Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 May 2016[1]

Joined Cases C-78/16 and C-79/16

Giovanni Pesce and Others (C-78/16),
Cesare Serinelli and Others (C-79/16)
v
Presidenza del Consiglio dei Ministri (C-79/16),
Presidenza del Consiglio dei Ministri — Dipartimento della Protezione Civile,
Commissario Delegato per Fronteggiare il Rischio Fitosanitario connesso alla Diffusione della Xylella nel Territorio della Regione Puglia,
Ministero delle Politiche Agricole Alimentari e Forestali,
Regione Puglia

(Requests for a preliminary ruling from the Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court, Italy))

(Reference for a preliminary ruling — Directive 2000/29/EC– Plant health protection against the introduction of harmful organisms into the European Union — Implementing Decision (EU) 2015/789 as regards measures to prevent the introduction and spread of Xylella fastidiosa — Removal of host plants, regardless of their health status — Proportionality — Right to compensation)

I – **Introduction**

1. *Xylella fastidiosa* is a phytopathogenic bacterium which attacks the conducting vessels[2] of many cultivated and wild plants, causing them to die through desiccation.[3]

2. Endemic in North and South America,[4] it was observed for the first time in Europe in October 2013, in the region of Puglia (Italy), on olive trees, before its presence was reported, in July 2015, in Corsica (France) on exotic ornamental shrubs and in Spain on broom plants, and then, in October the same year, in the department of Alpes-Maritimes (France), on the same shrubs as in Corsica.

3. Genetically diverse, the bacterium contains several subspecies, each of which attacks different plants.[5] It is dispersed naturally, carried by small insects which feed on the sap of infected plants.

1 — Original language: French.

2 — The bacterium develops in the xylem of the plants where it forms aggregates which eventually clog the vessels and restrict the circulation of sap.

3 — At this stage, I shall not discuss the matter of the causal link between the bacterium and desiccation, to which I shall return later.

4 — The bacterium, which seriously affected the Californian vineyards at the end of the XIX Century, was described for the first time in 1892 by the phytopathologist Newton B. Pierce (see Pierce, N.B., 'The California vine disease', U.S. Department of Agriculture, Division of Vegetable Pathology, Bulletin No 2), hence the name 'Pierce's disease' given to the vine quick decline syndrome.

5 — The list updated by the European Food Safety Authority (EFSA) is made up of 359 species of plant susceptible to the bacterium (see Update of a database of host plants of *Xylella fastidiosa*, of 20 November 2015, available at the time this Opinion was drafted on the EFSA website, at the address: http://www.efsa.europa.eu/en/efsajournal/pub/4378).

4. In Italy, *Xylella fastidiosa* has attacked mainly olive trees, which are of considerable economic,[6] cultural[7] and environmental importance in the countries bordering the Mediterranean. While prophylaxis measures, including tree felling, have been viewed with consternation in the areas in which the bacterium has already struck, the risk of spreading has caused deep concern in those which have so far been spared.

5. In order to eradicate the bacterium, the European Commission has adopted a strategy characterised by a gradual tightening of the measures implemented.

6. Between February 2014 and December 2015, four implementing decisions were successively adopted on the basis of 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,[8] and more particularly of the third sentence of Article 16(3) thereof, which authorises the Commission to adopt the 'necessary measures' when, inter alia, any of the harmful organisms listed in Annex I, Part A, Section I to that directive, among them the bacterium *Xylella fastidiosa* (Well and Raju), are found to be present.

7. By its first Implementing Decision 2014/87/EU of 13 February 2014,[9] the Commission prohibited the movement out of the profits of Lecce (Italy) of plants for planting, required official annual surveys to be carried out for the presence of *Xylella fastidiosa* and ordered the Member States to ensure that where anyone becomes aware of the presence of the bacterium or has reason to suspect such a presence, that person shall notify the competent authority within 10 days.

8. By its second Implementing Decision 2014/497/EU of 23 July 2014,[10] the Commission restricted the movement of plants which are hosts of *Xylella fastidiosa* and made their introduction into the Union subject to various conditions when they originate in third countries where the bacterium is known to be present. In order to eradicate the bacterium and prevent it from spreading, the Commission also required the Member States to establish, where necessary, 'demarcated areas' consisting of an 'infected zone' and a 'buffer zone' in which the Member States must, inter alia, uproot all the plants which are infected or show symptoms of possible infection and all plants likely to be infected.

9. By its third Implementing Decision (EU) 2015/789 of 18 May 2015,[11] the Commission, on the basis of the Scientific Opinion on the risk to plant health posed by *Xylella fastidiosa* (Wells and Others), published on 6 January 2015 by EFSA, first of all expanded the list of susceptible plants species and, in view of the situation in the South of Italy, ordered that the infected zone should cover the entire province of Lecce, and that the buffer zone should extend over at least 10 kilometres around the infected zone. The Commission also specified the nature of the 'eradication measures' to be taken in

6 — In view of the extent of olive oil production in the regions concerned. The European Union produces more than 75% of world production of olive oil, the Kingdom of Spain, the world's leading producer, representing on its own 45% of that production. The Italian Republic is the second largest producer.

7 — The olive tree is traditionally regarded, in Mediterranean countries, as a highly symbolic tree with many virtues. As Gabriele D'Annunzio (D'Annunzio, G., 'Agli olivi'):

'Olivi, alberi sacri, o voi che intenti nel terribile ardor meridiano udite il mare ...,
... versate la pace che v'irradia, l'inclita pace, nel cuor mio, benigni,
... o voi, …, ne l'azzurro immenso gravi di tale maestà ch'io penso l'antichissima dea Pallade Atena!'.

8 — OJ 2000 L 169, p. 1. Directive as amended by Council Directive 2002/89/EC of 28 November 2002 (OJ 2002 L 355, p. 45), ('Directive 2000/29').

9 — Decision as regards measures to prevent the spread within the Union of *Xylella fastidiosa* (Well and Raju) (OJ 2014 L 45, p. 29).

10 — Decision as regards measures to prevent the introduction into and spread within the Union of *Xylella fastidiosa* (Well and Raju) (OJ 2014 L 219, p. 56).

11 — Decision as regards measures to prevent the introduction into and the spread within the Union of *Xylella fastidiosa* (Wells et al.) (OJ 2015 L 125, p. 36).

the demarcated area, requiring the Member State concerned immediately to remove, within a radius of 100 metres around the infected plants, not only plants found to be infected and those showing symptoms of possible infection or suspected of being infected, but also, whatever their health status, 'host plants', defined as plants susceptible to the European isolates of the bacterium.[12]

10. Concluding that it was no longer possible to eradicate the bacterium in the province of Lecce, the Commission provided that the responsible official body could decide to apply merely 'containment measures', instead of eradication measures, in order 'to minimise the amount of bacterial inoculum … and keep the vector population at the lowest level possible'.[13] Those measures consisted mainly of the immediate removal of at least all plants which had been found to be infected by the bacterium if they were situated in the proximity of sites free from infection, of the sites of plants with particular cultural, social or scientific value or within a distance of 20 kilometres from the border of the containment area with the rest of the Union territory.

11. Finally, by its fourth Implementing Decision (EU) 2015/2417 of 17 December 2015,[14] the Commission amended Implementing Decision 2015/789 to take account of the development of scientific knowledge and established contingency plans for each Member State so as to fight the bacterium more effectively.

12. In implementation of the Commission's decisions, the Italian authorities adopted various measures.

13. By the deliberazione della Giunta Regionale de la Puglia n. 2023 — recante misure di emergenza per la prevenzione, il controllo e la eradicazione del batterio da quarantena *Xylella fastidiosa* associato al 'Complesso del disseccamento rapido dell'olivo' (Decision No 2023 of the Regional Council of Puglia concerning contingency measures for the prevention, control and eradication of the quarantine bacterium *Xylella fastidiosa*, associated with the 'rapid olive desiccation complex'), of 29 October 2013, the Regione Puglia (the Puglia Region) adopted contingency measures to prevent and eradicate the bacterium, in accordance with Article 16(1) of Directive 2000/29.

14. The decreto de Ministro delle Politiche Agricola Alimentari e Forestali (Decree of the Ministry of Agriculture, Food and Forestry), of 26 September 2014,[15] introduced the measures prescribed by Implementing Decision 2014/497.

15. On 10 February 2015, following the deliberazione della Giunta Regionale della Puglia n. 1842 — di richiesta di dichiarazione dello stato di emergenza fitosanitaira straordinaria (Decision No 1842 of the Regional Council of Puglia requesting a declaration of an extraordinary plant health emergency), of 5 September 2014, the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers) adopted a decision declaring a state of emergency owing to the spread of the quarantine pathogenic bacterium *Xylella fastidiosa* in the Puglia Region.

