

# **Food Regulation and Criminal Justice**

(International Colloquium Section II of the AIDP XXth World Congress,  
Beijing, China, 23<sup>rd</sup>-26<sup>th</sup> September 2016)



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## INTRODUCTION

*By Adan Nieto Martin*

In the last few decades, the development of food regulation has challenged the traditional categories of criminal law and raised new issues as to the use of the *ius puniendi* in this field. In the 1990s, when the debate revolved particularly around product liability, Winfried Hassemer coined the notion of 'modern criminal law'. This expression was meant to challenge the solutions that had been elaborated as regards, for example, the causal link between products and harm to health, the allocation of liability within companies, or the commission of a crime by omission (for example for not withdrawing a product). Further issues arose later, mainly triggered by the implementation of the precautionary principle. The debate essentially dealt with endangerment crimes and their suitability to respond to situations that, despite the scientific uncertainty, caused serious and catastrophic risks. The relationship between criminal law and risk society provided a theoretical background for these debates.

Such challenges have been particularly discussed in Europe, where food law has soon ceased to be a purely domestic matter. The way in which the European Union has regulated the food sector has had a twofold impact on criminal law. First, it has re-shaped its boundaries. Following the well-known *Cassis Dijon* judgment, the principle of mutual recognition abruptly put an end to the national food law rules that aimed at protecting specific production processes and genuine products. Within a European single market, many domestic criminal provisions were set aside, since their effect was to hinder the development of the single market.

The second aspect of the EU impact on national criminal laws was determined by the response to the 'mad cow' scandal (bovine spongiform encephalopathy), right on the turn of the century. This event evidenced that domestic food legislation was powerless without a common set of rules and regulations that ensured food safety within a single market. Regulation No 178/2002, also known as the General Food Law Regulation, as well as the establishment of the European Food Safety Authority, laid the foundations of EU food law. This set of EU law provisions had an impact on the enforcement of food rules and regulations whilst providing a common regulatory ground for Member States' criminal law, although no harmonization was ever proposed. Yet, probably for this reason one can observe some commonalities in the way Member States have developed their criminal law provisions related to food'.

Of course, the European developments must be analysed in the broader context characterised by an increasing globalisation, which has created new issues and challenges

that has not been always adequately addressed. Although important, it is not only about providing genuine food to consumers or about ensuring food safety. The point is, in the first place, to guarantee the right not to starve in large areas of the world, ie the right to food or, as stated in human rights language: food security. It could seem like an objective where criminal law has no bearing whatsoever. Nevertheless, like Olivier De Schutter clearly pointed out whilst he was the United Nations Special Rapporteur on the right to food, large multinational companies are to blame for many famines due to their irresponsible behavior. International law scholars have been discussing the human rights obligations incumbent upon these companies for a long time, and the AIDP now aims to explore the role of criminal law in this context. Once again, food law offers a good opportunity to reflect on broader issues.

Beside the abovementioned problem, globalisation is leading to a regulatory revolution: standardization, self-regulation and soft law are now used in a domain that was previously reserved to traditional legislation. As Paolo Grossi has shown us in his renowned *Prima Lezione di Diritto*, after being held by public authorities, law re-emerges right from the hands of society. Both European and American public law scholars have come up with the notion of 'Global Law' to refer to this unorthodox regulatory mix that governs globalization. The process through which lawmaking powers and legislation itself move away from governments brings along significant legitimacy issues. Who are these new regulators and where is their source of legitimacy? How can we make sure that a matter as basic as food law is not under the control of large food companies that determine rules and regulations in a somewhat secret and not transparent manner? Within this new framework, criminal law, and particularly food criminal law, must urgently find new tools to determine when and with which means the enforcement of such 'private' regulation may be legitimate.

Global Law must also enable governments to adopt different provisions, ie to regulate differently, in a more indirect manner. The concept of enforced self-regulation becomes particularly relevant in this context. The point is to capitalize on companies' self-regulation capacity in order to fulfil public goals, an essential strategy in the new food law, either by examining critical points or through new initiatives to tackle food fraud. As is well known, one of the main debated topics in contemporary criminal law policies is the criminal liability of legal persons, ultimately aimed at encouraging self-regulation. The importance of this new strategies becomes self-evident when observing food criminal law.

Within the overarching theme of the 20<sup>st</sup> Congress dedicated to 'Criminal Justice and Corporate Business', the choice of 'Food Regulation and Criminal Justice' as Section II has enabled an overall research on this complex set of issues, which are central in the understanding of contemporary criminal law. The Chinese Group of AIDP organized the Sectorial Colloquium, held in Beijing on 23-25 September 2016. The rich debate that took place during these days leads to the Resolutions that are now published.

The AIDP's traditional methodology has been applied, and several national reports have been drafted on the basis of a questionnaire provided for by the General Rapporteur. I would



like to express my appreciation and my gratitude to all the colleagues that have drafted the national reports on Argentina, Belgium, Brazil, Croatia, Finland, Italy, Netherlands, Peru, Russia, Spain, Sweden and Turkey. In addition, it is worth noting that the four transversal reports have been crucial for the research process. Michel Simonato, Bernd Van der Meulen and Antonia Corini have analysed the developments of food law in the EU. Susana Aires de Sousa has drawn up a report on product liability, and Eduardo Saad Diniz in the Brazilian report has focused on what can be deemed as the greatest food issue for the majority of the world population: hunger. As I have pointed out above, criminal law cannot be missing when it comes to protecting a human right as important as food security.

Last but not least, this publication would not have been possible without the great effort of Ligeia Quackelbeen and Michele Simonato, who have reviewed texts and made extremely valuable suggestions to improve our work. Thank you very much, my dear colleagues.



## **CONFERENCE PROCEEDINGS AND RESULTS**



**RESOLUTIONS OF THE XXTH AIDP-IAPL INTERNATIONAL  
CONGRESS OF PENAL LAW ON  
CRIMINAL JUSTICE AND CORPORATE BUSINESS,  
SECTION II FOOD REGULATION AND CRIMINAL LAW**

*Preamble*

Considering that food security, as it is defined in the General Comment 12 of the Committee on Economic, Social and Cultural Rights, is part of the universal system of human rights and this circumstance creates the state obligation for respect, protect and fulfil this right,

Considering that the obligation to protect may require the use of criminal law when it is necessary to achieve an effective protection of food security,

Considering that States have an obligation to guarantee that corporations respect human rights, including the right to adequate food,<sup>1</sup>

Considering that food security is threatened severely during armed conflicts or natural disasters; in these circumstances, in order to guarantee and provide people with an adequate protection,

Considering that the principle of prevention is fundamental to a state's obligation of ensure the right to adequate food,

Considering that collaboration between States and between public and private sectors is essential to ensure the right to adequate food,

Considering that scientific developments and new technologies, as well as globalisation pose new risks to food safety, security, and authenticity, and that

Taking into account the international character of food regulation, and the important role that international organizations, such as the WTO, play in its development,

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food E/C.12/1999/5 (22 May 1999): 'The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.'

Bearing in mind the importance of standards developed by private sector entities as well as the cooperation between public authorities and the private sector in improving the quality of the regulation and enhancing supervision,

Mindful that conduct that seriously affects the right to food, constitutes genocide, crimes against the humanity and/or war crimes, if the rest of the elements of such crimes are present in the case.

Taking into account the United Nations' Guiding Principles on Business and Human Rights, the Maastricht Principles on Extraterritorial Obligations on States in the area of Social, Economic and Cultural Rights, and the recommendations of the XIV International Congress (Vienna, 1989) on the legal and practical problems posed by the difference between criminal law and administrative penal law of the X International Congress (Rome, 1969), about endangering offenses,

Section II of the XXth International Congress of Penal Law, Food Regulation and Criminal Law, makes the following recommendations:

### *Resolutions*

#### **I. Criminal law protection of the right to food**

1. Corporations, including multinational corporations, given their size and cross-border nature, play a large impact on the realisation of the right to adequate food. In order to increase accountability, States should provide for the civil, administrative and/or criminal liability of corporations and heads of businesses.
2. Corporations, including multinational corporations, should assess the risk that their activity generates for the right to adequate food, and set up adequate procedures in order to mitigate it, and ensure that they are reviewed periodically. The disclosure of this assessment, through non-financial statements, should be mandatory.
3. Omission of the publication of non-financial compliance statements or publications in an incorrect, incomplete manner ought to be punished in the same manner the case of financial false statements.
4. In cases where there are serious violations of the right to food, sanctions should take into account the principles of restorative justice concerning victim's rights.
5. States should ensure that corporations with the centre of activity, its registered office or domicile or its main place of business or substantial business activities in their territory respond also in relation to serious offences committed abroad, which violate the right to food abroad, provided that the State where the fact has been committed is unwilling or unable to hold those responsible accountable.

6. In case of emergency, humanitarian aid is a part of the right to adequate food. Therefore, States should punish the theft, misappropriation, subsidy fraud or other property crimes related to the provision of humanitarian aid if this conduct violates the right to food abroad, provided that the State where the fact has been committed is unwilling or unable to hold those responsible accountable.

## **II. Food Safety and Criminal Law**

7. Given that self-regulation of the food industry and administrative regulation relating to standards of food safety frequently determine the elements of criminal liability, the offence definitions that refer to administrative norms or self-regulatory norms the reference should be as concrete as possible, in order to ensure compliance with the legality and proportionality principles. In addition, States should ensure that the self-regulatory standards are transparent and checked against food safety principles.

8. Due to the prominent role of administrative agencies in setting food safety standards, States should ensure that the regulatory process is transparent.

9. States should, in accordance with their legal systems, hold corporations and individuals liable for the intentional creation of serious food safety risks even in the absence of the violation of specific provision of food safety regulations.

10. States should punish corporations and individuals for violations of food laws that create a risk, even without the proof of concrete harm.

11. States should criminalize the violation of the duty to withdraw food that has been produced, processed or distributed in violation of food safety requirements, and to promptly inform consumers of related health risks.

12. In cases of food safety violations, States should punish producers, manufacturers, distributors and other operators involved in the food supply chain according to their legal duty and level of effective control over food safety standards.

13. States should encourage that compliance management systems in the area of food safety provide for a clear delegation of functions.

14. States should establish legal regimes which ensure that private certification entities are independent and are held accountable for acts of fraud, corruption and the issuance of false certifications.

## **III. Food fraud and consumer protection**

15. States should prevent the production and commercialisation of food that does not correspond to the representation of its content, quality, quantity or manner in which it is manufactured or traded.

16. States should punish the behaviour described above if committed with the purpose of economic or professional gain regardless of the impact on food safety.

#### **IV. Interaction among States**

17. States should share information, cooperate and coordinate in order to prevent, investigate and prosecute food safety crimes and food fraud.



# GENERAL REPORT ON FOOD REGULATION AND CRIMINAL LAW

By General Rapporteur Adán Nieto Martín\*

## **Abstract**

*The General Report addresses the relations between food regulation and criminal law from three different perspectives. The first part focusses on food security as a human right, paying special attention to the conduct of multinational companies and drawing up proposals on how to establish their criminal liability. The second part analyses food health and the importance of self-regulation and international standards as a new form of regulation and its significance for criminal law. The third part deals with food fraud, offering guidelines for national criminal law systems.*

## **1 Introduction**

### **1.1 General remarks**

Food regulation, and thus food criminal law, revolves around the protection of three major legal interests: food security, food safety and consumers' economic interests. Over the last two decades all of these legal interests have undergone a very significant internationalization process. The consequences of such process have barely been examined from a criminal law perspective.

Food security amounts to a global legal interest, since it is included in the universal human rights system under Article 11 of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR). Its core guarantees the right to be free from hunger and access to adequate food, which involves the right to healthy nutrition (see 2).

The consolidation of free trade as pillar of globalization has led to an intense international regulation of food safety that sets the boundaries for national and regional legislators. In addition to safeguarding health, it is aimed at preventing that domestic legislation unjustifiably hinders free trade on the grounds of food safety protection. Thus, the main promoters of the aforementioned legislation are, in addition to the Food and Agriculture Organization (FAO), the World Trade Organisation (WTO) and corporate self-regulation (see 3).

The vague notion of food fraud revolves around the protection of consumers' economic interests. Although food fraud usually involves some sort of risk or harm to health, this element is not necessary for all definitions of fraud. The internationalization of the food fraud issue stems from the existing globalized chains of suppliers, within which the weakest

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links are used to introduce, for instance, lower quality goods or adulterated products. In the EU, the fraud of the ‘horse meat case’ is the paradigm of this kind of criminality (see 4).

Although the invocation of transnational organized crime<sup>2</sup> represents until today the dominant paradigm to legitimizing the harmonization of criminal law, our report (without completely disregarding this perspective, particularly concerning food fraud) is rooted in a different paradigm: the actions of large international corporations and the problems posed thereby for the effective protection of global legal interests, particularly human rights.

This criminal law internationalization paradigm requires the construction of a criminal policy strategy different from the one formulated in relation to organized crime. This is due to three reasons:

- First, as opposed to organized crime groups, multinational companies operate as legal actors who are deemed to abide by the law and act socially responsible. Therefore, and by way of example, we should not only consider flashy measures in international criminal law, such as confiscation but also focus on redressing the victim and providing for restitution.
- Second, because legal persons, and specially multinational corporations, in the food industry have a notorious self-regulation capacity, criminal law must take advantage of this in order to provide a more effective protection of the relevant legal interests. This self-regulation capacity is also used by international human rights provisions, such as the UN Guiding Principles on Business and Human Rights. At this point, it could be asserted that international law does not only require multinational companies not to violate human rights, but also to implement self-regulation measures aimed at preventing human rights violations by the companies themselves, their subsidiaries and even their suppliers (see 2.3).
- Third, in addition to this self-regulation capacity, companies have the ability to influence public policies as well as shape the legal system. As opposed to the average citizen, companies can tailor the rules and regulations for their own convenience through the persuasion of lobby groups, funding of political parties, capturing the attention of governmental or administrative agencies, by means of their power in terms of scientific and technological innovation, or through their impact on public opinion. This leverage is particularly significant for food law, and thus it must be taken into account when drawing up a criminal policy strategy (see 4.3).

The aim of this report and its conclusions is to draw up a criminal policy strategy regarding large corporations; self-evidently, the resulting approach could be applied to other domains. This report also focuses on coming up with a set of criteria that could help domestic legislators in drafting and applying food criminal law. Accordingly, our work and the

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<sup>2</sup> Certain reports point to the existence of organized crime: see further the Italian report (pages 225-243) and the Belgian Report (pages 147-179).

conclusions of the Section 2 XXth IAPL International Congress can amount to a first step towards harmonization of criminal law in an area where essential international legal interests are at stake. Furthermore, the recommendations drafted by the International Association of Penal Law (IAPL) can also help to clarify the *opinio juris* of the international community.

This Report was elaborated on the basis on the following national reports: Argentina, Belgium, Brazil, Croatia, Finland, Italy, Peru, Russia, Spain, Sweden and Turkey, and a transversal report about the EU.

## 1.2 The concept of food

The broad understanding of food proposed by the *Codex Alimentarius* or Food Code<sup>3</sup> has had a broad impact on all legislation, and particularly on the definition applicable in the EU.<sup>4</sup> The notion includes any substance reasonably expected for human consumption, but also some others that may be incorporated into food during its manufacture or treatment, including additives and animal feed intended for human consumption. Almost every report points out that this notion of food has been embraced by criminal legislation as a result of which criminal law provisions do not only cover food with nutritional value but go far beyond. This has put an end to the debate regarding the criminal meaning of this notion, which originally only comprised food with nutritional value.<sup>5</sup>

This initial consensus does not imply that there are no controversial aspects. For example, certain countries exclude alcohol, and under certain approaches both tobacco products and cosmetics are included, whereas there is no room for them in the Food and Agriculture Organization of the United Nations (FAO) regulations. However, the most controversial aspect relates to the distinction between medicinal products and food, particularly regarding slimming products with medicinal properties or sports nutritional supplements. This is a significant controversy, provided that both administrative and criminal legislation differentiate between food and medicinal products, but it is also important from the viewpoint of the free movement of goods, which is essential for understanding the development of food law to this date. Since classifying a given substance as a medicinal

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<sup>3</sup> *Codex Alimentarius* Commission. Procedural Manual. Joint FAO/WHO Food Standards Programme (25 Edition. Rome. 2016) 23: 'Food means any substance, whether processed, semi processed or raw, which is intended for human consumption and includes drink, chewing gum and any substance which has been in the manufacture preparation of treatment of food but does not include cosmetics or tobacco or substances used only as drugs.'

<sup>4</sup> Regulation No. 178/2002 of the European Parliament and of the Council [2002] OJ 31/1, art. 2.

<sup>5</sup> See Brazilian report (p 181-201) and Argentina (forthcoming in the eRIDP).

product implies greater obstacles to the free movement of goods, the ECJ, for instance, provides for a strict interpretation of this concept.<sup>6</sup>

## 2 Multinational Companies and Food Security

### 2.1 Food Security and Human Rights

The right to food is mentioned in Article 25(1) of the Universal Declaration of Human Rights. It is connected with the right to an adequate standard of living. As is well known, the Declaration was not enshrined in an international convention until 20 years later due to the Cold War tensions. In 1966, the General Assembly of the United Nations approved the two main conventions in terms of human rights: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article 11 of the latter provides for the right to adequate food.<sup>7</sup>

Since the UN lacks a judicial body that can interpret the provisions of its covenant, the official interpretations provided in various declarations and comments by UN bodies are very significant. It is worth noting that the General Comment no. 12 of 1999 issued by the Committee on Economic, Social and Cultural Rights, was established in 1985 to monitor the implementation of the Covenant. The General Comment no. 12 defines the right to adequate food as follows:

‘The core content of the right to adequate food implies [...] the availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture [and] the accessibility of such food in ways that are sustainable and that not interfere with the enjoyment of other human rights.’<sup>8</sup>

The report on the right to food drafted by the first General Rapporteur on the right to food, Asbjørn Eide, had a large influence on the content of General Comment no. 12.<sup>9</sup> This report

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<sup>6</sup> See Sanchez Moraleda Vilches Natalia, ‘Suplementos deportivos nutritivos y medicamentos. Delimitación conceptual e intervención penal en el Derecho penal español’ in Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds), *La sicurezza agroalimentaria nella prospettiva europea* (Giuffrè Editore 2014) 279.

<sup>7</sup> See Narula Smita, ‘The Right to Food: Holding Global Actors Accountable Under International Law’, (2006) *Columbia Journal Of Transnational Law* 44, 691; see the contributions of Eide Asborn, Bernd Van Der Meulen, Wernaart Bart in Otto Hospes and Irene Hadiprayitino (eds), *Governing food security. Law, politics and the right to food* (Wageningen Academic Publishers 2010); Bellows Anne, Maria Daniela Núñez Burbano de Lara and Roseane do Socorro Gonçalves Viana, ‘The Envolving Nature of the Human Rights System and the Development of the Right to Adequate Food and Nutrition Concept’ in Anne C. Bellows et al (eds) *Gender, Nutrition, and the Human Right to Adequate Food. Toward An Inclusive Framework*, (Routledge Research in Gender and Society 2016) 1.

<sup>8</sup> Economic and Social Council, General comment No. 12: The right to adequate food, Art. 11 (1999) paras 6, 8 and 13.

<sup>9</sup> Eide Asbjorn, ‘State obligations for human rights: the case of the right o food, in Otto Hospes and Irene Hadiprayitino (eds), (n 6) 105.

did not only specify the content of the right to adequate food as provided above, but also laid down the obligations undertaken by the signatory states regarding the aforementioned right. Moreover, there were three different obligations: the obligation not to violate this right, the obligation to protect it and the obligation to facilitate it.

This excerpt of General Comment no. 12 has an enormous significance. During a long time, in the shaping of the United Nations human rights system, social rights had a different value than those rights enshrined in the International Covenant on Civil and Political Rights. Whereas the latter were deemed as individual rights enforceable against the Government, social and economic rights were considered to be mere political guidelines that did not give rise to any enforceable individual rights unless they were implemented through legislation. The declaration that states must not violate these rights and that they must protect them and facilitate them shows that we are beyond the said differentiation between rights, and places both categories of fundamental rights at the same level. From that moment onwards, a rights based approach is adopted to the right to adequate food. As a result the right does no longer depend on the will of Governments to increasingly implement it.<sup>10</sup>

This evolution is very important for criminal law. The obligation of Governments to protect the right to adequate food and to do so effectively, either *vis-à-vis* individuals or *vis-à-vis* corporations, does not only entail an obligation to regulate, but also to hold the offenders accountable. We will go back to this argument, but at this point, we must highlight that this general obligation to protect, to forbid and to hold accountable has recently been construed by the ECtHR and the Inter-American Court of Human Rights as a specific obligation to apply criminal law in order to safeguard human rights. In a number of judgments both courts have specified that granting effective protection implies applying criminal law, establishing suitable criminal offences providing for reasonable penalties to be effectively enforced, thus preventing impunity. This excludes measures such as amnesties or ‘full stop laws’ (*leyes de punto final*). This doctrine amounts to a true revolution regarding the relationship between criminal law and human rights, which has gone from being a mere limit to *ius puniendi* to also being the grounds for criminal law intervention, thereby overcoming the idea that resorting to criminal law is simply an additional option available to the legislator to effectively protect a human right.<sup>11</sup>

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<sup>10</sup> See U. N. FAO Legal Office, *The Right to Food in National Constitutions*, in *The Right to Food in Theory and Practice*, [www.fao.org/3/a-ah189e.pdf](http://www.fao.org/3/a-ah189e.pdf) (accessed 21 February 2017). The 2030 Agenda for Sustainable Development, adopted on 25th September 2015 at the UN Summit in New York connected the right to food with “promote a sustainable agriculture”. The communiqué of the G20 Summit in Antalya (15.11.2015) also takes up this reference of the Agenda 2030. See, Ines Härtel, “The right to food – normative reference in the multi level system”, in Ines Härtel and Roman Budzinowski (eds.), *Food Security Food Safety, Food Quality* (Nomos Verlag 2016) 18.

<sup>11</sup> See Francesco Viganò, “Sobre las obligaciones de tutela penal de los derechos fundamentales en la jurisprudencia del TEDH”, (2010) *Diritto penale contemporaneo* (<http://www.penalecontemporaneo.it/>) (accessed 21 February 2017).

We cannot assert that the UN approach regarding the right to food has been embraced by all states, let alone can we considered that the right to adequate food is part of customary international law. Obviously, not every state has to embrace the regional human rights courts' doctrine concerning the obligation to effectively protect human rights through criminal law.

Notwithstanding the foregoing, we must not forget that the International Covenant on Economic, Social and Cultural Rights (ICESCR) has been ratified by most countries in the world. Additionally, other UN conventions, such as those against discrimination or the Convention on the Rights of the Child, provide for the right to adequate food. This particularly reinforces children's right to food and to breastfeeding. Similarly, international humanitarian law grants the right to food to certain groups of people such as prisoners of war.

Along these lines, there are approximately twenty countries that acknowledge the right to food as a fundamental right in their constitutions. At a time of 'multilevel constitutionalism', this should have an impact both on regional human rights courts and on national courts regarding the interpretation of their own constitutions.

In any event, I consider that the International Association of Penal Law (IAPL) should support the idea that the right to adequate food is a fundamental right, and that in accordance with the United Nations doctrine set forth in Comment no. 12 that implies the obligation incumbent upon all states to provide for criminal penalties in an effective manner in order to punish the most serious conduct in violation of this right.

Below, I will focus on describing the most significant attacks to the right to food. Firstly, we will discuss the potential violations coming from multinational companies, mainly from the food industry (2.2). The main feature of the second kind of attack to the right to food is that it takes place in emergency or armed conflict situations, where the right to adequate food is particularly weakened. Violations usually consist of the misappropriation or misuse of food aid. Therefore, they impinge on the obligation of states to provide food (2.3). We will finally tackle extremely serious violations of the right to food, insofar as they are used as categories of criminal offences in crimes such as genocide or crimes against humanity (2.4).

## 2.2 Multinational companies and the right to food

It is hard to fully describe all of the problematic features of the strained relationship between multinational companies and the right to food. We have picked four groups of cases that show how this right can be affected by various kinds of multinationals.

Firstly, the abuses of power over third-world farmers by large supermarket chains or intermediaries shall be discussed. The imbalance in negotiation capacity between these giants and the farmers subjects the latter to tremendously poor working conditions, thus undermining their right to food (2.2.1). Secondly, we will examine food speculation, with special attention given to actions of financial intermediaries such as Goldman Sachs or

Lehman Brothers that lead to artificial rises in the price of food and as such once again harm the right to food of the weakest parts of society (2.2.2). Thirdly, we will deal with advertising campaigns through which companies such as Nestlé or Danone have affected the right to breastfeeding (2.2.3). Finally, we will examine the control over seeds performed by multinational companies such as Monsanto by means of intellectual property rights (2.2.4).

This analysis shows that there are many companies that regardless of their activity can jeopardize the right to food in multiple ways: through advertising, banking transactions or by imposing working conditions. The way the issues are chosen and the way they are presented in this report is based on several studies carried out by various NGOs, and particularly on the reports drafted by Olivier de Schutter, UN Special Rapporteur on the right to food, who was particularly sensitive to this matter.

