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THE ‘ANTECHAMBER’ OF EMERGENCIES: INSIGHTS FROM THE JUDICIAL APPLICATION OF THE PRECAUTIONARY PRINCIPLE AT THE UNION LEVEL

FEDERICO FERRI*

Emergencies have gradually found a more stable place in the law of the European Union. Nevertheless, the concept of emergency at the Union level presents some ambiguities that generate legal implications. That is coupled with various issues concerning the precautionary principle. Even if precaution has become a general principle of the law of the European Union, some of its structural aspects are still unclear. However, the precautionary principle seems to have the potential to be a decisive tool in the hands of policy and decision-makers when it comes to managing events that are related to emergencies. This article analyses and untangles the relevant case-law of the Court of Justice to detect common trends. This study envisages possible legal implications with respect to the management of emergencies (understood in a broad sense) through the precautionary principle in a multilevel context. In particular, the analysis demonstrates that, based on the Court's case-law, this principle could be key to taking actions in the preliminary phases of the emergency management cycle, especially when serious risks (are believed to) exist and are addressed in the absence of full scientific certainty.

1 INTRODUCTION

The precautionary principle has progressively gained momentum in the legal order of the European Community (EC) and the European Union (EU), thereby becoming key to justify the taking of impactful measures by both supranational and domestic policy and decision-makers. That is particularly true as far as initiatives aimed at managing emergencies are considered. The practice emerging from the COVID-19 pandemic is emblematic,¹ and new legislative approaches targeting future pandemics or similar events are flourishing in the Member States.² Nevertheless, when discussing the potential of the precautionary principle in the context of emergencies, two issues further affect an already complex scenario from a legal point of view at the Union level.

First, the concept of emergency is still not well circumscribed in the EU legal order. Focusing on the so-called ‘EU emergency law’, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) contain various provisions that have been associated with ‘emergency clauses’ or ‘emergency competences’:

* Senior Assistant Professor of EU Law at *Alma Mater Studiorum* – University of Bologna.

¹ Goldner Lang, “‘Laws of Fear’ in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19” (2021) 14(1) *European Journal of Risk Regulation* 141. It was affirmed that ‘(t)he precautionary principle has become the cardinal principle of the pandemic because it provides clear rules of conduct when administrations are faced with risk scenarios in which the outcomes are unknown or difficult to estimate’: Francesco De Leonardis, ‘The Precautionary Principle in the Administrative Management of Epidemiological Emergencies: From *ad hoc* Response Measures to Advance Planning Policies’ (2021) 13(1) *Italian Journal of Public Law* 1, 11.

² Reza Khabook, ‘Application of the Precautionary Principle in Dealing with Future Pandemic Diseases: The Dilemma of Legality and Legitimacy Under the Rule of Law’ (2024) 20(3) *Utrecht Law Review* 10.

among these are Art. 42(7) TEU and Arts. 66, 78(3), 107(2)(b), 107(3)(b), 122(1) and (2), 143, 144, 213, and 222 TFEU.³ However, the Treaties fail to provide a flagship concept of ‘emergency’, nor do they lay the ground for a uniform legislative action in an emergency.⁴ Moreover, some of these provisions do not appear to reflect a high degree of exceptionality, seriousness, suddenness and urgency.⁵

In addition, EU emergency measures also find space in a complex and variegated set of secondary law acts. Some of these acts are not even rooted in the legal bases mentioned above: this is the case of certain measures adopted in the realms of human health, food safety and environmental protection. This means that there could be emergency scenarios or emergency initiatives that are covered by EU Law even if they fall outside the scope of more traditional EU emergency law categories.

It is therefore no coincidence that ‘various sectoral policy strategies in the EU use different concepts and terms (e.g. crisis, resilience, adaptability, disaster risk management/reduction, emergency response) for similar issues – which may lead to fragmentation or limitation of knowledge, evidence and expertise that inform the overall EU crisis strategy, as well as to fragmented crisis management mechanisms and operations’.⁶ Accordingly, when considering events that have had serious consequences at EU level or in certain regions of the Union (such as epidemics or pandemics, natural and man-made disasters, serious situations related to migration flows, public security or the economy), it is noticeable that, in literature, they may be described as emergencies (at times, serious or complex emergencies), but also as threats, crises, or disasters.⁷ This is a matter of fact, even if there are some conceptual differences between these terms.

In support of what has just been stated, it was recently held that concepts like emergencies and crises are not synonyms, but are still affected by ‘definitional challenges that

³ See e.g., Claire Kilpatrick, ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts’ (2015) 35(2) *Oxford Journal of Legal Studies* 325; Bruno de Witte, ‘EU Emergency Law and its Impact on the EU Legal Order’ (2022) 59(1) *Common Market Law Review* 3.

⁴ Salvatore Fabio Nicolosi, ‘Emergency Legislation in European Union Law’, in Ton van den Brink and Virginia Passalacqua (eds), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing 2024) 61.

⁵ Guido Bellenghi, ‘Neither Normalcy nor Crisis: The Quest for a Definition of Emergency under EU Constitutional Law’ (2025) *European Journal of Risk Regulation* 1.

⁶ European Commission, ‘Strategic crisis management in the EU Improving EU crisis prevention, preparedness, response and resilience’ (Scoping paper, 2021), 3 <https://research-and-innovation.ec.europa.eu/system/files/2021-07/scoping-paper_crisis-management-in-the-eu_june_2021.pdf> accessed 30 November 2025.

⁷ Marco Gestri, ‘EU Disaster Response Law’, in Andera De Guttry, Marco Gestri, and Federico Casolari (eds), *International Disaster Response Law* (Springer 2012) 120; Arjen Boin, Magnus Ekengren, and Mark Rhinard, *The European Union as Crisis Manager. Patterns and Prospects* (Cambridge University Press 2013) 52; Mark L Flear and Anniek De Ruijter, ‘Guest Editorial to the Symposium on European Union Governance of Health Crisis and Disaster Management: Key Norms and Values, Concepts and Techniques’ (2022) 10(4) *European Journal of Risk Regulation* 605; Merijn Chamon, ‘The use of Article 122 TFEU. Institutional Implications and Impact on Democratic Accountability’ (European Parliament – Study Requested by the AFCO committee 2022) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU\(2023\)753307_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU(2023)753307_EN.pdf)> accessed 30 November 2025; Salvatore Fabio Nicolosi, ‘Health Emergency and Asylum Law in the European Union’ (2022) 34(3-4) *International Journal of Refugee Law* 398; Federico Casolari, ‘The EU Approach Towards Disaster Management. A Critical Appraisal in the Light of the Action Put in Place to Face the COVID-19 Pandemic’ (2023) 6 *Yearbook of International Disaster Law Online* 51; Steve Peers ‘The New EU Asylum Laws: Taking Rights Half-Seriously’ (2024) 43 *Yearbook of European Law* 113.

make any legal distinction inherently complex and sensitive to framing’.⁸ Other examples could be made, which relate to the possible links between emergencies and disasters. Some authoritative opinions consider natural disasters as a major type of crisis and inquire how should a legal order deal with ‘such emergencies’;⁹ this implies a juxtaposition between emergencies and disasters. According to a different standpoint provided by other renowned scholars, an emergency should be seen as ‘an umbrella term which is used to refer to sudden events causing the death of a large number of people, their internal displacement and even exodus’.¹⁰ However, this definition seems to fall within the scope of the most widely accepted notion of ‘disaster’ at the Union level, which is contained in Art. 4(1) of Decision 1313/2013/EC¹¹ (here, disaster ‘means any situation which has or may have a severe impact on people, the environment, or property, including cultural heritage’).

Now, given that EU literature and regulatory practice rightly refer to the existence of a disaster management cycle comprising several *ex ante* and *ex post* phases, and it is therefore possible to legally address a disaster before it has occurred,¹² the same approach should be allowed when looking at emergencies from the perspective of EU Law. Consequently, in this article, the expression ‘emergency management’ alludes to a multiple-phase cycle within which supranational or national competent bodies can take action to eliminate or reduce the seriousness of situation considered to be an actual or a potential emergency. In such a context, the multilevel legal discourse on emergencies is likely to cover a wider array of issues than one might think at first glance. Besides that, the regulatory landscape becomes even more varied when the laws of individual Member States are taken into account.¹³

The second point to make is that the conceptualisation and the operationalisation of the precautionary principle have been proving challenging also at the EU level.¹⁴ In a nutshell, the law of the EU is still experiencing uncertainty in terms of the nature, definition, scope, application and justiciability of this principle. Some scholars understandably claimed that there was a need for a thorough academic analysis of the way the principle of precaution was used and should be used.¹⁵ Therefore, the action of the Court of Justice of the European Union (Court, Court of Justice, or CJEU) is of particular importance to shed light on this principle. Some authors convincingly argued that references

⁸ Claudia Cinnirella, “Emergency Powers” of the European Union: An Inquiry on the Supranational Model’ (2025) 10(3) European Papers 525, 527 (footnote 4).

⁹ Antonis Antoniadis, Robert Schütze, and Eleanor Spaventa, ‘Introduction: The European Union and Global Emergencies’ in Antonis Antoniadis, Robert Schütze, and Eleanor Spaventa (eds), *The European Union and Global Emergencies: a Law and Policy Analysis* (Hart Publishing 2011) 1.

¹⁰ Inge Govaere and Sara Poli, ‘Introduction to EU Governance of (Global) Emergencies, Threats and Crises’ in Inge Govaere and Sara Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Nijhoff 2014) 1.

¹¹ Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism [2013] OJ L347/924 (see the consolidated version of 18 December 2023).