16. By the ordinanza della Presidenza del Consiglio dei Ministri — Dipartimento della Protezione Civile n. 225 (Order No 225 of the Presidency of the Council of Ministers — Department of Civil Protection), of 11 February 2015, the Comandante del Corpo Forestale dello Stato (Regional Commander of the Forestry Commission) of the Puglia Region was appointed Commissioner.

12 — See Article 1(c) of Implementing Decision 2015/789.

13 — Recital 7 of Implementing Decision 2015/789.

14 — Decision amending Implementing Decision 2015/789 (OJ 2015 L 333, p. 143).

15 — GURI No 239, of 14 October 2014.

17. On 16 March 2015, the Commissioner adopted a scheme to implement more rapidly the measures laid down in the decree of the Ministry of Agriculture, Food and Forestry of 26 September 2014. That scheme was designed to create a protection zone to prevent the bacterium spreading towards the north of the province of Lecce and to manage the worst affected area, in order to protect olive-tree cultivation in Salento (Italy).

18. The decreto del Ministero delle Politiche Agricole Alimentari e Forestali — recante misure di emergenza per la prevenzione, il controllo e l'eradicazione di *Xylella fastidiosa* (Wells e Raju) nel territorio della Repubblica italiana (Decree of the Ministry of Agriculture, Food and Forestry concerning contingency measures for the prevention, control and eradication of *Xylella fastidiosa* (Wells and Raju) in the territory of the Italian Republic), of 19 June 2015,[16] implemented Implementing Decision 2015/789.

19. Articles 8 and 9 of that decree essentially reproduce Article 6 of that implementing decision, relating to eradication measures, and of Article 7 thereof, relating to containment measures.

20. Moreover, that decree makes the owners of the agricultural holdings concerned responsible for carrying out the eradication measures, and the Agenzia Regionale per le Attività Irrigue e Forestali (Regional Agency for Irrigation and Forestry) is authorised to act, if necessary, in place of any who refuse to comply and to intervene at their expense.

21. By decision of 31 July 2015, the Council of Ministers extended the duration of the state of emergency by 180 days.

22. On 30 September 2015, the Commissioner who, on 3 July 2015, had presented a provisional scheme concerning emergency actions to be taken in the commune of Oria (Italy), adopted a new intervention plan incorporating, in essence, the measures provided for by the decree of 19 June 2015.

23. On 1 October 2015, the dirigente del Servicio Agricultura della Regione Puglia (Director of the Department of Agriculture of the Puglia Region) instructed the owners of agricultural holdings on which infected olive trees are found to fell the infected trees and any host plants found within a radius of 100 metres around the infected plants. Those removal decisions, notified to the applicants in the main proceedings on 3 and 4 October 2015, also provided that, if they refused to play their part, additional sanctions might be imposed on them, consisting of making them bear the cost of eradicating *Xylella fastidiosa* and imposing an administrative penalty.

24. By an action brought before the Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court, Italy) against the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers) (Case C-79/16), the Presidenza del Consiglio dei Ministri — Dipartimento della Protezione Civile (Presidency of the Council of Ministers — Department of Civil Protection), the Commissario Delegato per Fronteggiare il Rischio Fitosanitario connesso alla Diffusione della *Xylella* nel Territorio della Regione Puglia (Commissioner for addressing the phytosanitary risk connected with the spread of *Xylella* in the territory of the Puglia Region), the Ministero delle Politiche Agricole Alimentari e Forestali (Ministry of Agriculture, Food and Forestry) and the Regione Puglia (Puglia Region), Mr Giovanni Pesce (Case C-78/16) and Mr Cesare Serinelli (Case C-79/16) and other applicants in each of those cases, all owners of agricultural holdings situated on the territory of the commune of Torchiarolo (Italy), sought the annulment of the removal decisions and of any prior, connected or subsequent act.

16 — GURI No 148, of 29 June 2015; 'the Decree of 19 June 2015'.

25. The Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court), harbouring doubts as to the validity of Implementing Decision 2015/789 on the basis of which the measures contested by the applicants in the main proceedings were adopted, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Do Directive 2000/29 … in particular Articles 11(3), 13c(7), and 16(1), (2), (3) and (5) thereof, and the principles of proportionality, logic and reasonableness preclude the application of Article 6(2) and (4) of Implementing Decision 2015/789, as implemented in the Italian legal order by Article 8(2) and (4) of the Decree of [19 June 2015] in so far as it requires that host plants, regardless of their health status, be immediately removed within a radius of 100 metres around the plants which have been tested and found to be infected by the specified organism, and at the same time provides that the Member State is to carry out appropriate phytosanitary treatments prior to the removal of plants referred to in paragraph 2 against the vectors of the specified organism and plants that may host those vectors and that those treatments may include, as appropriate, removal of plants?

(2) Does Directive 2000/29 …, in particular Article 16(1) thereof, preclude, by use of the phrase "necessary measures to eradicate, or if that is impossible, inhibit the spread of the harmful organisms concerned", the application of Article 6(2) of Implementing Decision (EU) 2015/789, as implemented in the Italian legal order by Article 8(2) of the Decree of [19 June 2015] in so far as it provides for the immediate removal of host plants, regardless of their health status, within a radius of 100 metres around the plants which have been tested and found to be infected?

(3) Do Articles 16(1), (2), (3) and (5) of Directive 2000/29 and the principles of proportionality and logic and the right to due process preclude an interpretation of Article 6(2) and (4) of Implementing Decision 2015/789 — as implemented in the Italian legal order by Article 8(2) and (4) of the Decree of [19 June 2015] — to the effect that the eradication measure referred to in Article 6(2) can be imposed before and independently of the preventive measures provided for in Articles 6(3) and (4)?

(4) Do the precautionary principle and the principles of adequacy and proportionality preclude the application of Article 6(2), (3) and (4) of Implementing Decision 2015/789, as implemented in the Italian legal order by Article 8(2) and (4) of the Decree of [19 June 2015], in so far as it imposes measures to eradicate host plants within a radius of 100 metres around the plants which have been found to be infected by the organism [*Xylella fastidiosa*], without adequate scientific evidence to demonstrate with certainty the causal relationship between the presence of the organism and the desiccation of the plants deemed to be infected?

(5) Do the second paragraph of Article 296 TFEU and Article 41 of the Charter of Fundamental Rights of the European Union [17] preclude the application of Article 6(2) and (4) of Implementing Decision 2015/789, in so far as it provides for the immediate removal of the hosts plants, regardless of their health status, within a radius of 100 metres around the plants which have been tested and found to be infected, since it fails to provide an adequate statement of reasons?

(6) Do the principles of adequacy and proportionality preclude the application of Implementing Decision 2015/789 — as implemented in the Italian legal order by the Decree of [19 June 2015] — which provides measures for the removal of host plants, regardless of their health status, of plants known to be infected by the specified organism, and of plants showing symptoms

17 — 'The Charter'.

indicating possible infection by the organism [*Xylella fastidiosa*], or suspected of being infected by that organism, without providing for any form of compensation for the owners not responsible for the spread of the organism in question?'

26. By questioning the validity of Implementing Decision 2015/789, this reference for a preliminary ruling calls for an examination of the underlying question of whether, by adopting that decision, the Commission achieved the right balance between, on the one hand, concern for the protection of the areas not yet affected by the bacterium and, on the other hand, safeguarding the interests of the owners or operators of agricultural holdings situated in the areas already infected.

27. In this Opinion, I shall show that the plant removal measure laid down in Article 6(2) of Implementing Decision 2015/789 must be implemented by the Member State concerned following application of the phytosanitary treatments prescribed in Article 6(4) of that decision and that there is no contradiction between the different measures prescribed by the latter provision, which satisfies the obligation to state reasons.

28. I shall also demonstrate that the Commission has not exceeded the implementing powers conferred on it by Article 16(3) of Directive 2000/29 or infringed the precautionary principle, or the principle of proportionality by providing for the immediate removal of host plants, whatever their health status, in a radius of 100 metres around the infected plants.

29. I shall maintain that, under Article 17 of the Charter, the owners of the destroyed plants are entitled to receive compensation which is reasonable in relation to the value of those goods and that the fact that there is no mention of this in Directive 2000/29 and Implementing Decision 2015/789 cannot be interpreted as excluding that right. It follows, in my view, that the Member States which, when they adopt measures pursuant to Implementing Decision 2015/789, are implementing EU law, within the meaning of Article 51(1) of the Charter, are required to introduce a compensation scheme.