### *2.2.1 Large supermarkets and abuse of power*

The 2008 food crisis, overshadowed by the financial crisis that occurred that same year, evidenced the prominent role played by food corporations, and particularly large supermarkets and commercial intermediaries, in the said food crisis.<sup>12</sup> Over the last fifteen years we have witnessed a radical transformation of the agri-food market. It has gone from being a severely fragmented sector with a strong presence of state entities to being an industry controlled by large multinational chains, that not only display processed and semi-processed products, but also fresh goods. With the aim of getting food from ‘the farm to the fork’, they have started a new direct relationship approach with producers, designated as ‘contract farming’.<sup>13</sup> Large supermarkets enter into agreements with local farmers in third-world countries to sell to them certain goods, which must meet the first-world consumers’ requirements and preferences. This approach to agriculture greatly adds to the sophisticated first world’s ‘food safety,’ inasmuch as it allows large chains to control the quality of the food that is later displayed in the supermarket. However, it seriously damages the right to food.<sup>14</sup>

First, these large supermarkets force farmers to specialize in certain products which are not essential for their population whilst causing them to disregard other essential commodities such as rice.<sup>15</sup>

Second, this development triggers labour exploitation and child labour. In order to comply with the pricing policy set forth by multinational companies, producers conclude work contracts that are far from fulfilling the ILO (International Labour Organization) standards;

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<sup>12</sup> See Oliver De Schutter, ‘Background note: Analysis of the Food Crisis’ (2008), United Nations High Commissioner For Human Rights, Special Procedures of The Human Rights Council.

<sup>13</sup> Oliver De Schutter, ‘Agribusiness and the right to food’ United Nations, General Assembly A/HRC/13/33; De Shutter Oliver, ‘Right to Food. Interim Report’ (2011), United Nations, General Assembly.

<sup>14</sup> Oliver De Schutter, ‘Addressing Concentration in Food Supply Chains. The Role of Competition Law in Tackling the Abuse of Buyer Power’, (2010) Briefing Note 07.

<sup>15</sup> Oliver De Schutter, ‘Right to Food. Interim Report’ (n 12) 9.

both child labour and servitude are common in this context. In both cases the victims often have family ties with producers. In order to adequately assess the importance of this issue, it suffices to mention that agriculture accounts for 70% of child labour worldwide.<sup>16</sup> The labour exploitation suffered by agricultural workers significantly affects access to food. As pointed out by the ILO, most of the world's population suffering from hunger depends on agriculture. It could be stated that large multinationals are not responsible for labour exploitation or child labour, and that small and medium enterprises, and the multinationals' suppliers, are to blame instead. However, as we will see below, we must move beyond this perspective, and we must hold multinational companies accountable. They take advantage of countries where there are no conditions, such as effective labour inspections, to ensure basic labour rights.

Third, this kind of agreements usually bring along unfair commercial practices due to the economic dependence of agricultural workers, which increases if they are induced to a monoculture system by their buyers. In certain sectors, such as coffee or soy, a few intermediaries dominate the market as a whole.

Unfair commercial practices in the food chain also take place within developed countries such as the EU Member States. The European Commission itself has drafted a Report in which it takes note of practices such as the unilateral and retroactive amendment of contract clauses, the unexpected or abusive transfer of costs or risks by a business partner to its counterparty, or the unfair suspension or termination of a business relationship. However, these abuses (which in first-world countries exclusively relate to unfair competition) in third-world countries drive farmers to a situation of economic hardship that violates their right to adequate food.<sup>17</sup>

No contractual ties to any of these leading food sales or distribution companies are necessary for abuses to take place. Regarding certain products, such as coffee, there are four large firms responsible for 40% of all transactions worldwide, and 80% of the tea market is controlled by three corporations. In Brazil, 200,000 soy farmers are controlled by five major intermediaries. The prominent role played by these intermediaries or, once again, by certain supermarket chains, has led to the intervention of competition authorities in some states. In addition, it has been evidenced how economic concentration leads to price drops for many products, such as coffee, which again gives rise to situations of exploitation and misery as those described above.<sup>18</sup>

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<sup>16</sup> Oliver De Schutter, 'Right to Food. Interim Report' (n 12) 10; ILO, *Child Labour in Agriculture, International Programme On The Elimination Of Child Labour*, <http://www.ilo.org/ipec/areas/Agriculture/lang--en/index.htm> (accessed 21 February 2017).

<sup>17</sup> European Commission, Report From The Commission To The European Parliament And The Council On Unfair Business to Business Trading Practices In The Food Supply Chain, 29.8.2016, COM (2016) 32 final.

<sup>18</sup> De Schutter Oliver, 'Addressing Concentration in Food Supply Chains' (n 13) 2.



In spite of these concerns, there is barely any room for applying unfair competition and anti-trust laws to these cases. In certain EU countries, based on the abovementioned Report, some provisions aimed at enhancing the operation of the food chain as well as aimed at preventing contractual abuses as the ones pointed out above, have been approved.<sup>19</sup> These are either civil law provisions, or are aimed at enhancing corporate self-regulation. We do not question that these alternatives could make sense within the EU, where there are more equal positions amongst the different elements of the supply chain. However, it is doubtful that they have the ability to put an end to the abuse of economic power in situations where there is a large gap as was pointed out above.

As stated in various national reports, when the imposition of abusive contractual practices result from collusive or anti-competitive agreements between sector companies or rather from a dominant position, in theory, competition law would be applicable. Nevertheless, competition law is not effectively enough in many countries. Similarly, its extraterritorial application is quite limited. This applicability is focused on penalizing abuses of power or agreements that take place outside the territory but with effects in the national market. It is an opposite situation to the one with which we are concerned, where the restriction of competition has effects in a third country and such effects have an impact on human rights.<sup>20</sup>

### 2.2.2 *Food speculation and taking over of crops*

Prior to the economic globalization, when closed markets still existed, taking over food as a way to restrict supply causing a rise in prices amounted to a serious risk for the right to food. In 1943 three million people died in Bengal, mainly because an increase in the price of cereal was triggered by the monopolization of these goods by certain traders. Nowadays this kind of conduct is inconceivable, except in very closed markets dominated by a small group of producers or, to a greater extent, by intermediaries with a great capacity to buy the crops.<sup>21</sup>

An updated and equally dangerous way to cause food prices to rise today is by way of speculation with financial derivatives. The reference for these derivatives are not shares or other stock market parameters, yet raw materials indexes in which certain staple foods are included. With the aim of artificially increasing those indexes and thus the profitability of their financial instruments, brokers buy call options over these commodities (futures) in the futures market, and at their maturity date they renew them regardless of how high their price is. Accordingly, an artificial raise in staple food prices is caused by means of a mechanism similar to the classic monopolization or taking over of food, ie a contraction in supply and a subsequent increase in demand: on the one hand, the sellers of these goods

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<sup>19</sup> Vid. in Spain Ley 12/2013, de 2 de Agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria.

<sup>20</sup> Oliver de Schutter, 'Addressing Concentration in Food Supply Chains' (not 13) 4 ss.

<sup>21</sup> Commission of European Communities *Food Prices In Europe*, COM(2008) 821 final, p. 5 ss; Oliver de Schutter, "Food Commodities Speculation and Food Price Crises", (2010) Briefing note 02 .

prefer not to place them on the market, because they expect their price to increase (restriction of supply); on the other hand, buyers demand the product fearing further price raises.<sup>22</sup>

Self-evidently, no one can deny that there are some other factors (population increases or the appearance of biodiesel, among others) that have an influence on the price of certain agricultural commodities, but the price of a product is always the product of the accumulation of several factors. Conversely, since these practices may have little or no influence in food pricing, they may have no impact on the right to food in developed countries; for instance, in the EU only 14% of the annual income is allocated to food. However, there is a different scenario altogether in poor countries, where 60% of the annual income is allocated to food. Under such circumstances, any change in the price of basic commodities affects the fundamental right to adequate food. This kind of speculation took place because since the XXI century anyone was allowed to participate in agricultural futures markets, and not only farmers as was traditionally the case. This deregulation opened the door to speculators. Additionally, this kind of markets lacked oversight and were not very transparent. By way of example, the name of the sellers and buyers was not recorded anywhere.

In light of this experience, we are recently witnessing a return to a certain degree of agricultural futures markets regulation. For example, the Dodd Frank Act in the United States has instructed the market authority in this regard, the Commodity Futures Trading Commission (CFTC), to set limits on taking over agriculture products by a given investor. Similarly, the creation of an Agricultural Markets Information System<sup>23</sup> has been proposed. It would allow for gathering information on crops or food stocks, such as seeds, with the aim of preventing market manipulation. In the EU, Regulation no. 648/2012 on OTC derivatives<sup>24</sup>, provides also some limits in order to increase transparency and oversight through a complex clearing system connected to the positions that an operator can hold over a given commodity.

Regardless that it might be best to go back to the situation prior to 2000, ie to close the futures markets to third parties that are not farmers, the transactions as the ones described can constitute a criminal offence in terms of market manipulation if national legislation so provides. In the EU, the new Regulation on market abuse, resulting from the Libor scandal, expressly includes index manipulation. A different issue altogether is the sanction of these

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<sup>22</sup> Oliver de Schutter, "Food Commodities Speculation" (n 20) 4.

<sup>23</sup> See AMIS, *Enhancing Market Transparency* <http://www.amis-outlook.org/> (accessed 21 February 2017). AMIS was established at the request of the Agriculture Ministers of the G20 in 2011. The Agricultural Market Information System (AMIS) is an inter-agency platform to enhance food market transparency and encourage coordination of policy action in response to market uncertainty. AMIS focuses on four crops that are particularly important in international food markets, namely wheat, maize, rice and soybeans. It is actually a prevention mechanism aimed at avoiding market abuse.

<sup>24</sup> Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L 201/1.

conducts comprised of the so-called operational manipulation. As opposed to information manipulation, admissible and inadmissible speculative practices are harder to differentiate between in operational manipulation.<sup>25</sup>

Interpreting market manipulation as a criminal offence in conformity with human rights law should lead to considering this food speculation to be punishable (under criminal law provisions), regardless if other products could be deemed to be lawful. Stock market authorities such as ESMA in Europe or the SEC in the US, should provide specific criteria in this regard.

### 2.2.3 *Advertising and baby milk*

The baby milk industry started to develop significantly in the 1930s. As years went by, this newly adopted feeding practice replaced breastfeeding in many places. It was not until the 1970s that we became aware of how dangerous this could be for third-world countries. The scarcity of resources and the impossibility of buying artificial milk ended up in the death of many new-born babies. Sometimes, the lack of hygiene caused infections that could be fatal. Malnutrition was also caused by a bad preparation of the product, insofar as many women were unable to read the information material. Also at this time, large multinational companies, such as Nestlé or Danone, had already launched commercial and advertising campaigns to subtly induce women to give up breastfeeding; these campaigns were increasingly raising awareness in this domain. We must also point out some other factors that account for the giving up of breastfeeding: for instance, the lack of labour rights of many women.<sup>26</sup> This is why the ILO insists in promoting conventions that ensure the right to breastfeeding as a basic workers' right.<sup>27</sup>

Advertising or commercial practices that led women to give up breastfeeding are not always unlawful. Nothing prevents companies from giving away milk for infants in hospitals, even being aware that if this milk is used the mother may be unable to breastfeed her baby in the future. A picture of a bear breastfeeding her baby on a condensed milk label (meant for coffee) may lead people in countries with extremely low literacy rates to think that it is baby milk.

In order to avoid this kind of behaviours, in 1981 the World Health Organization (WHO) issued the International Code of Marketing of Breast Milk Substitutes. The purpose of this code is to enable women to make an informed choice as to whether to breastfeed the baby

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<sup>25</sup> Regulation (EU) 596/2014 of on market abuse (market abuse regulation) [2014] JO L 173/1 and Directive 2014/57/EU on criminal sanctions for market abuse (market abuse directive) [2014] JO L 173/179, art. 1.4.id. About the different kind of manipulation that conform the mark manipulation crime, vid. Joachim Vogel, Vor § 20 a) marg. 32-41, in Assmann/Schneider (hrsg), Wertpapierhandelsgesetz Kommentar (Nomos 6 Edition, 2012).

<sup>26</sup> Lida Lhostska, VeronikaScherbaum and Anne C.Bellows, Maternal, Infant and Young Child Feeding: Intertwined Subjectivities and Coporate Accountability, in Anne C. Bellows et al (n 6) 162.

<sup>27</sup> ILO Maternity Protection Convention 2000.

or give him or her baby milk. Since 1981 the Code has been completed by various WHO resolutions with equal status. The signatory countries of the International Convention on the Rights of the Child, ie almost every country in the world with the notable exception of the United States, are legally required to incorporate it into their domestic legislation and to enforce it.<sup>28</sup> The UN Committee on the Rights of the Child, established in 1989, monitors compliance with the Convention through its reports.

Nevertheless, the prevailing approach in international law when ensuring and enforcing the right of breastfeeding women has been to resort to the legal notion of social responsibility and corporate self-regulation,<sup>29</sup> thereby disregarding any approach oriented towards penalizing this kind of conduct. The reports drafted by NGOs specialized in children's rights protection put forward that there are constant violations of the 1981 Code. They also state that the approach based on voluntary self-regulation is clearly not enough.<sup>30</sup>

As it happened before, all countries provide for criminal offences for misleading advertising, which could be applicable to the most serious cases. Similarly, misleading or deceptive advertising with harmful effects for health is expressly laid down as a criminal offence in certain countries. However, on the one hand, the punishment of this conducts in the state where the multinational company is located is usually difficult, because these practices took place abroad. On the other hand, these behaviours cannot always be deemed to be as unlawful acts or at least as criminal offences, but rather (as has happened in the past) as lawful corporate action nevertheless severely affecting human rights.

#### 2.2.4 *Industrial property rights on seeds and access to food*

There have always been critics of those who come up with new varieties of plants, and particularly new seeds, although it led to the so-called 'green revolution' in the 1960s. This revolution allowed for a notorious increase in crop yields, thanks to new varieties of seeds, which enabled a significant rise in production. At that time, the production of new varieties was mainly controlled by public entities that triggered its development for social purposes. The situation is quite different nowadays. Large multinational companies, such as the US corporation Monsanto, research and market new corn, soy or barley seeds, which in many cases are obtained through genetic modification.<sup>31</sup>

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<sup>28</sup> Committee on the Rights of the Child, General Comment 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013).

<sup>29</sup> See, nevertheless, WHO/UNICEF, *Global Strategy for Infant and Young Child Feeding* (2003) and critically, Lida Lhostska, Veronika Scherbaum and Anne C. Bellows (n 25) 173.

<sup>30</sup> IBFAN, *International Baby Action Network* <http://www.ibfan.org/> (accessed 21 February 2017).

<sup>31</sup> See Peter Pringle, *Food, Inc. Mendel to Monsanto- The promises and Perils of the Biothec Harverst* (Simon & Shuster Paperbacks 2005); Maria Monique Robin, *El mundo según Monsanto* (Peninsula 2008), ETC Group, *Who Owns Nature, Corporate Power and the Final Frontier in the Commodification of Live* (2008) [www.etcgroup.org](http://www.etcgroup.org) (accessed 21 February 2017). Also are interesting the diverse publications of the international coalition "No Patents on seeds!" <http://no-patents-on-seeds.org/> (accessed 24 February 2017).

Besides, recently, the USA and some multinational companies are pressing national governments to change the legal regime of property rights on seeds. In most countries, the International Convention for the Protection of New Varieties of Plants of 2 December 1961 provides for the legal regime applicable to new seeds resulting from biotechnology. This legal framework, although it grants breeders exploitation rights, it does so to a lesser degree than patent law. It must be highlighted that it acknowledges the so-called 'exception for the benefit' of farmers.<sup>32</sup> This exception allows farmers to use seeds of protected varieties in subsequent harvests stemming from prior harvests that were lawfully acquired. This allows for complying with a long-standing tradition in agriculture which is essential for the right to food of many agricultural communities in third world countries.

This legal regime, applicable in EU countries, changed in the United States following a well-known ruling of the US Supreme Court in the *Diamond v. Chakrabarty* decision<sup>33</sup> which put an end to a core principle in patent law: the impossibility to patent living organisms. The ruling declared that a live, human-made micro-organism is patentable subject matter (specifying that patentable subject matters "include anything under the sun that is made by man"). Following this decision, genetically modified seeds produced by large multinational food companies have been admitted as patentable subject matter. This shift in the legal regime puts an end to the nuances of exploitation rights over varieties of plants, particularly the exception for the benefit of farmers.

There have been a couple successful attempts to extend this legal modification throughout the United States. To that end, the WTO and particularly its Agreement on Trade-Related Aspects of Intellectual Property Rights have played a significant part. Article 27(3)(3)b) of this Agreement points out that Member States may also exclude plants and animals from patentability, but they should provide for an effective protection system. There have been reactions to this Agreement and its hostile stance towards the 'farmer's exception', for instance through other agreements such as the International Treaty on Plant Genetic Resources for Food and Agriculture promoted by the FAO or the Convention on Biological Diversity. However, the pressure exercised by the WTO and the consequences that can stem from a breach of its agreements, makes that the 'farmers exception' in the WTO weighs in

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<sup>32</sup> Cfr. Amart Llobart (ed.), *La propiedad industrial sobre obtenciones vegetales y organismos* (Tirant lo Blanch 2007); Plaza Penedés and Grau Corts (coord.), *Cuestiones actuales sobre la protección de las obtenciones vegetales* (Aranzadi 2014).

<sup>33</sup> *Diamond v. Chakrabarty* 447 U.S. 303 (1980). In EU, the most controversial case is the 'Broccoli case' of the Enlarged Board of Appeal of 9 December 2010 (Case Number G 0002/07, Application Number 99915886.8, Publication Number 1069819). In this case the Enlarged Board of Appeal confirmed the non-patentability of "essential biological processes for the production of plants or animals", but less open the question where plants created by breeding methods, are covered by this exclusion. See Christina A. Falskühler, 'Patents on food: important question in a world of radical changes' in Ines Härtel and Roman Budzinowski (eds) (n 9) 79. On 20.2.2017 the Council of the EU has adopted a common position in order to prevent the European Patent Office (EPO) from granting further patents in the area of conventionally bred plants and animals <http://www.consilium.europa.eu/en/meetings/compet/2017/02/20-21/>.

much more than the FAO provision on the subject. Additionally, the US Trade Act allows for imposing trade sanctions on those countries that fail to provide adequate protection to industrial property rights. The International Convention for the Protection of New Varieties of Plants itself has been amended twice (in 1978 and 1991) for the purpose of narrowing the scope of the 'farmer's exception'.<sup>34</sup>

These pieces of legislation, promoted to a great extent by the lobby of large multinationals, jeopardize the right to food, insofar as they actually allow for an appropriation of the Earth's genetic resources. Such an appropriation implies an alarming concentration of power considering that 67% of seeds marketed worldwide belong to four large industrial groups.<sup>35</sup> Whether directly or indirectly, the expansion of intellectual property rights has an impact on the right to adequate food of the most vulnerable farmers. Their right is directly affected when they are banned from using lawfully acquired seeds from prior harvests. In some countries the use of their own seeds instead of those provided for by these multinationals can constitute a criminal offence or at least under certain conditions, requires them to compensate and can give rise to compensation. In any event, the very food industry has come up with a more efficient mechanism to prevent the reuse of its seeds: through Terminator Technology, i.e. the designation of methods for restricting the use of genetically modified plants by causing second generation seeds to be sterile.<sup>36</sup>

The abovementioned indirect impact is much more concerning. It occurs when genetically modified seeds, corn seeds for example, infect other non-modified corn varieties. This entails a loss of biodiversity, and it also deprives farmers from seeds of plant varieties they had been using for centuries. Some multinational companies have even prosecuted these farmers for using infected seeds in their crops.<sup>37</sup>

All of the national reports consider that planting seeds from prior harvests in breach of industrial property law constitutes a criminal offence. In other words, there are no criminal law provisions specifically directed at the 'farmer's exception'. Regardless of patent law provisions, I consider that it would be convenient to make it abundantly clear in the criminal law domain that reusing seeds from lawfully acquired varieties of plants is not serious enough to constitute a criminal offence. In this regard, only Brazilian legislation shows a particular sensitivity. Confiscated seeds, since they stem from a crime against industrial property, are given to farmers that belong to special programs so they can reuse them.

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<sup>34</sup> See Sánchez Gil, El privilegio del agricultor y la excepción en beneficio del agricultor de la ley 3/2000, en Amat Lombart (n 31) 337-358; Sánchez Gil, Protección de las obtenciones vegetales el privilegio del agricultor (Ministerio de Agricultura Pesca y Alimentación 2004).

<sup>35</sup> Oliver de Schutter, *Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation*. Report presented to the UN General Assembly (64th session) (UN doc. A/64/170).

<sup>36</sup> Marie Monique Robin, *El mundo según Monsanto* (n 30) 295 ss.

<sup>37</sup> Marie Monique Robin, *El mundo según Monsanto* (n 30) 361 ss.

## 2.3 Criminal liability of corporations and right to food: drawing up a strategy

We have demonstrated above the two main issues concerning the impact of multinational companies on human rights.

### 2.3.1 *Principle of extraterritoriality of criminal law in case of human rights violations*

The first one is that many times the actions of corporations would constitute a criminal offence if they had been performed in the territory where their main place of business is located. Many of these behaviours constitute crimes against workers (imposing abusive working conditions or child labour, among others), market manipulation crimes, collusive or anti-competitive practices, or advertising crimes. In almost all of these criminal offences, the criminal law principle of territoriality applies. Those cases of extraterritoriality that can be found in US competition law or in financial markets law come in response to market protection or consumer protection criteria, but not at all to the protection of human rights.

The proposal made by the present General Rapporteur is aimed at filling the existing gap in the protection of human rights and advocates for the extraterritorial application of national criminal law to those cases in which criminal behaviour, regardless of its kind, affects the human rights of a significant number of people. The extraterritorial application of criminal law would be based on the active personality principle, grounded on the nationality of the offender or his or her place of residence. On the basis of this principle the location of legal persons is determined by the location of the entity's registered office or its main place of business.

This proposal is not only in line with international human rights law, but it is also absolutely necessary.<sup>38</sup> Since 2000 there has been a far-reaching debate, both academic and institutional, on the obligation of the signatory states of the various human rights conventions to protect such rights extra-territorially. The outcome of this debate has been enshrined in the so-called Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. As provided by principles 8 and 9 of this text, the decisive criterion in order to determine the jurisdiction of a given country over human rights violations is not, or at least not only, the territoriality standard. The determinative criterion is rather whether the State exercises effective control over the natural or legal person responsible for the relevant human rights violation. The effective control test mainly stems from the ECtHR case law and triggers a State's obligation to protect a given right acknowledged in the convention.<sup>39</sup>

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<sup>38</sup> See Sckogly Sigrun, 'Right to Adequate Food: Natural Implementation and Extraterritorial Obligation' (2007) Max Planck Institut Yearbook of United Nations, 1,20.

<sup>39</sup> Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, Ian Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) Human Rights Quarterly Volume 34, Number 4, 1170, 1192.

Accordingly, international human rights law has its own rationale regarding the extraterritorial application of law, which is different from the rationale that has traditionally governed public international law, where extraterritoriality amounts to a prerogative and not to an obligation as in this case. It is precisely the invocation of this shared doctrine on extraterritoriality which has allowed states hosting corporations to evade responsibility in relation to attacks carried out by their corporations worldwide. The 'territory linked' criterion perfectly fits the Westphalian world order, whereas the effective control standard is better suited to the new reality of globalization and the universal nature of human rights. The effective control criterion obviously stems from a State's ability to legislate over natural or legal persons in its territory, the possibility to investigate them, and ultimately to effectively hold them accountable for their human rights violations.<sup>40</sup>

It could be stated that the effective protection of human rights and the abovementioned accountability can be attained by the state's exercise of effective control by means other than criminal law. However, there are counterarguments to be made here. First, as we have seen before, regional human rights courts have found that the most serious human rights violations should be protected through criminal law. Second, as the actual Maastricht principles set forth, the principle of non-discrimination applies and prevents states from discriminating against anyone on the basis of nationality when protecting human rights. If a State applies criminal law provisions to protect human rights violations affecting its citizens, or violations that take place in its territory, yet fails to address human rights violations of foreign citizens, it would be considered discriminatory. Thus, international human rights law *de facto* provides for an assimilation principle similar to the one applicable within the EU.<sup>41</sup>

In conformity with the notion of assimilation, the principle of extraterritoriality could be worded as follows: the protection of human rights against violations occurring outside of a State's territory by persons over which the State exercises an effective control must be penalized as if the violation has occurred in the State's territory, and in any event in an effective, proportionate and dissuasive manner.

The assimilation obligation, on which extraterritoriality is grounded, has an additional effect: legal interests with an exclusively national scope become universal when the effect on the legal interest (by way of example) brings along an impact on human rights, as it has happened in EU countries. As is well known, in certain legal systems there are legally protected interests, such as the reliance on financial markets, the consumer's right to accurate information or competition, with an exclusively domestic frame. The impact on human rights would take such exclusively national legal interest to a new dimension, and thus such legal interest would acquire a supranational projection.

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<sup>40</sup> Augenstein Daniel and Kinley David, 'When Human Rights "Responsibilities" become Duties: The Extra-Territorial Obligations of States' (2012) Legal Studies Research Paper, 7/21.

<sup>41</sup> Augenstein Daniel and Kinley David, 'When Human Rights "Responsibilities" become Duties' (n 39) 10s.



Such a proposal could and should have limits, as pointed out in the Maastricht principles. From this point of view, there are two aspects we must focus on.