¹² See e.g., *ibid.* See also Andrea de Guttry, Micaela Frulli, Federico Casolari, and Ludovica Poli (eds), *International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events. Towards an All-Hazards Approach* (Brill Nijhoff 2022).

¹³ See Daniel Sarmiento, ‘General Report: Topic I – EU Emergency Law’ (2025), 21 <https://www.fide-europe.org/xms/files/Katowice2025/REPORTS/Topic_I_EU_Emergency_Law_General_Report_by_D_Sarmiento_-_provisional_version-.pdf> accessed 30 November 2025.

¹⁴ Ex multis, Nicolas de Sadeleer, ‘The Precautionary Principle in EU Law’ (2010) 5 Aansprakelijkheid Verzekering En Schade 173.

¹⁵ Ragnar Lofsted, ‘The Precautionary Principle in the EU: Why a Formal Review is Long Overdue’ (2014) 16(2) Risk Management 137.

to the principle of precaution in the case-law of the Court of Justice (including the General Court) were considerably more detailed than in legal acts.¹⁶ As will be seen in the next Sections, this seems to be even more true in the face of acts qualified as ‘emergency measures’ by the competent authorities, adopted in the context of selected policy areas, and leading to (heavy) restrictions on competing interests.

Against this backdrop, and based on the relevant case-law of the Court of Justice, the present article contributes to this Special Issue by assessing and untangling the main legal issues associated with the application of the precautionary principle. It explores its potential with respect to the management of emergencies (understood in the broad sense) with a view to envisaging significant legal implications within the EU legal order. In particular, it is posited that the precautionary principle may facilitate the adoption or maintenance of measures expected to help competent authorities to define the emergency nature – whether sectoral or general – of certain situations which, *prima facie*, do not fall within the scope of the emergency clauses mentioned at the beginning of this Section.

The article is structured as follows. The next Section provides a brief overview of the genesis of the precautionary principle in International and EC/EU Law, in order to clarify since the very beginning some delicate issues characterizing this principle from both the theoretical and practical points of view. In Section 3, the main findings of some landmark judgments through which the Court ‘anticipated’ the precautionary principle are pointed out and streamlined (Section 3.1); subsequently, the very first judicial test for the operability of the precautionary principle is discussed (Section 3.2). Section 4 highlights common features of the case-law on the application of the precautionary principle with respect to EU and national measures aimed at preventing health emergencies, focusing on influential judgments of the General Court (Section 4.1) and discussing subsequent trends fuelled by the Court of Justice (Section 4.2). Finally, and through the analysis of three case studies, Section 5 looks at further issues and possible new areas of investigations concerning the goals (Section 5.1), impact (Section 5.2) and misuse (Section 5.3) of the precautionary principle. Some concluding remarks on the main outcomes of the CJEU’s approach follow in Section 6.

2 SETTING THE SCENE: THE GENESIS OF THE PRECAUTIONARY PRINCIPLE AT THE INTERNATIONAL AND EU LEVEL

Even though precautionary approaches were first ‘spotted’ in the law and practice of some European States (in particular, Germany),¹⁷ the principle of precaution was mainly framed and developed under International Environmental Law. To sum up, the 1972 United Nations Conference on the Human Environment, held in Stockholm, brought environmental protection to the heart of the international community’s agenda.¹⁸ Then, the 1987

¹⁶ Kristel De Smedt and Ellen Vos, ‘The Application of the Precautionary Principle in the EU’ in Harald A. Mieg (ed), *The Responsibility of Science* (Springer 2022) 176.

¹⁷ See e.g., Meinhard Schröder, ‘Precautionary Approach/Principle’ (2014) Max Planck Encyclopedias of International Law <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1603>> accessed 30 November 2025.

¹⁸ Among the outcomes of this Conference were a Declaration and an Action Plan containing a series of principles and recommendations for sound management of the environment a series of principles for sound management of the environment.

‘Our Common Future’ Report (also known as ‘Brundtland’ Report),¹⁹ prepared by the World Commission on Environment and Development, introduced the concept of sustainable development and guiding principles to achieve that new overarching goal for humankind. Interestingly, the Annex enshrining the proposed legal principles for environmental protection and sustainable development also included a ‘strict liability’ obligation based on which States were to take ‘all reasonable precautionary measures to limit the risk when carrying out or permitting certain dangerous but beneficial activities’.

These novelties paved the way for the 1992 Rio de Janeiro Conference on Environment and Development, renamed ‘the Earth Summit’, because of its symbolic importance. The Rio Conference proceedings included a Declaration of Universal Principles,²⁰ Agenda 21,²¹ and other international instruments.²² Here, the precautionary principle formally saw the light. The main reference is Principle 15 of the 1992 Rio Declaration on Environment and Development, which runs as follows:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Subsequently, further definitions or conceptualisations of the precautionary principle were elaborated, taking the cue from Principle 15 of the Rio Declaration. For instance, Art. 5.7 of the 1994 World Trade Organisation (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) does not explicitly refer to this principle, but it allows the contracting parties to take action even in cases where relevant scientific information is simply ‘insufficient’. It also adds that the measures adopted must be provisional and that States shall seek to obtain the additional information necessary for a more objective assessment of risk and review the measure accordingly within a reasonable period of time. Other important insights stem from the 1998 ‘Wingspread Statement on the Precautionary Principle’; in this case, the principle was the subject matter of an initiative that aimed to add human health to the category of protected goods (next to the environment) and to downgrade the risk threshold to generic ‘threats of harm’.²³

The European Community tried to keep pace with the legal advancements in the realm of International Environmental Law.²⁴ In 1986, the Single European Act introduced a

¹⁹ The text of the Report is available here

<<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>> accessed 30 November 2025.

²⁰ Rio Declaration on Environment and Development (A/CONF.151/26).

²¹ The text of the Agenda 21 is available here:

<<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>> accessed 30 November 2025.

²² In particular, the Convention on Biological Diversity (Biodiversity Convention or CBD) entered into force on 29 December 1993, and the United Nations Framework Convention on Climate Change (UNFCCC), entered into force on 21 March 1994. Another outcome was the Statement of Principles for the Sustainable Management of Forests (A/CONF.151/26, Annex III).

²³ The text of the Statement is available here: <<https://www.gdrc.org/u-gov/precaution-3.html>> accessed 30 November 2025. See more in detail Charles Vlek, ‘A Precautionary-Principled Approach Towards Uncertain Risks: Review and Decision-Theoretic Elaboration’ (2009) 2(2) Erasmus Law Review 129, 137.

²⁴ Some EC measures predating the Maastricht Treaty expressed the precautionary approach, albeit in a sectoral manner: see *amplius* Joakim Zander, *The Application of the Precautionary Principle in Practice. Comparative Dimensions* (Cambridge University Press 2010) 80.

provision, Art. 130r, concerning Community action on the environment. This provision also included the principle of environmental integration, which soon ceased to be a sectoral principle. With the adoption of the Maastricht Treaty, in 1992, this action was turned into a policy of the newly formed European Union, and Art. 130r was partly amended. Among other things, the precautionary principle was added to the text of this Article (it was the same year of the Rio Conference on Environment and Development). The structure and core contents of this provision, including the precautionary principle, have been reproduced time after time until the adoption of the Lisbon Treaty; they can now be found in Art. 191 TFEU.²⁵

Notwithstanding the influence of International Law on EU Law, and despite the developments outlined above, the precautionary principle quickly proved difficult to conceptualise and apply at the EU level. It was thus not surprising to come across divergent implementation schemes at the international level, even outside the scope of application of environmental protection. As for the Community, the risk of double standards for what was permissible internally and in international relations was highlighted.²⁶ A famous testing ground was the ‘hormone beef’ dispute, which took place within the WTO following complaints submitted by the United States and Canada to challenge an EC ban on the importation of meat and meat products from cattle treated with specific hormones for growth promotion purposes. In that case, the WTO Panels and the Appellate Body ruled in favour of the applicants and stated that the contested EC measures were not in line with the SPS Agreement.²⁷ This dispute brought to the surface the uncertainty surrounding this principle,²⁸ with the Appellate Body trying to shed some light on the matter.²⁹

²⁵ The precautionary principle remains a founding principle of the EU’s environmental policy, alongside principles that emphasize the need for preventive action, the priority of rectifying environmental damage at its source, and the principle that the polluter should pay. Instead, the principle of environmental integration acquired a more general nature and is enshrined in Art. 11 TFEU and Art. 37 of the Charter of Fundamental Rights. See more in detail Patrick Thieffry, *Manuel de droit de l’environnement de l’Union européenne* (Bruylant 2014) 65; David Langlet and Said Mahmoudi, *EU Environmental Law and Policy* (Oxford University Press 2016) 40; Geert Van Calster and Leonie Reins, *EU Environmental Law* (Edward Elgar Publishing 2017) 17; Gyula Bándi, ‘Principles of EU Environmental Law Including (the Objective of) Sustainable Development’ in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) 36; Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (2nd edn, Oxford University Press 2020), especially Part I; Ludwig Krämer with Christopher Badger, *Kramer’s EU Environmental Law* (9th edn, Hart Publishing 2024) 14.

²⁶ Giandomenico Majone, ‘What Price Safety? The Precautionary Principle and its Policy Implications’ (2002) 40(1) *Journal of Common Market Studies* 89.

²⁷ WTO Panel, Report of 18 August 1997 (WT/DS26/R/USA); WTO Panel, Report of 18 August 1997 (WT/DS48/R/CAN); WTO Appellate Body, Report of 16 January 1998 (WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4).

²⁸ For example, regarding its definition, its nature under International Law, and its position in the SPS Agreement. More to the point, the applicants claimed that the precautionary principle was inherent in risk assessment and should not have been linked to risk management (as argued by the EC): Anna Szajkowska, ‘The Impact of the Definition of the Precautionary Principle in EU Food Law’ (2010) 47(1) *Common Market Law Review* 173, 178.