30. I shall conclude that examination of the questions has revealed nothing capable of affecting the validity of Implementing Decision 2015/789.

II – **Legal framework**

A – *Directive 2000/29*

31. On 8 May 2000, the Council of the European Union adopted Directive 2000/29, which codifies Council Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community,[18] which had been amended several times.[19]

32. Under Article 16 of Directive 2000/29:

'1. Each Member State shall immediately notify in writing the Commission and the other Member States of the presence in its territory of any of the harmful organisms listed in Annex I, Part A, Section I or Annex II, Part A, Section I or of the appearance in part of its territory in which their presence was previously unknown of any of the harmful organisms listed in Annex I, Part A, Section II or in Part B or in Annex II, Part A, Section II or in Part B.

18 — OJ 1977 L 26, p. 20.

19 — Directive as last amended by Commission Directive 1999/53/EC of 26 May 1999 (OJ 1999 L 142, p. 29).

It shall take all necessary measures to eradicate, or if that is impossible, inhibit the spread of the harmful organisms concerned. It shall inform the Commission and the other Member States of the measures taken.

2. Each Member State shall immediately notify in writing the Commission and the other Member States of the actual or suspected appearance of any harmful organisms not listed in Annex I or in Annex II whose presence was previously unknown in its territory. It shall also inform the Commission and the other Member States of the protective measures which it has taken or intends to take. These measures must, inter alia, be such as to prevent risk of the spread of the harmful organism concerned in the territory of the other Member States.

In respect of consignments of plants, plant products or other objects from third countries considered to involve an imminent danger of the introduction or spread of the harmful organisms referred to in paragraph 1 and the first subparagraph of this paragraph, the Member State concerned shall immediately take the measures necessary to protect the territory of the Community from that danger and shall inform the Commission and the other Member States thereof.

Where a Member State considers that there is an imminent danger other than that referred to in the second subparagraph, it shall immediately notify in writing the Commission and the other Member States of the measures which it would like to see taken. If it considers that these measures are not being taken in sufficient time to prevent the introduction or spread of a harmful organism in its territory, it may temporarily take any additional measures which it deems necessary, as long as the Commission has not adopted measures pursuant to paragraph 3.

The Commission will present a report to the Council on the operation of this provision, together with any proposals, by 31 December 1992.

3. In cases referred to in paragraphs 1 and 2, the Commission shall examine the situation as soon as possible within the Standing Committee on Plant Health. On-site investigations may be made under the authority of the Commission and in accordance with the relevant provisions of Article 21. The necessary measures based on a pest risk analysis or a preliminary pest risk analysis in cases referred to in paragraph 2 may be adopted, including those whereby it may be decided whether measures taken by the Member States should be rescinded or amended, under the procedure laid down in Article 18(2). The Commission shall follow the development of the situation and, under the same procedure, shall amend or repeal, as that development requires, the said measures. Until a measure has been adopted under the aforesaid procedure, the Member State may maintain the measures that it has employed.

4. The detailed rules for applying paragraphs 1 and 2 shall be adopted as necessary, in accordance with the procedure referred to in Article 18(2).

5. If the Commission has not been informed of measures taken under paragraphs 1 or 2, or if it considers the measures taken to be inadequate, it may, pending the meeting of the Standing Committee on Plant Health, take interim protective measures based on a preliminary pest risk analysis to eradicate, or if that is not possible, inhibit the spread of the harmful organism concerned. These measures shall be submitted to the Standing Committee on Plant Health as soon as possible to be confirmed, amended or cancelled in accordance with the procedure referred to in Article 18(2).'

33. Article 18 of Directive 2000/29 provides:

'1. The Commission shall be assisted by the Standing Committee on Plant Health instituted by Council Decision 76/894/EEC. [20] ...

20 — Decision of 23 November 1976 establishing a Standing Committee on Plant Health (OJ 1976 L 340, p. 25).

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply. [21]

The period laid down in Article 5(6) of Decision 1999/468 … shall be set at 3 months.

…'

34. Annex I, Part A, Section I(b) to Directive 2000/29 mentions the bacterium *Xylella fastidiosa* (Well and Raju) among the harmful organisms the introduction and spread of which must be prohibited in all the Member States.

B – *Implementing Decision 2015/789*

35. Article 1 of Implementing Decision 2015/789 defines the term 'specified organism' as grouping together all the European and non-European isolates of *Xylella fastidiosa* (Wells et al.). That article also distinguishes the 'specified plants' listed in Annex I to that implementing decision and the 'host plants' listed in Annex II thereto, the former being all plants known to be susceptible to the specified organism, whereas host plants are plants known to be susceptible only to the European isolates of the bacterium.

36. Article 4 of Implementing Decision 2015/789, entitled 'Establishment of demarcated areas', provides:

'1. Where the presence of the specified organism is confirmed, the Member State concerned shall without delay demarcate an area in accordance with paragraph 2 …

2. The demarcated area shall consist of an infected zone and a buffer zone.

The infected zone shall include all plants known to be infected by the specified organism, all plants showing symptoms indicating possible infection by that organism, and all other plants liable to be infected by that organism due to their close proximity to infected plants, or common source of production, if known, with infected plants, or plants grown from them.

As regards the presence of the specified organism in the province of Lecce, the infected zone shall at least include that entire province.

The buffer zone shall be of a width of at least 10 km, surrounding the infected zone.

The exact delimitation of the zones shall be based on sound scientific principles, the biology of the specified organism and its vectors, the level of infection, the presence of the vectors, and the distribution of specified plants in the area concerned.

3. If the presence of the specified organism is confirmed in the buffer zone, the delimitation of the infected zone and buffer zone shall immediately be reviewed and changed accordingly.

4. On the basis of the notifications by Member States in accordance with Commission Implementing Decision 2014/917/EU, [22] the Commission shall establish and update a list of the demarcated areas and communicate that list to the Member States.

21 — Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23).

22 — Commission Implementing Decision of 15 December 2014 setting out detailed rules for the implementation of Directive 2000/29 as regards the notification of the presence of harmful organisms and of measures taken or intended to be taken by the Member States (OJ 2014 L 360, p. 59).

5. Where based on the surveys referred to in Article 3 and on the monitoring referred to in paragraph 7 of Article 6 the specified organism is not detected in a demarcated area for a period of 5 years, this demarcation may be lifted. In such cases, the Member State concerned shall notify the Commission and other Member States.

…'

37. Under Article 6 of Implementing Decision 2015/789, entitled 'Eradication measures':

'1. The Member State having established the demarcated area referred to in Article 4 shall take in that area the measures as set out in paragraphs 2 to 11.

2. The Member State concerned shall, within a radius of 100 m around the plants which have been tested and found to be infected by the specified organism, immediately remove:

(a) host plants, regardless of their health status;

(b) plants known to be infected by the specified organism;

(c) plants showing symptoms indicating possible infection by that organism or suspected to be infected by that organism.

3. The Member State concerned shall sample and test the specified plants within a radius of 100 m around each of the infected plants, in accordance with the International Standard for Phytosanitary Measures ISPM No 31 …

4. The Member State concerned shall carry out appropriate phytosanitary treatments prior to the removal of plants referred to in paragraph 2 against the vectors of the specified organism and plants that may host those vectors. Those treatments may include, as appropriate, removal of plants.

5. The Member State concerned shall, in situ or in a nearby location designated for this purpose within the infected zone, destroy the plants and parts of plants referred to in paragraph 2, in a manner ensuring that the specified organism is not spread.

…

9. The Member State shall, where necessary, take measures addressing any particularity or complication that could reasonably be expected to prevent, hinder or delay eradication, in particular those related to the accessibility and adequate destruction of all plants that are infected or suspected of infection, irrespective of their location, public or private ownership or the person or entity responsible for them.

10. The Member State concerned shall take any other measure, which may contribute to the eradication of the specified organism, taking account of ISPM No 9 … and applying an integrated approach according to the principles set out in ISPM No 14 …

…'

38. Article 7 of Implementing Decision 2015/789, entitled 'Containment measures', provides:

'1. By way of derogation from Article 6, only in the province of Lecce, the responsible official body of the Member State concerned may decide to apply containment measures, as set out in paragraphs 2 to 6 …

2. The Member State concerned shall immediately remove at least all plants which have been found to be infected by the specified organism if they are situated in any of the following locations:

(a) in the proximity of the sites referred to in Article 9(2);

(b) in the proximity of the sites of plants with particular cultural, social or scientific value;

(c) within a distance of 20 km from the border of the containment area with the rest of the Union territory.