First, compliance with the *ne bis in idem* principle is more difficult to abide by when following the effective control doctrine taking into account that the expansive effect on jurisdiction of this doctrine can bring about more positive jurisdiction conflicts. The extraterritorial application of criminal law based on the effective control standard can give rise to the initiation of multiple criminal proceedings. The state in which the facts took place can initiate proceeding, but also the State exercising effective control over the offender can do so. When both states want to exercise jurisdiction, the first takes priority over the second. However, as provided in the Rome Statute of the International Criminal Court, ‘sham proceedings’, shall not block another state from exercising jurisdiction. The ‘ability and willingness’ test in the Rome Statute provides for an effective tool in solving such jurisdiction conflicts and only lets a State that is both willing and able to prosecute take precedent in exercising jurisdiction.<sup>42</sup>

The second objection that could be raised to the extraterritoriality clause is that it is contrary to the *lex certa* principle in criminal law. At this point we must take into account that the liability extension clause does not affect the description of the criminal conduct or the penalty. It defines the jurisdiction to hear the criminal case, ie an element of procedural law. Although the principle of legal certainty also applies here, it does not apply with the specific requirements of the *lex certa* principle concerning the description of the criminal conduct and the penalty. Moreover, we must recall that the ECtHR has shaped the *lex certa* principle differently, connecting it with the need for predictability. This requirement can be met not only by case law that determines the impact on human rights, but also, for example, by guidelines drafted by the public prosecutor’s office further specifying this notion.<sup>43</sup>

### 2.3.2 Corporate liability and compliance programs with regard to human rights

The second issue that has been evidenced by the cases listed above is that a number of corporate actions affecting the right to adequate food do not constitute criminal offences. For instance, civil wrongs such as imposing abusive clauses in agreements between large supermarkets and suppliers can have a tremendous impact on human rights, yet there is no reason for them to be considered a crime. In fact, as we have discussed regarding seeds and industrial property rights, the exercise of a legally acknowledged right could affect human

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<sup>42</sup> See Helmuth Satzger Helmuth and Julia Kaiser, ‘Ne bis in idem en el Derecho penal internacional: muchas preguntas a segunda vista’ in Adán Nieto Martín and Luis Arroyo Zapatero (dirs), *El principio ne bis in idem en el Derecho penal europeo en internacional*, (2007 Ediciones de la Universidad de Castilla la Mancha) 95 ss.

<sup>43</sup> See Juan Antonio Lascurañin Sánchez, ‘La protección multinivel de la garantía de tipicidad penal’ in Mercedes Pérez Manzano/Juan Antonio Lascurañin Sánchez (dirs.), *La tutela multinivel del principio de legalidad penal*, (Marcial Pons 2016) 119 ss.

rights. This would also be the case for the commercial practices related to baby milk, which not always shall constitute an advertising crime in accordance with domestic legislation.

This situation takes us to another controversial aspect in theory and in practice of international human rights law: if and to what extent international corporations are bound by human rights. This implies not only the negative obligation not to violate other individuals' human rights but also (as for states) a set of active or positive obligations, such as protecting human rights and ensuring compliance therewith. If only negative compliance was required, as for any other individual, it would suffice to comply with the applicable legislation. However, an obligation similar to that incumbent upon states requires corporations to promote and facilitate the implementation of human rights (positive compliance). This debate stems from the ability of multinational companies to affect human rights, as well as from the prominent role they currently play as global actors or, even more, as 'new sovereign'. Also, this debate is framed by the various violations carried out by these entities, from which they have emerged unscathed.<sup>44</sup>

In the international debate that has taken place following the intervention of the United Nations and other international organizations, such as the OECD there have been three main stances. The strictest stance is displayed in the 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights . The purpose of this project was to consider multinational companies as addressees of the obligations stemming from human rights in a similar way to states. The opposition of large corporations stunted this project. On the opposite side, we can find the soft approach of voluntarism or pure self-regulation as enshrined in the Global Compact: a voluntary document stating the will to comply with human rights, accompanied by press reports on the progress made by each company.<sup>45</sup> The third stance and the actual answer was proposed by the United Nations and can be situated somewhere in the middle. It is based on the reports drafted by UN General Rapporteur John Ruggie<sup>46</sup> and comprises three pillars:

- (a) On the one hand, it accepts the fact that only states are directly bound by human rights. As stated above, there are certain active obligations stemming therefrom, such

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<sup>44</sup> See only for a general view about this topic John Ruggie, *Just Business. Multinational Corporations and Human Rights* (Norton & Company 2013); Oliver De Schutter, *Transnational Corporations and Human Rights* (Hart 2006). From the point of view of the political science see Juan Ramón Capella, *Estado y derecho ante la mundialización: aspectos y problemáticas generales*, in Juan Ramón Capella (dir) *Transformaciones del derecho en la mundialización* (Estudios de derecho judicial 1999) 83-122

<sup>45</sup> See Martin Chenut, 'Droits de L'homme et Responsabilité des Entreprises: Les Principes Directeurs des Nations Unies' Geneviève Giudicelli-Delage Geneviève and Stefano Manacorda Stefano, *La Responsabilité Pénale des personnes Morales: Perspectives Européennes et Internationales* (Société de Législation Comparée 2013) 229 ss.

<sup>46</sup> John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles For The Implementation Of The United Nations 'Protect, Respect And Remedy' Framework*, (United Nations 2010).

as protecting human rights against third parties' violations, in this case violations resulting from the actions of multinational companies.

(b) The obligation of states to protect human rights ultimately means that they must require corporations to fulfil due diligence obligations.<sup>47</sup> These obligations take concrete form in the shape of internal self-regulation measures aimed at preventing their activity from affecting human rights.

(c) The third pillar of Ruggie's proposal is that victims should be redressed and they should have access to judicial and extrajudicial remedies.<sup>48</sup>

As is demonstrated, multinational companies are subject to human rights in an indirect manner. The State is bound by the primary obligation, yet such obligation entails both negative obligations (not to affect) and positive obligations. The latter requires the adoption of adequate control measures so that human rights remain unaffected. Therefore, the situation is *de facto* similar as if companies were directly bound by human rights.

In 2011 this strategy was embedded in the UN Guiding Principles on Business and Human Rights.<sup>49</sup> Aside from embracing Ruggie's strategy, the Principles provide for the key points on how to fulfil human rights due diligence. Nevertheless, there is still a need to draw up a compliance programme in this regard.<sup>50</sup>

As it happens with corporate compliance programs, the core principle should be the political commitment of the company's governing body, which could be evidenced by approving a code of conduct setting out 'what the company expects, regarding human rights, from its employees, its partners and other parties directly connected with its transactions, products or services'.<sup>51</sup>

Although we cannot carefully examine this point, we must highlight that the scope of compliance programs does not only extend to the multinational company itself; it also

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<sup>47</sup> See Oliver De Schutter, Oliver, Anita Ramasatry, Mark Taylor and Robert Thompson, *Human Rights Due Diligence, The Role of the States* (2012) (<http://humanrightsinbusiness.eu/> (accessed 21 February 2017)).

<sup>48</sup> Gwyne Skinne, Robert McCorquodale and Oliver De Schutter, *The Third Pillar: Acces to Judicial Remedies for Human Rights Violations by Transnational Business* (2013). <http://icar.ngo> (accessed 21 February 2017).

<sup>49</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (2011). [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_SP.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_SP.pdf). (accessed 21 February 2017).

<sup>50</sup> See *Guiding Principles* (n 48) p. 13, ss. For more details about compliance programmes in human rights, Robert Blitt, "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance" (2012) *Texas International Law Journal*, Vol. 48, Issue 1, 33-52; Adán Nieto Martín, "Global law y empresas multinacionales: estrategias para la protección de bienes jurídicos globales", in *El comportamiento ético en la economía y en la sociedad*, (Asociación Alexander von Humboldt de España Instituto de Dirección y Organización de Empresa 2016), 79-110.

<sup>51</sup> *Guiding Principles* (n 48) point 15, 16, in respect to this aspect in shaping compliance programmes, Adán Nieto Martín, La institucionalización del Sistema de cumplimiento, en Nieto Martín Adán (ed), *Manual de cumplimiento penal en la empresa* (Tirant lo Blanch 2015) 187 ss.

extends to suppliers or potential business partners and obviously to subsidiaries. Despite it remaining unclear to what extent the legal person and its executives can be held liable for the conduct of its suppliers or business partners, the guiding principles make it clear that the company's obligation to protect human rights covers these third parties. In relation to food law, we have witnessed how contract farming leads farmers to the use of child labour or servitude. We can argue about the extent to which the supermarket chain can be held liable, but there is no doubt that it must implement preventive measures in this regard.

Additionally, the principles are particularly thorough when it comes to instructing corporations how to perform risk assessments, adequately assessing the impact of their performance on human rights in all of their procedures.<sup>52</sup> By way of example, this would imply the need to assess the risks for the right to food attached to launching a baby milk advertising campaign.

The principles are open-ended regarding how states must penalize the breach of due diligence obligations by companies. Nevertheless, it could be inferred that there are certain transparency obligations that require companies to report periodically on the measures to be adopted to prevent human rights violations.<sup>53</sup> To this end, the Guiding principles reporting framework is an essential document. It was drafted by a group of experts, and it is intended to evidence the compliance measures developed in terms of human rights.<sup>54</sup>

In EU countries, the protection obligation incumbent upon states has been enshrined in Directive 2014/95 EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.<sup>55</sup> Article 29a) requires parent companies of a group exceeding 500 employees to issue non-financial annual accounts (statements). By means of a 'consolidated non-financial statement', they must disclose information 'to the extent necessary for an understanding of the group's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters'. Article 29 provides that companies must declare the existing risks related to those matters linked to the group's business relationships, products and services, and how the group manages those risks.

At least in EU countries it can be inferred that the penalties for misleading information in this regard must be effective, proportionate and dissuasive.<sup>56</sup> Since untrue information in financial statements is a punishable behaviour in almost every country in the world, it would be convenient that untrue information in financial statements was punished through

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<sup>52</sup> *Guiding Principles*, (n 48) point, 17, 18.

<sup>53</sup> *Guiding Principles*, (n 48) point, 21.

<sup>54</sup> *UN Guiding Principles. Reporting Framework* [www.UNGPreporting.org](http://www.UNGPreporting.org) (accessed 21 February 2017).

<sup>55</sup> Directive 2014/95/EU disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1.

<sup>56</sup> *Vid.* especially the doctrine of ECJ, in "Berlusconi case" related with the misrepresentation of the financial statements, ECJ (Grand Chamber), 3.5.2015, asun. C-387/02, C-391/02, C-403/02, par. 65.

criminal law. The claim from a given company that it complies with certain human rights international standards or codes of conduct that is not accompanied by the adoption and implementation of effective protection measures must constitute a criminal offence. This strategy was particularly proposed by Olivier de Schutter, former UN Special Rapporteur on the right to food.<sup>57</sup> In this connection, he invokes the *Nike case* in the US, where Nike was convicted for false advertising, since it declared in its code of ethics that it guaranteed that there was no child labour involved in the making of its products when this was not true.<sup>58</sup>

#### 2.4 Frauds related to humanitarian aid

The right to food security entails the obligation to effectively protect, but also to provide access to food. Within the latter obligation we must underline that states and international organizations are required to provide food to groups of people in emergency situations or in times of crises. It is not unusual to see frauds related to humanitarian aid that significantly undermine access to food. Suspecting fraud, the United States Agency for International Development (USAID) recently suspended Syrian aid programs.<sup>59</sup> In the EU, OLAF also detected some diversions of EU food aid to the Sahara refugee camps that were subsequently sold in public markets.<sup>60</sup>

As evidenced by national reports, these behaviours are most certainly punishable and even with aggravating circumstances if the criminal conduct occurs within the country's territory. Conversely, if the relevant behaviours take place outside of the territory the chances of prosecuting such conducts decreases significantly, particularly when the diverted or misused funds belong to international organizations. Except for the EU, states rarely equate the protection of international organizations' funds (UNICEF or UNHCR, among others) to their own economic interests.<sup>61</sup> The extraterritorial application of domestic legislation is usually limited to cases where citizens from the country are involved in the fraud or the latter affects national funds. It is unlikely that the investigation is carried out in the territory where the fraud occurs. First, because local authorities or governments are often involved; second, because countries that receive humanitarian aid usually – and this probably results from the emergency situation – have weak judicial systems.

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<sup>57</sup> Oliver De Schutter, "Agribusiness and the right to food" (n 11) 11; in relation to environmental crimes proposing a similar solution, Adán Nieto Martín, "Bases para un futuro Derecho penal internacional del medio ambiente", en Carlos Espósito and Garcimartín Alférez, *La protección de bienes jurídicos globales* (Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid 16, 2012) 161 s.

<sup>58</sup> *Kasky v. Nike*, 27 Cal. 4 th 939 (2002), cert. granted, 123 S. Ct. 817, and cert. dismissed, 123 S. Ct. 2254 (2003).

<sup>59</sup> "Suspecting fraud, U.S. suspends some Syrian aid programs", *The Washington Post* ( 26 July 2016)

<sup>60</sup> European Anti Fraud Office, Rapport final d'Enquête, Les camps de réfugiés du Sahara occidental, en *Alérie du Sud* (2007).

<sup>61</sup> Convention on the protection of the European Communities' financial interests [1995] OJ C 316/48.

## 2.5 Adulteration of food as a way to commit genocide and crimes against humanity

Polluting water as a form of warfare or harassing populations through food shortages, starvation and deprivation of food amount to a grave violation of the right to food security. In 1932, millions of farmers died in Ukraine as a result of the Soviet agricultural policy, which ultimately intended to weaken the population. The Nazis also used their control over food in the occupied areas for the aim of annihilating certain groups. More recently, in Sarajevo, Serbian troops seized humanitarian aid from the civil population.<sup>62</sup>

This kind of conduct clearly falls within the scope of international criminal law. Except for the report on Peru, which shows some doubts, it is undisputed that in the remaining countries this conduct can constitute genocide or crimes against humanity. As for genocide, the conduct consisting in 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' is considered to be the most suitable to cover these cases.<sup>63</sup> In the context of crimes against humanity, the final clause concerning '[...] inhumane acts [...] intentionally causing great suffering, or serious injury to body or to mental or physical health'. Similarly, international humanitarian law refers to these situations. Article 8(b)(xxv) of the Rome Statute defines as a war crime to 'intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions'.<sup>64</sup>

## 3 Food Safety and Criminal Law

### 3.1 The internationalization and privatization of criminal law and its effects on food criminal law

Food criminal law has had long-standing legitimacy problems stemming from: (1) the wide utilization of crimes of endangerment; (2) the dependency of criminal law on administrative law; and (3) the allocation of responsibilities within companies. Until now, these issues have been discussed from a state-oriented perspective given that food legislation was shaped and applied in each singular jurisdiction differently. Additionally, the food production and distribution systems were mainly national and were based on stable relationships between the various links in the supply chain. Since the last two decades, the food law scenario and commercial relationships have significantly changed, which makes it necessary to rethink the foundations of food criminal law.

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<sup>62</sup> See Cristina Fernández Pacheco Estrada, 'La (in)seguridad alimentaria como arma. Derecho Penal Internacional y Seguridad alimentaria' in Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds), *La sicurezza agroalimentare* (n 5) 337 ss.

<sup>63</sup> See the Italian Report (p 225-263).

<sup>64</sup> See Article 26 of the III Geneva Convention relative to the Treatment of Prisoners of War and Article 89 of the IV Geneva Convention relative to the Protection of Civilian Persons in Time of War.

### 3.1.1 *The structure of food law*

Supranational food law has four main pillars: public international law; WTO international agreements; soft law rules from international organizations (FAO, for example), among others the *Codex Alimentarius* or Food Code; and corporate self-regulation. Domestic or regional law (EU) moves between the gaps left by this 'meta-regulation'.<sup>65</sup>

In fact, the structure of food law is one of the best examples of so-called global law.<sup>66</sup> This new form of regulation is of particular importance in those sectors affected the most by globalization, such as food safety or food trade. The first distinct feature of global law is the emergence of new regulators: alongside states and international organizations, the informal cooperation mechanisms such as G20, the periodic meetings of international administrative agencies or, in our domain, standardization bodies or food multinationals become increasingly important. Secondly, the emergence of new regulators has led to, or rather has revitalized, the importance of regulatory instruments other than laws or conventions: soft law, ISO standards and codes of ethics among others.<sup>67</sup>

The emergence of new actors and regulatory instruments does not mean that a legal framework has been newly created in parallel to the domestic legal frameworks. There is a new regulatory network in which new actors and rules interact and support each other. Corporate standards or codes of ethics benefit from domestic courts or contract law. For instance, compliance with an ISO standard or with a code of ethics of a large multinational company can get into a contract clause with a supplier. However, this is a two-way street; domestic law also uses corporate self-regulation or standards. Many administrative law provisions refer to these standards and foster corporate self-regulation.

The WTO is the world's 'free trade police'. By means of a quasi-judicial system, it ensures compliance with a series of international agreements that amount to the basic pillars of free trade. Regarding food law, the most important ones are those related to the free movement of goods (GATT agreements) and the Agriculture Agreement. Aside from tariffs, the purpose of these agreements is to remove trade barriers worldwide.

From this point of view domestic rules that provide for restrictions on grounds of food safety are always suspected of being protectionist.<sup>68</sup> Therefore, the WTO has drafted two agreements intended to regulate the most important cases where these exceptions can be

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<sup>65</sup> See Bernd van der Meulen, 'The Global Arena of Food Law: Emerging Contours of a Meta-Framework' [2010] *Erasmus Law Review*, Volume 3, Issue 4, 216 ss.

<sup>66</sup> See Eyal Benvenisti, *The law of global governance* (The Hague, Hague Academy of International Law 2014); Sabino Cassese, *El derecho global : justicia y democracia más allá del estado*, (Editorial Derecho Global 2010). Merçè Darnaculleta Gardela, "El Derecho administrativo global: ¿un nuevo concepto dentro del Derecho administrativo?" [2016] *RAP* 199,11-50. Neil Walker, *Intimations of global law* (Cambridge University Press 2015).

<sup>67</sup> See Dario Bevilacqua, *Introduction to Global Food-Safety Law and Regulation* (Europa Law Publishing 2015).

<sup>68</sup> Admitted by Article 20 of the General Agreement on Tariffs and Trade (GATT).

introduced.<sup>69</sup> Consequently, domestic legislators' room to manoeuvre is significantly narrowed. If they wish to include exceptions to free trade on grounds of food safety they must either provide adequate scientific evidence showing, for instance, the danger of a given pesticide or additive; or they must invoke international agreements, standards or guidelines. At this point, the classic intersections of the abovementioned global law become clear: WTO agreements – governed by public international law – refer for further specification or completion to international standards, i.e. soft law rules or even rules stemming from corporate self-regulation.<sup>70</sup>

In this regard, the *Codex Alimentarius*, drawn up by the FAO and the WHO, is the most important supplementary rule. The *Codex* is a classic soft law rule, and thus is not binding on states. However, its validity as a rule is undisputable. On the one hand, the *Codex* is of importance because of the aforementioned references in the WTO agreements to it. On the other hand, its content influences domestic and EU legislation: key concepts such as food or additive, used in food legislation, are directly derived from the text of the *Codex*. Furthermore, the ECJ uses the *Codex* for the interpretation of EU Food law. Also, the food industry recognises that a *de facto* compliance to its provisions implies that commodities can move freely throughout the world. The *Codex* also provides for essential aspects concerning corporate self-regulation, such as the analysis of critical points (General Principles or Food Hygiene and the Hazard Analysis and Critical Control Point, HACCP).

In spite of its soft law nature, the *Codex Alimentarius* drafted by the FAO and the WHO is the most important regulatory instrument for food safety in the world. Thus, it is important to highlight that the drafting process of its provisions is, *prima facie* sufficiently open-ended and participatory as to meet a considerable standard of legitimacy. The procedure for the elaboration of *Codex* standards and related texts is a complex 8-step process to which both NGOs and business world representatives have access.<sup>71</sup>

In order to fully understand the importance of the WTO, and the significance of the *Codex Alimentarius* as an implied part of its legal framework, we must take into account that the WTO has a quasi-judicial system that ensures compliance of its treaties. Indeed, when a state considers that another state has carried out an unjustified legal amendment (for instance, the ban on transgenic products) the first state can bring a claim before the Dispute Settlement Body, which will settle the case on the basis of a set of WTO rules. In case of disagreement there is an Appellate Body. The WTO merely upholds or rejects the measure. However, what

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<sup>69</sup> Agreement Technical Barriers to Trade (TBT) and Agreement on the Application for Sanitary and Phytosanitary Measures (SPS Agreement)

<sup>70</sup> See Linda Fulponi Linda, 'Private voluntary standards in the food system: The perspective of mayor food retailers in OECD countries' [2006] *Food Policy* 31, 1-13; Bernd Van Der Meulen Bernd, *Quasi States? The unexpected rise of private food law*, in Van Der Meulen Bernd, *Private Food Law*, (Wageningen Academic Publishers 2011)

<sup>71</sup> See Spencer Henson and John Humphrey, 'Codex Alimentarius and private Standards', in Van der Meulen (n 70) 149-175.



gives these resolutions their force is the WTO's capacity to 'condone' or compensate trade sanctions that states that feel prejudiced by a given measure contrary to WTO law can agree to.<sup>72</sup>

As we have demonstrated above, national law makers have lost their autonomy in order to shape food legislation due to, on the one hand, international norms, and on the other hand, soft law and corporate self-regulation. Specifically, the reason for this corporate self-regulation surge is threefold.

First, self-regulation has increased indirectly because of the internationalisation of the supply chain and its increased complexity. The liberalization of food trade in the world has given rise to a new kind of multinational company: large supermarket chains such as Wal-Mart, Carrefour, Tesco, Auchan or Target. Before this liberalization, international trade encountered serious restrictions and supermarkets (at least regarding fresh products) mainly acted within the confines of their national market and boundaries. This implied that they usually worked with known suppliers engaging in long-lasting commercial relationships. Nowadays, the chain that takes food from the farm or the crop fields to the supermarket shelves is anonymous and international. Within this new context, the leading company (usually a supermarket) sets standards to try to get its products to have the quality desired by consumers. Compliance with these standards is part of the agreement with the suppliers, ensured through a certification system discussed below. Standardization ultimately amounts to the way of managing the chain of suppliers.<sup>73</sup>

Second, self-regulation fills the gaps in domestic law, which under the pressure of the WTO system, tends to be *de minimis* legislation in many aspects. From the perspective of free trade, any piece of national food legislation with a health or consumers' protection objective/dimension must evidence that they are proportionate (reasonable) to be considered lawful provisions. In other words, it must be evidenced that the relevant piece of legislation is not a trick to impose some sort of restriction on free trade. In the EU, as specified in the transversal Report, the primacy of European law has resulted in the disapplication of criminal law provisions targeting food regulations, that were considered to be disproportionate (unreasonable).<sup>74</sup> In order to understand the surge of standardization in this context, we must recall that state legislation on food safety must pass the WTO test. However, this is not the case for private standards. The majority opinion considers that although these standards may impose unjustified and sometimes abusive barriers to free

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<sup>72</sup> Bernd Van Der Meulen (n 65) 222.

<sup>73</sup> See Bernd Van der Meulen, 'Anatomy of private food law' in Van der Meulen (n 70) 75; in reference to the EU agricultural market, where the contractual freedom is more reduced in products like sugar or milk, Izabela Lipinska, "Contractual relation on the EU agricultural market in the context of food security and production risk", in Ines Härtel and Roman Budzinowski (eds.) (n 9) 187. In the EU the agricultural contract law is regulated by Regulation 1308/2013 establishing a common organization of the markets in agricultural products [2013] OJ 347/361.

<sup>74</sup> See further: Michele Simonato The EU dimension of 'Food criminal law' (p 97-129).

trade, even discriminating against certain producers, they fall within the scope of freedom of choice.<sup>75</sup>

Third, the surge of self-regulation is also due to the fact that state legislation, and particularly so European provisions, foster self-regulation and use it by applying the so-called regulated self-regulation approach. The most prominent example is the HACCP. We must carefully examine this self-regulation technique, since it ultimately determines the acceptable level of hazard and due diligence in each company, which ends up shaping criminal liability. The HACCP requires each company to determine the procedures with the highest level of risk for consumers' health as well as the most suitable times to introduce controls aimed at reducing such hazards. Constant oversight as well as the assessment of these controls' effectiveness is an essential part of the HACCP. This document is drafted by all members of the food chain (producers, food carriers or stockists) and is highly standardized. Its basic methodology is provided in the *Codex Alimentarius*, but each country normally performs further specifications, drawing up their own manuals. The competent administrative agencies and business sector representatives are often involved in the drafting of these national manuals.

One of the most salient features of corporate self-regulation in the food sector is that it does not only supplement the State's regulatory capacity, but also its inspection and oversight duties. Until recently, public inspection systems were responsible for inspecting facilities and analysing end products, whereas inspections are now focused on whether or not companies have adequately 'regulated themselves' in accordance with the HACCP. Many aspects on which inspections focus are subject to certification. One could say that there is some sort of cooperation amongst private auditors, certification bodies and public inspection. Governments do not only rely on the regulatory capacity of corporations to determine the permitted hazard within their activity. In fact, it has ended up taking advantage of self-regulation and private certification bodies as an alternative to or as complementing the public oversight and inspection system. Obviously, this indirect inspection system is not as intense in every country, but is slowly but surely becoming the most common form of inspection in the US and within the EU, where Regulation No. 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, openly fosters it.<sup>76</sup>

Corporate self-regulation normally follows this process: (A) First there is a set of standards and certificates promoted by business groups, such as Global G.A.P, GFSI, and a myriad of national associations. These rules cover the same matters as state legislation: rules

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<sup>75</sup> See Huge Marinus, "Private retail standards and the law of the World Trade Organisation", in Bernd van der Meulen, (n 70) 175 s; Luigi Russo, "Gli standard private per la produzione alimentare nel commercio internazionale", in Alessandro Somma (a cura di), *Soft law e hard law nelle società postmoderne*, (Giappichelli 2009) 133.

<sup>76</sup> See Recital 13.

concerning products, their production process and the labelling thereof. The core of these standards are the rules concerning the production process, which comprises business organization, hygiene and traceability rules. (B) These standards become self-regulation provisions within those companies that wish to adhere to the said standards. (C) Thirdly, compliance with these standards is ensured through compliance audit and certification. These stages must not be construed as a linear process ( $A \rightarrow B \rightarrow C$ ), but as a cycle. An industry-leading company's self-regulations usually end up becoming the common standard.<sup>77</sup>

### 3.1.2 *Legitimacy of food law and criminal liability*

The new food safety regulatory approach, as well as transformations in the chain, poses new problems for criminal law. At this point we will tackle a transversal issue such as legitimacy. As seen before, the private food law framework and the public law legal system must not be taken in isolation; they interact with each other. Thus, legitimacy is one of the most controversial aspects for all authors concerned with standardization. If corporate power already has considerable leverage in state legislation through lobbying, corruption or illegal financing, along with a great capacity to capture regulators, companies' possibilities to tailor soft law rules and standards to their best convenience is almost unlimited. Standardization bodies depend on corporations that either directly hire them or fund them, and the origin of many standards are rules stemming from self-regulation which are subsequently adopted and generalized by standardization bodies.<sup>78</sup> The surge of self-regulation and standardization would ultimately entail asking the fox (corporations) to guard the henhouse (food safety).