²⁹ See further Wybe Th Douma and M Jacobs, ‘The Beef Hormones Dispute and the Use of National Standards under WTO Law’ (1999) 8(5) *European Energy and Environmental Law Review* 137; Christophe Charlier and Michel Rainelli, ‘Hormones, Risk Management, Precaution and Protectionism: An Analysis of the Dispute on Hormone-Treated Beef between the European Union and the United States’ (2002) 14(2) *European Journal of Law and Economics* 83; Ilona Cheyne, ‘Gateways to the Precautionary Principle in WTO Law’ (2007) 19(2) *Journal of Environmental Law* 155, 158; Jacqueline Peel, ‘Of Apples and Oranges (and Hormones in Beef): Science and the Standard of Review In WTO Disputes Under The SPS Agreement’ (2012) 61(2) *International & Comparative Law Quarterly* 427.

The final decision of the Appellate Body pushed the European Commission to draft a Communication on the precautionary principle, which was published in 2000.³⁰ The Communication definitely brought some elements of interest. For example, the Commission illustrated that the principle's scope is wider than what could be inferred from the EU's founding Treaties, as it covers priorities and policy areas like health and the internal market. The critical threshold was represented by the existence of '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'.³¹ The background against which the principle could be activated should be characterised by insufficient, inconclusive, or uncertain scientific information that make it impossible to determine the risk with sufficient certainty. Finally, any measure adopted by decision-makers under the umbrella of the precautionary principle has to be proportionate, non-discriminatory, consistent with similar initiatives, resulting from a cost and benefits analysis, subject to review in the light of new scientific data, and capable of assigning responsibility for producing the scientific evidence.

The fact is that the 2000 Communication was literally designed as a point of departure for broader studies, meaning that the Commission itself expected substantive evolutions in the future. However, as anticipated in the previous Section, the EU institutions and bodies failed to improve the state-of-the-art on the legal debate about the precautionary principle.³²

In the absence of thorough legal guidance in the EU's founding treaties and secondary law, the role of the CJEU became (and continues to be) inevitably preponderant and suitable to lead to innovative outcomes.³³ So, the purpose of the next Sections is to highlight the alleged added value of the CJEU's case-law for the concretisation of the precautionary principle, and to contextualize the main findings with respect to the management of emergencies (keeping in mind the potential broadness of this concept).

3 THE EARLY STAGES OF THE PRECAUTIONARY PRINCIPLE

The attention is now directed to the activity of the EU judicial bodies in order to discuss some evolutionary stages of the principle of precaution. Next Sections consider the role played by the Court of Justice to make the precautionary principle 'fit' for the supranational legal order.

3.1 THE BASELINE

To start with, it is worth emphasising the influence of the Court of Justice's case-law even before the precautionary principle was officially spelt out. The Court acted as a 'forerunner'

³⁰ Commission, 'Communication from the Commission on the precautionary principle', COM(2000) 1 final.

³¹ *ibid.*, 2.

³² Kenisha Garnett and David J Parsons, 'Multi-Case Review of the Application of the Precautionary Principle in European Union Law and Case Law' (2017) 37(3) Risk Analysis 502.

³³ Alberto Alemanno, 'The Shaping of the Precautionary Principle by European Courts: From Scientific Uncertainty to Legal Certainty' in Lorenzo Cuocolo and Luca Luparia (eds), *Valori costituzionali e nuove politiche del diritto. Scritti raccolti in occasione del decennale della rivista 'Cahiers Européens'* (Halley 2007) 11; Eloise Scotford 'Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights' in Sanja Bogoević and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 133, 146.

in this respect because it laid the groundwork for a legal narrative on precaution-related powers and duties.

A set of judgments evidently favoured the emergence of a “precautionary approach” in sectors that were regulated to a small extent by the European Economic Community (EEC or Community) many years ago. These judgments often related to a branch under the course of development in the law of the Community, namely food security. However, the very aim of the approach constituting the *fil rouge* of these judgments was safeguarding human health and consumer protection in a single market-driven context where potentially negative consequences were difficult to estimate. Essentially, the main findings of the then Court of Justice of the European Community (CJEC) mirrored the mandatory requirements of the doctrine elaborated since the seminal *Cassis de Dijon* judgment.³⁴ Basically, the Court enabled the Member States to err on the side of caution with the result that competent national authorities often enjoyed much leeway in determining the threshold where a balance between rules (primarily related to free movement of goods) and exceptions had to be struck. Some examples may help clarify this point.

In the *Kaasfabriek Eyssen* case,³⁵ the Court had to consider whether a Dutch prohibition on the use of a specific antibiotic to preserve cheese was justified on health protection grounds, even though, at that time, the state of scientific research did not offer any clear result about the existence of a health risk. The CJEC nonetheless ensured a wide margin of manoeuvre to the Member State concerned and confirmed the validity of the domestic prohibitions. To reach this conclusion, the Court noted that some United Nations agencies, such as the Food and Agriculture Organisation and World Health Organisation, had decided to undertake scientific studies on the risk of ingestion, not only from cheese but also from all other sources.

Similarly, with the *Sandoz* judgment,³⁶ related to national authorisation schemes for vitamins intake in food and beverages, the Court of Justice provided a broad interpretation of the findings of another ruling, *Frans-Nederlandse Maatschappij*,³⁷ on plant protection products. The Court held that in case of scientific uncertainty on the harmfulness of a certain additive, and in the absence of full harmonisation, the Member States can establish the degree of protection of the health and life of humans that they intend to assure, having regard of the specific eating habits of their own population. In *Heijn*³⁸ and *Mirepoix*,³⁹ concerning the harmfulness of pesticide residues for human health, the Court, again, confirmed that domestic restrictions could be justified even in the face of scientific uncertainty on the minimum level of danger for human organisms.

The *Melkunie* judgment⁴⁰ had a particular impact, as it expressed a ‘zero tolerance approach’ for threats to human health. The case referred to non-pathogenic micro-organisms

³⁴ Case 120/78 *Rewe-Zentral AG contro Bundesmonopolverwaltung für Branntwein* EU:C:1979:42. According to some scholars, it is right in the post-*Cassis de Dijon* internal market rationale that the precautionary logic fits: Kai Purnhagen, ‘The EU’s Precautionary Principle in Food Law is an Information Tool!’ (2015) 26(6) European Business Law Review 903.

³⁵ Case C-53/80 *Officier van Justitie/Kaasfabriek Eyssen BV* EU:C:1981:35.

³⁶ Case 174/82 *Criminal proceedings against Sandoz BV* EU:C:1983:213.

³⁷ Case 272/80 *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV* EU:C:1981:312.

³⁸ Case 94/83 *Criminal proceedings against Albert Heijn BV* EU:C:1984:285.

³⁹ Case 54/85 *Ministère public against Xavier Mirepoix* EU:C:1986:123.

⁴⁰ Case C-97/83 *Criminal proceedings against CMC Melkunie BV* EU:C:1984:161.

in pasteurised milk products and was dealt with in the framework of the exceptions to the free movement of goods at the Community level. The CJEC affirmed that the data available did not make it possible to determine with certainty the minimum threshold of non-pathogenic micro-organisms in pasteurised milk products at which an acceptable level turns into a source of danger to human health. In the absence of harmonisation in this field, the Court ruled that

it is for the Member States to determine, with due regard to the requirements of the free movement of goods, the level at which they wish to ensure that human life and health are protected. In those circumstances, national legislation seeking to ensure that at the time of consumption the milk product in question does not contain micro-organisms in a quantity which may constitute a risk merely to the health of some, particularly sensitive consumers, must be considered compatible with the requirements of [the treaty-based derogations to the free movement of goods].⁴¹

Considered as a whole, these judgments suggest that the Court was inclined to confirm the significance of precaution as a regulatory tool. The CJEU appeared to have laid the foundations for a generally deferential approach towards competent authorities seeking to invoke precaution in order to prevent situations that could have led to (or constituted) health emergencies. It does not even seem that the conditions to be met to validly invoke precaution included the burden of proving the cross-border nature of the scenario to be averted. This circumstance becomes even more important if one considers the effects that the Court tolerated when it agreed to uphold the arguments of the authorities that had adopted measures expressing the precautionary approach. At a time when the single market represented the main goal of the European integration process (pursuant to Art. 2 of the Rome Treaty establishing the EEC),⁴² the precautionary approach was indeed turning into one of the main drivers to limit market freedoms by means of domestic measures.

3.2 THE INITIAL ‘STRESS TEST’: THE *BSE* JUDGMENT

The first real implementation of the precautionary principle in the case-law of the Court of Justice took place in 1998, in the case *United Kingdom and Northern Ireland v European Commission*.⁴³ The case arose at the time of a continental alarm for the potential effects of Bovine Spongiform Encephalopathy (BSE), commonly known as ‘Mad Cow disease’, first detected in 1986 in the United Kingdom (UK). In March 1996, a specific variant of BSE epidemic in cattle was found to be present in humans in the UK; the event was allegedly linked to the consumption of meat and other food products from contaminated cattle. Just one week later, the European Commission adopted Decision 96/239/EC on ‘emergency measures’ to protect against bovine spongiform encephalopathy.⁴⁴ This Decision temporarily banned the UK’s exports of bovine animals, as well as meat and derivative products. The

⁴¹ *CMC Melkunie BV* (n 40) para 18.

⁴² It is well-known that the formulation of Art. 3 TEU is very different, and the concept of the internal market is now way broader.

⁴³ Case C-180/96 *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities (BSE)* EU:C:1998:192.

