse that we’ve tried to acknowledge in this paper might provide the public a misleading understanding of a situation, and prevent it from forming a well-informed opinion about the legitimacy of institutional objectives, socially and economically. In this context, it might be difficult to promote a real social dialogue about the measures that are to be taken. Indeed, the precautionary principle, as a procedural decision making tool, should relate to democratic participation in risk management. Then, in a more radical way, one might even see in such ramification of the legal discourse as a way of not pointing fingers at the economic development and industrialisation process, or to say it otherwise, as a way to maintain an *organized irresponsibility* pattern<sup>78</sup>. May be this whole “staging”, to use the expression of U. Beck, of contemporary risks and their management aims to hide the lost faith in the capitalist utopias, which still paradoxically guide our actions<sup>79</sup>. Because, as Ulrich Beck said, the risks we manage might be, in the end, only a reflection of ourselves:

“Les risques dont on fait l’expérience présupposent un horizon normatif de sécurité perdue, de confiance brisée. C’est pourquoi les risques, même lorsqu’ils apparaissent muets, recouverts

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<sup>76</sup> This argument of the “autonomisation” of the market has been beautifully presented by Mirelle Delmas-Marty in a class given at *College de France* called “Sens et non sens de l’humanisme juridique”, especially in the class of January 26, 2011. She refers amongst others to A. SUPIOT, “Les avatars de l’Europe sociale”, *L’esprit de Philadelphie*, Seuil, 2010 and A. SUPIOT, “Contribution à une analyse juridique de la crise économique de 2008”, (2010) 149(2) *RIT*.

<sup>77</sup> “[...] the unforeseen consequences of functional differentiation can no longer be controlled by further functional differentiation. In fact, the very idea of controllability, certainty or security – so fundamental to first modernity – collapses”. See U. BECK & C. LAU, “Second Modernity as a Research Agenda: Theoretical and Empirical Explorations in the “Meta-Change” of Modern Society”, (2005) 56(4) *British Journal of Sociology* 525, 526.

<sup>78</sup> See U. Beck, *World at Risk*, Cambridge, Polity Press, 2009, p. 7-8. On this topic, see also A. SUPIOT & M. DELMAS-MARTY, *Prendre la responsabilité au sérieux*, Paris, Presses Universitaires de France, 2015.

<sup>79</sup> On the topic of the utopias related with capitalism, see P. ROSANVALLON, *Le capitalisme utopique. Histoire de l’idée de marché*, Paris, Seuil, 1999.

d'un habillage de chiffres ou de formules, restent par définition liés à un point de vue ; c'est pour cela qu'ils demeurent des poétisations mathématiques de visions déçues de la vie qui mériteraient d'être vécues. Or, ces poétisations elles-mêmes demandent à être crues, ce qui équivaut à dire qu'on ne peut en faire l'expérience comme ça. En ce sens, on peut dire que les risques sont en négatif les images concrétisées des utopies dans lesquelles est conservé et revitalisé ce qu'il y a d'humain dans le processus de modernisation, ou du moins ce qu'il en reste.”<sup>80</sup>

We might then just have to imagine new utopias, utopias that would lead us back to having faith in our own humanity, if it has ever been the case.

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<sup>80</sup> U. BECK, *La société du risque. Sur la voie d'une autre modernité*, Paris, Aubier, 2001, p. 51.

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