Although to a lesser extent, the legitimacy issue also appears in international organizations and their creation of soft law. In this context, a public-private partnership model that lets corporations participate is usually adopted. If this is not carried out with high transparency levels and guarantees that the stakeholders have the necessary power and presence to have a similar ability to influence, soft law also has legitimacy problems. In our case, the *Codex Alimentarius* (which as has been discussed is currently the most important food law provision) fortunately has a drafting process that guarantees the involvement of all concerned parties or stakeholders.

This widespread legitimacy issue is aggravated when we move it to the criminal law domain. In all legal systems, the principle of legality requires that rules penalising certain conduct and imposing sanctions are drafted with a greater degree of specificity –

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<sup>77</sup> Theo Appelhof and Ranald van den Heuvel, "Inventory of private food law", in Bernd Van der Meulen Bernd (n 70)113 ss.

<sup>78</sup> See about the standardization law making process, Tim Bütte Tim and Mattli Walter (ed), *The New Global Rulers. The Privatization of Regulation in the World Economy* (Princeton University Press 2011) Peters Anne, Koechlin Luc, Förster Till and Zinkernagel F. Gretta, *Non State Actors as Standard Setters* (Cambridge University Press 2009).

particularly in relation to the crime definition – and clarity so to enhance the accessibility. The legality principle also safeguards the legislator’s prerogative to criminalize certain conduct. As such, the legality principle can be affected to the extent that criminal law rules are shaped by non-state or private rules.<sup>79</sup> In the most extreme example, criminal law can simply sanction conduct that violates a specific standard in those private rules. This can be done through an explicit or indirect reference to the soft law or private standards. There is an indirect reference if the criminal norm refers to an administrative norm, and this one refers back to the private standard or self-regulation provisions. As is demonstrated in the national reports, compliance with standardization provisions at least gives rise to the presumption that the conduct is lawful or, on the other side of the coin, that it is an undue behaviour. The Italian<sup>80</sup> and Peruvian<sup>81</sup> reports show how there is a very strict ancillary relationship not only with food law but also with soft law rules.

Private food law also allows for laying down standards of care for negligent crimes or to allocate liability within companies. One of the aims of ISO standards is the attribution of responsibility within the management chain. These rules can be taken into account by criminal judges both to establish and to exclude criminal liability. The key question here is: to what extent are we willing to admit the interference of corporate power (alongside with the legislative power) when it comes to describing criminal conducts and attributing responsibility? The proposal contained herein is that criminal judges should generally apply a legitimacy test as a first step prior to considering a ‘private rule’ in order to determine the criminal conduct, either to exculpate the defendant or to establish criminal liability. Depending on the grade obtained by the private rule in the legitimacy test, its influence in order to determine criminal liability must be high, reduced or none at all.<sup>82</sup>

In this regard, it must be acknowledged that the aim of solving the legitimacy issue is increasingly more present within standardization bodies, business groups and even certain companies when it comes to drawing up their compliance programs. In broad terms, to that end they tend to get the various stakeholders involved in the drafting of provisions and they

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<sup>79</sup> See Alessandro Bernardi, “Soft law e diritto penae: antinomia, convergenze, intersezioni” en Alessandro Soma (a curda di), *Soft law e hard law nelle società postmoderna* (Giappichelli 2009) 1; Alessandro Bernardi, “Il principio di legalità alla prova delle fonti sovranazionali e private: riflessi sul diritto penale alimentare” [2015] *Rivista di Diritto alimentare* <http://www.rivistadirittoalimentare.it> (accessed 21 February 2017); Torre Valeria, “Produttori di alimenti e produttori di norme? Gli standard di sicurezza tra fonti pubblicistiche e fonti privatistiche e il loro valore tipizzante nel fatoo colposo” Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds), (n 5). 507; Torre Valeria, *La Privatizzazione delle fonti di diritto penale. Un’analisi comparata dei modelli di reponsabilità penale nell’esercizio dell’attività d’impresa*, Bologna, 2013.

<sup>80</sup> See further Italian Report (225-245).

<sup>81</sup> See Report of Peru (forthcoming in the eRIDP 2017).

<sup>82</sup> See Adán Nieto Martín, *Autorregulación, compliance y Justicia restaurativa*, in Adán Nieto Martín and Luis Arroyo Jimenez, *Autorregulación y sanciones*, (Aranzadi 2015 2ª Ed) 103. Considering that only the explicit or direct remission to the soft law or private standard is in accordance with legality principle, Alessandro Bernardi, in Alessandro Soma (n 79) 23.

also seek participation of public authorities. However, the fact that there was some sort of involvement must not be deemed to be enough. In order to attain full relevance, the governance system of private entities must have the following guarantees: involvement of and on an equal footing of all parties affected by the rule, and a transparent decision-making process.<sup>83</sup>

## 3.2 Food regulation and definition of criminal conducts

### 3.2.1 General structure of food law violations

If we analyse the structure of food crimes, we can see a two-tier system in most legal systems,<sup>84</sup> leaving aside those cases of death or injury, which will be discussed below. The first one is made up of the traditional intentional water or food poisoning crimes. Anyone can be the perpetrator of the crime and specialist food law plays no role whatsoever. The ultimate rationale of these criminal offences is to punish cases where an indefinite number of people are endangered (*Gemeingefahr*). The second tier is formed by the concrete or abstract endangerment crimes. Industrial food production that characterizes our society makes it more necessary to have this kind of crimes with an undetermined hazard.

The attribution of criminal responsibility in this kind of endangerment crimes is ancillary to food law. Most of the food endangerment offences are, in almost every country, defined by criminal provisions that establish the criminal conduct through a reference to administrative food law (*normas penales en blanco*). In order to breach this kind of provisions the perpetrator must violate a rule aimed at protecting food safety. This ancillary nature turns them into special offences, the perpetrators of which can only be the addressees of the food law provision.

In addition to this first feature, as it is well known, the danger can appear in various degrees: abstract endangerment crimes find that the dangerous situation comes from the infringement of the rule in itself; suitability crimes (*Einigungsdelikte*) or abstract-concrete endangerment crimes require the judge to verify that the violation is actually suitable to create a dangerous situation; hypothetical or potential endangerment crimes require in addition to the previous type of crimes that the judge must verify whether or not it is likely that the dangerous situation comes into contact with one or more persons and; finally, concrete endangerment crimes, for which evidence must be provided that the criminal

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<sup>83</sup> See Busch Lawrence, 'Quasi-Satates?' in Bernd Van Der Meulen Bernd, (n 70) 62 ss.

<sup>84</sup> See about the Italian system, but proposing models of intervention within the criminal offences against the health public criminal that could be generalised Massimo Donini and Donato Castronuovo (dir), *La riforma dei reati contro la salute pubblica. Sicurezza del lavoro, sicurezza alimentare, sicurezza dei prodotti* (Cedam 2007). About the crimes of *Gemeingefahr*, see, Antonio Doval Pais, *Delitos de fraude alimentario*, (Aranzadi 1996) 289; Alberto Gargani, "Il pericolo comune e la nozioni di disastro sanitario nel settore alimentare: profili de lege ferenda", in Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds), (n 5) 601 ss.

conduct actually endangers people.<sup>85</sup> Only in this last category of concrete endangerment crimes is there no requirement of an ancillary relationship, i.e. where committing a crime does not entail a violation of food law. However, except for these cases, which are highly exceptional, it is usual to combine the requirement danger with an infringement of food law in order to define the criminal conduct.

Based on the general structure that has just been put forward, below we will deal with three main issues. First, the relationship between administrative and criminal penalties; second, the kind of reference by the criminal provision to the administrative rule; third, the legitimacy of abstract endangerment crimes.

### *Criminal and administrative penalties*

All of the countries examined in this general report draw a distinction between criminal and administrative penalties.<sup>86</sup> The most traditional relationship between the two revolves around the principle of proportionality related to the seriousness of the offences. This implies that less serious offences, i.e. abstract endangerment crimes or infringements of ancillary aspects of food law, are laid down as administrative offences. It could be asserted that this first model sticks to the recommendations issued by Section I of the XIV International Congress of Penal Law (Vienna, 1989) on the legal and practical problems posed by the difference between criminal law and administrative penal law. Within this first approach there are certain legal systems that acknowledge the *ne bis in idem* principle (Spain, Germany, Brazil or Belgium) and some others that do not (Argentina, Peru, Turkey or Italy).

However, there is an alternative approach to shaping the relationship between punitive administrative law (or administrative penal law) and criminal law, which relates to another way of understanding the proportionality principle. In this approach, the application of either administrative or criminal law is more complex, and its rationale is beyond a differentiated definition of offences. What characterizes this second model, implemented in countries such as Finland or Belgium, is a multi-stage or progressive intervention.<sup>87</sup> Administrative authorities begin by imposing administrative penalties, sometimes mere coercive measures (Finland), to warn the company so that it can remedy its issues regarding

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<sup>85</sup> See about the endangerment crimes in economic crimes, Jose Manuel Paredes Castañón, 'Los delitos de peligro como técnicas de incriminación en el Derecho penal económico' [2003] RPDC 11, 95.

<sup>86</sup> Recently about this subject Francesca Galli and Anne Weyembergh, *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU* (Editions de l'université de Bruxelles 2014). Specially in relation to the protection of consumers, Manuel Gomez Tomillo, "La protección de los consumidores por medio de la represión: Derecho penal, Derecho administrativo sancionador y Daños punitivos" in Mirentxu Corcoy Bidasolo and Victor Gómez Martín, *Fraudes a consumidores y derecho penal. Fundamentos y talleres de leading cases*, (BdeF, Edisofer, 2016) 41 ss.

<sup>87</sup> One of the most famous and elaborate formulation of this intervention is the "regulatory Pyramid" proposing by John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) 30 ss; see also Adán Nieto Martín Adán, *Autorregulación, compliance y Justicia restaurativa*, en Luís Arroyo Jimenez and Adán Nieto Martín, *Autorregulación y sanciones*, (Aranzadi 2<sup>a</sup> Ed 2015) 111

compliance with food law. Within this approach, administrative authorities address the various compliance issues faced by companies. Unless the conduct is serious and clearly intentional, administrative authorities discuss the situation with the companies involved. The application of criminal law (criminal law intervention) is left for clearly intentional offences. This approach, aside from the different definition of offences, considers the Government and its administrative agencies as the most suitable bodies to enforce food law and provides criminal law a subsidiary role.

*Legislative references: lex certa principle and principle of proportionality*

We have pointed out that the characteristic structure of food law violations is twofold: reference and infringement of a food law provision and hazard. We must now examine how these references must be performed. Within theory of legislation there are three kinds of references: static, dynamic and open-ended references. In the first type, the definition of the criminal conduct refers to the content of either a specific and existing administrative provision or a yet to be established administrative provision (the latter being a dynamic reference). Open-ended references direct to a set of undifferentiated provisions, for instance, 'food law', and again can be dynamic in that sense.<sup>88</sup> Amongst the examined legal systems we have found all kinds of references, but generally speaking we could say that there are legal systems clearly prone to open-ended references whereas some others prefer static references.

As the Argentinian report points out, static references provide, on the one hand, greater legal certainty, and they also further help in complying with the principle of proportionality. Food law provisions, when they ban certain substances, or they provide for controls, elaboration procedures or shipping conditions, require to weigh health protection and other social interests at stake such as economic development on a case by case basis. From the health protection perspective, this means that there are absolutely essential rules, insofar as they lay down basic conditions within the food safety system. Those conducts that violate them are highly disapproved. In turn, there can be much less essential rules. Open-ended references to any kind of rules, which are common in some of the legal systems analysed herein, provide for equal penalties for behaviours of very diverse seriousness from the viewpoint of the legal interest protected.<sup>89</sup>

It could be said that if the open-ended reference, as in the Spanish Criminal Code, requires evidence of suitability (suitability crimes *Einigungsdelikte*) or of the concrete endangerment, the offences are ultimately equated. Nevertheless, if the legislator uses suitability crimes, the degree of indetermination is very high. The judge would be responsible for determining, on a case by case basis, whether or not the violation matches the definition of the criminal

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<sup>88</sup> See Yamila Fakhouri Gómez Yamila, in Lascuraín Sánchez J. Antonio, *Introducción al Derecho penal* (Civitas 2015) 174 ss.

<sup>89</sup> Massimo Donini, *Modelli ed esperienze di riforma del diritto penale complementare* (Giuffrè 2003).

conduct, by verifying whether or not the behaviour was able to create a hazard. In case of concrete hazard violations, the appearance of such hazard will often be purely random.

For the foregoing reasons, dynamic references to food law as a whole or, for instance, general references to quality and composition, should be either removed, or limited to the specific endangerment crime framework. It is generally much more in line with the *lex certa* and proportionality principles to have static references to food law rules or sets of rules that bring together provisions of equal importance. As we will see below, this kind of references make endangerment crimes more admissible. As laid down in the International Association of Penal Law's (IAPL) resolution in the International Congress of Penal Law held in Rome in 1969, abstract endangerment crimes are admissible if, as in the case at stake, the protected legal interest is tremendously important and the wording of the provisions is very thorough.

This close relationship between food law and attribution of criminal responsibility does not mean that it has to be a rule with no exceptions. The legal systems examined, differ in this regard, and there is no clear answer to this. This issue has only been discussed in a somewhat heated debate in the context of the ongoing Italian legislation reform process.

If we examine this issue from the perspective of corporate power there must be exceptions to the rule of totally ancillary relationships.<sup>90</sup> Food corporations have research departments that allow them to be one step ahead of the scientific knowledge in the hands of the legislator. Thus, they are in a better position than the legislator when it comes to noticing the risks attached to a given product or additive. Demanding a strict ancillary relationship would not account for what actually happens in reality. However, when solving this issue, legal certainty must not be left aside. The solution to the recent Caselli project in Italy shows, in my view, a correct weighing in the wording of the new Criminal Code article.<sup>91</sup> Ancillary relationships are not necessary when placing a harmful product in the market can give rise to damage to human health of an undetermined number of people (food disaster crime). The definition of the criminal conduct requires intention or gross negligence.

### *Legitimacy of abstract endangerment crimes*

Having regard to the above, the preferred approach is to have the main food crimes to be drafted as abstract endangerment crimes. This is the choice in many legal systems as well as in proposals such as that of "*Eurodelikten*"<sup>92</sup>. In spite of this tendency towards abstract

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<sup>90</sup> Massimo Donini, 'Reati di pericolo e salute pubblica' in Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds), (n 5) 624; in favor of the autonomy of the criminal law see also M. Elena Iñigo Corroza, *La responsabilidad penal del fabricante por defectos en sus productos* (Bosch 2001) 214 ss.

<sup>91</sup> Ministero Della Giustizia, Commissione per l'elaborazione di proposte di intervento sulla rigorma dei reati in materia agroalimentare, Presidente dott. Gian Carlo Caselli, Schema di disegno di legge recante: "Nuove norma in materia di reati agroalimentari, 14 ottobre 2015, Art. 4 (Modifiche all'articolo 440 del código penale) 3.

<sup>92</sup> Gerhard Dannecker, 'Europäisches Lebensmittelstrafrecht', in Klaus Tiedemann (hrsg), *Wirtschaftsstrafrecht in der Europäischen Union* (Carl Heymans Verlag KG 2002) 239 ss.



endangerment crimes that can be noticed in Northern Europe, we are far from reaching an agreement. In Russia there are concrete endangerment crimes, and in Spain there are suitability crimes, as in other South American countries.

To my understanding, a general report on food criminal law must take a stance regarding what kind of endangerment crimes are considered to be more adequate. Food legislation and the current approach to risk prevention in food safety show the little applicability of concrete endangerment crimes: these forms of attributing criminal responsibility that require, first, verifying a contact between a given natural person and the source of danger and, second, that the perpetrator had lost the control over the source of danger. Even if we disregard this last element, the shaping of which is widely debated, in practice concrete endangerment crimes are very rarely applied unless the dangerous situation gives rise to a harmful result. Additionally, the endangerment of a person in a specific moment in time is harder to prove.<sup>93</sup>

However, moving beyond practical matters, the main objection that can be currently raised to concrete endangerment crimes is that they are not consistent with the way risks are managed pursuant to food law. The legitimacy of endangerment crimes, and what is the most suitable kind of endangerment crimes, must not only be debated from the internal perspective of criminal law, but it must also be regarded in relation to the applicable risk management system under the administrative provisions currently in force. There are two features of the current risk management approach that are worth highlighting.

Risk management is currently performed pursuant to the principle of total quality.<sup>94</sup> Food security depends on whether or not risk prevention measures are applied with equal intensity in all links of the food chain. All companies and individuals involved in the food chain must carry out their HACCP. Similarly, being within the chain brings along the obligation of abiding by the quality and standardization rules. The principle of total quality thus implies a regulatory decision, affecting the legal system as a whole, pursuant to which all stakeholders have an equal degree of responsibility.

Concrete endangerment crimes imply focusing the intervention of criminal law on the last part of the food chain, i.e. retail distribution, where products are put in contact with end consumers. This is contrary to the food law hazard-related liability system. It overexposes the last link whilst to some extent dismissing the remaining members of the chain from responsibility. If controls take place in the food chain, it is unlikely that a security flaw in the first links affects a consumer, regardless of how serious it is. Conversely, it will be much more likely for a flaw to be detected when it takes place in the last link, even if such flaw has been less serious. Concrete endangerment crimes are in line with a risk management system

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<sup>93</sup> Lately about this question A. Kiss, 'Delito de lesión y delito de peligro concreto: ¿Qué es lo adelantado?' [2015] *Indret* 1/2015, 10 ss.

<sup>94</sup> See Catalán Lapesa and Subirá Goñi, 'La calidad en la industria agroalimentaria' in Vicente Rodríguez Fuentes (dir), *El Derecho agroalimentario*, (Bosch 2003) 181 ss.

focusing on the last stage of production, where the product's suitability was verified. However, it is not consistent with the idea of quality, which equates all of the stakeholders' liability, and which considers all food law rules, from the first link to the last, equally important.

The second feature of risk management has an impact on how the legislator must make its decisions in this regard. The *Codex Alimentarius* lays down the general principle that prior to banning a given substance or forbidding certain activities considered to be dangerous, administrative regulations must carry out a threefold risk analysis: a risk assessment, a risk management and a risk communication. Leaving aside this last stage, which is uninteresting at this point, the risk 'assessment' and the 'management' are two clearly differentiated moments in time. The assessment is carried out through a purely scientific methodology on the basis of which a given product's or additive's level of risk is determined. On the basis of this information, a political decision, ie risk management, is taken. Independent administrative agencies have appeared in many countries. Following a very complicated procedure that ensures the involvement of the scientific community and stakeholders, they make the decision of either banning or permitting certain goods or food. At the EU level, Article 22 of Regulation (EC) No. 178/2002 provides for a strict separation between the assessment phase and the management stage. The first must be implemented by the European Food Safety Authority (EFSA), whereas the Commission or the Council as political decision-making bodies, must carry out the latter.<sup>95</sup>

The debate on endangerment crimes in the food domain is also affected by this new legal framework for risk management. Until now, the legitimacy of endangerment crimes has been developed on the basis of a scientific paradigm. This paradigm granted the judge in a criminal procedure the chance to review or verify the decisions made by the legislator in this domain, or assess whether a dangerous situation affecting an individual, has materialized. This long-standing debate on endangerment crimes was held in many domains where criminal law was the first measure to manage risk (*prima ratio*) since there was no administrative risk regulation or risk management.

The high degree of legitimacy and the highly technical nature of the decision-making process regarding risks in food law must be taken into account in order to understand endangerment crimes. These aspects must also be particularly taken into account to refuse the creation of suitability or abstract-concrete endangerment crimes. In the suitability or abstract-concrete endangerment crime, the law setting out the general dangerousness of a behaviour is not enough. This kind of criminal offences, require the judge to verify whether in a specific case, an actual dangerous situation exists. In the context of food law, it is truly surprising that the judge is empowered to verify the dangerousness of a given additive against an administrative decision. The risk management administrative process carried out

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<sup>95</sup> Simone Gabbi, 'L'approccio europeo alla valutazione dei rischi alimentari', in Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds) (n 5) 21 ss.

by independent agencies acting under a transparent procedure taking into account all interests at stake is much more suitable than the criminal procedure to decide on the dangerousness of a given substance. In this new context, the possibilities of error of administrative decisions are lower than those of judicial decisions, and the legitimacy is similar to say the least.

When assessing the admissibility of abstract endangerment crimes, the following aspects must also be taken into account: first, state legislation to which criminal law provisions refer must be considered as *de minimis* legislation; second, if a risk is not adequately assessed (it is overrated) within domestic legislation, the WTO system will most likely correct this assessment under Article 2(2) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). As is well known, pursuant to this provision risk-based restrictions require very stringent scientific evidence.<sup>96</sup>

This decision to place endangerment crimes in the core of food law must be understood in relation to the conclusions drawn in the previous section regarding the *lex certa* principle. Accordingly, the paramount rule of food criminal law is a provision where the legislator provides for specific prohibitions having regard to the importance of the various rules for food security. The legitimacy and technical quality of food legislation nowadays in developed countries' legal systems prevent us from having mere disobedience offences.

This general conceptualization must come hand in hand with a pyramidal enforcement strategy.<sup>97</sup> Prior to resorting to criminal proceedings, administrative agencies must apply this enforcement approach to companies in violation, particularly when they are small; and alongside the use of coercive measures, conversations, negotiation and persuasion must be put into place. The criminal law domain must be left for large corporations or small companies showing a repeated will not to comply with the applicable provisions.

### 3.2.2 Risk crimes, precautionary principle and genetically modified organisms

Over the last few years, the existence of food crimes based on administrative provisions following the so-called precautionary principle, is one of the most widely debated topics.<sup>98</sup> Particularly in relation to genetically modified organisms,<sup>99</sup> the large applicability and relevance of the precautionary principle has led to considerable debate on the penalty system. The arrival of criminal conducts which involve a violation of an administrative provision and are drafted on the basis of the precautionary principle has led legal scholars

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<sup>96</sup> See Van der Meulen (n 65) 229.

<sup>97</sup> See (n 88).

<sup>98</sup> See G3mez Tomillo (dir.) (n 87); vid. also the works of Donato Castronuovo Donato (519), Gorj3n Barranco (537), Pongiluppi Caterina (549), Consorte Francesca (559), Perini Chiara (585), in Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds), (n 5); Nicol3s Garcia Rivas, 'Influencia del principio de precauci3n sobre los delitos contra la seguridad alimentaria', en Javier Boix Reig J and Alessandro Bernardi, *Responsabilidad penal por defectos en productos destinados a los consumidores* (Iustel 2005) 417.

<sup>99</sup> See Belgian Report (p. 147-179)

to create a new category of endangerment crimes: risk or regulatory risk crimes. This is a distinct category, different from the abovementioned endangerment crimes.<sup>100</sup>

Endangerment crimes require the judicial verification of a true or actual risk. Regardless of their kind, endangerment crimes depend upon scientific evidence showing the harmful nature of a given conduct. Lacking a legal provision on causation or a provision requiring statistical evidence proving the existence of a risk, an endangerment crime should not be drafted, ie the criminalisation of mere endangerment is not legitimate.

Conversely, risk crimes focus on ensuring compliance with the rules based on the so-called precautionary principle, which inspires food law in several countries. Thus, it is impossible to give an opinion about the legitimacy of risk crimes without knowing the precise content of the legal rules that are derived from the precautionary principle.

The precautionary principle entitles the legislator to make decisions that restrict rights (in the case at stake, banning a given substance or forbidding an elaboration process) in 'scientifically uncertain' situations, i.e. in situations where science is not completely capable of providing conclusive evidence of the harmfulness of a given element or behaviour. Therefore, its role is to also manage risks in 'scientifically uncertain' situations.<sup>101</sup>

In EU countries, the precautionary principle is expressly enshrined in Article 7(1) of Regulation No. 178/2002,<sup>102</sup> also referred to as the European general food law. However, since it is a principle that allows for measures restricting rights without proving their effectiveness, it is surrounded by significant guarantees. The distinction between risk assessment and risk management must be applied. This distinction is central in the law making process of food law. The scientific body or the competent administrative agency, must offer public authorities reliable and solid information in order to understand the scientific issue that has been put forward (risk assessment). The legislative or political body (risk management) should take into account this information in order to adopt political decisions. The normative aspect of the precautionary principle should always be considered provisional. If there is new scientific information about the dangerousness of a substance, the norm have to be reviewed.

The precautionary principle is not a universal principle. Mainly in the environmental criminal law domain, the International Court of Justice (ICJ) has refused several times to consider this principle as customary law. Also the WTO does not fully embraced this principle, which requires all decisions banning a given product or substance to be taken on

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<sup>100</sup> See Manuel Gómez Tomillo (dir) (n 87) 92 ss.

<sup>101</sup> See José M. Baño León, 'El principio de precaución en el Derecho público', p. 29 ss, Albert Ituren Oliver A, "Riesgo, precaución y Constitución", in Javier Boix Reig and Alessandro Bernardi (n 95) 29, 43

<sup>102</sup> Regulation (EC) No 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [200] OJ L 31/1.

the basis of scientific certainty.<sup>103</sup> The precautionary principle is applied, and the debate on the legitimacy of criminal offences attached thereto has mainly taken place in EU countries<sup>104</sup> and in some other countries such as Brazil.<sup>105</sup>

The legitimacy of risk crimes based on the precautionary principle, as in endangerment crimes, is closely related to the degree of legitimacy of the underlying administrative decision.<sup>106</sup> From this perspective, there is no substantial difference between both kinds of criminal offences. At least within the EU, these are both adopted through a similar procedure and also judicial review is similar. The use of the precautionary principle expresses the decision of society's representatives on the risk level they wish for their society.