⁴⁴ Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy [1996] OJ L78/47.

ban was passed, although available scientific information was not sufficient to take a definitive stance on the transmissibility of BSE to humans. Apparently, the risk of transmission could not be excluded, and that immediately raised serious concern among consumers. The emergency measures provided for by Commission's Decision had as their legal foundations legislative acts adopted in the framework of the Common Agricultural Policy.⁴⁵

The CJEU was confronted with an action for annulment brought against this Decision. The Court's ruling – which has gone down in history as the '*BSE* judgment' – confirmed the legality of the challenged measure. The Judges stressed the importance of competent authorities' relevant publications about new scientific information that had established a probable link between a disease typically affecting cattle and a fatal disease affecting humans for which no known cure existed at that time. The core of the judgment is in a statement: 'Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent' (para 99).⁴⁶ The Court added that such an approach could be inferred by the Treaty-based provisions shaping the environmental policy. Furthermore, after applying the proportionality test, the Court concluded that the ban on the export of live bovine animals could not be regarded as a manifestly inappropriate measure in view of the seriousness of the risk and the urgency of the situation.⁴⁷ As one can see, the CJEU did not expressly mention the precautionary principle. Nevertheless, it was convincingly argued that the Court's reasoning implicitly included this principle in the legitimization of the protective measure in the face of scientific uncertainty.⁴⁸ Not by chance, the management of the BSE crisis at the Community level was immediately labelled as a case study on the precautionary principle.⁴⁹ This aspect constitutes a remarkable evolution with respect to the background of the cases illustrated in the previous Section.

In addition, the application of the precautionary principle in the *BSE* judgment had two very important legal effects. First, the legal act in question was clearly designed to extend the scope of application of the precautionary principle outside the environmental dimension, particularly to trace it back to health protection. Second, in the *BSE* case, the precautionary principle was crucial in attributing the characteristics of a health emergency to the specific situation that the European Commission sought to avert. The fact that the Court upheld the Commission's Decision means that the judgment confirmed the emergency nature of that act, i.e. a particularly urgent measure, adopted during an epidemic, and with a view to introducing heavy restrictions on intra-Community trade. The context that emerges from a joint reading of the contested act and the judgment appears to be one of possible and

⁴⁵ Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market [1990] OJ L224/29, and Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market [1989] OJ L395/13.

⁴⁶ The Court took the same stand in a judgment closely related to *BSE* and completed the same day: see Case C-157/96 *The Queen v Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others* EU:C:1998:191 para 63.

⁴⁷ *BSE* (n 43) para 110.

⁴⁸ Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 696.

⁴⁹ Jane Holder and Sue Elworthy, 'The BSE Crisis: A Study Of The Precautionary Principle and The Politics Of Science in Law' in Helen Reece (ed), *Law and Science: Current Legal Issues 1998* (Oxford University Press 1998) 129.

imminent emergency, notwithstanding scientific uncertainty regarding the existence of serious large-scale risks to human health, and even though the disease at issue was known for years.

4 CONSOLIDATING THE PRINCIPLE

The *BSE* judgment proved to be a driving factor for the EU legislation. In particular, it had a profound impact on the preparation of the 2002 General Food Law Regulation, whose Art. 7 is notable for being one of the most striking precautionary clauses in EU secondary law. The legal framework of other sectors was also underpinned by the precautionary principle: the 2006 Regulation on chemicals⁵⁰ and the 2009 Regulation on plant protection products,⁵¹ are good examples in this respect. Additionally, all these Regulations contain provisions openly referring to emergency situations, procedures or measures. However, *BSE* became a reference point in the case-law on the precautionary principle, bearing in mind the difficulties the Union faced in managing scientific uncertainty, due to varying national standards affecting administrative discretion at the EU level.⁵² The following sections illustrate the main outcomes of the post-*BSE* case-law on the precautionary principle.

4.1 THE BASELINE: THE EARLY 2000s JURISPRUDENCE OF THE COURT OF FIRST INSTANCE (AND THE EFTA COURT)

Since the early 2000s, the case-law of the CJEU on the precautionary principle has intensified. In particular, the *BSE* decision was soon followed by some judgments issued between 2002 and 2003 by the former Court of First Instance (CFI, now General Court), which still constitute milestones in this regard. Among these decisions are *Pfizer*,⁵³ *Alpharma*,⁵⁴ *Artegodan*,⁵⁵ and *Solvay Pharmaceutical*,⁵⁶ concerning cases that are about Community measures establishing the withdrawal of the authorisation of certain antibiotics, medicinal products, or additives in feedingstuffs. For the purposes of the present analysis, the findings on the issue of scientific evidence are particularly noteworthy, as the CFI went beyond the conclusions reached by the CJEU in the *BSE* judgment and the guidelines published in 2000 by the European Commission.

⁵⁰ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1.

⁵¹ Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L309/1.

⁵² Karl-Heinz Ladeur, 'The Introduction of the Precautionary Principle into EU Law: A Pyrrhic Victory for Environmental and Public Health Law? Decision-Making under Conditions of Complexity in Multi-Level Political Systems' (2003) 40(6) Common Market Law Review 1455, 1475.

⁵³ Case T-13/99 *Pfizer Animal Health SA v Council of the European Union* EU:C:1999:572.

⁵⁴ Case T-70/99 *Alpharma Inc. v Council of the European Union* EU:T:2002:210.

⁵⁵ Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan GmbH and Others v Commission of the European Communities* EU:T:2002:283.

⁵⁶ Case T-392/02 *Solvay Pharmaceuticals BV v Council of the European Union* EU:T:2003:277.

In these judgments, the CFI addressed risks to human health⁵⁷ and stated that a preventive measure cannot be based on a purely hypothetical approach to target risks:⁵⁸ a conjecture that has not been scientifically verified is not sufficient to activate the precautionary principle validly. Against this background, the *Pfizer* judgment clarified that a risk assessment must be carried out to verify the degree of scientific (un)certainty before taking a restrictive measure. The CFI acknowledged that arbitrary measures could not in any circumstances be rendered legitimate by the precautionary principle and that even preventive measures must be based on ‘as thorough a scientific risk assessment as possible’, account being taken of the particular circumstances of the case at issue, as well as the best available scientific data and the most recent results of international research.⁵⁹ This may also be the reason why the CFI, in *Pfizer*, got into the very technical substance of the case, thereby paving the way for the application of a proactive approach in cases where scientific knowledge is needed.⁶⁰

However, the initial emphasis on risk assessment may be misleading, as the judges also added that:

when the precautionary principle is applied, the fact that there is scientific uncertainty and that it is impossible to carry out a full risk assessment in the time available does not prevent the competent public authority from taking preventive protective measures if such measures appear essential, regard being had to the level of risk to human health which the public authority has decided is the critical threshold above which it is necessary to take preventive measures.⁶¹

Therefore, it does not come as a surprise that in cases like *Alpharma* and *Solvay Pharmaceutical*, the CFI applied the principle of precaution even though the defendant institution had not carried out a risk assessment prior to the taking of the measures challenged by the applicants.⁶² Moreover, it appears that the explicit evidence of the risk was not deemed to be necessary in order to trigger the precautionary principle.⁶³ This is why the literature rightly points out that the determination of the exact level of uncertainty implies very challenging evaluations, to the point that the requirement of conducting a solid risk assessment is unlikely to be fulfilled in practice.⁶⁴ The CFI, if anything, constructed

⁵⁷ Indeed, after *BSE*, the Luxembourg judges ended up dealing with the precautionary principle mostly in the areas of health and food safety, rather than environmental protection. See more extensively Nicolas de Sadeleer, ‘The Precautionary Principle in EC Health and Environmental Law’ (2006) 12(2) *European Law Journal* 139.

⁵⁸ See e.g., *Pfizer* (n 53) para 143, *Alpharma* (n 54) para 156.

⁵⁹ *Pfizer* (n 53) para 162.

⁶⁰ This choice was criticised by some scholars who claimed that in *Pfizer*, the CFI took its epistemic role seriously and acted as a kind of ‘super-expert’. That resulted in the CFI going ‘further than performing a role as informational catalyst would permit’. See Luca Knuth and Ellen Vos, ‘When EU Courts Meet Science: Judicial Review of Science-Based Measures Post-Pfizer’ in Mark Dawson, Bruno de Witte, and Elise Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar Publishing 2024) 191, 199.

⁶¹ *Pfizer* (n 53) para 382.

⁶² See also Anne-May Janssen and Nele F Rosenstock, ‘Handling Uncertain Risks: An Inconsistent Application of Standards?: The Precautionary Principle in Court Revisited’ (2016) 7(1) *European Journal of Risk Regulation* 144, 150.

⁶³ De Smedt and Vos (n 16) 177.