All necessary precautions shall be taken to avoid spreading of the specified organism during and after removal.

3. The Member State concerned shall, within a radius of 100 m around the plants referred to in paragraph 2 and which have been found to be infected by the specified organism, sample and test the host plants, in accordance with the International Standard for Phytosanitary Measures ISPM No 31. That testing shall be carried out at regular intervals and, at least, twice a year.

4. The Member State concerned shall apply appropriate phytosanitary treatments prior to the removal of plants referred to in paragraph 2 against the vectors of the specified organism and plants that may host those vectors. Those treatments may include, as appropriate, removal of plants.

5. The Member State concerned shall, in situ or in a nearby location designated for this purpose within the containment area, destroy the plants and parts of plants referred to in paragraph 2, in a manner ensuring that the specified organism is not spread.

6. The Member State concerned shall apply appropriate agricultural practices for the management of the specified organism and its vectors.'

39. Article 8 of Implementing Decision 2015/789 provides for the establishment of a surveillance zone in Italy, with a width of at least 30 km.

III – **My assessment**

A – *Admissibility of the questions*

40. By its six questions, the referring court asks whether Implementing Decision 2015/789 infringes, on different grounds, the second paragraph of Article 296 TFEU, Article 41 of the Charter, Article 11(3), Article 13c(7) and Article 16(1), (2), (3) and (5) of Directive 2000/29 and the principles of adequacy and proportionality.

41. Since the validity of Implementing Decision 2015/789 is contested as a preliminary issue in an action brought before the referring court against, inter alia, the Decree of 19 June 2015 enacted directly pursuant to that implementing decision, the wording of which it repeats, in essence, it is necessary to establish, at the outset, the admissibility of the questions raised in that particular configuration.

42. It is apparent from settled case-law that the Court makes a party's rights to raise a plea of invalidity of a Union measure subject to the condition that that party did not have the right to seek annulment of that measure directly before the EU judicature, in accordance with Article 263 TFEU. [23]

23 — See, inter alia, the judgment of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90, paragraph 17.

43. However, since the solution is based on the risk that the definitive nature of a Union measure might be circumvented, it applies only as regards the party which invokes the unlawfulness of a Union measure before a national court, whereas it could undoubtedly have brought an action for the annulment of that measure, but failed to do so within the prescribed period.[24] The party who clearly cannot bring the direct action for annulment against the decision therefore retains the power to contest its lawfulness indirectly.

44. Under the fourth paragraph of Article 263 TFEU, 'any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

45. In the present case, since it is not disputed that the applicants in the main proceedings are not the addressees of Implementing Decision 2015/789, which is addressed to the Member States, it is necessary to examine whether it is of direct and individual concern to them, within the meaning of the fourth paragraph of Article 263 TFEU, or whether that implementing decision may be described as a regulatory act which does not entail implementing measures, within the meaning of that provision, concerning the applicants in the main proceedings directly, and it seems to me that the examination of whether the act is regulatory or not, must be carried out before the examination of whether it is of direct and individual concern.

46. In the first place, it is apparent that Implementing Decision 2015/789 constitutes a regulatory act entailing implementing measures.

47. In that regard, it should be noted, first of all, that the concept of 'regulatory acts', provided for in the fourth paragraph of Article 263 TFEU, includes acts of general scope, other than legislative acts.[25]

48. Although the term 'decision' is generally defined as an act of individual scope which binds only the persons to whom it is addressed,[26] it may nevertheless be of a normative nature where it is applicable not only to limited addressees but to categories of persons envisaged in a general and abstract manner.[27] Moreover, since the entry into force of the Treaty of Lisbon, the normative nature of a decision may be recognised a fortiori because Article 288 TFEU expressly provides that a measure may constitute a decision even though it does not name an addressee.

49. The term 'regulatory decision' therefore lies outside the legal oxymoron and, moreover, the assessment of the legal nature of a measure issued by the Council or the Commission does not depend only on its official designation but must take account, first of all, of its purpose and content.[28] It is therefore necessary, in order to classify Implementing Decision 2015/789, to examine whether it is of general application.

24 — See, inter alia, judgment of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 30.

25 — See, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 58, 60 and 61.

26 — See settled case-law according to which 'the criterion for distinguishing between a regulation and a decision must be sought in the general application or otherwise of the act in question' (see, inter alia, judgment of 17 March 2011, *AJD Tuna*, C-221/09, EU:C:2011:153, paragraph 51 and the case-law cited).

27 — See, to that effect, Kovar, R., 'L'identification des actes normatifs en droit communautaire', in Dony, M., and de Walsche, A., *Mélanges en hommage à Michel Waelbroeck*, Bruylant, Brussels, 1999, p. 387, who observes that 'the principle of "going beyond appearances" is also applicable to decisions addressed to the Member States which may have normative scope ... where those decisions apply to a group of persons by reference to an objective factual or legal situation defined in relation to the purpose of those acts' (p. 395).

28 — See, to that effect, judgment of 14 December 1962, *Confédération nationale des producteurs de fruits et légumes and Others* v *Council*, 16/62 and 17/62, EU:C:1962:47, p. 479.

50. According to the Court's case-law, a measure is of general application if it applies to objectively determined situations and produces legal effects with regard to categories of persons envisaged in a general and abstract manner. [29]

51. In accordance with equally established case-law, the general application and hence the normative nature of a measure is not called in question by the fact that it is possible to define more or less precisely the number or even the identity of the persons to whom it applies at any given time, as long as it is established that such application takes effect by virtue of an objective situation of fact or of law defined by the measure in question in relation to its purpose. [30]

52. In the present case, it must be stated, first, that Implementing Decision 2015/789 was not adopted according to the legislative procedure and, secondly, that the obligations laid down in that implementing decision are redacted in general and abstract terms and directed at all the Member States, as Article 21 of that implementing decision expressly provides. In spite of the fact that the Italian Republic is more concerned than other Member States and that Article 7 of Implementing Decision 2015/789 concerns only a specific geographical area, namely the province of Lecce, that implementing decision is not directed at limited addressees, whether named or identifiable, but applies in an abstract manner to geographical areas delimited objectively according to the presence of the bacterium. [31] Moreover, the aforementioned implementing decision produces immediate legal effects, in all the Member States, in respect of categories of person envisaged in the general and abstract manner.

53. It is also necessary to point out that Implementing Decision 2015/789 entails implementing measures.

54. In order to assess whether a regulatory act entails implementing measures, it is necessary to take into account the position of the person pleading the right to bring proceedings under the final limb of the fourth paragraph of Article 263 TFEU [32] and to make reference exclusively to the subject matter of the action. [33]

55. Moreover, in that assessment, it is irrelevant whether or not those measures are mechanical in nature. [34]

56. In this case, in order to determine whether Implementing Decision 2015/789 entails implementing measures, it is necessary to ascertain whether that implementing decision itself determines the prophylaxis measures needed to combat the bacteria or whether a decision of the national authorities is necessary for that purpose.

29 — See judgments of 18 January 2007, *PKK and KNK* v *Council*, C-229/05 P, EU:C:2007:32, paragraph 51 and the case-law cited, and of 17 March 2011, *AJD Tuna*, C-221/09, EU:C:2011:153, paragraph 51.

30 — See, inter alia, order of 28 June 2001, *Eridania and Others* v *Council*, C-352/99 P, EU:C:2001:364, paragraph 19 and the case-law cited.

31 — It is apparent from the case-law that limitations or derogations which are temporary or territorial in nature form an integral part of the provisions as a whole within which they are found and, in the absence of any misuse of powers, are of the same general nature as those provisions (see, to that effect, the judgment of 29 June 1993, *Gibraltar* v *Council*, C-298/89, EU:C:1993:267, paragraph 18).

32 — See judgments of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 30, and of 10 December 2015, *Kyocera Mita Europe* v *Commission*, C-553/14 P, EU:C:2015:805, paragraph 44.

33 — See judgments of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 31, and of 10 December 2015, *Kyocera Mita Europe* v *Commission*, C-553/14 P, EU:C:2015:805, paragraph 45.

34 — See judgments of 28 April 2015, *T & L Sugars et Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraphs 41 and 42, and of 10 December 2015, *Kyocera Mita Europe* v *Commission*, C-553/14 P, EU:C:2015:805, paragraph 46.