Obviously, assuming the paradigm of scientific endangerment crimes there is no room for risk crimes, as it happens with abstract endangerment. However, if we partially move away from the scientific paradigm and we have regard to the democratic legitimacy of the risk-related decision, there must be no problem to accept criminal infringements stemming from the precautionary principle. The foregoing entails that regulatory endangerment crimes are only accepted if they are shaped as criminal provisions laying down the penalty yet not the criminal conduct (*normas penales en blanco*), and administrative provisions meet the degree of legitimacy pointed out above.

Nevertheless, national reports put forward that the precautionary principle has been applied in different situations from the ones discussed above. For instance, it has been applied within the frame of result crimes with the aim of providing evidence of the causal link between a given conduct and the resulting injury or hazard.<sup>107</sup> As has been put forward, the use of the precautionary principle requires a procedure ensuring the legitimacy of the prohibition in a democratic and scientific manner. Self-evidently, this prevents the application of the principle directly by judges with the aim of widening criminal liability.

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<sup>103</sup> See Danilo Bevilacqua D (n 67) 104.

<sup>104</sup> See Martínez Pérez, 'El principio de cautela en la práctica internacional y europea: concepto, naturaleza jurídica y contenido', in Manuel Gómez Tomillo (n 87) 17.

<sup>105</sup> See further Brazilian report ( p 181-201).

<sup>106</sup> See for the discussion about the legitimacy of crimes based on precautionary principle Manuel Gómez Tomillo, "El principio de precaución en el Derecho penal", Mercedes Alonso Álamo, "¿Riesgos no permitidos? Observaciones sobre la incidencia del principio de precaución en el Derecho penal" in Gómez Tomillo (dir) (n 87) 51, 104. Between the Italian scholars see Donato Castronuovo, *Principio de precauzione e diritto penale. Paradigma dell'incertezza nella struttura del reato* (Libellula 2012); Donato Castronuovo, "Política criminal, generaciones futuras y principio de precaución" in Mirentxu Corcoy Bidasolo and Víctor Gómez Martín (n 87) 77; Emanuele Corni, *Il principio di precauzione nel diritto penale. Studio sui limiti dell'anticipazioni delle tutela penalé* (Giappichelli 2013).

<sup>107</sup> See specially the discussion that take place in Italy or Portugal, Gabriele Fornasari, "El principio de precaución en la experiencia legislativa, jurisprudencial y doctrinal italianas. Aspectos de parte general", Helena Moniz and Susana Aires de Sousa, "Manifestações do principio da precaução no direito português", in Manuel Gómez Tomillo (dir) (n 87) 149, 357.

### 3.2.3 *The (relative) notion of harmfulness to human health*

Food law tends to use a notion of relative harmfulness crystalized in Article 14(4) of the Regulation 178/2002 that should be used also by the criminal law. This relative notion solves the so-called 'accumulation crimes', where the dangerousness of a given conduct stems from its successive repetition and not from an isolated act. German<sup>108</sup> and Italian criminal law, specifically in the reform project, embrace this accumulation criterion (vid. Projected Article 445 ter of the Codice Penale).<sup>109</sup> As for the relative notion, it suffices that the food is harmful for a limited group of consumers (children or coeliacs, for instance).

### 3.3 Attribution of responsibility in the event of defective products

Under most legal systems, food safety crimes are special offences for which only those perpetrators specifically subject to food law can be held liable. According to the national reports, the most relevant cases concern deaths or injuries caused by consumption. Product liability cases have led most countries to reconsider basic issues of attribution of criminal responsibility.<sup>110</sup>

Two broad categories of problems can be singled out. Firstly, problems exist in relation to establishing causality between consumption and the outcome, and whether liability may arise from wilful misconduct, negligence or an omission (due to the lack of warning to consumers). Secondly, there are issues with attributing liability within a company and throughout the food chain.

#### 3.3.1 *Attribution of individual criminal responsibility*

The *conditio sine qua non* is the starting point in all legal systems. As shown by most reports, significant probability between the outcome and consumption of the product is generally admitted as evidence of this relationship. It is not necessary to identify the specific causal pathway, nor is a universal causal law required (theory of seriousness). For this approach to be compatible with the presumption of innocence, other plausible alternative explanations for the outcome must have been previously excluded. This cannot be simply solved by referring to the principle of free evaluation of evidence, giving priority to some expert

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<sup>108</sup> Gerhard Dannecker, "Das deutsche System des Lebensmittelstrafrechts", in Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds), (n 5) 207, for Spain, Mirentxu Corcoy Bidasolo, "Protección penal de los consumidores e imputación de homicidios y lesiones: el caso de la colza" in Mirentxu Corcoy Bidasolo and Victor Gómez Martín (n 87) 483, 506.

<sup>109</sup> Ministero della Giustizia (not 91).

<sup>110</sup> See for the early discussion in Germany and with a considerable influence in other countries, Lothar Khulen, *Fragen einer strafrechtlicher Produkthaftung*, (C.F Müller Juristen Verlag 1989), the last discussion about this topic could be found in Susana Aires de Sousa, *A responsabilidade criminal pelo produto e o topos causal em direito penal* (Coimbra Editora 2014).

reports over others. The court's decision must involve an explanation of the doctrine confirmed and acknowledged by a relevant sector, even if it is controversial.

A much debated issue which cannot be comprehensively addressed here is the determination of the mental element (*mens rea*). Around the mid-90s, it was advocated that the author's awareness of the risks to workers' health or life derived from a food product should be considered enough to establish his/her intent.<sup>111</sup> However, this understanding has been rejected in many countries. For instance, Italy's *Corte di Cassazione* has recently required proof of a wilful element.<sup>112</sup>

Compliance with technical or even legal regulations is a common defence in product liability cases. In order to define the criminal conduct in negligent offences, the courts of all legal systems resort to rules of experience or, where applicable, legal or technical regulations providing for a specific degree of care. However, certain exceptions are required when such regulations are outdated.

The role of special knowledge in determining the duty of care or due diligence has been widely discussed, and it is particularly important today. While in Max Weber's time the state's scientific and technological mastery was presumed, today such expertise resides within companies' R&D departments. As we have seen, the state resorts to self-regulation to benefit from this. Against this background and from a criminal policy perspective, it makes absolute sense to build the duty of care on the offender's special knowledge. An additional consequence of this approach is that those "who know more than the law"<sup>113</sup> -and hence than the state- cannot rely on outdated regulations to justify their conduct.<sup>114</sup>

Cases of death or injury from consumption of defective food products also triggered the debate on the limits of liability for failure to act within the company. The problem has essentially been raised in connection with the withdrawal obligation established in most countries' food legislation. Such obligation requires food companies to recall any non-

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<sup>111</sup>See Spanish Report

<sup>112</sup> Cass., Sez. Un., ud. 24 aprile 2014, Pres. Santacroce, Rel. Blaiotta, Ric. P.m. c. Espenhahn Harald ed altri. On the recent case law in Italy, vid. Francesco Viganò, "Il dolo eventuale nelle giurisprudenza più recente", *Diritto penale contemporaneo* [2014] (<http://www.penalecontemporaneo.it>), for the doctrinal discussion vid. Massimo Donini, "Il dolo eventuale: fatto, illecito e conpavolezze" [2015] *Diritto Penale Contemporaneo*, *Rivista Trimestrale*, 70.

<sup>113</sup> See about the problem of special knowledges in cases of product responsibility Elena Iñigo Corroza (n 91)157.

<sup>114</sup> See Merçe Darnaculleta i Gardella, José Esteve Pardo and Spiecker Gen Döhman I (eds.), *Estrategias del Derecho ante la incertidumbre y la globalización*, (Marcial Pons 2015). About the specific problem in criminal law Frigols e Brines, "El papel de las reglas técnicas en la determinación del injusto de los delitos imprudentes: su relevancia en el ámbito de la responsabilidad por el producto" in Javier Boix Reig and Alessandro Bernardi (n 95) 247.

compliant product from the import, manufacturing or distribution market. If the product has reached the consumers, there is a further information obligation.

There are doubts as to whether failure to fulfil such duty (see above) entails criminal liability for the death or injury caused by the food products. This is obviously relevant in cases where the product's hazardousness could not have been known at the time of its distribution. We are currently far from reaching a consensus on the subject. In fact, issues concerning omission of information or the provision of inaccurate information have not been discussed at all.<sup>115</sup> Therefore, the creation of a specific criminal offence punishing the infringement of these obligations seems particularly appropriate, as has been demonstrated in the recent Italian draft amendment.<sup>116</sup> This specific criminal offence (by omission) should only be applicable when liability for omission cannot be established.

### 3.3.2 *Liability within the company and throughout the food chain (manufacturers' liability)*

As already noted, a classic problem with hazardous products is the attribution of liability within companies and throughout the food chain.<sup>117</sup> In both cases, the debate should be linked to food law provisions, which in many legal systems govern liability throughout the food chain, as well as to standardization: ISO 22000 Food Safety and ISO 28000 Food Chain Security. ISO standards 9001 on quality management are also worth noting.

Standardization rules have devoted greater attention than state legislators to business organization criteria and the allocation of liability within companies. As a result, such standards adopt a management model involving all members of the organization – and particularly the company's officials – in certain goals. These standardization rules also seek to regulate the manufacturing process, generating documentary systems that enable traceability of the decisions adopted with regard to a specific issue.

The usefulness or applicability of the standardization process concerning the attribution of criminal responsibility within companies is ambivalent. The 'involvement approach' that governs the drafting of ISO standards and the manuals drafted within each company based thereon, generally provide for an ambiguous attribution of responsibility, which cannot match the reality. These provisions convey the impression that everything is everyone's business concerning, for instance, product quality. This philosophy contrasts with the

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<sup>115</sup> See Gerhard Danecker, in Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds) (n 5) 222 s; Carmen Juanatey Dorado, 'Responsabilidad penal omisiva del fabricante o productor por los daños a la salud derivados de productos introducidos correctamente en el mercado' in Javier Boix Reig J and Alessandro Bernardi (n 95)133.

<sup>116</sup> Ministero della Giustizia (n 91) Art. 5 (Modifiche all'articolo 442 del código penale, *Omesso ritiro di alimenti pericolosi*).

<sup>117</sup> See Gerhard Danecker, in Luigi Foffani, Antonio Doval Pais and Donato Castronuovo (eds) (n 5) 218; M. Elena, Iñigo Corroza (n 91) 251.



delegation theory,<sup>118</sup> which has been drawn up with essentially identical criteria in most EU countries, and which was expressed, for example, in Article 13.2 of the Corpus Juris for the protection of the EU's financial interests. From a criminal law perspective, it is necessary to accurately lay down each actor's duties, the power and the means by which he/she has to carry out such duties. Furthermore, it has to be specified what the obligations are incumbent upon the supervisor that has delegated the relevant task. In other words, criminal responsibility must stem from a true examination of the power and decision-making structure within the company, and not from the role of management manuals arising from standardization rules. In turn, from a procedural viewpoint, ISO standards are incredibly useful, since they allow for producing significant documentary evidence on the company's decision-making process.

In EU countries, responsibility within the food chain is governed by Article 17 of Regulation 178/2002,<sup>119</sup> which provides that producers, processors and distributors shall ensure that regulations and standards are in compliance with the applicable food law provisions at all stages of production. In addition, responsibility within the food chain must currently be construed in the context of the food chain's structure. As pointed out above, nowadays the food chain is highly hierarchical and complex. The company on top, usually a large supermarket, imposes its rules and has enforcement capacity. Many producers have a relationship of dependence which, as discussed above, can even lead to abuse of power. From this perspective, the impact of rules similar to Article 17 of Regulation 178/2002 that fail to mention distributors, must be limited.

Criminal law must assess, on the one hand, the actual power and decision-making structure. On the other, it must consider the principle of trust.<sup>120</sup> The principle of trust was meant for anonymous and depersonalized domains, such as road traffic, where it was essential for the system's normal operation that all actors relied on the remaining actors, except for evident signals, to fulfil their role correctly. The current structure of the food chain does not match this reality. Although it is most certainly anonymous, having regard to the standardization and certification system to which it is subject, its pyramidal and hierarchical structure takes us to a drastically different system.

In the current food chain, actors rely on certifications and certification bodies,<sup>121</sup> and hence it is important to hold a debate on certification bodies' liability. Among other reasons, their liability is relevant for the effectiveness of criminal law in this domain, since it helps to determine responsibility. In globalized food chains, producers are usually in distant

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<sup>118</sup> See about the delegation theory in criminal law Juan Antonio Lascurain Sánchez, in Adán Nieto Martín (dir) (n 50) 166.

<sup>119</sup> See n 102.

<sup>120</sup> See about the trust principle and their importance in product responsibility cases, M. Elena Iñigo Corroza, (n 91) 253.

<sup>121</sup> See Van der Meulen, 'The anatomy of private food law' in Van der Meulen, *Private food law*, 80 ss.

countries with which judicial cooperation is complex. This can be, among other reasons, because food liability cases stir interest of domestic authorities to reject national producers' liability with the aim of protecting their agri-food sector.

When it comes to defining responsibility, it does not make much of a difference, if the certification is awarded by the company that is in the head of the supply channel or more commonly, that a specialized body does. In theory, certification bodies or certifiers can be held liable for negligence in case of death or injury arising from a harmful product coming from companies that have been certified by them. Nevertheless, in practice it will be hard to establish a causal relationship between a defective certification and harmful food. Thus, it would be convenient to come up with a punitive law system (providing for criminal or administrative penalties) to determine liability of food certification bodies. This system would allow for penalizing conducts such as misrepresentations in a certificate or the provision of certification services without meeting the necessary requirements. Simultaneously, a civil liability regime should be established as well as setting out rules on the election of certification bodies by the company. Following the model of account auditing, a regulation that could avoid conflicts of interest whilst ensuring the certification body's independence, should be thought out.

The certification body's liability does not put an end to the debate on liability within the food chain. As provided by Article 17 of the abovementioned EU Regulation through the expression 'under their control', liability must stem from the actual possibilities of control and the monitoring and control obligations incumbent upon each of the operators. Transporters are by no means required to ensure that the food transported by them are in good condition. However, the importer that hires them must make sure that transporters meet the necessary conditions to guarantee that food does not suffer deterioration. Trust or reliance on certifications – as well as liability arising therefrom – applies, if appropriate, in connection with the degree of liability. The importer meets the standard of care if he/she trusts a duly certified transporter. In those sectors where this system has not been implemented, liability must apply within the abovementioned frame having regard to the standard of care that can be reasonably required in each case, which must necessarily take into account economic efficiency criteria.

## **4 Food Frauds: Towards a shared definition of food fraud crimes**

### **4.1 Concept, factors and strategies against fraud**

The attacks on food safety that have been examined so far consist mostly of negligent conduct. Contrary thereto, food frauds are generally intentional conducts that undermine the genuineness of food. The fraud consists in producing, trading (importing, exporting, transporting or distributing) or marketing food that has been deprived of its nutritional components; mixed with lower quality substances; or given a composition that goes against

the applicable rules and regulations. Food fraud is done with the intention of generating profit.<sup>122</sup>

International reports and studies demonstrate that food fraud has skyrocketed in the last few years. There are various causes that have contributed to that. On the one hand, a lot of competition leads small traders in particular to buy food with worse characteristics and at a lower price than that of the products they will subsequently offer. On the other hand, it is hard to discover this kind of frauds because it requires costly and sophisticated means and resources. The globalization of food trade and the internationalization of the food chain requires a tremendous coordination to discover fraud cases. Additionally, within this industry, all signs suggest that there is organized crime. As evidenced in the EU regarding the horse meat case,<sup>123</sup> organized crime inadvertently creeps into the various links of the food chain.<sup>124</sup>

The increment of competition leads to a 'short cycle fraud', featuring small retailers. The remaining factors that have been examined above point to a very different kind of criminality; transnational criminality well rooted in all links of the food chain. Preventing this kind of 'long cycle' fraud requires smooth cooperation amongst all companies involved in the food chain. The recipe for success in this regard is, firstly, to ensure product traceability. In lack thereof it is impossible to discover the weaknesses of the food chain and hence the provenance of tampered or misrepresented food.

Secondly, we need to address corporate self-regulation once again. Companies of the food chain must implement a mechanism ensuring that they will not be the weak chains through which low quality food gets into the chain. Although standardization and certification are way behind when it comes to food fraud – as opposed to food safety protection –, several significant alternatives have started to appear. GFSI, which constitutes the greatest collective action in the food industry and which has benchmark standards, in 2014 launched a new industry-driven initiative aimed at approving self-regulation rules aimed at preventing fraud. To that end, it recommends companies to perform a food fraud vulnerability assessment. Along the lines of HCCP, its purpose is to identify critical or vulnerable points in order to implement control measures, such as sampling tests, checking a product's origin, developing anti-counterfeiting technology or performing due diligence on suppliers.<sup>125</sup> The

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<sup>122</sup> See about the definition of food fraud Lotta and Bogue, 'Defining Food Fraud in the Modern Supply Chain' [2015] EFFL 2/2015, 114.

<sup>123</sup> See European Parliament, *Draft Report on the Food Crisis* [8.10.2013] 2013/2091 (INI).

<sup>124</sup> Limited to UK, but with conclusions that could be generalised, Elliot Review into the Integrity and Assurance of Food Supply Networks. Final Report. A National Food Crime Prevention Framework, HM Government [2014] <https://www.gov.uk/government/publications>. See also Susane Van der Meulen, Boin G, Bausola I, et al, 'Fight Food Fraude' [2015] EFFL 1/2015, 2.

<sup>125</sup> GFSI Position on Mitigating the Public Health Risk of Food Fraud [July 2014].

Elliot report in the United Kingdom goes in the same direction.<sup>126</sup> Only through risk management within companies and by establishing a culture that opposes fraud can we successfully tackle this phenomenon.

## 4.2 Food fraud crimes

The current typology of fraud as an activity that extends throughout the food chain, contrasts with the orientation of the legal systems examined above. Within this typology, infringements mainly relate to the last link in the chain, i.e. the relationships between retailers and consumers. In this regard there are two types of violations. The first one is in connection with advertising crimes. This typology focuses on the misleading or deceptive nature of offers targeting consumers to get them to purchase certain goods or services. The other typology can be found in Italy,<sup>127</sup> Argentina or Portugal.<sup>128</sup> The decisive element within this typology is the delivery of a food product different from the one agreed or chosen, performed in an establishment open to the public. Both typologies are close to embezzlement and both typologies advance criminal law protection with the aim of effectively safeguarding consumers' economic interests or their right to accurate and truthful information.<sup>129</sup>

As opposed to this model, the current typology of food frauds calls for designing a criminal law provision that is able to apply, regardless of the impact on the end consumer, to the various links in the food chain, i.e. where the substitution, addition, tampering, or misrepresentation of food takes place, with no need to be close to the delivery or supply to the end consumer. As has happened before throughout this report, the Caselli Project can yet again orient us at this point, through the notion of *frode in commercio di prodotti alimentari* (Article 516), the purpose of which is to extend the punishment for fraud to everyone who 'carries out farming, industrial or intermediation activities.'<sup>130</sup>

Most of the definitions of fraud in the legal systems analysed in this report demonstrate, in the first place, that their purpose is to protect consumers' economic interests and their right to receive accurate and truthful information on the food they purchase. However, there are legal systems where there is some sort of confusion between fraud and food safety.

In practice, it is not easy to draw a dividing line between food frauds and crimes against food safety. In fact, intentional frauds in which documents have been altered can entail very serious risks to human health. For instance, the 'rapeseed case' in Spain in the early

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<sup>126</sup> Elliot Review into the integrity and assurance of food supply networks. Final Report. A National Food Crime Prevention Framework. July. 2014.

<sup>127</sup> See further Italian Report (p 225-245).

<sup>128</sup> See Susana Aires de Sousa, Product Liability and Criminal law (p 131-144)

<sup>129</sup> See about the determination of the legal interest in food fraud Susana Aires de Sousa, Product Liability and Criminal law (p 131-144)

<sup>130</sup> Ministero della Giustizia (no 91).

1980s illustrates this kind of ambivalence. The affected parties thought they were buying vegetable oil fit for human consumption in exchange for a significant amount of money. However, such oil caused hundreds of deaths and injuries. Similarly, conduct that falls within the scope of fraud, such as false or misleading statements in food labels or advertisements, can be harmful to human health. Consequently, certain legal systems include fraud within their food safety crimes. The connection between consumers' economic interests and their health also allows for these provisions to apply as general clauses or catch-all provisions. If the harmfulness of a given product is not evidenced, maybe because it has expired, we could assert that there is a fraud, since the passage of time has removed its qualities.

As demonstrated by the EU initiatives,<sup>131</sup> it would make perfect sense, in the absence of harmonization of food fraud crimes, that there at least exist a common understanding of food fraud crimes that would allow for judicial and police cooperation. In fact, there are several proposals seeking to create a concept of food fraud. In my view, these attempts are too vague. The international notion of fraud does not have to perfectly match the existing definitions of criminal offences in many countries. As has just been discussed, in most legal systems there is some sort of conceptual confusion.

To that end, it could be useful to differentiate between harmful or unsafe food, and non-genuine or inadequate food. Harmful or unsafe products are those that violate food law provisions aimed at ensuring food safety or those the producer or operator of which is aware of their harmfulness. This food is subject to food safety crimes. Non-genuine products fall within the scope of food frauds. Non-genuine food products are those that have been deprived of their nutritional components or mixed with lower quality substances, or having a composition that goes against the applicable rules and regulations. Non-genuine food encompasses putrid, deteriorated or decaying products the use of which is unacceptable. Self-evidently, many non-genuine foods can be harmful at the same time. Nevertheless, as we know, these kinds of intersections relate to an issue of concurrence of provisions and is very common in criminal law.

Secondly, in order to reach a common understanding of what is meant by food fraud, there must be an agreement concerning the protected legal interests. This broad term encompasses the following: (a) the right to receive accurate and truthful information; (b) economic interests, protecting the economic value of one's assets; (c) consumers' freedom of choice and disposal, regardless of the economic value of the non-genuine or inadequate product being lower than that of the product the consumer wanted to purchase.

Pursuant to the foregoing, food fraud crimes can be placed in three different levels tiers. In the first level, the production or to placement of non-genuine products or food unfit for human consumption, is penalized. In the second level, offering products to consumers

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<sup>131</sup> Michele Simonato, *The EU Dimension of food Criminal law* (p 97-129)

through misleading or deceptive advertising or in establishments open to the public, is tackled. The third level relates to the causation of economic loss penalized through the crime of embezzlement.

As can be seen, the structure is similar to that of crimes against food safety, with an abstract endangerment tier, a concrete endangerment tier and an injury-related tier. Accordingly, the abovementioned comments on endangerment crimes equally apply. However, in this domain, when assessing the legitimacy of endangerment crimes we must take into account firstly that we are confronted with intentional and profit-seeking conduct. Secondly, we must consider the involvement of organized crime in a very early stage of the fraud, prior to making the products available for consumers. In the third place, given our current typology of food frauds, their 'long cycle' is the most important level from the perspective of prevention and international cooperation.

The intermediate or second level is key in order to come up with a common definition of food fraud. Such a definition, in accordance with the Italian proposal,<sup>132</sup> could consist of the activity of producing or placing on the economic traffic non-genuine products for profit. Penalties should be more severe if the conduct is carried out in a systematic and organized manner.

#### 4.3 Criminal liability of legal entities

National reports put forward that criminal liability of legal entities is not quite settled in this domain. This does not imply that it has an exceptional nature. On the one hand, there are countries where corporations can be held liable for all crimes. On the other hand, there are some other countries that expressly and specifically provide for corporate criminal liability in certain cases. Finally, there are some other countries where quasi criminal penalties are imposed on legal entities.

This irrelevant role currently played by criminal liability of legal persons sharply contrasts with the findings of this report in which corporate self-regulation has been highlighted as a key aspect. In a globalized world, states have no option but to profit from corporate self-regulation as a way to enforce their regulatory powers indirectly or from distance. Thus, it is key to provide for criminal penalties against companies (but probably also against those who can be held liable individually) fostering, but also forcing, an effective regulation. This is the actual aim of criminal liability in this sector.

In the first part of this work, when addressing food safety, we described a distinct kind of self-regulation. Concerning human rights, self-regulation has just recently began to play an increasingly important role. Therefore, in order to foster self-regulation, a criminal corporate liability approach based on misrepresentations and untrue information has been chosen.

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<sup>132</sup> Ministero della Giustizia (n 91) Art 12 (Modifiche all'articolo 516 del código penale, Fodi in commercio di prodotti alimentari).

Through non-financial statements, companies must account for the measures they adopt aimed at protecting human rights, following the performance of the relevant risk assessment.