⁶⁴ Marjolein B A van Asselt and Ellen Vos, ‘The Precautionary Principle and the Uncertainty Paradox’ (2006) 9(4) *Journal of Risk Research* 313.

uncertainty as the absence of full safety, which ultimately leads to a very limited room for any judicial review of the precautionary principle.⁶⁵ Most notably, given the likelihood of diverging scientific opinions on uncertainty in many situations, these CFI's judgments suggest that the precautionary principle has the potential to always be applied.⁶⁶

For the sake of completeness, it should be stressed that CFI was partly influenced by the case-law of the Court of the European Free Trade Association (EFTA Court).⁶⁷ A major example is the *Kellogg's* judgment,⁶⁸ concerning a ban on import and marketing imposed by Norway on cornflakes fortified with iron and vitamins.⁶⁹ *Kellogg's* boosted a sort of circular approach when it comes to the relationship between the CJEU and the EFTA Court; on the one hand, it contributed to developing the law of the European Economic Area (EEA) in an integration-friendly way, while on the other, the CJEU cited *Kellogg's* in various judgments on the precautionary principle.⁷⁰

Now, if one puts the main takeaways of these rulings in the context of emergency management, it seems fair to conclude that the CFI opened the way to a framework in which policy and decision-makers enjoy a significant margin of manoeuvre since the first phases of the cycle. That is particularly true when it comes to assessing the lawfulness of measures already adopted. This argument is strengthened by the fact that, in those years, the CFI elevated the precautionary principle to the rank of the general principles of Community law, requiring that 'competent authorities' take appropriate measures.⁷¹ Moreover, the category of 'competent authorities' was interpreted as encompassing both EU institutions involved in

⁶⁵ Anne-May Janssen and Marjolein van Asselt, 'The Precautionary Principle in Court. An analysis of post-Pfizer Case Law' in Marjolein van Asselt, Esther Versluis, and Ellen Vos (eds), *Balancing between Trade and Risk: Integrating Legal and Social Science Perspectives* (Routledge 2013) 197, 213. However, it was also argued that this line of judgments showed the CFI's propensity to require the demonstration of solid evidence of harm to justify precautionary measures: Elen Stokes, 'The EC Courts' Contribution to Refining the Parameters of Precaution' (2008) 11(4) *Journal of Risk Research* 491, 497.

⁶⁶ Sara De Vido, 'Science, Precautionary Principle and the Law in Two Recent Judgments of the Court of Justice of the European Union on Glyphosate and Hunting Management' (2020) 43(2) *DPCE Online* 1319, 1332.

⁶⁷ This Court is a peculiar judicial body, as it is an independent International Law Organisation with a limited jurisdiction. See Halvard Haukeland Fredriksen, 'The EFTA Court', in Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein and Michelle Q Zang (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge University Press 2018) 138. The EFTA Court was not found to play the same para-constitutional role of the CJEU, and it should be recalled that the latter underscored the different aims of the EFTA Convention and the Treaty establishing the European Economic Community, notwithstanding the identical formulation of certain provisions (Case 270/80 *Polydor and Others v Harlequin and Others* EU:C:1982:43). However, it was opined that the case-law of the EFTA Court at times influenced that one of the CJEU: Carl Baudenbacher, 'The EFTA Court's Contribution to the Realisation of a Single Market' (2018) 29(5) *European Business Law Review* 671.

⁶⁸ Case E-3/00 *EFTA Surveillance Authority v The Kingdom of Norway* [2000-2001] EFTA Ct. Rep. 73 points 25-29.

⁶⁹ In *Kellogg's*, the EFTA Court ruled that the ban ran counter to the prohibition of quantitative restrictions on imports and all measures having equivalent effect between the Contracting Parties. However, it also laid down some important insights on the application of the precautionary principle. Above all, the *Kellogg's* ruling clarified that, in the absence of harmonisation, and when there is uncertainty as to the current state of scientific research, States can decide what degree of protection of human health they intend to assure, thereby enjoying discretion to make risk management decisions, including establishing the level of risk they consider appropriate. The EFTA Court added that restrictive measures can be justified under the precautionary principle 'when the insufficiency, or the inconclusiveness, or the imprecise nature of the conclusions to be drawn from those considerations make it impossible to determine with certainty the risk or hazard, but the likelihood of considerable harm still persists were the negative eventuality to occur'. See *ibid*, paras 25-31.

⁷⁰ Halvard Haukeland Fredriksen, 'The EFTA Court 15 Years On' (2010) 59(3) *The International and Comparative Law Quarterly* 731, 747.

⁷¹ *Artegodan* (n 55) para 184.

preparing and applying secondary legislation, as well as Member States when acting within the scope of EU Law.⁷² That being stated, a common trait of the judicial decisions considered so far is the consolidation of the precautionary principle's high potential to justify measures aimed at tackling risks leading to possible health emergencies. Even when the aim is to lower the intensity of these risks, the approach at hand is likely to anticipate the emergency threshold, and this applies regardless of whether the emergency envisaged by the competent authorities is sectoral or general in nature.

4.2 FURTHER EVOLUTIONS: OF DISCRETION AND PROPORTIONALITY

The judgments referred to in the previous Sections opened the way to an extensive use of the precautionary principle in cases relating to the nexus between environment and human health. Chiefly, the precautionary principle was operationalised to determine whether restrictions on certain products, as decided by the EU or national institutions, were compliant with supranational rules. Most of the times, a large latitude was warranted to competent bodies.⁷³

Predictably, the Court drew some red lines to anchor the uncertainty condition to scientific knowledge. A good example is the *Monsanto* judgment (2003), concerning genetically modified organisms (GMOs), where the Court indicated that the risk assessment to be conducted (by domestic bodies) is in line with the precautionary principle if it provides 'specific evidence which, without precluding scientific uncertainty, makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available and the most recent results of international research that the implementation of those measures is necessary' in order to avoid potential (thus, not necessarily actual) risks to human health.⁷⁴

At the outset, it can easily be observed that, in many judgments, the CJEU relied on the principle of precaution to warrant restrictive measures adopted – in whole or in part – to protect human health. That happened either in cases where supranational norms had been challenged⁷⁵ or in cases involving alleged non-compliance with EU Law.⁷⁶ More generally (and more importantly), these rulings bring to the surface the issue of the leeway afforded by the precautionary principle to policy and decision-makers when a serious risk to human

⁷² Didier Bourguignon, 'The Precautionary Principle: Definitions, Application and Governance' (in-depth analysis - European Parliamentary Research Service 2015), 6
<[https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/573876/EPRS_IDA\(2015\)573876_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/573876/EPRS_IDA(2015)573876_EN.pdf)> accessed 30 November 2025.

⁷³ It was claimed that this effect could in turn reinforce the dominance of administrations over citizens: Veerle Heyvaert, 'Facing the Consequences of the Precautionary Principle in European Community Law' (2006) 31(2) European Law Review 185, 187.

⁷⁴ See in particular Case C-236/01 *Monsanto Agricoltura Italia Sp.A and Others v Presidenza del Consiglio dei Ministri and Others* EU:C:2003:431 para 113.

⁷⁵ To give just a few examples, see: Case C-154/04 *Alliance for Natural Health judgment* EU:C:2005:449; Case C-558/07, *The Queen, on the application of S.P.C.M. S.A, C.H. Erbslöh KG, Lake Chemicals and Minerals Ltd and Hercules Inc. v Secretary of State for the Environment, Food and Rural Affairs* EU:C:2009:430; Case C-343/09 *Afton Chemical Limited v Secretary of State for Transport* EU:C:2010:419; Case C-616/17 *Criminal proceedings against Mathieu Blaise and Others* EU:C:2019:800.

⁷⁶ For instance, see Case C-192/01 *Commission of the European Communities v Kingdom of Denmark* EU:C:2003:492 (the same approach was followed one year later in Case C-41/02 *Commission of the European Communities v Kingdom of the Netherlands* EU:C:2004:762, even though the national measure was found in breach of EU Law, especially due to the absence of scientific data affecting the assessment carried out by Dutch competent authorities); Case C-95/01 *Criminal proceedings against John Greenham and Léonard Abel* EU:C:2004:71.

health is supposed to exist notwithstanding scientific uncertainty. Furthermore, if the likelihood of real harm to health (or actual damage to environment) persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.

So, the Court reaffirmed the wide discretionary powers enjoyed by EU institutions as regards the definition of the objectives pursued and the choice of appropriate means of action. Accordingly, the scope of judicial review ends up being limited to checking whether a manifest error of assessment vitiates the institutions' exercise of their powers, whether there has been a misuse of powers, or whether the institutions have manifestly exceeded the limits of their discretion.⁷⁷ In this respect, further useful insights can also be found in judicial decisions where the Court acknowledged that the principle of precaution is instrumental to the achievement of health priorities even regardless of a connection with other policy areas characterised by high-intensity powers and competences of the EU (e.g. environmental protection, agriculture, internal market). In other words, the Court gradually accepted the connection of the precautionary principle to Art. 168 TFEU, which embodies a supporting competence of the EU and prescribes the inclusion in all the policies and actions of the Union of the requirements relating to the protection of human health.⁷⁸

Quite similar prerogatives were guaranteed to the Member States acting in sectors that were not harmonised by supranational legislation, although in some of the judgments concerned the Court failed to reproduce the same considerations on the limits to judicial review.⁷⁹ Paradoxically, this seems to be confirmed by rulings in which the Court took a restrictive stand on the possibility of invoking the precautionary principle. A case in point is *Fidenato* (2017),⁸⁰ a sort of 'follow-up' judgment with regard to the '*Monsanto saga*'.⁸¹ Here, the Court indirectly denied the lawfulness of a restriction established by national competent authorities against the cultivation of genetically modified maize. Still, in that case, precise and exhaustive EU-based criteria contributed to clarifying the specific extent to which the precautionary principle could be applied. In fact, the placement in the internal market was originally authorised at the EU level. Additionally, the provision to interpret was Art. 34 of the 2003 Food and Feed Regulation,⁸² concerning the so-called 'emergency measures' that Member States may take under the 'Emergencies' Section of the 2002 General Food

⁷⁷ E.g., Case T-204/11 *Kingdom of Spain v European Commission* EU:T:2015:91 paras 30-34; Case T-584/13 *BASF Agro and Others v Commission* EU:T:2018:279 paras 92-96; Case T-317/19 *AMVAC Netherlands BV v European Commission* EU:T:2022:62 paras 203-206 and 230; Case C-499/18 P *Bayer CropScience AG and Bayer AG v European Commission* EU:C:2021:367 paras 170-172.