57. It need only be stated that Implementing Decision 2015/789 requires the Member States to adopt measures consisting, in particular, in the demarcation in their territory, in accordance with the requirements of Article 4 thereof, of infected zones and buffer zones and in the eradication or, only for the province of Lecce, in the possible containment of the infected plants and host plants. That implementing decision must therefore be implemented by national measures which may be the subject of an action on the part of their addressees.

58. In the second place, it must be stated that the applicants in the main proceedings are not individually concerned by Implementing Decision 2015/789.

59. The lack of individual concern seems to me to stem necessarily from the finding that that decision is not only procedurally, but also substantively, regulatory, since the criterion followed to determine whether that act is normative — relating to its abstract dimension and to the objectivity of the situations it is called upon to govern — precludes, in my view, that measure affecting the applicants in the main proceedings by reason of certain attributes peculiar to them or, by reason of a factual situation which differentiates them from all other persons and, therefore, individualises them as addressees.

60. Since the conditions linked to the fact of being both directly and individually concerned by the Union measure are cumulative, it is not necessary to ascertain whether or not, in the present case, the applicants in the main proceedings are directly concerned by Implementing Decision 2015/789.

61. In the light of all the foregoing considerations, it does not appear that the applicants in the main proceedings could have brought an action for annulment against Implementing Decision 2015/789. It must therefore be concluded that they have the right to plead the invalidity of that implementing decision before the referring court, so the questions raised are admissible.

B – *The validity of Implementing Decision 2015/789*

1. The first and third questions

62. By its first and third questions, which should be examined together, the referring court asks, in essence, first, whether Article 6(2) and (4) of Implementing Decision 2015/789 is invalid in that it infringes Article 13(3), Article 13c(7) and Article 16(1), (2), (3) and (5) of Directive 2000/29, since it requires the immediate removal of the host plants, whatever their health status, within a radius of 100 metres around the infected plants, and provides at the same time that, before removing the plants, the Member State concerned must apply the appropriate phytosanitary treatments against the vectors of the specified organism to plants likely to be hosts of those vectors, and such treatments could include, if appropriate, the removal of plants, and secondly, insofar as that provision is to be interpreted as meaning that the eradication measure laid down in paragraph 2 may be imposed before and separately from the preventive application of the measures laid down in paragraphs 3 and 4, whether that provision is invalid in the light of Article 16(1), (2), (3) and (5) of Directive 2000/29, of the principles of proportionality and logic and also the principal of the right to due process.

63. It is apparent from the grounds of the order for reference (C-79/16) and from the wording of the questions raised that the referring court seeks to ascertain the link between the provisions of Article 6(2) of Implementing Decision 2015/789, which requires the ‘immediate’ removal of the infected plants and host plants, whatever their health status, and those of Article 6(3) and (4) of the decision, which provides for the taking of samples and the prior application of appropriate phytosanitary treatments against the vectors of the bacterium.

64. It is, more specifically, unsure whether eradication measures may be ordered without prior application of phytosanitary treatments and whether those two series of provisions do not contain an internal contradiction which may affect validity.

65. I find no uncertainty as regards the interpretation of the provisions at issue or any contradiction which would make them inapplicable.

66. Paragraphs 2, 3 and 4 of Article 6 of Implementing Decision 2015/789 state respectively that the Member State concerned 'should … immediately remove' host plants, infected plants and plants showing symptoms indicating possible infection or suspected of being infected, 'shall sample and test the specified plants within a radius of 100 m around each of the infected plants' and that, 'the Member State concerned shall carry out appropriate phytosanitary treatments prior to the removal of plants referred to in paragraph 2 against the vectors of [*Xylella fastidiosa*] and plants that may host those vectors'. Those treatments may include, as appropriate, 'removal of plants'.

67. A reading of those provisions shows that the Member State must, before removing the host plants and infected plants, apply a phytosanitary treatment to fight the vectors of the disease, that is to say the sucking insects which feed on the liquid from the xylem of plants, by eradicating those insects or removing the plants which harbour them. That prior phytosanitary treatment is consistent with the eradication procedures suggested by the EFSA opinion adopted on 30 December 2014,[35] which mentions that, although the first measure to be taken in the demarcated areas is the withdrawal of the infected plants as quickly as possible, it is necessary to apply beforehand an insecticide treatment since the insect vectors may move from the infected plants to other plants.[36]

68. Under Article 6(3) of Implementing Decision 2015/789, the Member State concerned must also, with no precise chronology, sample and test all the specified plants, bearing in mind that that category of plant is larger than that of the host plants, since it contains all plants susceptible to the European and non-European isolates of the bacterium.

69. The prior application of phytosanitary treatments to fight the vectors of the disease, which may include the removal of plants which harbour them, and the carrying out of sampling and testing on all the specified plants in no way contradicts the removal of host plants and infected plants, plants which are suspected of being infected or show symptoms of infection. In short, the measures laid down in Article 6(2), (3) and (4) of Implementing Decision 2015/789 are different in nature and scope, and, as regards those laid down in Article 6(2) and (4) of the decision, they apply consecutively. They are therefore by no means irreconcilable with one another.

70. It is apparent from the foregoing considerations, first, that Article 6 of Implementing Decision 2015/789 is to be interpreted as meaning that the measure requiring removal of the plants laid down in paragraph 2 thereof must be applied by the Member State concerned after the phytosanitary treatments laid down in paragraph 4 have been applied and, secondly, that consideration of the first and third questions contains nothing affecting the validity of Article 6(2), (3) and (4) of Implementing Decision 2015/789.

35 — See 'Scientific Opinion on the risk to plant health posed by *Xylella fastidiosa* in the EU territory, with the identification and evaluation of risk reduction options', available on the EFSA website.

36 — See point 4.6.8 of that opinion.

2. The fifth question

71. By its fifth question, the referring court asks, in essence, whether Article 6(2) of Implementing Decision 2015/789 is invalid in that the measure requiring immediate removal of host plants, whatever their health status, within a radius of 100 metres around the infected plants does not satisfy the obligation to state reasons.

72. According to the Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court), the statement of reasons of Implementing Decision 2015/789 is deficient since it contains no mention of the fact that the Commission verified that the measures imposed on the Member States were proportionate.

73. It should be pointed out that, although the statement of reasons required by Article 296 TFEU must show clearly and unequivocally the reasoning of the EU institution which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its review, it is not required to go into every relevant point of fact and law. [37]

74. Furthermore, observance of the obligation to state reasons must be evaluated not only according to the wording of the contested act, but also according to its context and to the whole body of legal rules governing the matter in question. In the case, as in the main proceedings, of a measure intended to have general application, the statement of reasons may be limited to indicating, first, the general situation which led to its adoption and, secondly, the general objectives which it is intended to achieve. If the contested measure discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made. [38]

75. In the present case, recitals, 1, 2 and 3 of Implementing Decision 2015/789 serve to explain why the eradication measures adopted were extended to all the host plants situated within a radius of 100 metres around the infected plants. Those measures meet the general objective, expressed in recitals 1 and 3, of strengthening the eradication measures following the discovery of new outbreaks and of preventing the spread of *Xylella fastidiosa* in the rest of the European Union and the intention to take account of the new scientific opinions adopted by EFSA on 30 December 2014 and 20 March 2015, which expanded the list of plant species susceptible to the bacterium, while restricting certain measures only to host plants ‘in order to ensure proportionality’.

76. It is apparent from the foregoing considerations that Implementing Decision 2015/789 complies with the obligation to state reasons set out in Article 296 TFEU.

3. The second question

77. By its second question, the referring court asks, in essence, whether Article 6(2) of Implementing Decision 2015/789 is invalid in so far as it infringes the provisions of Directive 2000/29, in particular Article 16(1) thereof, by providing for the immediate removal of the host plants, whatever their health status, within a radius of 100 metres around the infected plants.

37 — See, to that effect, judgment of 18 June 2015, *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 58 and the case-law cited.

38 — See, to that effect, judgment of 18 June 2015, *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 60 and the case-law cited.

78. At the end of an examination of recitals 11 and 37, Article 1(2), Article 11(3), Article 16(1) and (5), Article 22 and Article 23(2), and also of Annex IV, Part A, Section I, points 17, 20, 23.1 and 37 to Directive 2000/29, the referring court considers that the directive lays down no provisions permitting the eradication of healthy plants, even by way of preventive measures to avert the possible spread of a recognised and classified pathogen, and that, on the contrary, it seeks, as a whole, to protect organisms as yet unaffected. Within the scheme established by the directive, only plants which, having been inspected, are found to be infected or at least show objective and visible symptoms suggesting that they may be infected, may be destroyed or uprooted. However, Implementing Decision 2015/789 requires the eradication of plants which do not show symptoms of infection.