As this report demonstrates food safety largely depends on corporate self-regulation. This is evidenced by many countries' punitive law, where there are penalties to be imposed on companies or their managers who, for instance, have failed to comply with the obligations. Food law, alongside standardization rules, is more accurate and thorough in determining the elements to be included in food safety compliance programs than other sectors' provisions. In other words, as opposed to the previous case, there is a high degree of thoroughness when it comes to drafting the so-called compliance programs related to food safety. In this regard the Caselli Project is very enriching, not only because one of its goals is to provide for corporate criminal liability, but also because it also lays down the core elements for the corporate compliance programs in this domain. Upon determining the national and international obligations incumbent upon companies through compliance programs (information and labelling, traceability obligations, the duty to withdraw food products, risk assessment or constant oversight), it sets forth the kind of organizational measures to be laid down by the company (documentary systems, disciplinary sanctions or adequate delegation of powers).<sup>133</sup>

As for food frauds, the self-regulation obligations of companies are also emerging, but everything suggests that there will be a fast standardization process. Therein we can already glimpse a methodology similar to the one applicable in the food safety domain (and, in broad terms, similar to regulatory compliance as a whole) based on the analysis of critical points, the design of adequate control measures and constant oversight thereof. The Elliot Report in the UK has evidenced the importance of a good corporate culture as well as of measures such as whistleblowing to tackle food fraud.<sup>134</sup> In sum, compliance programs regarding food fraud will have the same elements that are usual and commonly included in self-regulation tools and used for preventing and detecting other kind of infringements

Nevertheless, the purpose of the compliance program in cases of food fraud is not quite that a given employee or manager acts, in the discharge of his/her duties, for the benefit of his/her company. Rather, self-regulation measures in this domain are aimed at turning the company into a gatekeeper in order to prevent the company from being taken advantage of in order to place misrepresented products in the food chain. The goal of the compliance program is to discover points of weakness that can be used to introduce fraudulent food; another goal of the program is to lay down certain controls. Self-regulation has a similar rationale to that of anti-money laundering, where the aim is to avoid that banks launder money for profit, but also to prevent the bank from being taken advantage of by third parties. One of the

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<sup>133</sup> Ministero della Giustizia (n 91) Art . 31 (Introduzione dell'articolo 6 bis del decreto legislativo 8 giugno 2001, n 231).

<sup>134</sup> Elliot Review (n 126) 19.

central elements of compliance programs in this regard will therefore be to implement due diligence measures with the aim of acknowledging the creditworthiness of suppliers within the food chain. As can be seen, the orientation is similar to that of 'know your customer' in money laundering.

Ensuring correct and effective self-regulation requires to penalize legal entities and/or to create distinct offences to penalize, either the companies themselves or their managers, for failing to adopt these measures. Corporate liability for crimes against food safety and fraud can be left for the most serious cases, where a manager, an employee, or a third party, acts on behalf of the company to provide profit to the company. Alongside this kind of liability, as a catch-all provision, penalties must be imposed on companies or their managers for failing to implement self-regulation measures.



**MINUTES OF  
THE XXTH AIDP-IAPL INTERNAL CONGRESS OF PENAL LAW  
CRIMINAL JUSTICE AND CORPORATE BUSINESS  
SECTION 2  
FOOD REGULATION AND CRIMINAL LAW  
BEIJING, 23-25 SEPTEMBER 2016**

*By Lawrence Siry*

Between the 23<sup>rd</sup> and 25<sup>th</sup> of September 2016, the International Association of Penal Law (AIDP-IAPL) met in Beijing, as part of the 20<sup>th</sup> Congress. The purpose of was to meet, discuss and draft model rules related to the criminal regulation of food safety standards. These rules were seen as necessary given the importance of food as a human right, and the dangers that food contamination and fraud, due to criminal acts, can have on the health of a population in general and vulnerable populations in particular.

A committee of the Congress met on the 23<sup>rd</sup> and 24<sup>th</sup> of September to draft resolutions to be presented to the general meeting. The deliberations of this committee were long and lively. The resolutions had to be flexible to allow for differences in legal systems and culture, but strong enough in order to highlight the importance of the subject for which the committee had been tasked. The committee also had to balance many perspectives, which at times were countervailing, with the goal of reaching consensus regarding the need for criminal law solutions when other forms of regulation prove ineffective.

The committee started from the perspective that it needed to highlight that food is a fundamental human right as provided for by International Covenant on Economic, Social and Cultural Rights. Additionally, the committee recognized that the effective criminal regulation regarding food safety required that individuals and businesses should be held to account for criminal acts related to food safety and/or fraud. Particularly, committee members posited that multinational corporations, which are involved in the production of food, must be held accountable for the safety of their products due to their great influence over the supply of food.

With these goals in mind the Committee drafted a set of resolutions to be presented to the plenary of the conference. The committee sought to balance the need for criminal sanctions for serious violations of food safety rules, as well as fraud with the need to ensure legality, fair process and proportionate sanctions.

The general plenary of the Congress occurred on the 25<sup>th</sup> of September 2016. The meeting was attended by eminent Chinese scholars, as well as academics and practitioners from Europe and Japan. The Committee presented a set of draft resolutions, which were debated at length. The concerns of the general meeting echoed those in the committee: the resolutions

ought to be clear and simple enough to apply to all areas of the globe, regardless of their legal traditions, geographic location or economic circumstance, yet specific enough in order to provide concrete guidance to policy makers and civil society.

The Congress considered each of the proposed resolutions with debate as to their clarity, necessity and consistency. The Congress had a broad perspective in that it sought to agree on a framework of rules, which were relevant, yet respected the mission of the International Association of Penal Law aid in the codification of law and to foster Human Rights in the application of criminal law.

The Congress sought to provide principles, which covered the major areas where criminal law could be used as a tool for law enforcement and food safety officials, but also guide national policies for the provision of food during disaster, war and civil unrest.

Additionally, the delegates sought to include provisions, which would underscore the need to provide sanctions, which would benefit the victims of food safety violations in a manner that would be restorative.

The Congress recognized that and the cross border trade in food products is vital to many economies and that criminal regulation can promote confidence in food safety, particularly when other forms of regulation prove inadequate. It was also noted that armed conflict as well as natural disasters, pose risks for food safety.

Particularly, the Congress noted that while scientific advancements and globalization may promote the availability of food, they also pose a risk, which may or may not be the result of criminal actions. It was therefore recognized that the setting down of principals for criminal regulation of food safety would promote international food safety.

The general meeting added a resolution encouraging states to share information, coordinate and cooperate in the fight against food safety crimes and the provision of foods that are fraudulent in some manner, either as they purposely contain ingredients which do not mirror the provided ingredients, or are produced in a manner contrary to the manner advertised or expected. (Resolutions 15 to 17). Notably, the Congress added Resolution 17, which provides: 'States should share information, cooperate and coordinate in order to prevent, investigate and prosecute food safety crimes and food fraud.' This emphasis on cooperation was seen as vital to an effective strategy to combat food based criminal activity, and reflects the recognition that the globalisation of the food market today.

The Congress recognized that different systems have varying perspective on food regulation with some jurisdiction relying on governmental regulation models while others rely on self-regulatory models. Taking this into consideration, the Congress approved a Resolution, which promotes transparency (Resolution 9). Resolution 14 puts the onus on Governments to ensure a system which discourages fraud and corruption in the regulation of food production and provision, while encouraging the implementation of compliance mechanisms.

Additionally, the adopted instrument contains Resolutions sought to impose liability for heads of businesses which criminally violate food safety standards, (Resolution 1), and for the fraudulent disclosure of ingredients (Resolution 3). The Congress also sought to clarify mechanisms to determine in which jurisdiction criminal violations would arise (Resolutions 5, and 6), as well as the criminalisation of the misappropriation or interception of Humanitarian Aid during times of emergency or armed conflict (Resolution 6).

The Congress adopted the Resolutions on the 25 September 2016 after due debate and discussion. The adopted Resolutions reflect the consensus of the participating delegates that the criminal regulation of food production and provision ought to promote the human right to food, while fostering the economic efficiency of the industry.



## **TRANSVERSAL REPORTS**



# FOOD LAW ENFORCEMENT IN THE EU: ADMINISTRATIVE AND PRIVATE SYSTEMS

By Bernd van der Meulen and Antonia Corini\*

## **Abstract**

*In the food law sector, enforcement power is held at national level. However, the European Union has detailed several requirements to which Member States must comply. Enforcement of food law, as understood in the General Food Law, involves monitoring and verification of compliance by food business operators with the relevant requirements of food law. Member States are overall responsible for the direct enforcement of food law and for the performance of official controls. This includes the power to establish measures and sanctions in case of non-compliances. The legal framework has developed and has changed over the years. Also food related problems may give raise to new issues that require new efforts to find new solutions. These may result in ex-post solutions: strengthen administrative enforcement, intensified, risk based and more effective official controls. However, also an ex ante approach should be taken into consideration to prevent non-compliances. In this domain, both public and private tools, next to an effective administrative enforcement system, may effectively be used and adapted to the complex and ever-changing food system.*

## **1 Introduction**

Most of substantive food law in the European Union (EU) consists of uniform rules and regulations enacted at EU level. However, the enforcement power largely rests with the Member States. Nevertheless, even with regard to food law enforcement, EU law holds detailed requirements to which the Member States must comply. In this contribution we examine the EU legal system on enforcement in the food sector and we analyse the considerable changes in the field of enforcement of food law envisaged in the new Regulation on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health, plant reproductive material, plant protection products (the new OCR).<sup>135</sup> At the time of writing,

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<sup>135</sup> European Commission Proposal for a Regulation of the European Parliament and the Council on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health, plant reproductive material, plant protection products, COM(2013) 265 final. All official EU documents are available at < <http://eur-lex.europa.eu/homepage.html>>. Legislation, court cases and proposals from the European Commission are coded with a year and a number. These codes give easy access to the database.

the procedure for the adoption of this Regulation is at an advanced stage.<sup>136</sup>

Before examining the enforcement of food law, we introduce, in the following Section, a framework analysis of European food law.

## 1.1 Food in European integration

The EU regulatory approach to the food sector has changed over the years.<sup>137</sup> From the end of the 1950s onwards, the countries that founded the EU, a supra-national entity different from its Member States with sovereign powers conferred by the Member States themselves, have pursued the objective to establish a common market without borders where goods can freely circulate, as happens in the market of each single country. Prior to the creation of this supra national organisation, the dominant approach in European countries to the food sector consisted for vertical legislation (ie product standards). To deal with food related problems such as safety and quality issues and deception of consumers through the use of inferior ingredients, national legislators resorted to defining composition and properties on a product-by-product basis. With a view to creating a common market, the countries members of what at that time was called the European Economic Community, tried to harmonise the mass of differing national standards. In this way EU-wide standards were created for products such as marmalades, jams, chestnut paste and chocolate. However, it was soon acknowledged that, due to the relevant differences among rules and food cultures and products which exist among the Member States in the EU, the harmonisation of all existing national product standards was an unachievable mission.

The Court of Justice of the European Union (CJEU), in its case law including the landmark judgement '*Cassis de Dijon*'<sup>138</sup> recognised the 'principle of mutual recognition' as a principle underlying the rules on free movement of goods in the founding Treaties.

According to this principle, products conforming to the national standard in the Member State of origin, in principle have access to all EU Member States, even if the product at issue does not comply with the national legal standard in the Member State of destination. With the principle of mutual recognition, the CJEU solved the problem that food standards presented de facto barriers to trade. At the down side, however, due to the fact that all national food standards could apply simultaneously in all EU Member States and that more and more products could freely circulate in the EU, national standards could no longer adequately be used to protect consumers and to prevent fraudulent practices. Therefore, actions were needed to provide additional protection to the consumers. Instead of

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<sup>136</sup> At the Session of the European Parliament Plenary of 15 March 2015, the new OCR text was signed by the President of the European Parliament and by the President of the Council <http://eur-lex.europa.eu/legal-content/EN/HIS/?qid=1489788729935&uri=CELEX%3A52013PC0265>; [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:PE\\_1\\_2017\\_INIT](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:PE_1_2017_INIT).

<sup>137</sup> For a detailed analysis of EU food law, please see BMJ Van der Meulen (ed.) *EU Food Law Handbook* (Wageningen, Wageningen Academic Publishers, 2014).

<sup>138</sup> Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 1979 p. 649.



complying to legal product definitions, businesses were required to disclose the composition of their products by declaring all ingredients on the label of the product<sup>139</sup> enabling consumers to make informed choices.

## 1.2 Focus on Food Safety

Until the late 1990s, the EU approach mainly focussed on enabling the free circulation of goods and on consumer information. Then priorities dramatically shifted to food safety and consumer protection from harm. The series of food safety crises that broke out in the 1990s, and particularly the BSE crisis, showed the urgency to ensure food safety and to protect consumers' life and health. All this required a reorganization of EU food law with the purpose to prevent hazards and avoid the occurrence of risks.<sup>140</sup>

The reorganisation of the legal infrastructure, started with Regulation (EC) 178/2002<sup>141</sup> laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. This regulation acquired the popular name 'General Food Law' or 'General Food Law Regulation' (GFL). As evidenced from its official title, this Regulation addresses three main issues:

1. it provides general principles, including rules on enforcement;
2. it creates the European Food Safety Authority (EFSA) which is an independent agency responsible for scientific risk assessment;<sup>142</sup>
3. it provides procedures for food safety matters.

The principles and institutions provided by Regulation (EC) 178/2002 represent the basis of all the following legislation. They respond to the need to provide rules and instruments to deal with any food safety problems 'in order to ensure the proper functioning of the internal market and to protect human health' (Recital 10, Regulation (EC) No 178/2002). The core provision of this regulation and, indeed, of all EU food law<sup>143</sup> states that food shall not be placed on the market if it is unsafe (Article 14(1) GFL). Food is considered unsafe when it is injurious to health or when it is unfit for human consumption (Article 14(2) GFL). According to the ECJ a food can be unfit for human consumption and thus unsafe without being injurious to health.<sup>144</sup>

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<sup>139</sup> Council Regulation 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer [1979] OJ L 33/1.

<sup>140</sup> BMJ Van der Meulen, 'Is current EU food safety law geared up for fighting food fraud?' (2015) 10 *Journal of Consumer Protection and Food Safety* 19.

<sup>141</sup> European Parliament and Council Regulation (EC) 178/2002 [2002] OJ L31/1.

<sup>142</sup> It is based in Parma (Italy).

<sup>143</sup> BMJ Van der Meulen, 'The Core of Food Law- A Critical Reflection on the Single Most Important Provision in All EU Food Law' (2012) 3 *European Food and Feed Law Review* 117.

<sup>144</sup> CJEU, C-636/11, *Karl Berger v Freistaat Bayern* [2015], ECLI:EU:C:2013:227.

### 1.3 EU Law enforcement instruments: inspections, measures and sanctions

Among the general principles, the GFL attributes responsibility<sup>145</sup> to food and feed business operators (FBOs) for compliance with legal requirements on food and feed<sup>146</sup> at all stages of production, processing and distribution within the businesses under their control. In addition, it holds<sup>147</sup> Member States overall responsible for the enforcement of food law and for the performance of official controls aimed at monitoring and verifying the fulfilment of the relevant requirements of food law by FBOs.

Within this framework, the FBOs mainly play a 'preventive role'. They have to avoid placing on the market food which is unsafe or unfit for human consumption. FBOs at all stages of production, processing and distribution within the businesses under their control are obliged to set up a system of self-monitoring to ensure that foods or feeds satisfy the requirements of food law (Article 17(1) GFL). Furthermore, FBOs are obliged to withdraw a food from the market and to recall it from consumers when they have reason to believe that it is not in compliance with food safety requirements (Article 19 GFL).

EU Member States, on the other hand, play a 'verification role' of FBOs' compliance with all the legal requirements. According to Article 17(2) GFL, Member States shall enforce food law, and monitor and verify that the relevant requirements of food law are fulfilled by food and feed business operators at all stages of production, processing and distribution. Therefore, Member States are overall responsible for the direct enforcement of food law and for the performance of official controls. Member States enforce food law through National inspectors who are often organized in one or more competent authorities (CAs).<sup>148</sup> These CAs have powers under national law to inspect FBOs, that is to say any type of premises of production, processing and distribution of food.<sup>149</sup> In doing so, the CAs, must have access to premises of and documentation kept by FBOs.<sup>150</sup> FBOs, on the other hand, are obliged, when an inspection is carried out at their premises, to assist the staff of the CAs in the carrying out of their tasks.<sup>151</sup> Further to the inspections,<sup>152</sup> Article 17(2) GFL provides for the possibility to adopt measures and to impose sanctions. Inspections may lead to the finding of non-compliances. Such non-compliance may result in administrative law or criminal law

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<sup>145</sup> Article 17(1) GFL.

<sup>146</sup> Hereafter we make no separate reference to feed.

<sup>147</sup> Article 17(2) GFL.

<sup>148</sup> In some Member States the National inspectors work in the context of more or less autonomous agencies or are distributed over several levels, in these case coordination is required among these Competent Authorities. Cf F Andriessen, A Szajkowska, BMJ van der Meulen, 'Public powers: official controls, enforcement and incident management' in BMJ Van der Meulen (ed) *EU Food Law Handbook* (Wageningen, Wageningen Academic Publishers, 2014) 403, 404.

<sup>149</sup> F Andriessen, A Szajkowska, BMJ van der Meulen (n 14) 403, 404.

<sup>150</sup> F Andriessen, A Szajkowska, BMJ van der Meulen (n 14) 403, 405.

<sup>151</sup> F Andriessen, A Szajkowska, BMJ van der Meulen (n 14) 403, 405.

<sup>152</sup> In the present contribution when we make reference to 'inspections', we mean to include any types of activities performed in order to check compliance with food law requirements.

sanctions. The purpose of measures is to oblige FBOs to remedy the non-compliant situation, while the objective of sanctions is to punish wrongdoers.<sup>153</sup>

**Figure 1 | Inspection competences**

<b>Inspection</b>	<b>Within the EU</b>	<b>In third countries</b>
On FBOs	National competent authorities	EC experts (Directorate-F)
On national competent authorities	EC experts (Directorate-F) <sup>154</sup>	EC experts (Directorate-F)

#### 1.4 Cross-border food law enforcement: RASFF and emergency measures

Next to the rules on enforcement as such, the GFL also establishes communication tools and emergency powers which have an important impact in the administrative enforcement of food law. These procedures laid down in GFL, mainly consist of the Rapid Alert System for Food and Feed (RASFF) and of emergency powers for the European Commission (the Commission).

When non-compliances are ascertained, the sharing of information is a fundamental step in effectively managing the problem. RASFF, as provided in Article 50 GFL, is a network set up between the Commission, the Member States and EFSA with the purpose of notifying direct or indirect risks to human health deriving from food.<sup>155</sup> When Member States take measures dealing with a risk, they must immediately notify the Commission and explain these measures. The notification of the risk must be followed in good time by supplementary information, in particular where the measures are modified or withdrawn.

When a very serious problem is raised and certain conditions are met, the Commission is enabled to use emergency powers. Article 53(1) GFL establishes two conditions which, if present, allow the Commission to take emergency measures such as suspension of the placing on the market or of imports of food. First, the likelihood that the food constitutes a serious risk to human health, animal health or the environment. Second, that the risk cannot be contained satisfactorily through measures taken by the Member State concerned. The Commission, by acting on its own initiative or at the request of a Member State, can adopt, in accordance with the Comitology procedure,<sup>156</sup> these emergency measures. In addition,

<sup>153</sup> On the relation between EU food law and national criminal law, see M Simonato, 'The EU dimension of Food criminal law', Section 3.1 'The impact of EU food law upon national criminal law' in this issue.

<sup>154</sup> We will see it more in detail in Section 2.1.

<sup>155</sup> Article 50 GFL.

<sup>156</sup> The Commission can, in certain areas, exercise implementing powers. This on the basis of an empowerment provided by the European Parliament and/or the Council and under the control of Member States. The Member States are represented in a committee with which the Commission must cooperate. This means that the Commission can only take a decision if the committee agrees. The committee relevant for food, the Standing Committee on Plants, Animals, Food and Feed (PAFF) is put in place by Article 58 GFL. Important rules about the Comitology procedure are detailed in the European Parliament and Council Regulation (EU)

Article 53(2) GFL provides the possibility that the Commission, instead of following the Comitology procedure prior to taking its decision, may provisionally adopt emergency measures after consulting the Member State or Member States concerned and informing the other Member States. These provisional measures must be confirmed, amended, revoked or extended through Comitology procedure.

Member States may only adopt transnational emergency measures<sup>157</sup> when the Commission has not acted in accordance with Article 53. Accordingly, the concerned Member State(s) must immediately inform the other Member States and the Commission and their measures must be confirmed, amended, revoked or extended through Comitology.

**Figure 2 | Competences to deal with non-compliance**

<b>Enforcement</b>	<b>Within MS</b>		<b>Beyond MS /emergency</b>	
Measures	National authorities	competent	European Commission	
Sanctions	National authorities	competent	National authorities	competent

It follows from the principles of official controls indicated in Article 17(2), that the main objective of official controls is to verify compliance with the rules on food law and, thus, to check that the food produced, processed or distributed by the FBOs is safe and that consumer rights are adequately protected. However, as we will see in the following Sections, other types of violations may disturb the sale and trade of food products and affect consumers' interests. As the GFL was adopted in a moment when the main focus was on food safety, also official controls, as intended in Article 17(2) GFL, aim first and foremost to identify, bring to an end and punish cases which present risk for consumers.

From this introductory analysis, food law enforcement emerges as a composite system characterized by various regulatory aspects and of different levels of intervention. In this 'multi-layered' food control systems,<sup>158</sup> national enforcement of controls are the core component in ensuring food safety all across the EU.

In this domain, an effective verification of the implementation of food law rules and principles is fundamental in order to protect consumer health and interests. In the following

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No 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13. At present, a reform of the Comitology procedure is ongoing <[http://europa.eu/rapid/press-release\\_MEMO-17-273\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-273_en.htm)>.

<sup>157</sup> Article 54 GFL.

<sup>158</sup> BMJ Van der Meulen, AA Freriks, 'Millefeuille. The emergency of a multi-layered controls system in the European food sector' (2006) 2(1) *Utrecht Law Review* 156, 172.

Section we will analyse the issue of the official controls in the food chain as it represents the first step for an effective enforcement system.

The following Sections are organised as follows: first we analyse the current OCR indicating the scope, organization and management of the inspection powers; then we focus on the available measures in cases of non-compliance and we discuss reparatory measures and the sanction systems. In parallel to that, we tackle the issue of sharing information concerning the inspection and we point out instruments to be used in exceptional circumstances. Then, we examine the political and regulatory approaches within which the new OCR is going to be adopted. Last we perform the same analysis carried out in relation to the current OCR in order to identify differences in terms of inspection powers, measures and other instruments that will result from the new OCR.

## **2 The current official controls Regulation**

### **2.1 Inspection powers**

The Regulation still in force at the time of writing (February/March 2017), Regulation (EC) 882/2004 on Official Controls (current OCR),<sup>159</sup> 'lays down general rules for the performance of official controls'.<sup>160</sup> According to Article 2(1) current OCR: "'official control" means any form of control that the competent authority or the Community performs for the verification of compliance with feed and food law, animal health and animal welfare rules'. This concept of official controls encompasses both monitoring and investigating and the current OCR further provides a framework for sanctions. Official controls are performed by CAs which are designated by the Member States and which vary in the different Member States, both in terms of their organization (in some Member States there is a unique CA while in other Member States there are several CAs) and in terms of their nature (public or private).

The current OCR specifies how Member States have to implement internal controls: it requires Member States, for example, to ensure that official controls are carried out regularly, on a risk basis and with appropriate frequency,<sup>161</sup> that legal procedures are in place to ensure that staff of the CAs have access to premises of and documentation kept by FBOs<sup>162</sup> and that CAs ensure the impartiality, quality and consistency of official controls at all levels.<sup>163</sup> Also the EU plays a role in the enforcement of food law. The EU, through experts

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<sup>159</sup> European Parliament and Council Regulation (EC) 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L165/1. In relation to controls performed on certain products specific rules exist, for example: Regulation (EC) 854/2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption [2004] OJ L139/206.

<sup>160</sup> Article 1 current OCR.

<sup>161</sup> Article 3(1) current OCR.

<sup>162</sup> Article 8(2) current OCR.

<sup>163</sup> Article 4(4) current OCR.

appointed by the European Commission,<sup>164</sup> mainly intervenes as the ‘supervisor of the supervisors’; its controls are limited to the verification of enforcement work of the CAs responsible to perform controls in each Member State. Also, Commission experts (Directorate F) and possibly Member States’ experts appointed by the Commission, have the duty to perform ‘Community controls in third countries’, that is, to verify the compliance with EU requirements or equivalence of third country food legislation.<sup>165</sup>

Thus, differently from EU controls within the EU Member States, inspections outside the EU may assess businesses as well as legal systems.

## 2.2 Sharing of information concerning official controls

The current OCR makes references to several tools to be used in order to share information concerning inspections. For example, instruments which facilitate administrative assistance when official controls are implemented. In this context, the ‘Liaison bodies’ aim at assisting and coordinating communication among CAs of different Member States.<sup>166</sup> Also the organization of official controls requires that information is shared between the Commission and the Member States, for example on the annual control programme of Community controls in Member States.<sup>167</sup> As to the communication of the results of the official controls, the CAs are required to draw up reports on official controls that the CAs themselves have carried out.<sup>168</sup>

## 2.3 Non-compliances

The current OCR also sets out two main approaches on how Member States have to deal with possible non-compliances detected when performing the official controls. In these cases, CAs have one of two options at their disposal or often both.<sup>169</sup> They can take measures to factually remedy the non-compliance and to ensure future proper implementation of the existing rules or they can take measures to punish the perpetrator to deter him or her, as well as others, from future infringements.<sup>170</sup>

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<sup>164</sup> Article 45 current OCR provides the rules applicable to the Community controls in the Member States. The Commission undertakes its controls on food through its Directorate for Health and Food Audits and Analysis ‘Directorate F’ – formerly known as the Food and Veterinary Office (FVO) – which was instituted in 1997. It is part of the Directorate General Health and Food Safety (known as DG SANTE) that in turn is a part of the Commission’s civil service.

<sup>165</sup> Article 46 current OCR.

<sup>166</sup> Article 35 current OCR.

<sup>167</sup> Article 44 current OCR.

<sup>168</sup> Article 9 current OCR.

<sup>169</sup> F Andriessen, A Szajkowska, BMJ van der Meulen (n 14) 403, 408.

<sup>170</sup> F Andriessen, A Szajkowska, BMJ van der Meulen (n 14) 403, 408.