⁷⁸ See in particular the *Gowan Comércio* judgment, where the Court confirmed the validity of a Commission's measure adopted to include fenarimol as 'active substance' pursuant to the Community's legal framework on the placing of plant protection products on the market: Case C-77/09 *Gowan Comércio Internacional e Serviços Lda v Ministero della Salute* EU:C:2010:803 para 70.

⁷⁹ *Ex multis*, Case C-24/00 *Commission of the European Communities v French Republic* EU:C:2004:70 para 50 (basically, the Court recalled previous judgments related to the precautionary approach and issued before the precautionary principle was officially established, like *Sandoz*); Case C-333/08 *European Commission v French Republic* EU:C:2010:44 para 86; Case C-663/18 *Criminal proceedings against B S and C A* EU:C:2020:938 para 90.

⁸⁰ Case C-111/16 *Criminal proceedings against Giorgio Fidenato and Others* EU:C:2017:676.

⁸¹ See also Joined cases C-58/10 and C-68/10 *Monsanto SAS et al. v Ministre de l'Agriculture et de la Pêche* EU:C:2011:553. On the case-law concerning the application of the precautionary principle in response to the introduction of GMOs in the Member States, see Alessandra Guida, 'The Precautionary Principle and Genetically Modified Organisms: A Bone of Contention between European Institutions and Member States' (2021) 8(1) *Journal of Law and the Biosciences* 1.

⁸² Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed [2003] OJ L268/1.

Regulation; and this provision is formulated in a very precise way, as it allows the adoption of said domestic measures exclusively when it is evident that a product authorised by or in accordance with that Regulation is likely to constitute a serious risk to human health, animal health or the environment. So, the Court's conclusions in *Fidenato* depend on the peculiar nature of the applicable secondary law provision, to be seen as a *lex specialis* (vis à vis the discipline on the precautionary principle contained in the 2002 General Food Regulation) authorising only in exceptional circumstances the implementation of Member States' subsidiary powers in the face of the risk assessment conducted by the European Union.⁸³

In addition to all this, a large part of the judgments integrating the trend discussed in this Section adds a further layer of analysis. These rulings stand out for the development of a close connection between the principles of precaution and proportionality. This circumstance is not wholly innovative, compared with judgments issued shortly after the publication of the 2000 Commission's Communication on the precautionary principle. The point is that the power/duty of the Member States' authorities and the EU institutions to act with precaution when they are aware of risks to health or the environment associated with certain activities or products is likely to cause disproportionate restrictions. To avoid the so-called 'panic struck approach', the EU Courts paid much attention to the respect of the proportionality principle in cases concerning measures adopted under the principle of precaution.⁸⁴ This trend has evolved over time. As confirmed by comprehensive analyses, judgments like *Pfizer* and *Alpharma* 'drew a clear distinction between review of the scientific substantiation of risk management measures and review of risk management measures, manifest errors of assessment, and proportionality'. As a matter of fact, the Court subsequently proved more inclined to conduct joint assessments on both principles. That resulted in the scrutiny on precaution becoming ancillary to (or even being absorbed within) proportionality review.⁸⁵ For instance, in the case *BASF Argo BV*, the judges pointed out that the obligation to carry out an impact assessment under the precautionary principle 'is ultimately no more than a specific expression of the principle of proportionality'.⁸⁶

So, the precautionary principle can likely raise the discretion threshold of competent authorities within the application of the principle of proportionality,⁸⁷ particularly in the final balancing sub-test. In other words, precaution could turn into a key tool to identify

⁸³ Furthermore, the *Fidenato* case was decided when a new Directive on GMOs had already been adopted, but was still not applicable *ratione temporis* (Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory [2015] OJ L68/1). This Directive marked a turning point in the sense that it allows Member States to restrict or prohibit the cultivation of GMOs in their territory (see the amendments that this directive produced to Art. 26 of the 2001 Directive on GMOs). See also Elena Corcione, 'Emergency Measures Against GMOs. Between Harmonizing and De-harmonizing Trends: The Case *Fidenato et al.*' (2018) 3(1) European Papers 345.

⁸⁴ Koen Lenaerts, "'In the Union We Trust': Trust-Enhancing Principles of Community Law' (2004) 41(2) Common Market Law Review 317, 335.

⁸⁵ Giulia Claudia Leonelli, 'Acknowledging the Centrality of the Precautionary Principle in Judicial Review of EU Risk Regulation: Why It Matters' (2020) 57(6) Common Market Law Review 1773, 1791.

⁸⁶ *BASF Argo BV* (n 77) para 170.

⁸⁷ Xavier Groussot and Katharina Girbinger, 'The Precautionary and Proportionality Principles in Emergency Situations: an Analysis of the Concept of Discretion in the Context of the Covid-19 Pandemic and EU/EEA Law' (November 2024)

<https://www.researchgate.net/publication/385423324_The_precautionary_and_proportionality_principles_in_emergency_situations_an_analysis_of_the_concept_of_discretion_in_the_context_of_the_Covid-19_pandemic_and_EUEEA_law> accessed 30 November 2025.

the potentially negative health consequences of certain activities. Accordingly, when conducting the proportionality test, competent authorities could enjoy much latitude in determining at least the imminence of a potential emergency as well as its possible impact (until it is possible to reach opposite conclusions thanks to new scientific evidence).

With all this in mind, it can be assumed that the precautionary principle may be implemented quite easily as a tool to justify the adoption of anticipatory measures in the management cycle of events perceived as possible emergencies, especially where such perception can be inferred from the supranational sectoral legislation to be applied in the case concerned. The judgments considered so far contribute to confirming that one of the effects of the precautionary principle could be facilitating the use of the language of the emergency by competent authorities, to the point that certain measures adopted on the basis of this principle could be conceived as emergency ones even though the emergency in the strict sense is not yet truly imminent. These measures would thus be adopted in times of no emergency, although in the name of emergency and outside the scope of the ‘emergency clauses’ expressed by the TEU and the TFEU.⁸⁸ The CJEU’s case-law on the management of health-related issues suggests that the precautionary principle can easily pop up like a ‘jack in the box’ and be used to establish if an event is an emergency (or part thereof) or to take action at an earlier stage than response. Drawing on the terminology typically used in EU disaster law, it can be said that the precautionary principle, as operationalised by the Court, can prove to be an important factor in the management of emergency scenarios understood in a broad sense, acting in particular in the preparedness phase or in a ‘buffer zone’ between preparedness and prevention.⁸⁹ Furthermore, the case-law of the CJEU on the precautionary principle appears to confirm that precaution could be invoked to justify restrictive measures during the response to an event that in turn constitutes a risk or a threat capable of leading to a subsequent emergency.

5 ADDITIONAL ISSUES AND NEW TESTING GROUNDS

Although the precautionary principle finds its original background in environmental law, and despite the numerous links between this principle and the health of animals and plants, human health was the real target in the case-law discussed so far. What is more, these judgments often focused on actual or potential prejudices for the free movement of certain goods and were invoked to justify exceptions to EU Law rules (primarily, market freedoms). However, it can be assumed that the importance of the precautionary principle as a guiding principle in emergency contexts is also witnessed by some CJEU’s judgments that are not exclusively limited to these dynamics. Three case studies are thus discussed in this Section:

⁸⁸ See above, Section 1.

⁸⁹ According to Art. 4(3) of Decision 1313/2013/EU (n 11), preparedness ‘means a state of readiness and capability of human and material means, structures, communities and organisations enabling them to ensure an effective rapid response to a disaster, obtained as a result of action taken in advance’. Instead, Art. 4(4) defines prevention as ‘any action aimed at reducing risks or mitigating adverse consequences of a disaster for people, the environment and property, including cultural heritage’. For more information on preparedness in International and EU Law with respect to emergencies, see Andrea de Guttery, ‘Rules of General Scope in Order to Be Prepared to Deal with CBRN Emergency Situations’ in Andrea de Guttery, Micaela Frulli, Federico Casolari, and Ludovica Poli (eds), *International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events. Towards an All-Hazards Approach* (Brill Nijhoff 2022) 49, 51.

Pesce and others (2016),⁹⁰ *Nordic Info* (2023)⁹¹ and *PAN Europe ASBL* (2023).⁹²

5.1 PESCE AND OTHERS AND CONCEPTUAL DILEMMAS: A CONTROVERSIAL CONTEXTUALISATION OF THE PRECAUTIONARY PRINCIPLE'S FIELD OF OPERATION?

Whereas the precautionary principle can be invoked to counter threats to the environment as well as human, animal, or plant health,⁹³ *Pesce and others* is a prime example of the shifting boundaries that may characterise the reference context when health protection requirements are at stake. Chiefly, the concepts of 'emergency' and 'health' deserve specific attention.

The case concerned *Xylella fastidiosa* (*Xylella*), a bacterium that affects a large number of plants and can cause their death by desiccation. *Xylella* was first detected in olive trees in some areas of the Apulia region (Italy). The outcomes of scientific analyses indicated that *Xylella* could rapidly spread through certain insects. Notably, in a scientific opinion published at the beginning of 2015, the European Food Safety Authority (EFSA) highlighted that the exact role of *Xylella* as regards the syndrome of those olive trees remained to be understood. However, EFSA explained that this bacterium presented a major risk because it had the potential to cause disease to olive trees in the target area once it established.⁹⁴ More precisely, it was specified that the risk identified by EFSA affected the whole EU territory, given the likelihood of transboundary consequences.