79. In their written observations and at the hearing, the applicants in the main proceedings maintained, along the same lines, that the concept of eradication is not synonymous with destruction and that the eradication provided for in Article 16 of Directive 2000/29 refers exclusively to harmful organisms, so that only infected plants could be destroyed.

80. Since Implementing Decision 2015/789 was adopted solely on the basis of Directive 2000/29 and, in particular, the fourth sentence of Article 16(3) thereof, the question raised by the referring court leads to the question of whether that directive authorises the Commission to require the Member States to adopt eradication measures in respect of healthy plants or whether, on the contrary, by adopting such measures, that institution exceeded the powers which the aforementioned directive conferred on it for the implementation of the rules which it has laid down.

81. That question therefore relates not to the lawfulness of the decision of the EU legislature to confer, pursuant to the third indent of Article 202 EC, an implementing power on the Commission, but to the lawfulness of the implementing measure, namely Implementing Decision 2015/789, based on Article 16(3) of Directive 2000/29, inasmuch as that institution exceeded its implementing powers.

82. Before the entry into force of the Treaty of Lisbon, the expression ‘implementing powers’ in the third indent of Article 202 EC covered the power to implement, at Union level, a Union legislative act or certain Union provisions and also, in certain circumstances, the power to adopt normative acts which supplement or amend certain non-essential elements of a legislative act.

83. The Treaty of Lisbon introduced a distinction between implementing power and delegated power. When an implementing power is conferred on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of the legislative act, in order to ensure that it is implemented under uniform conditions in all Member States. Where a delegated power is conferred on that institution pursuant to Article 290(1) TFEU, the Commission has the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

84. It seems clear to me that the power conferred on the Commission by Article 16(3) of Directive 2000/29 to adopt the ‘necessary measures’ in the cases referred to in paragraphs 1 and 2 of that article is an implementing power, within the meaning of that new distinction. I note, furthermore, that, in accordance with the requirements of Article 291(4) TFEU, the act was classified as an ‘implementing’ decision.

85. It follows from Article 290(1) TFEU, in conjunction with Article 291(2) TFEU that, in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements. [39]

39 — See judgment of 15 October 2014, *Parliament* v *Commission*, C-65/13, EU:C:2014:2289, paragraph 45.

86. Moreover, it is apparent from settled case-law that the Commission's implementing power is characterised by the significant discretion allowed to that institution which is free to determine, subject to review of manifest error of assessment and misuse of power, what is necessary and appropriate in the light of the objectives pursued by the basic regulation. According to the wording regularly used by the Court, both before and after the entry into force of the Treaty of Lisbon, 'within the framework of the Commission's implementing power, the limits of which must be determined by reference amongst other things to the essential general aims of the legislative act in question, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of that act, provided that they are not contrary to it'. [40]

87. Furthermore, it should be pointed out that the Commission's implementing power was exercised, in the present case, in the specific area of the assessment of measures to be taken to combat a phytosanitary risk. According to equally established case-law, in an area in which the EU legislature is called upon to make complex assessments on the basis of technical and scientific information which is likely to evolve rapidly, the judicial review of the exercise of its power can be only restricted. It must be limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether the EU legislature has manifestly exceeded the limits of its discretion. [41] The Court has concluded that the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the institution is seeking to pursue. [42]

88. I shall examine the lawfulness of Implementing Decision 2015/789 in the light of the power conferred on the Commission, taking into account that discretion and the limited judicial review which is its consequence.

89. It is apparent from recitals 4, 5 and 6 and from Article 1 of Directive 2000/29 that the aim of the directive is principally to ensure a high level of phytosanitary protection against the introduction into the Union of harmful organisms in products imported from third countries. [43]

90. In addition to the rules relating to the introduction of plants from third countries and the movement of plants within the Union, the various measures are intended to combat the presence and spread of harmful organisms which have managed to enter the territory of the Union. Accordingly, Article 16(1) of that directive provides, inter alia, that each Member State must notify the Commission and the other Member States of the presence in its territory of any of the harmful organisms which, like the *Xylella fastidious bacterium*, are listed in Annex I, Part A, Section I to that directive.

91. After that notification, Directive 2000/29 requires the Member States and the Commission, concurrently, to adopt the measures which are imposed. Article 16(1) of the directive requires the Member States to take all necessary measures to eradicate or contain the harmful organisms, whereas Article 16(3) of the directive confers on the Commission the power to adopt any 'necessary measures', and expressly includes in that power, which also constitutes an obligation, the power to rescind or amend decisions taken by the Member States.

40 — See, inter alia, judgment of 15 October 2014, *Parliament* v *Commission*, C-65/13, EU:C:2014:2289, paragraph 44 and the case-law cited.

41 — See judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, paragraph 52 and the case-law cited.

42 — See, by analogy, judgment of 1 March 2016, *National Iranian Oil Company* v *Council*, C-440/14 P, EU:C:2016:128, paragraph 77 and the case-law cited.

43 — That was the aim of Directive 77/93, which was replaced by Directive 2000/29 (see, to that effect, judgment of 30 September 2003, *Anastasiou and Others*, C-140/02, EU:C:2003:520, paragraph 45).

92. Article 16(3) of Directive 2000/29 is couched in general terms which do not permit the inference that the scope of the measures which may be taken is limited only to measures concerning plants already infected. On the contrary, that provision authorises, without distinction, any necessary measures to eradicate or contain the harmful organisms, so that if the eradication or containment of those organisms implies not only the destruction of infected plants, but also of healthy plants situated nearby, that measure also comes within the powers conferred on the Commission.

93. The restrictive interpretation suggested by the applicants in the main proceedings therefore finds no support in the wording of Article 16(3) of Directive 2000/29. Nor is it corroborated by Article 11(3) and Article 13c(7) of that directive, which are not relevant for assessing the extent of the Commission's implementing power since that is based exclusively on Article 16(3) of the directive. In any event, it is not apparent from reading those two provisions that they place any limitation with regard to the plants which may be affected by destruction measures.

94. It follows that, by adopting Implementing Decision 2015/789, the Commission did not exceed the powers conferred on it by Directive 2000/29 to eradicate and contain the harmful organisms.

4. The fourth question

95. By its fourth question, the national court asks, in essence, whether Article 6(2), (3) and (4) of Implementing Decision 2015/789 is invalid in so far as it infringes the precautionary principle and the principles of adequacy and proportionality.

96. The doubts expressed in that regard by the national court stem from the fact that Implementing Decision 2015/789 imposed eradication measures concerning not only the infected plants, but also all healthy plants situated within a 100 metre radius around the infected plants, although there is no scientific certainty either as to the causal link between the bacterium and rapid olive desiccation or as to the pathogenicity of the bacterium for the host plants.

97. What is more, there is no objective evidence to show that a radius of precisely 100 metres — and not less — constitutes sufficient space necessary to obtain the objectives sought, since, although that distance seems to have been chosen because the insect vectors of the bacterium cannot fly from one plant to another over a greater distance, EFSA nevertheless pointed out, in its opinion of 26 November 2013, that insect vectors can be transported by the wind over long distances and, in its opinion of 6 January 2015, that there is a lack of data on how far insect vectors can fly.

98. Therefore, according to the referring court, Implementing Decision 2015/789 is not based on scientific data having a degree of certainty and capable of supporting the Commission's choices and is not based on a risk evaluation or an evaluation of the potential consequences of inaction. It does not state to what extent the measures taken are appropriate or assess whether there are alternative, less radical measures.

a) Preliminary observations

99. It is necessary, first of all, to give due consideration to the facts in accordance with which the lawfulness of the measures at issue in the main proceedings must be reviewed, measures which were adopted on the basis of the scientific data available at the time.

100. It should be noted that, in principle, the lawfulness of a measure of the European Union falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted.[44] However, I believe I can detect, in several recent judgments of the Court, the beginning of a line of case-law which qualifies the rigour of that principle by allowing, in certain specific circumstances, subsequent facts to be taken into consideration.

101. The judgment in *Schrems*[45] provides a recent and particularly topical illustration of that case-law, since the Court considered that when the validity of a Commission decision stating that a third country ensures an adequate level of protection for transfers of personal data is examined, 'account must also be taken of the circumstances that have arisen after that decision's adoption'.[46] That solution is justified by the particular nature of the decision on adequacy, which must be regularly reviewed by the Commission on the basis of the factual and legal circumstances prevailing in the third country.