### 2.3.1 *Reparatory measures*

According to Article 54 of the current OCR, the CAs shall take action to ensure that the FBOs remedy the situation. Article 54(2) lists several measures that CAs can take, such as the restriction or prohibition of the placing on the market of products or animals, the imposition of sanitation procedures, ordering the recall, withdrawal and/or destruction of food and the suspension of operation or closure of all or part of the business concerned for an appropriate period of time. When deciding which action to take, the CAs have to take account of the nature of the non-compliance and the operator's past record with regard to non-compliance. The decision imposing remedial measures has to be supplied in writing with reasons and information on rights of appeal. FBOs are responsible to pay for all expenditure incurred pursuant to remedial measures. The CAs when implementing their controls may also evaluate the effectiveness of the self-monitoring activities put into place by the FBOs. CAs may require FBOs to carry out these self-monitoring activities. The FBOs are required to put into place systems able to ensure that the food they sell is not injurious to health, unfit for human consumption or contaminated.<sup>171</sup>

### 2.3.2 *Sanction systems*

In cases of infringement of food law, Member States may establish sanctions. Member States have sovereign powers in establishing these sanctions, however the current OCR requires, in Article 55, that these sanctions are effective, proportionate and dissuasive. Furthermore, Member States shall notify the provisions applicable in relation to sanctions. The nature of the sanctions – administrative or criminal – is left to the discretion of the Member States. However, with the requirements of effectiveness, proportionality and dissuasive nature of sanctions, the EU determines a relevant influence over the Member States legal systems; national provisions on sanctions can be challenged also at EU level.

### 2.3.3 *Failing enforcement*

Similarly to emergency measures that can be taken under the GFL, the current OCR provides for safeguard measures which can be adopted when the Commission has evidence of a serious failure in a Member State's control systems and such failure may constitute a possible and widespread risk for human health, animal health or animal welfare, either directly or through the environment.<sup>172</sup>

## **3 Current changes in the EU food law framework**

After having presented the state of the art on the principles that govern official controls in the EU, in this Section we will highlight the possible future developments in the enforcement system, both in terms of its scope of activities and its purposes.

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<sup>171</sup> CJEU, 6 October 2011, Case C-382/10 *Erich Albrecht et al v. Landeshauptmann von Wien* [2011] ECR I-9295.

<sup>172</sup> Article 56 current OCR.

### 3.1 Challenges

The food chain and the ways of presenting and selling food have changed over the years. In parallel, the food related problems have also become more numerous and complex. The legal framework and the available tools to deal with food issues reflect the priorities in the legislator's agenda. When in 2014 horse DNA was found in beef lasagne in Ireland, awareness was raised concerning the in-effectiveness of the available instruments. After Ireland also in many other places in the EU horse was found to be sold in or as beef(product). The horsemeat scandal, with its European dimension, showed the weakness of the system in dealing with fraudulent practices.<sup>173</sup>

EU food law is designed, first and foremost, to ensure food safety. Human malice appeared to have been the blind spot of GFL.<sup>174</sup> Instruments are designed to prevent, find and deal with problems occurring accidentally. Such instruments must fail in situations where human intelligence is used to circumvent these instruments by deliberately hiding irregularities from view. The most telling example is the Melamine crisis. Melamine was added to hide the addition of water to milk from view through the common detection methods. As Melamine was a substance not known to enter the food chain accidentally, no detection strategies were in place until it was too late.

### 3.2 Smart Regulation Policy

In 2010 the European Commission launched the Smart Regulation Agenda with the purpose to further improve the quality of EU legislation to enhance growth, jobs and competitiveness.<sup>175</sup> In 2015, the Commission set up the Regulatory Fitness and Performance Programme (REFIT) platform.<sup>176</sup> Within this framework, the Commission has launched 'fitness checks' that is to say evaluation processes aimed at checking whether the regulatory

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<sup>173</sup> On the horsemeat scandal see M Simonato, 'The EU dimension of Food criminal law', Section 3.2.3 'The EU fragmentation' in this issue.

<sup>174</sup> BMJ Van der Meulen (n 6).

<sup>175</sup> See: <[http://europa.eu/rapid/press-release\\_MEMO-12-974\\_en.htm#footnote-2](http://europa.eu/rapid/press-release_MEMO-12-974_en.htm#footnote-2)> accessed 16 February 2017; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Smart Regulation in the European Union [2013] COM 543.

<sup>176</sup> See: < [https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/evaluating-and-improving-existing-laws/reducing-burdens-and-simplifying-law/refit-making-eu-law-simpler-and-less-costly\\_en](https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/evaluating-and-improving-existing-laws/reducing-burdens-and-simplifying-law/refit-making-eu-law-simpler-and-less-costly_en)> accessed 16 February 2017. On REFIT initial results, see European Commission, Commission staff working document Regulatory Fitness and Performance Programme (REFIT): Initial Results of the Mapping of the Acquis [2013] SWD(2013) 401 final. On recent news on REFIT, see the 'REFIT Scoreboard' which shows the state of play on initiatives for simplifying and reducing administrative burdens in existing legislation <[https://ec.europa.eu/info/strategy/decision-making\\_en](https://ec.europa.eu/info/strategy/decision-making_en)> accessed 16 February 2017.



framework for a policy sector is fit for purpose.<sup>177</sup> In relation to food policy sector, the Commission started, in 2014, a Fitness Check on the General Food Law Regulation.<sup>178</sup>

#### 4 The 'future' official controls Regulation

The Proposal for the new OCR together with a Proposal on Animal Health and a Proposal on Plant Health form the 'package of measures' adopted by the European Commission on 6 May 2013. Thus, the review of OCR rules comes together with a major revision of the acquis in the areas of plant health, animal health or plant reproductive material.<sup>179</sup> The main objectives of the package were to strengthen the enforcement of health and food safety standards for the whole agri-food chain and to respond to the call for simplification of legislation and, accordingly, for reduction of administrative burdens for operators.<sup>180</sup> In addition, the need of consolidation of provisions for official controls at EU level, which are currently spread over a range of EU legal acts, was recognized.<sup>181</sup>

The horsemeat scandal was one of the reasons for this increasing need to revise and improve the legislation. As Tonio Borg, Health and Consumer Commissioner at the time of the adoption of the Proposal, put it:

'The agri-food industry is the second largest economic sector in the EU, employing over 48 million people and is worth some €750 billion a year. Europe has the highest food safety standards in the world. However, the recent horsemeat scandal has shown that there is room for improvement, even if no health risk emerged. Today's package of reforms comes at an opportune moment as it shows that the system can respond to challenges; it also takes on board some of the lessons learned. In a nutshell, the package aims to provide smarter rules for safer food'.<sup>182</sup>

The new OCR reviews existing rules on official controls and creates a single framework for all official controls along the agri-food chain. In respect to the current OCR, the new OCR follows a comprehensive approach. It extends the scope of the current OCR on official controls to plant reproductive material, animal by-products and plant protection products in order to cover the whole agri-food chain<sup>183</sup> while also aiming at simplifying the legislative framework.<sup>184</sup> In addition, the new OCR brings improvements in terms of organization and coordination of official controls at National level and of formation of CAs. The new OCR also focuses on the communication of official controls outcomes and on the communication

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<sup>177</sup> <[http://ec.europa.eu/food/safety/general\\_food\\_law/fitness\\_check\\_en](http://ec.europa.eu/food/safety/general_food_law/fitness_check_en)> accessed 16 February 2017.

<sup>178</sup> Ibid.

<sup>179</sup> F Andriessen, A Szajkowska, BMJ van der Meulen (n 14) 403, 411.

<sup>180</sup> <[http://europa.eu/rapid/press-release\\_IP-13-400\\_en.htm](http://europa.eu/rapid/press-release_IP-13-400_en.htm)> accessed 16 February 2017.

<sup>181</sup> F Andriessen, A Szajkowska, BMJ van der Meulen (n 14) 403, 411.

<sup>182</sup> <[http://europa.eu/rapid/press-release\\_IP-13-400\\_en.htm](http://europa.eu/rapid/press-release_IP-13-400_en.htm)> accessed 16 February 2017.

<sup>183</sup> Article 2(2) new OCR provides the complete list of the areas to which the rules on official controls apply.

<sup>184</sup> <[http://ec.europa.eu/dgs/health\\_food-safety/pressroom/docs/qa\\_on\\_ocr\\_proposal\\_17062013\\_en.pdf](http://ec.europa.eu/dgs/health_food-safety/pressroom/docs/qa_on_ocr_proposal_17062013_en.pdf)> accessed 16 February 2017.

among CAs, always designed at National level. Considerable attention is placed on fraud in the agri-food chain and the ‘appropriate frequency’ of controls is also proportioned in order to pursue this ‘new’ objective.

The most recent version of the Regulation, at the time of writing, is the one of 15 March 2017 when the new OCR text was signed by the President of the European Parliament and by the President of the Council.<sup>185</sup> The text is substantially the same of the position of the Council of the European Union which was adopted, at first reading, on 19 December 2016.<sup>186</sup> After that, on 6 January 2017, the Commission issued a Communication pursuant to Article 294(6) of the Treaty on the Functioning of the European Union where it summarizes the background of the new OCR and it concludes that it supports the common position adopted on 19 December 2016.<sup>187</sup> On 19 January 2017 the European Parliament received the position of the Council of the European Union at first reading.

When the Regulation will be published in the Official Journal and will enter into force, the Commission will have to adopt several implementing and delegated acts to lay down rules on specific issues.<sup>188</sup> As to the application date, we must wait a few years before all the new OCR rules are applied; most of the provisions will be applicable from December 2019 (Article 167 new OCR).

In the following Sub-Sections, when we cite Articles, we refer to the new OCR version (of 15 March 2017).

#### 4.1 Inspection powers

The new OCR provides rules on official controls and other official activities<sup>189</sup> at National level carried out by the CAs of the Member States and also on official controls performed by the Commission in Member States and Third Countries.

Several provisions included in the new OCR are dedicated to the ‘inspectors’ and, specifically, to their duties and their skills in performing official controls. Among the provisions on the formation of the CAs, we may cite Article 5(4) where it is specified that staff performing official controls and other official activities shall receive appropriate training to enable them to undertake their duties competently and to perform official controls and other official activities in a consistent manner. According to the same provision,

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<sup>185</sup> <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:PE\\_1\\_2017\\_INIT&from=IT](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:PE_1_2017_INIT&from=IT)> accessed 23 March 2017.

<sup>186</sup> <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_10755\\_2016\\_REV\\_1&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10755_2016_REV_1&from=EN)> accessed 16 February 2017.

<sup>187</sup> <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0006&from=EN>> accessed 16 February 2017.

<sup>188</sup> For example, Article 15(4) on the rules on the cooperation and exchange of information between operators and competent authorities.

<sup>189</sup> For example, activities aimed at verifying the presence of animal diseases or pests of plants and activities which concern the issuance of official certificate and official attestation (Article 2(2) new OCR).

CAs staff shall also keep up-to-date in their area of competence and shall receive training on control methods and techniques, control procedures and assessment of non-compliances and other matters.<sup>190</sup>

With a purpose of coordination among the different controls rules and procedures existing at National level, the Commission may organise training activities for the staff of the CAs involved in investigations of possible infringements of food related rules (Article 130(1)) Regulation and of the rules referred to in Article 1(2).

In addition, the new OCR envisages administrative coordination of CAs in cases where a Member State confers, for the same area, the responsibility to organise or perform official controls or other official activities on more than one CA, at national, regional or local level (Article 4(2)). Coordination is required not only within the Member States, but also among the CAs of different Member States. In this context, liaison bodies are established acting as contact points responsible not only for coordinating the communication among CAs,<sup>191</sup> but also for effectively facilitating the exchange of communications between CAs in order to provide administrative assistance (Article 103).

The new OCR requires timely and effective notifications among CAs of different Member States. In that light, Article 105(1) provides that, when the CAs in a Member State become aware of a non-compliance, and if such non-compliance may have implications for another Member State, they shall notify, also when not expressly requested to do so, and without undue delay such information to the CAs of that other Member State. An even broader assistance may be requested in cases where, official controls are performed on animals or goods originating in another Member State. According to Article 106(1), if the CAs consider that such animals or goods do not comply with food related rules, they shall notify this non-compliance to the CAs of the Member State of dispatch and of any other concerned Member State in order to enable those CAs to undertake appropriate investigations. If needed, the Commission can intervene in order to coordinate the measures and actions undertaken by the CAs to address the non-compliance (Article 108).

Similarly to the already existing framework, Commission experts shall perform controls, including audits, in each Member State (Article 116(1)). This supervision over the supervisors serves both to check compliance with the rules and to set up recommendations managing the shortcomings identified (Article 117). Accordingly, Commission experts carry out controls in third countries (Article 120).

General requirements are set up concerning the frequency of implementation of official controls which, in principle, shall be performed without prior notice. Additional requirements are established regarding official controls and other official activities in certain

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<sup>190</sup> Annex II 'Training of staff of the Competent Authorities', Chapter I 'Subject matter for the training of staff performing official controls and other official activities'.

<sup>191</sup> Article 35 current OCR.

areas, such as the production of products of animal origin intended for human consumption (Article 18).

As to the rules on the ways of performing the official controls, the new OCR specifies the techniques of controls. For example, in Article 14 'Methods and techniques of official controls' are listed. After having implemented an inspection on the cleaning and maintenance products and processes or interviews with the FBOs and their staff, CAs may need to take samples. The methods used for sampling, analyses, tests and diagnoses, shall adhere to the rules and criteria established at EU level (Article 34(1)). Official laboratories are designated by each Member State to carry out the laboratory analyses, tests and diagnoses on samples taken during official controls and other official activities (Article 37(1)). With the purpose to promote uniform practices, a European Union reference laboratory shall be established (Article 92(2)). Accordingly, Member States shall designate one or more national reference laboratories for each Community reference laboratory (Article 100(1)).

When carrying-out the official controls, CAs have to comply with organization requirements. The CAs shall perform official controls in accordance with documented procedures (Article 12(1)). The official controls themselves have to be specifically planned. Accordingly, Member States shall draw up programmes on the basis of which official controls are implemented by the CAs (Article 109). In addition, the Commission may set up coordinated control programmes and information and data collection (Article 112).

Moreover, the CAs shall carry out internal audits or have audits carried out on themselves and shall take appropriate measures in the light of the results of those audits (Article 6). In order to effectively execute official controls, Article 10(2) indicates that the CAs shall draw up and keep up-to-date a list of operators. Where such a list or register already exists for other purposes, it may also be used for the purposes of this Regulation.

Another relevant introduction of the new OCR is represented by the financing of official controls and of other official activities. Article 79 on 'Mandatory fees or charges' lists the cases where these fees shall be collected, for example when official controls were not originally planned but are performed to assess the extent and the impact of the ascertained non-compliance or to verify that the non-compliance has been remedied (Article 79(2)(c)(ii)).

#### 4.2 Communication tools

Clear, transparent and effective communication represents a fundamental step in the execution of the official controls.

First and foremost, communication is required when planning official controls to be performed. According to Article 110, Multi-annual national control plans (MANCPs) are prepared so as to ensure that official controls, performed by the CAs, are planned in all areas governed by food related rules (Article 110). Since the implementations of official controls

vary from Member State to Member State, Article 110(2) establishes that the MANCPs shall contain general information on the structure and organisation of the system of official controls in the Member State concerned in each of the covered areas. Control programmes may be set up also at EU level when coordination, information and data collection are needed, this for example in order to assess the state of play of the rules on official controls or to establish the prevalence of certain hazards across the EU (Article 112(1)). In accordance with transparency requirements, the CAs shall, at least once a year, make available to the public (for example through publications on internet) relevant information concerning the organisation and performance of official controls such as the type and number of cases of non-compliance detected (Article 11(1)). In addition, CAs may publish, or make otherwise available to the public, information about the rating of individual operators deriving from the outcome of official controls (Article 11(3)).

In order to facilitate the implementation phase, the Commission shall, in collaboration with the Member States, set up and manage a computerised information management system for official controls (IMSOC) (Article 131(1)). Within this system data, information and documents concerning official controls and other official activities are managed, handled and automatically exchanged (Article 131(1)). Thanks to this communication tool, the framework is built for an effective and rapid management of data, information and documents (such as export certificates needed to export animals and goods) and also to avoid any administrative burden such as the duplication of documents or the implementation of additional controls by the CAs of the place of destination (Article 133(2)).

Also the outcomes and related information of official controls have to be communicated. Article 113 asks Member State to submit to the Commission an annual report on several issues, including the type and number of non-compliances (per area) detected in the previous year by the CAs. This report shall include the measures taken to ensure the effective operation of the MANCP itself and, if taken, enforcement actions and their results (Article 113(1)). The Commission too is bound to draw up an annual report on the operation of official controls in the Member States; this report shall be made available to the public (Article 114).

In respect to the current OCR, administrative communication both with the Member State and among CAs of different Member States, is strengthened. With the 'Liaison bodies', already mentioned in the previous Section, the objective of a smooth collaboration among CAs is set and the Commission is enabled to establish the technical tools and the procedures for communication between these liaison bodies (Article 103(6)). As to cases of possible non-compliance, Article 102(4) requires Member States to take measures to facilitate, in certain cases, the transmission of relevant information from law enforcement authorities, public prosecutors and judicial authorities, to the CAs.

### 4.3 Non-compliances

When, non-compliances are detected, CAs are bound to general obligations as regards to enforcement actions (Article 137). The purpose of these actions is, first, to eliminate or contain a risk arising in the food chain, to be intended in comprehensive way, including food, feed, animals, plants, GMOs and environment (Article 137(1)). When there is a mere suspicion of non-compliance, the CAs shall perform an investigation in order to confirm or to eliminate that suspicion (Article 137(2)). These investigations may result in intensified official controls on animals, goods and operators for an appropriate period or shall detain animals and goods and of any unauthorised substances or products as appropriate (Article 137(3)).

#### 4.3.1 *Reparatory measures*

Article 138 on 'Actions in the event of established non-compliance' requires that CAs take any action necessary to determine the origin and extent of the non-compliance and to establish the operator's responsibilities (Article 138(1)(a)). Then, CAs are also equipped with powers to take remedial measures designed to make the operator concerned remedy the non-compliance and also to prevent further occurrences of such non-compliances (Article 138(1)(b)). As a guideline in the choice of the remedial measures to take, Article 138(1) adds that the CAs shall take account of the nature of that non-compliance and the operator's past record with regard to compliance. Article 138(2) provides a non-exhaustive list of measures and includes, differently from Article 54(2) of current OCR, measures such as the order of performing treatments on animals or on goods (alteration of labels or corrective information to be provided to consumers) and the order to the FBOs to increase the frequency of self-monitoring control. The FBO shall be informed, in writing, of the decision to take remedial measures, of the reasons for that decision and of the right of appeal against the decision itself (Article 138(3)).

#### 4.3.2 *Sanctions system*

As generally happens in the criminal law, the nature and type of these penalties may vary in the different Member States; however, Article 139(1) requires that penalties are effective, proportionate and dissuasive (Article 139 (1)). National provisions on penalties may be monitored at EU level; Article 139(1) indicates that Member States shall, by 14 December 2019, notify these provisions and any subsequent amendment affecting them. In order to effectively manage infringement cases and, if possible, to prevent them, Article 139(2) indicates that Member States shall ensure that CAs have effective mechanisms to enable reporting of actual or potential infringement of the OCR rules (Article 140(1)).

### 4.4 Failing enforcement

EU enforcement measures shall be taken when there is evidence of a serious disruption in a Member States' control system and such disruption may constitute a widespread real risk to human, animal or plant health, animal welfare or, as regards GMOs and plant protection

products (Article 141(1)). Measures, such as the prohibition to place certain animals or goods on the market, have to be adopted when the Commission has evidence of a serious disruption in a Member State's control system. This applies even in cases where a risk has not emerged yet (Article 141(1)). Another condition that shall be met in order to allow EU enforcement measures is that the Member State concerned, after having been requested by the Commission, has not corrected the situation within the appropriate time set by the Commission (Article 141(2)).

#### 4.5 Food frauds

Since the prevention and the detection of violations others than the ones that involve food safety, is one of the novelties introduced by the new OCR, we dedicate some observations to the link between official controls rules and food frauds. Article 1(2)(a) specifically indicates that the scope of official controls shall include the verification of compliance, further to the area of food and food safety, also to the matters related to the integrity and wholesomeness at any stage of production, processing and distribution of food and, accordingly, to rules aimed at ensuring fair practices in trade and protecting consumer interests and information.

##### 4.5.1 *Inspection powers*

Article 9(1)(b) indicates that CAs shall perform official controls regularly, with appropriate frequencies taking account of several issues, not necessarily linked to the presence of risk, but concerning the presence of any information indicating the likelihood that consumers might be misled. The same provision indicates a list of factors that may be affected by fraudulent practices, such as the nature, identity, properties, composition, quantity, durability, the method of manufacture or production of food (Article 9(1)(b)).

To provide supportive tools to deal with food fraud, Article 97 indicates that EU reference centres may be instituted by the Commission with the purpose to support the activities of the Commission and of the Member States to prevent, detect and combat violations of food law, when the rules at issue are violated through fraudulent or deceptive practices.

##### 4.5.2 *Communication tools*

Further to these provisions on planned controls to deal with food fraud to verify the compliance with requirements and to detect other possible violations, the Commission has introduced procedures to fight against food fraud. Among these administrative procedures, a Food Fraud Network was instituted. Within this network, Food Fraud contact points are established with the objective to carry out the function of organisms of connection and administrative support especially in cases of frauds in the market of food products that concern different EU Member States. In addition, the Commission has introduced the AAC – Administrative Assistance and Cooperation, a computer tool to handle cases of non-compliances including those perpetrated through fraudulent and deceptive practices to be

managed by the CAs of the different Member States concerned.<sup>192</sup>

#### 4.5.3 *Non-compliances*

The same rules analysed above on non-compliances apply also at cases of food fraud. However, the new OCR, showing a considerable interest in the issue of food fraud, indicates that Member States shall ensure that financial penalties are established and applied to punish violations perpetrated through fraudulent or deceptive practices. The amount of these penalties shall be calculated, in accordance with national law, by taking into consideration the economic advantage achieved by the operator or by a percentage of the operator's turnover (Article 139(2)).

### 5 **Private actors**

So far, we have mainly focused our attention on public administrative enforcement, however also private bodies can perform control activities which have an impact on the food chain. In the following Section we examine the issue of private law enforcement.

#### 5.1 Delegation of powers

Private bodies can participate in the execution of official controls. The new OCR dedicates several rules on the matter of delegation of powers to 'delegated bodies', defined as 'a separate legal person to which the CAs have delegated certain official control tasks or certain tasks related to other official activities' (Article 3(5)). These delegated bodies – or natural persons to which controls tasks are delegated – shall possess certain characteristics, including arrangements to ensure efficient and effective coordination between the delegating CAs and the delegated body/natural persons (Articles 29 and 30). CAs shall ensure that these delegated bodies have the powers needed to effectively perform these tasks (Article 28(1)). Delegated bodies are identified through a code number and their activities shall be approved and supervised by authorities appointed by the Member States (Article 28(2)). Delegation does not necessarily encompass a general attribution of powers to perform any official controls. Also delegation of certain tasks related to other official activities is possible (Article 31).

The delegated bodies or delegated natural persons are bound to several obligations regarding communication, cooperation and assistance to the delegating CAs (Article 32). Especially, communication shall be delivered on the non-compliances identified when executing control tasks, unless specific arrangements are established (Article 32(b)). Communication activities shall be performed on a regular basis and whenever those CAs so request (Article 32(a)). Delegated bodies and delegated natural persons shall also give the CAs access to their premises and shall assist and cooperate with the CAs themselves (Article

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<sup>192</sup> On the tools introduced after the horsemeat scandal, see M Simonato, 'The EU dimension of Food criminal law', Section 3.2.3 'The EU fragmentation' in this issue.



32(c)). Delegation of control tasks shall be in writing and shall precisely describe the official controls tasks that the delegated body may perform (Article 29(1)). Moreover, CAs that have delegated certain official control tasks or certain tasks related to other official activities shall organise audits or inspections of such bodies or persons, as necessary and avoiding duplication, and shall fully or partly withdraw the delegation where problems related to the execution of control tasks arise (for example, the delegated body or the natural person fails to take appropriate and timely action to remedy the shortcomings identified) (Article 33(b)).

## 5.2 Occupation of powers

Apart from powers that have been delegated by public authorities (official controls), governed by public law, private actors also autonomously create enforcement systems within private law.

### 5.2.1 *Private food safety regulation*

Also the private sector responded to the food scares of the 1990s. Probably the earliest example in the EU food sector is the SKV (*Stichting Kwaliteitsgarantie Vleeskalveren sector*; Veal-calf Quality Assurance Foundation) in the Netherlands. In Belgium and the Netherlands a big scandal erupted in the 1980s concerning use of illegal hormones in livestock rearing. It involved criminal activities, up to and including murder, that have been compared to the mafia.<sup>193</sup> To bring the situation under control and to regain trust in the sector from consumers, foreign importers and authorities, a strict system of controls was organised. Farmers could subscribe to the system. If they did, they agreed to submit themselves to controls and pay penalties in case of infringements. The scope and participation rate increased until it now covers all use of medication, animal health and welfare requirements and import rules. Virtually all calf breeders in the Netherlands participate. Slaughterhouses refuse to slaughter any calves not SKV certified.