Based on Directive 2000/29/EC,⁹⁵ the European Commission adopted several implementing Decisions aimed at preventing the spread of *Xylella* within the EU.⁹⁶ Importantly, these acts were qualified as 'emergency measures' by the EFSA in its 2015 scientific opinion, which proved crucial in enabling Commission to adopt strict prohibitions in the case concerned.⁹⁷ It should also be noted that a core EFSA's task in this case was to carry out an evaluation of the EU phytosanitary requirements against *Xylella* and its insect vectors, as laid down in Directive 2000/29/EC 'and in possible future EU emergency legislation'.⁹⁸ Evidently, the implementing Decisions adopted by the Commission were aimed to go beyond the national 'emergency measures' (once more, this is the terminology chosen to qualify the acts at stake)⁹⁹ put in place since 2013 to prevent and eradicate the specified organism in accordance with Art. 16(1) of Directive 2000/29/EC. All these elements, taken together, contribute to determining partial overlaps between risk and emergency

⁹⁰ Joined cases C-78/16 and C-79/16 *Giovanni Pesce and Others v Presidenza del Consiglio dei Ministri - Dipartimento della Protezione Civile and Others* EU:C:2016:428.

⁹¹ Case C-128/22 *Nordic Info* EU:C:2023:951.

⁹² Case C-162/21 *Pesticide Action Network Europe ASBL, Nature et Progrès Belgique ASBL, TN v État belge*, EU:C:2023:30

⁹³ For considerations on the possibility of applying, at least, the precautionary approach beyond these areas, see Guido Bellenghi.

⁹⁴ The document is available here

<<https://efsa.onlinelibrary.wiley.com/doi/pdfdirect/10.2903/j.efsa.2015.3989>> accessed 30 November 2025.

⁹⁵ 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 [2000] OJ L169/1.

⁹⁶ These Decisions were adopted pursuant to Art. 16(3) of Council Directive 2000/29/EC.

⁹⁷ See *supra* (n 94).

⁹⁸ *ibid* 13.

⁹⁹ *Pesce and others* (n 90) para 16.

management scenarios.¹⁰⁰

Among other things, the Commission ordered Italy to carry out eradication activities, consisting in the immediate removal not only of the infected plants (in particular olive trees), but also of all host plants – even in the absence of any symptoms of infection – situated within a radius of 100 metres of those infected, both in the infected area and in the adjacent zone (referred to as the ‘buffer zone’).¹⁰¹ An Italian Administrative Court submitted a preliminary ruling for validity to the CJEU to challenge this measure.

In its ruling, the Court confirmed the validity of the Commission’s Decision and highlighted that the precautionary principle allows the adoption of restrictive measures even where it is 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.¹⁰² Next to this, the Court pointed out that the principle of precaution had to be applied having regard to the proportionality principle. By virtue of the EFTA’s scientific opinion and the wide margin of appreciation typically recognised to the Commission, the Court – in the analysis of both principles – stated that the contested Decision was adequate to attain the objectives sought.¹⁰³ Overall, the CJEU struck a balance between competing interests, which led in particular to (major) restrictions on the right to property of the owners of olive trees in the area concerned, and environmental protection in that Region.¹⁰⁴

It is worth recalling that the CJEU focused on health protection to explore the perspectives of application of the precautionary principle in the case concerned. However, the baseline question is: what kind of health? The reason behind this question is in the core background condition that Court indicated for the principle’s application. The judgment points out that the validity of the provision under dispute (in the implementing act) must be checked against Art. 16(3) of Directive 2000/29/EC. Well, in the Court’s words,

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.¹⁰⁵

Nonetheless, in the legal reasoning of the judgment, references to human health suddenly disappear, nor did the Court cite *BSE*. On the contrary, the ruling simply stresses the key function of plant health in the framework of the Commission’s Decision. Although the judgment does contain some references to public health, they are quite generic. It must also be observed that Art. 16(3) of Directive 2000/29/EC does not mention human health;

¹⁰⁰ *ibid*, para 48 (the CJEU qualified the Commission’s Decision at hand as a risk management measure).

¹⁰¹ 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 *Xylella fastidiosa* [2015] OJ L125/36; see also Commission Implementing Decision (EU) 2016/764 of 12 May 2016 amending Implementing Decision (EU) 2015/789 as regards measures to prevent the introduction into and the spread within the Union of *Xylella fastidiosa* [2016] OJ L126/77.

¹⁰² *Pesce and others* (n 90), especially para 47.

¹⁰³ *ibid*, especially para 64.

¹⁰⁴ *ibid* para 81.

¹⁰⁵ *ibid* para 47, emphasis added.

the same applies to the baseline EFSA analysis.¹⁰⁶ Similarly, the Court refrained from centring its reasoning on the protection of the health of humans also in the judgment concluding an infringement procedure that the European Commission had activated for Italy's failure to comply with the Xylella Decisions.¹⁰⁷

These circumstances allow to figure out the potential fluidity of the precautionary principle in the case-law of the Court of Justice. *Pesce and others* remains a good illustration of the moving boundaries of the precautionary principle's scope of application as regards, on the one hand, the characterisation of the operational context and the nature of the precautionary measures, and, on the other, the (re)definition of the interest to protect by means of this principle.

5.2 NORDIC INFO: THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE AGAINST THE FREE MOVEMENT OF UNION CITIZENS

The *Nordic Info* case, instead, was about travel bans and testing and quarantine obligations established by Belgium after the outbreak of the COVID-19 pandemic. Those restrictions were initially applied also to non-essential travel from Sweden, as this Member State was temporarily classified as a 'red zone' by the Belgian authorities. Nordic Info, an agency organising travel in Scandinavia, cancelled all scheduled trips between Belgium and Sweden and brought proceedings against the Belgian State to seek compensation for the damage. The Belgian court submitted a preliminary ruling to the CJEU, which was thus asked to interpret provisions establishing exceptions to the free movement rules enshrined in Directive 2004/38/EC (Citizens' Rights Directive – CRD)¹⁰⁸ and the Regulation (EU) 2016/399 (Schengen Border Code – SBC).¹⁰⁹

The Court resorted to the precautionary principle to grant the defendant's arguments, even if further guidelines were provided to assist the referring court in striking a fair balance. The judgment stresses the measure of discretion enjoyed by the Member States in the area of public health on account of the precautionary principle.¹¹⁰ Nonetheless, the judgment adds that, in these circumstances, the referring court's scrutiny must be confined

to ascertaining whether it is evident that, in the light, in particular, of the available information on the COVID-19 virus at the time of the facts in the main proceedings, measures such as the obligation to maintain social distancing and/or wear a mask and the obligation for any person to regularly carry out screening tests

¹⁰⁶ At most, it indicated a connection between this goal and possible large-scale insecticide treatments. The crux of the matter was that EFSA had not proved the existence of a definite causal link between the bacterium Xylella and the rapid olive tree desiccation in the Puglia Region (however, the existence of a significant correlation between the bacterium and the occurrence of such a pathology was proved).

¹⁰⁷ Case C-443/18 *European Commission v Italian Republic* EU:C:2019:676.

¹⁰⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

¹⁰⁹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

¹¹⁰ *Nordic Info* (n 91) para 90.

would have sufficed to give the same result as the restrictive measures [at stake].¹¹¹

Even if the focus on human (indeed, public) health in *Nordic Info* is self-evident, unlike *Pesce and others*, the most peculiar feature of this judgment is that, for the first time, the precautionary principle was applied to limit the free movement of persons. That happened notwithstanding the centrality of Union citizens' rights, bearing in mind that Union citizenship is a fundamental *status* of the EU legal order¹¹² and considering the traditional restrictive interpretative approach provided by the Court when interpreting exceptions to free movement rights recognised and guaranteed in the CRD and the SBC. Indeed, even in the presence of a totally uncommon factual background that could justify a less stringent scrutiny from a precautionary principle perspective, it appears that the Court, in *Nordic Info*, breathed life into health protection grounds via the principle of precaution.¹¹³

It is interesting to note that the Court never expressly mentioned the word 'emergency' in the judgment. This confirms that the field of action selected in the present work to assess the potential of the precautionary principle remains controversial. However, the *Nordic Info* ruling provided an opportunity for the Court to further strengthen the joint analysis of the precautionary and proportionality principles in a public health emergency of international concern.¹¹⁴ What is more, in this judgment, the CJEU applied the classic three-step proportionality test, as opposed to the two-step proportionality test applied in previous public health cases.¹¹⁵ This time, the penetration of precaution in the proportionality scrutiny was visible yet in the necessity sub-test; that probably lowered the threshold of the evidentiary requirement and shifted the assessment of uncertainty from the existence of a risk to the effectiveness of mitigating measures.¹¹⁶ Overall, although the Judges confirmed the much-vaunted (highly) deferential approach in favour of the competent national authority, the judicial review concerning the assessment of the national measures proved to be particularly intense, to the point that some authors claimed that 'the CJEU acted as if it were a public health authority explaining their proportionality and not a reviewing judicial authority'.¹¹⁷

¹¹¹ *Nordic Info* (n 91).

¹¹² Case C-181/23 *Commission v Malta* EU:C:2025:283 para 92.

¹¹³ The core of the CJEU's reasoning in *Nordic Info* was followed by the EFTA Court in a judgment issued after a few months: see Case E-5/23 *Criminal Proceedings against LDL*.

¹¹⁴ See e.g., the website of the European Medicines Agency <<https://www.ema.europa.eu/en/human-regulatory-overview/public-health-threats/coronavirus-disease-covid-19/covid-19-public-health-emergency-international-concern-2020-23>> accessed 30 November 2025.