102. Similarly, the Court, in its judgment of 23 December 2015, *Scotch Whisky Association and Others*,[47] held that, in the context of a review of the lawfulness of national rules which have not yet entered into force, the national court, called on to examine the compatibility of those rules with EU law on the date on which it gives its ruling,[48] must take into consideration any information of which it has knowledge, '[particularly] in a situation … where there appears to be scientific uncertainty as to the actual effects of the measures provided for by the national legislation.[49] The Court based that approach on the principle, stated in its judgment of 9 February 1999, *Seymour-Smith and Perez*,[50] according to which the requirements of EU law must be complied with 'at all relevant times, whether that is the time when the measure is adopted, when it is implemented or when it is applied to the case in point.[51]

103. The Court had previously held that where a Member State adopts national rules which come within the context of a policy of protecting human and animal health, it must review those rules if it appears that the reasons that led to their adoption have changed as a result, in particular, of further information becoming available through scientific research.[52]

104. With regard to the application of the precautionary principle, the Court has held that, when new elements change the perception of a risk or show that that risk can be contained by measures less restrictive than the existing measures, it is for the institutions and in particular the Commission, which has the power of legislative initiative, to bring about an amendment to the rules in the light of the new information.[53]

105. Finally, it is interesting to note that, in its judgment of 8 September 2011, *Monsanto and Others*,[54] the Court held that, although national courts seised of actions against emergency measures adopted by the Member States pursuant to Article 34 of Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed[55] have jurisdiction to assess the lawfulness of those measures, having regard, inter alia, to the substantive

44 — See, inter alia, to that effect, judgment of 23 December 2015, *Parliament* v *Council*, C-595/14, EU:C:2015:847, paragraph 41 and the case-law cited.

45 — C-362/14, EU:C:2015:650.

46 — Paragraph 77.

47 — C-333/14, EU:C:2015:845.

48 — Paragraph 63.

49 — Paragraph 64.

50 — C-167/97, EU:C:1999:60.

51 — Paragraph 45.

52 — See, to that effect, judgments of 19 September 1984, *Heijn*, 94/83, EU:C:1984:285, paragraph 18, and of 13 March 1986, *Mirepoix*, 54/85, EU:C:1986:123, paragraph 16.

53 — See judgment of 11 July 2013 *France* v *Commission*, C-601/11 P, EU:C:2013:465, paragraph 110 and the case-law cited.

54 — C-58/10 to C-68/10, EU:C:2011:553.

55 — OJ 2003 L 268, p. 1.

conditions laid down in that regulation, as long as no decision has been adopted at EU level, on the other hand, where a decision is taken in a specific case, the factual and legal assessments contained in such a decision are binding on the courts, which are called on to assess the lawfulness of provisional measures adopted at national level. [56] Justified by the requirements of primacy and uniformity of EU law, that judgment therefore requires that factual and legal assessments contained in decisions adopted at EU level be taken into account, even if they were subsequent to the national measures the lawfulness of which is contested.

106. I propose an approach which marks the point where traditional case-law and that new case-law which favours taking later developments into account converge. 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.

107. Although, in my view, new scientific data precluding the existence of any phytosanitary risk linked to *Xylella fastidiosa* may give a reason for no longer putting into effect Implementing Decision 2015/789 and the subsequent national decisions, I consider that account may also be taken, in order a posteriori to confirm the choices made by the Commission, of the improvement in scientific knowledge which would, on the contrary, render certain the risk identified as potential at the time the eradication measures were adopted.

108. In the light of the foregoing considerations, I shall not restrict myself, in order to reply to the questions raised by the referring court, only to the scientific data known at the date of the adoption of Implementing Decision 2015/789.

b) Observance of the precautionary principle

109. It is apparent from settled case-law that the EU legislature must take account of the precautionary principle, according to which, where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent. [57]

110. Furthermore, where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures. [58]

111. The precautionary principle therefore confirms the action of the EU legislature if there is uncertainty as to the existence of a risk to the environment or to human, animal or plant health, where that uncertainty stems not from a total lack of knowledge, but from circumstantial knowledge which is the result of a scientific assessment.

112. Did the Commission infringe that principle by requiring the Member States to adopt measures to eradicate host plants within a radius of 100 metres around infected plants?

113. I think not.

114. The applicants in the main proceedings contest, in essence, the fact that so serious a measure was ordered without there being scientific certainty as to the causal link between the bacterium and the desiccation of the olive trees.

56 — Judgment of 8 September 2011, *Monsanto and Others*, C-58/10 to C-68/10, EU:C:2011:553, paragraphs 78 to 80.

57 — See, inter alia, judgment of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraph 81 and the case-law cited.

58 — See, inter alia, the judgment of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraph 82 and case-law cited.

115. 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.

116. Although the existence of a cause and effect relationship between *Xylella fastidiosa* and the rapid olive desiccation complex had not been demonstrated in the opinion of 6 January 2015, that opinion had, nevertheless, shown a significant correlation between the bacterium and the occurrence of that pathology. The existence of a potential risk stemming from the spread of the bacterium could therefore be regarded as sufficiently substantiated, in accordance with current scientific knowledge, to justify the application of the precautionary principle.

117. What is more, the risk has gone from being merely potential to certain since the opinion adopted on 17 March 2016,[59] in which it is stated that the result of recent experience shows that the *Xylella fastidiosa* isolate 'de Donno' causes the symptoms of rapid olive desiccation complex and is therefore the causal agent of the disease.[60]

118. It remains to be determined whether the measures adopted in Implementing Decision 2015/789 are proportionate.

c) Observance of the principal of proportionality

119. In order to ascertain whether the Commission observed the principle of proportionality in the exercise of its powers under Article 16(3) of Directive 2000/29, it is necessary to establish whether the resources which it set in motion in Implementing Decision 2015/789 were appropriate for attaining the objective sought and whether they did not go beyond what was necessary to achieve it.

120. As regards, first of all, the appropriateness of the measure at issue in the main proceedings for attaining the objective pursued, it should be pointed out that, in its opinion of 6 January 2015, EFSA stated that asymptomatic hosts, asymptomatic infections or low infections can escape surveys based solely on visual inspection and even based on laboratory tests owing to early infections or heterogeneous distribution of the bacterium in the plant. Starting from the premise that the disease is spread from one plant to another by insect vectors and that there is a latency period between the inoculation of the bacterium by those vectors and the appearance of symptoms, or even the possibility of detecting the bacterium in the plant, EFSA considered that it was essential, when eradicating plants known to be infected, also to destroy all the other plants in the vicinity.

121. As regards the decision to fix the radius around the infected plants at 100 metres, it should be pointed out that, although it mentioned the persisting uncertainties relating to the role of the contamination resulting from human intervention and to way in which the bacterium was spread by the wind and also the insufficiency of data concerning the distances flown by insect vectors, which are the only natural means of dispersal of the bacterium, EFSA nevertheless stated that those insects generally fly over short distances, up to 100 metres, even though they may probably be carried by the wind over longer distances.

59 — See 'Scientific opinion on four statements questioning the EU control strategy against *Xylella fastidiosa*', available on the EFSA website.

60 — See pages 10 and 11 of that opinion.

122. This dual finding by EFSA seems to me to justify the Commission's choice to eradicate not only the infected plants, but also the host plants, whatever their health status, situated in the area in which the likelihood of the disease spreading from an infected tree to a healthy tree is greater. Even if it is obviously not certain that it can halt the dispersal of the bacterium definitively and completely, the measure adopted by the Commission seems nevertheless appropriate for limiting effectively the risk of the disease spreading.

123. In order to respond to the objection raised at the hearing by the applicants in the main proceedings, referring to the paradox that it was necessary to introduce eradication measures in the least infected areas while sparing the province of Lecce, the most affected, in which simple containment measures may be practised, I shall add that that difference in treatment appears, in fact, to be justified. As the Commission pointed out in recital 7 of Implementing Decision 2015/789, it is no longer possible to eradicate the bacterium in the province of Lecce because it is already widely established there. Moreover, as the Italian Government argued at the hearing, that difference is explained by the geographical situation of the province of Lecce, which is in the far south of Italy and surrounded by sea, with the exception of its northern border.

124. As regards, in the second place, the question of whether the measure at issue in the main proceedings does not go beyond what is necessary to attain the objective pursued, it should be pointed out that, at the date of the adoption of Implementing Decision 2015/789, there did not appear to be less onerous measures for eradicating the bacterium. In its opinion of 6 January 2015, EFSA stated that no treatment was currently available to cure diseased plants in the field and that, although changes in cropping systems, such as pruning, fertilisation or irrigation, could have some impact on the disease, this was not enough to cure plants. Then, examining more particularly the effectiveness of pruning olive trees, EFSA observed that 'in Apulia, severe pruning of infected olive trees resulted in the emission of new sprouts from the base of the tree …, but, so far, this has not been shown to cure the plants and prevent them from dying'. [61]

125. In those circumstances, it has not been established that the Commission committed a manifest error of assessment by requiring the eradication of host plants, whatever their health status, situated within a radius of 100 metres around the infected plants.

C – *The sixth question*

126. By its sixth question, the referring court asks, in essence, whether Implementing Decision 2015/789 is invalid in so far as it infringes the principles of adequacy and proportionality, since it provides for measures for the removal of the host plants, whatever their health status, of plants known to be infected by *Xylella fastidiosa* and of plants showing symptoms of possible infection or suspected of being infected, without providing for any form of compensation for owners who are not responsible for the spreading of the bacterium.

127. The court has already had occasion to rule several times on compensation for damage caused to owners by national measures taken in implementation of EU law.

61 — See page 97 of that opinion.

128. According to the judgment of 6 April 1005, *Flip and Verdegem*,[62] on Union rules relating to classical swine fever, by adopting measures to combat that disease, the EU legislature did not intend to regulate the financial aspects of implementation of those measures by the owners of the animals concerned and, specifically, to prescribe measures to compensate those owners.[63] In the absence of EU provisions on the matter, compensation of owners whose pigs have been slaughtered by order of the national authorities under measures to control that disease falls within the competence of each Member State.[64]

129. The Court confirmed its case-law in its judgment of 10 July 2003, *Booker Aquaculture and Hydro Seafood*,[65] concerning EU legislation introducing minimum measures for the control of certain fish diseases. After stating that the EU legislature may consider, in the context of its broad discretion in the field of agricultural policy, that full or partial compensation is appropriate for owners of farms on which animals have been destroyed and slaughtered, it concluded that the existence, in EU law, of a general principle requiring compensation to be paid in all circumstances could not be inferred from that fact.[66]

130. The Court again repeated that case-law in its judgment of 22 May 2014, *Érsekcsanádi Mezőgazdasági*,[67] which concerned EU legislation establishing measures for the control of avian influenza, stating that it was also applicable in the case which gave rise to that judgment, 'particularly when account is taken of the fact that the national measures at issue … are less severe than the destruction and slaughter measures in *Booker Aquaculture and Hydro Seafood* [[68]]'.[69]

131. However, the legal environment has changed significantly since the judgments of 6 April 1995, *Flip and Verdegem*, C-315/93, EU:C:1995:102, and of 10 July 2003, *Booker Aquaculture and Hydro Seafood*, C-20/00 and C-64/00, EU:C:2003:397.

132. Since the entry into force of the Treaty of Lisbon, it is necessary, as regards fundamental rights, to apply the Charter, which enshrines the right to property and the right to fair compensation in the event of deprivation of property. Under Article 17(1) of the Charter, 'no one may be deprived of his or 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. The use of property may be regulated by law in so far as is necessary for the general interest'.

133. According to the explanations relating to Article 17 of the Charter[70] which, under the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into consideration for interpreting the Charter, Article 17 corresponds to Article 1 of the First Additional Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

134. According to the settled case-law of the European Court of Human Rights, Article 1 of the First Additional Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains three 'distinct' but 'complementary' rules. The first rule, which is set out in the first sentence of the first paragraph, enounces the principle of respect for property, which is of a general nature, whereas the other two rules cover specific situations of infringement of the right to

62 — C-315/93, EU:C:1995:102.
63 — Paragraph 25.
64 — Paragraph 30.
65 — C-20/00 and C-64/00, EU:C:2003:397.
66 — Paragraph 85.
67 — C-56/13, EU:C:2014:352.
68 — C-20/00 and C-64/00, EU:C:2003:397.
69 — Judgment of 22 May 2014, *Érsekcsanádi Mezőgazdasági*, C-56/13, EU:C:2014:352, paragraph 49.
70 — See the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

property. The second rule, which is in the second sentence of the same paragraph, covers deprivation of property and subjects it to certain conditions. Finally, the third rule, which is in the second paragraph, recognises that the contracting States have the power to introduce such laws as they deem necessary to control the use of property. [71]

135. In any event, the European Court of Human Rights requires respect for the requirement of proportionality in the form of the 'fair balance' which must be maintained between the demands of the general interest and the requirements of the protection of the right to property. [72]

136. In the case of a measure depriving a person of his property, a fair balance necessarily means, except in 'exceptional circumstances', the payment of compensation fixed at a 'reasonable' level. In situations falling within the scope of the legislation on the use of property or in those which cannot be put into a specific category, the need to ensure a 'fair balance' between the requirements of the general interest and the requirements for the protection of the fundamental rights of the individual is resolved differently, since compensation for the owner is then only one of the elements to be taken into consideration in the overall assessment of the 'fair balance' between the interests at issue. The 'fair balance' is disrupted when one person bears an 'individual and excessive' burden, [73] which is disproportionate to the public interest objective pursued, without adequate compensation being paid for that burden.

137. Without it being necessary to examine whether the eradication of the plants, whatever their health status, situated within a radius of 100 metres around the infected plants involves deprivation of property in that it may be assimilated to an actual expropriation measure, it need only be said that that measure clearly constitutes an interference in the right to property of the applicants in the main proceedings. In view of the particularly harmful consequences for the owners concerned, that measure cannot maintain a fair balance between the requirements of the general interest and those of the protection of the right to property unless the owner of the agricultural holding concerned may receive compensation. It may therefore be inferred from Article 17 of the Charter that, in order to ensure a fair balance between the interests at issue, the owners of the destroyed plants are entitled to receive compensation which is reasonable in relation to the value of those assets.

138. Since the right to compensation stems directly from Article 17 of the Charter, the fact that neither Directive 2000/29 nor Implementing Decision 2015/789 mentions that point cannot be interpreted as precluding such a right. Consequently, the applicants in the main proceedings cannot claim that the EU legislature infringed the principles of adequacy and proportionality by not providing for a compensation scheme.

139. The provisions of the Charter, according to Article 51(1) thereof, apply to Member States when they are implementing EU law. It should be pointed out that the Member States implement EU law, within the meaning of that provision, when they introduce eradication or containment measures pursuant to Implementing Decision 2015/789, which was itself adopted pursuant to Directive 2000/29. [74] They are therefore required, in accordance with Article 17 of the Charter, to establish a scheme which grants the owners of the agricultural holdings concerned compensation which is reasonable in relation to the value of the destroyed plants.

71 — ECtHR, 23 September 1982, *Sporrong and Lönnroth v. Sweden*, CE:ECHR:1982:0923JUD000715175, § 61.

72 — ECtHR, 23 September 1982, *Sporrong and Lönnroth v. Sweden*, CE:ECHR:1982:0923JUD000715175, § 69.

73 — ECtHR, 23 September 1982, *Sporrong and Lönnroth v. Sweden*, CE:ECHR:1982:0923JUD000715175, § 73.

74 — I disagree, in that regard, with the solution offered in paragraph 55 of the judgment of 22 May 2014, *Érsekcsanádi Mezőgazdasági*, C-56/13, EU:C:2014:352.

140. I note, furthermore, that, as the Commission points out, compensation schemes established by the Member States to make reparation for interference with the right to property suffered in the general interest may be co-financed by the Union under Regulation (EU) No 652/2014. [75]

141. It is apparent from all the above considerations that consideration of the question referred has not disclosed any factor of such a kind as to affect the validity of Article 6 of Implementing Decision 2015/789.

IV – **Conclusion**

142. In the light of the foregoing considerations, I propose that the Court reply to the questions referred by the Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court, Italy) as follows:

Article 6 of Commission Implementing Decision (EU) 2015/789 of 18 May 2015 as regards measures to prevent the introduction into and spread with in the Union of *Xylella fastidiosa* (Wells et al.) is to be interpreted as meaning that the measure for removal of plants laid down in paragraph 2 thereof must be implemented by the Member State concerned following the application of phytosanitary treatments against the vectors of the bacterium as provided for in paragraph 4.

Consideration of the questions referred has not disclosed any factor of such a kind as to affect the validity of Article 6 of Implementing Decision 2015/789.

75 — Regulation of the European Parliament and the Council of 15 May 2014 laying down provisions for the management of 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 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 (OJ 2014 L 189, p. 1).