¹¹⁵ Danaja Fabčič Povše, 'So Long and See You in the Next Pandemic? The Court's One-And-Done Approach on Permissible Reasons to Restrict Freedom of Movement for Public Health Reasons in the Nordic Info Case (C-128/22) of 5 December 2023' (*European Law Blog*, 19 December 2023) <<https://www.europeanlawblog.eu/pub/so-long-and-see-you-in-the-next-pandemic-the-courts-one-and-done-approach-on-permissible-reasons-to-restrict-freedom-of-movement-for-public-health-reasons-in-the-nordic-info-case-c-128-22/release/1>> accessed 30 November 2025.

¹¹⁶ Vincent N Delhomme, 'The Legality of Covid-19 Travel Restrictions in an 'Area without Internal Frontiers' Court of Justice (Grand Chamber) 5 December 2023, Case C-128/22, *Nordic Info*' (2024) 20(2) *European Constitutional Law Review* 307, 324.

¹¹⁷ Patrycja Dąbrowska-Kłosińska, 'The EU Court of Justice on Travel Bans and Border Controls Deference, Securitisation and a Precautionary Approach to Fundamental Rights Limitations' (2025) 50(1) *European Law Review* 107, 113.

5.3 *PAN EUROPE*: THE DOUBLE DIMENSION OF THE PRECAUTIONARY PRINCIPLE IN THE EU PESTICIDES FRAMEWORK

Finally, it is worth adding some considerations on case law concerning the precautionary principle in EU pesticide law, which constitutes the background of the *PAN Europe ASBL* judgment. Specifically, the case revolved around plant protection products containing active substances that had been prohibited or restricted by the Commission through implementing acts.

The request for a preliminary ruling concerned Regulation (EU) 1107/2009 on the placing of plant protection products on the market.¹¹⁸ This piece of legislation is a balancing act with three legal bases and a twofold aim: ensuring a high level of protection of human and animal health as well as the environment, and safeguarding the competitiveness of the EU's agriculture. Indeed, pesticides serve the second purpose, while representing a potential risk for the first one. Hence, the backbone of the Regulation is a complex system of authorisations for products containing active substances. In brief, the rule provided for by the Regulation is that such products can be authorised within a Member State if there has been a previous authorisation at the EU level.

Within this framework, Art. 53(1) of the Regulation allows Member States to introduce derogatory measures in case of 'emergency situations in plant protection'. More to the point, it stipulates that 'in special circumstances a Member State may authorise, for a period not exceeding 120 days, the placing on the market of plant protection products, for limited and controlled use, where such a measure appears necessary because of a danger which cannot be contained by any other reasonable means'. For the avoidance of doubt, this clause does not aim to restrict the placing on the market of products with already approved substances.¹¹⁹ Despite presenting some ambiguities, it was formulated in rather strict terms so that national competent authorities could invoke it in clearly exceptional situations.

Nevertheless, it was shown that Art. 53 of Regulation (EC) 1107/2009 had become a kind of catch-all clause, as some Member States resorted to it to authorise the same products time after time or even to allow the placing on the market of products that had neither been approved nor banned by the EU. As a result, the ordinary authorisation procedures established by the Regulation were replaced by extraordinary measures that, step by step, had become routine.¹²⁰ The Court of Justice was pushed to address this practice, particularly the aforementioned case *PAN Europe ASBL*.¹²¹ The final ruling unequivocally confirms that

¹¹⁸ See *supra* (n 51).

¹¹⁹ These situations are covered by Chapter IX of Regulation (EU) 1107/2009, where Art. 69 permits derogations only when it is clear that what was approved at the EU level is now likely to constitute a serious risk to human or animal health or the environment, and that such risk cannot be contained satisfactorily by means of measures taken by the Member State(s) concerned.

¹²⁰ Pietro Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations: The Role of the EU Principles of Good Administration and the Precautionary Principle in Shaping Better National Administrative Practices' (2025) 8(1) *Nordic Journal of European Law* 70.

¹²¹ Further preliminary rulings were activated in cases where *PAN Europe* was involved and the precautionary principle in the framework of Regulation (EU) 1107/2009 was at stake (although the Court did not interpret Art. 53): see e.g., Case C-308/22 *Pesticide Action Network Europe (PAN Europe) v College voor de toelating van gewasbeschermingsmiddelen en biociden* EU:C:2024:350; Joined Cases C-309/22 and C-310/22 *Pesticide Action Network Europe (PAN Europe) v College voor de toelating van gewasbeschermingsmiddelen en biociden* EU:C:2024:356. See also Pietro Mattioli, 'How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant

Art. 53(1) of the Regulation does not allow a Member State to authorise the placing on the market of plant protection products if the Commission had expressly prohibited the substances concerned.

For the purpose of the present analysis, the most important aspect is the way the precautionary principle was operationalised. The Court refrained from applying it as a justification for the ‘normalisation’ of pro-State emergency clause, but used it to foster the scope of the Regulation.¹²² In other words, the CJEU confirmed that the precautionary principle is an inherent element of the Regulation.¹²³ Due to this circumstance, which can be inferred by recital 8 and Art. 1(4), precaution here stands out not as a legal basis for justifying an emergency-related exception to the rule, but as a reinforcement of a rule that could have been neutralised by extensive (potentially abusive) use of the exception.

6 CONCLUDING REMARKS

Given the absence of a uniform definition of ‘emergency’ at EU level and considering that various secondary law acts introduced or corresponded to emergency measures in the context of certain Union policies (in particular, environmental protection, food safety and, above all, human health), the analysis conducted in the preceding pages is based on a fairly flexible conceptualisation of the term ‘emergencies’. In this regard, it was considered legally acceptable to apply the cornerstones of the disaster management cycle, including the *ex ante* phases, to emergencies as well. On the basis of these premises, the article demonstrated how the precautionary principle can influence this management cycle, especially with regard to the phases that constitute the prelude to (or the ‘antechamber’ of) an emergency.

The case-law analysed in the previous Sections shows that the EU institutions and national authorities can validly apply the precautionary principle in many situations falling within the emergency management cycle. That is likely to occur even outside the domain of environmental protection. The Court of Justice (and the General Court) progressively set forth some strict requirements, but many judgments contribute to substantiating a deferential approach in favour of competent authorities, especially for the evaluation of precautionary measures already adopted. This remains true despite the significant restrictions that these measures may produce on interests of utmost importance to the Union (e.g., the market freedoms) and even if the Court’s scrutiny tends to be more intensive where domestic measures are at stake. Moreover, applying the precautionary principle within the proportionality test (particularly in the final stages of the latter) could further expand the margin of manoeuvre for adopting measures that, despite scientific uncertainty, allow for

Protection Products at Member State Level? Some Clarifications from the Court of Justice’ (2025) 16(2) European Journal of Risk Regulation 824.

¹²² Paradoxically, in a previous case the referring Court submitted questions concerning the compatibility of Regulation (EU) 1107/2009 with the precautionary principle; the Court did not find any ground to declare the act contrary to this principle. Case C-616/17 *Procureur de la République v Blaise and Others* EU:C:2019:800. See Sabrina Röttger-Wirtz, ‘The Precautionary Principle and its Role in Judicial Review: Glyphosate and the Regulatory Framework for Pesticides’ (2020) 22(4) Maastricht Journal of European and Comparative Law 529.

¹²³ However, it seems that this aspect does not exclude the existence of controversial issues, especially as far as discretionary powers of the European Commission are concerned: Nicolas de Sadeleer, ‘Renewal of an Active Substance Found in an insecticide: How to Articulate Risk Assessment and Risk Management?’ (2024) 26(4) Environmental Law Review 304.

prolonged restrictions on specific interests in order to pursue others.

In particular, many of the CJEU's rulings lead to the conclusion that competent authorities can enjoy a certain leeway when it comes to using the language of the emergency in order to justify the taking of certain measures in a given sector and before the immediacy of a sudden event with far-reaching negative consequences. In order to bring these initiatives more into line with EU law, it is believed that the case law analysed in this article can help trace many of these initiatives back to the scope of the preparedness phase in the face of a likely upcoming scenario perceived as an emergency.

As regards future prospects, and thus going beyond the main outcomes of the analysis conducted in this work, the CJEU could still play a decisive role in mitigating certain additional issues. First, the Court should strive to draw a line between the principles of precaution and preventive action, and take a clearer stance on challenging aspects such as the identification of the objective(s) to pursue, the degree of protection to achieve, the time frame before which the risk is likely to materialize, the choice of the most appropriate means, the intensity and length of the provisional measures. In this way, the typically deferential approach followed by the Court could be partly reoriented if need be, at least when there is strong evidence that the challenged measure is wrong.¹²⁴ Second, the Court's action could also be noteworthy in resolving conflicts that may occur between different priorities covered by the precautionary principle, thereby – hopefully – restoring any balances that may have been unlawfully or even abusively altered; for example, when the conditions behind the adoption of precautionary measures have been established clearly and precisely in secondary law acts. Finally, attention should be paid to the evolution of the relationship between the precautionary and proportionality principles before or during emergencies in order to see if the Court is more inclined to assess both principles separately or if the former is destined to be a component of the latter. While adjusting proportionality to precaution may result in more flexible and knowledge-based assessments,¹²⁵ ensuring more autonomy to the proportionality principle could foster procedural safeguards against excessive discretion.¹²⁶ To this end, the role of the Court will be crucial to balance not only competing priorities but also these two principles.

¹²⁴ In this respect, see Ladislav Vyhnánek, Anna Blechová, Michael Bártla, Jakub Míšek, Tereza Novotná, Amnon Reichman, and Jakub Harašta, 'The Dynamics of Proportionality: Constitutional Courts and the Review of COVID-19 Regulations' (2024) 25(3) *German Law Journal* 386, 393.

¹²⁵ Pavel Ondřejek and Filip Horák, 'Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures (2024) 20(1) *European Constitutional Law Review* 27, 50.

¹²⁶ Groussot and Girbinger (n 87).

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