After the eruption of the BSE-crisis businesses – retailers in particular – feared that they would be held liable (under criminal law or tort law) in case consumers sustained damage from unsafe foods. Under United Kingdom (UK) law the most important legal tool to escape liability is the so-called due-diligence defence. The due diligence defence in the UK implies that (legal) persons charged of infringing food law with regard to safety or fraud, escape punishment if they establish that the following conditions have been met: they neither prepared the food nor imported it; the offence was due to an act or default of another person who was not under their control; they carried out all such checks of the food in question as were reasonable in all the circumstances; and they did not know and had no reason to

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<sup>193</sup> J Vandemeulebroucke, *De Hormonenmafia* (Antwerp, Hadewijch, 1993).

suspect at the time of the commission of the offence that their act or omission would amount to an offence.<sup>194</sup>

Retailers mainly sell products that have been produced by other businesses. Therefore, for a retailer doing everything within its power to prevent harm, mainly means controlling that no harmful products are supplied to it. For this purpose, the association of British retailers, the British Retailer Consortium (BRC), formulated a standard elaborating in great detail the practices that suppliers should implement to ensure food safety. BRC members would only purchase from suppliers that contractually agreed to implement the standard. On a regular basis, representatives from the retailers would come to audit the suppliers' premises to check if compliance was to their satisfaction. Soon auditing was outsourced. Suppliers were requested to have an independent third party audit their businesses and supply a certification showing compliance. In this way, a three party governance system emerged. First, there is the party requiring compliance with a certain standard. This requirement is backed up by buyer power. Then there is the party whose business practices are regulated by the standard. While compliance in a legal sense is voluntary, it is a condition that must be fulfilled to be able to do business with (in this case) any member of BRC. Finally there is the certification body that performs audits and – in case of a favourable outcome – provides certification.<sup>195</sup>

This three-party food safety governance structure provided a tool for dominant businesses to integrate food chains by regulating the consecutive suppliers upstream.

The approach caught on. BRC might well have become the single global standard if not for the marketing error of labelling it 'British'. Rather than submitting themselves to a British standard, French and German retailers created their own standard: the International Food Standard (IFS – now International Featured Standard). Despite a certain reluctance towards private regulation, even the USA followed. Instead of developing an own standard, they took over SQF (Safe Quality Food), a standard originating in Australia. Retailers in the EU developed a standard for primary producers of fresh produce. This standard was initially known as EurepGAP and now as GlobalGAP. Also SQF has a module for primary production.

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<sup>194</sup> Caoimhim MacMacMaoláin has the following to say on the concept: 'The (...) defence is that due diligence was exercised, provided that the accused can demonstrate that he took all reasonable precautions to avoid the commission of the offence by himself or by a person under his control. Due diligence can also be demonstrated by those who did not prepare or import the offending food if it can be shown that the food was made unsafe by someone else and that all reasonable safety checks were carried out. Due diligence can only be used as a defence where the accused identifies, or takes all reasonable steps to identify, the other party involved, that is the one who it is claimed is responsible for making the food unsafe'. C MacMaoláin, *Food Law. European, Domestic and International Frameworks* (Oxford, Hart, 2015) 122-123.

<sup>195</sup> For a detailed analysis of private regulation see: BMJ Van der Meulen (ed) *Governing food chains through contract law, self-regulation, private standards, audits and certification schemes* (Wageningen, Wageningen Academic Publishers, 2011).

The international standards organisation ISO also set up a standard for food safety: ISO 22000, which is a standard without its own audit and certification infrastructure. A standard plus such infrastructure is also known as a 'scheme'. ISO 22000 has been adopted in the scheme of FSSC 22000 (formerly known as 'Dutch HACCP'). As opposed to the other schemes mentioned here, FSSC 22000 is not a retailer scheme but is mainly used by producers of A-brands.<sup>196</sup>

Private food safety schemes largely overlap and elaborate on public law requirements regarding food hygiene such as HACCP. It is not without sense to reiterate legal requirements in private schemes. It makes these legal requirements part not only of the public law relation between authorities and business, but also of the contractual relation between customer and supplier and thus subject to the enforcement mechanisms related to the contractual relation (such as liability for damages, possible contractual fines and exclusion from future contracts – so-called 'delisting') and to the scheme (such as loss of certification and in some schemes fines). Furthermore, private standards often hold requirements that go beyond the level of protection in legislation.

Food Safety schemes are all business-to-business labels, ie usually consumers do not see the certification. Food safety is considered a licence to produce, not a competitive issue. This is different for schemes addressing sustainability issues such as FairTrade, Marine Stewardship Council and Rainforest Alliance. Also religious certification (Halal, Kosher) may be organised in similar ways.

### 5.2.2 *Harmonisation of private food law*

This proliferation of private schemes came with challenges. With the increase of the number of standards, producers had to invest in complying with a widening variety of requirements and in receiving increasing numbers of audit teams. To deal with these challenges, the leading retailers in the world took the initiative to set up the Global Food Safety Initiative (GFSI). GFSI functions like a 'standard of standards'. It sets requirements against which schemes are benchmarked. The idea is that retailers globally should recognise GFSI benchmarked standards as equivalent and accept products on their shelves that are certified against any of these schemes; 'certified once, accepted everywhere'.

### 5.2.3 *Private enforcement*

Private schemes require businesses that wish to be certified, to submit themselves to audits and to measures or sanctions as foreseen in the scheme. Measures may include obligations to solve problems or adjust operations, to contain or recall products and to inform customers

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<sup>196</sup> For an overview of schemes, see: T Appelhof, R Van den Heuvel, 'Private Food Law, part III' in I Scholten-Verheijen, T Appelhof, R Van den Heuvel, BMJ Van der Meulen (eds), *Roadmap to EU Food Law* (The Hague, Eleven international publishing, 2013).

of problems. Sanctions may include refusal or withdrawal of certification, de-listing and fines.

#### *5.2.4 Interplay between public and private enforcement*

According to Article 3(1) current OCR official controls should be risk based. It goes without saying that a well-functioning private controls system reduces the risk of occurrence of food safety incidents. In the Netherlands, one of the EU Member States, the Food Safety Authority follows a risk based inspection policy. Risk is considered on the basis of the type of product in relation to compliance performance of the business. Businesses are colour coded. High risk businesses are red, low risk businesses are green, in between are the categories yellow and orange. The colour coding is used in deciding on inspection frequency. The authority currently works on a system of recognition of private schemes. A scheme can be recognised if it effectively controls hazards that are relevant to the authority's inspection. Findings from audits should be shared with the authority. Food supplier control in relation to the product's safety is a central issue in the RiskPlaza assurance scheme established in 2015. In addition to requiring supplier control, RiskPlaza provides a database listing products and the related hazards and an audit scheme to check the presence of these hazards.

Certification against a recognised scheme, is taken into account in the assessment of the risk a business poses and thus in the colour-code attached to it. This in turn affects the frequency of inspections and the costs incurred by the business in relation to the inspections. It is said that other EU Member States take a keen interest in the Dutch approach. If the approach will be adopted widely in the EU a relevant amount of food safety controls may de facto be transferred from the public sector to private audit schemes. Ideally, the inspection capacity will be turned towards high(er) risk businesses. Much of it, however, is likely to fall victim to the insatiable hunger for budget cuts.

#### *5.2.5 Developments*

In the EU, the horsemeat scandal had an effect similar to the BSE crisis in that it raised awareness, imparted a sense of urgency and captured the political agenda. Where the BSE crisis placed the issue of safety at centre stage, the horsemeat scandal brought to light that criminal intentions of people had become the blind spot of EU food law.

#### *GFSI*

GFSI convened a Food Fraud Think Tank and wrote a position paper (GFSI, 2014). A distinction is made between food fraud (for economic gain) and food defence (against harm intentionally inflicted). Emphasis is on the former.

'The Think Tank recommends that two fundamental steps are taken by the food industry to aid in the mitigation of food fraud: firstly, to carry out a 'food fraud vulnerability assessment' in which information is collected at the appropriate points along the supply chain (including raw materials, ingredients, products, packaging)

and evaluated to identify and prioritise significant vulnerabilities for food fraud. Secondly, appropriate control measures shall be put in place to reduce the risks from these vulnerabilities. These control measures can include a monitoring strategy, a testing strategy, origin verification, specification management, supplier audits and anti-counterfeit technologies. A clearly documented control plan outlines when, where and how to mitigate fraudulent activities.'

The GFSI board has announced that it follows the recommendations of the Think Tank by incorporating two new key elements in the GFSI Guidance Document: to require to perform a food fraud vulnerability assessment and to have a control plan in place.

### *FSSC 22000*

Where GFSI leads, private schemes must follow. It is beyond the scope of this chapter to discuss all relevant schemes. By way of example, we make a few observations regarding FSSC 22000.

FSSC 22000 prepares an integrated food safety management system combining food safety, food defence and food fraud. Businesses should address food safety through HACCP (Hazard Analysis and Critical Control Point), food defence through TACCP (Threats Analysis and CCP) and food fraud through VACCP (Vulnerability Analysis and CCP).

According to the draft standard, the organization shall have a documented and annually reviewed food defence threat assessment procedure in place to identify potential threats and prioritise preventive measures. Furthermore, it shall have a documented and annually reviewed food fraud vulnerability assessment procedure in place to identify potential vulnerabilities and prioritise food fraud mitigation measures.

As regards the tools used, it is worth mentioning, for food defence, the ISO 28000 Security management system standard, and for food fraud, the SSAFE Food Fraud Vulnerability Assessment tool developed by PWC.

### 5.3 Integration of private schemes into food fraud policy

In the Netherlands, the horsemeat scandal, lessons learnt from it, and actions to be taken were debated in a taskforce (taskforce *Voedselvertrouwen* – food trust) consisting of representatives of the government and the industry. This taskforce was formed to strengthen existing enforcement, to fight food fraud and to protect food authenticity.

The conclusions of the taskforce strongly focused on the use of private means of enforcement. One of the reasons mentioned in its conclusions to focus of private law instruments, is the international character of trade and purchase.<sup>197</sup> This stands to reason. Powers of public authorities face geographic limitation by definition. Outside their territory,

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<sup>197</sup> <<http://ketenborging.nl/>> accessed 16 February 2017.

they have no jurisdiction. Private actors by contrast, have no such limitations – certainly not in the EU internal market. The taskforce recommends the Global Food Safety Initiative (GFSI) to require the participating private schemes such as FSSC 22000, BRC and IFS to include in their system so-called fraud-modules. With these module, through their quality systems, businesses will require their suppliers to ensure food integrity and traceability. The taskforce has formulated certain criteria that the private schemes should meet. These include: training of auditors, unannounced audits, exchange of information between auditors and public authorities, and private sanction instruments. A list of schemes that comply with these requirements and with businesses that are certified against these schemes, has been published.<sup>198</sup> In this way, businesses may ascertain whether their suppliers are up to standard – or choose different suppliers. The CA in the Netherlands will accept these schemes in their enforcement policy granting a lighter inspection regime to certified businesses.

## 6 Conclusions

The way rules and regulations on food and their enforcement have developed in the EU, appears to be incident driven. This is true both for rules and enforcement of a public law nature and for rules and enforcement of a private law nature. Prior to the institution of the EU concerns of food legislation and enforcement in the (later to become) Member States was mainly on protection of consumers against fraudulent practices. The regulatory method consisted of vertical product standards. After the institution of the European Economic Community, this approach appeared to be at odds with the ambition to create a common market. It was replaced by mutual recognition of vertical standards and European legislation of a more horizontal nature.

The BSE crisis sparked awareness of and fear for food borne risks of a microbiological, chemical and physical nature. The EU reorganised its legislative infrastructure to deal with these problems and fears, ie to ensure food safety and to regain consumers' trust. Businesses were held responsible and had to put in place systems of self-controls which were then supervised by public authorities. The most important instruments were designed to deal with unsafe food and ensure its removal from the market. In parallel the private sector developed schemes to live up to its responsibilities and to ensure compliance with food safety requirements upstream.

The next game changing moment came with the horsemeat scandal. It raised awareness of and fear for the involvement of criminals in the food chain. The shift in problem perception from microbes as the most important enemy to human villains was followed by increased emphasis on controls both in public law and in private law. Responses to non-compliances will increasingly focus on deterrence of criminal behaviour (for example through the

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<sup>198</sup> <<http://ketenborging.nl/kwaliteitsschemas-en-status/>> accessed 16 February 2017.

imposition of high financial penalties) and thus on checking compliance with the rules. However, further to this ex-post approach, ex-ante tools may be useful. The new OCR rules – which are applicable to the whole food chain and which represent detailed requirements on which national enforcement is based – may, if effectively implemented, contribute to fraud prevention in the EU. In addition, EU reference centres for the authenticity and integrity of the agri-food chain may technically support Member States to prevent, detect and combat violations of the food related rules perpetrated through fraudulent or deceptive practices. Furthermore, tools such as the AAC may raise the awareness on the possible non-compliances along the food chain with the purpose of prompt and effective responses. Further to that, also preventive assessment instruments developed by private actors, which directly play a role within the market, may adequately contribute to prevention. In the present and continuously changing food-chain, a joint effort on the part of public and private sectors seems to be an effective solution to safeguard consumer rights while balancing it with a smooth and efficient development of the market.

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# THE EU DIMENSION OF 'FOOD CRIMINAL LAW'

By Michele Simonato\*

## Abstract

*Over the course of the past few decades, the European Union (EU) has developed a complex food law system in order to protect its citizens living in 28 different Member States. This has certainly improved the level of food safety across the region; however, recurring scandals reveal persisting vulnerability and loopholes. Criminal sanctions, therefore, are often perceived as a necessary reaction to such scandals; however, it is up to national legislators and authorities to provide the criminal law response. This Special Report, by highlighting the complex interaction between national and supranational enforcement, aims to clarify the extent to which such a national dimension is influenced by the design of EU food law.*

## 1 Introduction

Ever since modern techniques of production and distribution have de-territorialised the consumption of food (people do not eat only what they produce), food has become one of the most important products in globalised markets. Furthermore, the supply chain has become extremely complex. An ingredient can be produced, transformed, processed, mixed with other ingredients, packaged, conserved, exported, imported, sold, cooked, and served by different 'operators' – some or all of which can be in different countries. At the same time, food is not just a commercial product, since it conveys a variety of meanings and feelings that make it somehow special. To some extent food still defines culture and traditions of certain communities.<sup>199</sup> And, most importantly, food is crucial for public health: people suffer from shortage of food, from bad food, or from an excessive intake of food.

To an international organisation such as the European Union (EU), it has been clear since the beginning of its existence that it is essential not to leave the regulation of such an important aspect of EU citizens' lives to national legislators alone. It has therefore been very active in this field, and as a result food is now one of the most heavily regulated sectors. There is, indeed, an intricate maze of regulations that complicates scholars' analysis and, most importantly, the work of food businesses.<sup>200</sup> This is certainly due to the complexity of

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<sup>199</sup> See K Zurek, *European Food Regulation After Enlargement: Facing the challenges of diversity* (Leiden, Martinus Nijhoff, 2012) 2.

<sup>200</sup> The EU legal framework defines 'food business' as 'any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of production, processing and distribution of food'; whereas 'food business operator' is defined as 'the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control'. See Art 3 of Regulation No 178/2002 of 28 January 2002 laying down the general principles and requirements of food

the subject as such: food is a broad category encompassing a wide variety of products, actors, phases of the food chain/production, and interests. But it is also due to the architecture of the EU and to its legislative technique: EU food law is the result of a progressive development of sectoral rules addressing specific products, gradually replacing national rules. Only recently has some horizontal legislation been enacted in order to lay down general principles on food in the internal EU market. Nonetheless, this field requires a high level of technical specifications, hence the full content of certain food is determined by 'secondary' rules (implementing or delegated regulations, national and regional sources, standards laid down by the private sector, etc). For this reason, in recent years the EU Commission – the executive branch of the EU – has launched a process of evaluation and analysis (the so-called 'fitness check') in order to identify which aspects of EU law can be streamlined and improved.<sup>201</sup> Therefore, not only is EU food law extremely complex, but it is also constantly changing.

The evolving nature of food law is also due to the fact that the objectives of contemporary food policies may be very different. What citizens ask of governments may vary according to the context and the times. Food 'security' (ensuring the availability of enough food) and 'safety' (ensuring that food is not dangerous) are the traditional objectives of governments worldwide. More recently, the idea that consumers want to be sure of what they eat, for example when buying food with particular qualities or coming from a specific region, has also gained traction.<sup>202</sup> In addition, the production of excessive food waste which is potentially damaging for the environment is becoming more alarming. Moreover, obesity is increasing, especially among young generations.<sup>203</sup> In other words, food law can be a moving target in modern societies, since rights, values and interests of populations are changing, or simply are different from one region to another, from one social level to another, or from one consumer to another. Governments address citizens' concerns to different extents and with different approaches and means; and criminal law is supposed to be one of the most powerful means available to public powers. The EU too is constantly developing and

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law, establishing the European Food Safety Authority and laying down procedure in matters of food safety [2002] OJ L 31/1.

<sup>201</sup> Commission Staff Working Document 'A fitness check of the food chain – state of play and next steps', 5 December 2013 (SWD(2013)516 final). This process is now managed within the general 'Regulatory Fitness and Performance Programme' (REFIT). See the Communication from the Commission: 'Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook', 18 June 2014 (COM(2014)368 final). See also L González Vaqué, 'EU: has the time come to simplify food law?' [2016] *Rivista di diritto alimentare* 6.

<sup>202</sup> See, among others, F Albisinni, 'The Path to the European Food Law System' in L Costato and F Albisinni (eds), *European Food Law* (Padova, Cedam, 2012) 17; T Marsden, R Lee, A Flynn, S Thankappan, *The new regulation and governance of food* (New York, Routledge, 2010); R Paarlberg, *Food politics*, 2nd ed (Oxford University Press, 2013).

<sup>203</sup> See: [http://www.eufic.org/page/en/show/latest-science-news/page/LS/fttid/global\\_obesity\\_target\\_not\\_reached\\_if\\_trend\\_continues/](http://www.eufic.org/page/en/show/latest-science-news/page/LS/fttid/global_obesity_target_not_reached_if_trend_continues/). See A Alemanno, 'What can EU Health Law Learn from Behavioural Sciences? The Case of EU Lifestyle Regulation' in A Alemanno and AL Sibony (eds), *Nudge and the Law. A European Perspective* (Oxford, Hart, 2015) 235.

updating its policies, and although there is no specific constitutional reference to food (neither in the Treaties nor in the Charter of fundamental rights)<sup>204</sup> the Union is striving to find the best way to protect citizens' interests.

This article aims to clarify the role played by criminal law in the context of EU food law. More specifically, it focuses on the following questions: what is the impact of the EU food law on (national) criminal law? What does the supranational setting of the EU add compared with purely horizontal relationships between nation-states? In order to answer these questions, it is necessary to explore territories going beyond the criminal law field, and take a 'picture' of the entire EU food law system. However, this article does not dwell on substantive issues concerning the regulation of food in Europe, but rather offers an analysis of the structure of EU food law, with a particular focus on its enforcement, which is a shared responsibility between EU and national actors. The first section, therefore, clarifies what EU food law looks like and how it is enforced; to do so, it will start from a cursory overview of its historical developments. The second part will enter into the core of the above questions, by elucidating the ancillary function of criminal law for the purpose of EU law enforcement, and the extent of the impact of EU food law on national criminal provisions.

## **2 The development of EU law on foodstuffs: from the internal market to food safety**

### **2.1 From the birth of the EU to the end of the 20th century**

The regulation of foodstuffs is one of the core areas of the legislative production of the EU, so much so that one may now affirm that EU law would not be the same without legislation related to foodstuff.<sup>205</sup> However, EU food law has not always evolved in a linear fashion, developing instead in reaction to several food safety crises affecting more than one Member State. As such, an explicit competence to regulate on foodstuffs was not even provided in the founding Treaties.<sup>206</sup> In other words, originally no specific policy on food was envisaged by the 'founding fathers' of the EU (at that time the 'European Economic Community').

Of course, indirect impact on foodstuffs was produced by rules adopted within the common agricultural policy (CAP). This – at least initially, in the aftermath of World War II – mainly pursued objectives of food security, namely the development of the primary sector. However, the definition of agricultural products adopted by the EU is quite broad and also

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<sup>204</sup> There is no explicit legal basis for EU policies on food. However, it is considered as a transversal topic touching upon other policies covered by the Treaties, such as agriculture, consumer protection, public health, and more in general the internal market. For example, a recent proposal for a new Regulation on official controls (see below) is based on Art 43 (agriculture), Art 114 (approximation of laws), and Art 168 (public health) TFEU.

<sup>205</sup> See eg, F Albisinni, 'The Path to the European Food Law System', (n 4) 17.

<sup>206</sup> The EU is based on the principle of conferral, whereby the EU can adopt legislative instruments (secondary law) only when the Treaties (primary law) adopted by Member States provide for a competence in that regard.

includes some processed food products.<sup>207</sup> Rules in principle adopted only for agricultural producers ended up, therefore, with a wider scope of application affecting also food producers not engaged in primary production but rather in the processing and distribution of agricultural products.<sup>208</sup>

The main policy field in which EU food law has grown, however, is the internal market – an ‘area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’.<sup>209</sup> The idea of a common area for goods entailed in particular the prohibition of customs duties on intra-EU trade, including charges having an ‘equivalent effect’, and in the prohibition of quantitative restrictions on imported goods. Similarly, technical barriers to trade, such as the imposition of certain requirements, can also affect the free movement of goods, and are therefore forbidden (‘measures equivalent to quantitative restrictions’).<sup>210</sup> Restrictive measures are, however, permitted if they pursue non-economic interests, such as public health;<sup>211</sup> in principle, therefore, it was possible for Member States to limit the free movement of goods within the EU with the objective of protecting the safety of citizens of the importing country. It was therefore clear to the EU that Member States should not be left alone in deciding on restrictions to food trade due to public health concerns, but had to establish common rules in order to ensure that a foodstuff produced in one Member State did not find obstacles to be exported to another Member State. The first attempt, therefore, was to establish common standards.<sup>212</sup>

The early attempts to approximate national legislations tended to aim at regulating specific food products (‘vertical directives’),<sup>213</sup> such as chocolate,<sup>214</sup> honey,<sup>215</sup> or coffee.<sup>216</sup> Such attempts, however, quite soon encountered major obstacles, on the one hand concerning the EU legislative procedures and the difficulties to reach a consensus within the Council (the legislative actor composed of representatives of the Member States),<sup>217</sup> and, on the other

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<sup>207</sup> See Annex I to the TFEU.

<sup>208</sup> See L Russo, ‘Agricultural law and food law’ in L Costato and F Albisinni (eds), *European Food Law* (Padua, Cedam, 2012) 141.

<sup>209</sup> Art 26 TFEU.

<sup>210</sup> See eg, P Craig, G De Búrca, *EU Law*, 5th ed (Oxford, OUP, 2015) 638; C MacMaoláin, *Food law* (Oxford, Hart, 2015) 67.

<sup>211</sup> Now 36 TFEU.

<sup>212</sup> See C MacMaoláin, *Food law*, (n 12) 87.

<sup>213</sup> See B van der Meulen, ‘Food law: development, crisis and transition’ in B van der Meulen (ed), *EU Food Law Handbook* (Wageningen, Wageningen Academic Publishers, 2014) 199. Vertical legislation for specific foodstuffs was also typical in ancient law: see C MacMaoláin, *Food Law*, (n 12) 3.

<sup>214</sup> See Directive 73/241, replaced by Directive 2000/36 of 23 June 2000 relating to cocoa and chocolate products intended for human consumption [2000] OJ L 197/19.

<sup>215</sup> Directive 2001/110 of 20 December 2001 relating to honey [2002] OJ L 10/47.

<sup>216</sup> Directive 1999/4 of 22 February 1999 relating to coffee extracts and chicory extracts [1999] OJ L 66/26.

<sup>217</sup> At that time the legislative procedure required unanimity within the Council (nowadays a majority suffices).

hand, the myriad of food products that make the sectoral regulation inherently incomplete. In other words, many products were not covered by these vertical directives.

By not regulating enough, the EU was not able to effectively ensure the free movement of foodstuffs. Facing such an impasse, the EU Court of Justice (CJEU) developed a body of case law based on 'mutual recognition'. The origin of this principle, later applied to the cooperation in criminal matters, can indeed be traced back to the internal market, namely to the free movement of food products. To mutually recognise a product essentially means that where a Member State considers a foodstuff to be safe and suitable to be marketed, all other Member States must open their market to that foodstuff, in the sense that they cannot impose further requirements having the effect of precluding its sale in their territories merely because of different applicable regulations. The most famous case is *Cassis de Dijon*.<sup>218</sup> It concerned the import to Germany of a French spirit containing 20 per cent alcohol. According to German law that kind of spirit should have contained at least 25 per cent alcohol, and therefore the sale of *Cassis de Dijon* was initially forbidden in Germany. The EU Court, however, considered this to be an unreasonable restriction: products lawfully produced in one Member State cannot be forbidden in another Member State just because they do not comply with national rules, unless there is an overriding reason related, for example, to the protection of public health. In other words, in the absence of common EU standards, Member States cannot ban a food product just because of its 'foreign' origin: what is considered good in another Member State should be marketable in the whole EU internal market.

The drawbacks of mutual recognition are self-evident. In particular, a market relying only on this principle would risk allowing and encouraging low standards. It may be difficult, indeed, to prevent business operators from producing food in the Member State(s) offering more attractive – or simply a lower level of – regulation. For this reason, although to this day mutual recognition remains one of the key principles of the internal market, the EU has also adopted 'horizontal' directives addressing aspects common to all food products rather than specific foodstuffs.<sup>219</sup>

Towards the end of the century, however, some cases endangering consumer safety in several Member States – namely the bovine spongiform encephalopathy (BSE) and the Belgian dioxin crisis – exposed the limitations of the EU system. Such crises spurred on EU policy makers to rethink the whole structure of EU food law; in 2000, the EU Commission issued the 'White Paper on Food Safety' featuring a proposed 'radical new approach'.<sup>220</sup> This policy document – identifying 84 measures to be implemented in the following years – is considered the foundation act of contemporary EU food law. First of all, the White paper

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<sup>218</sup> CJEU, 20 February 1979, 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.

<sup>219</sup> See, for example, Directive 2000/13 on food labelling, now repealed by Regulation No 1169/2011 of 25 October 2011 on the provision of food information to consumers [2011] OJ L 304/18.

<sup>220</sup> 12 January 2000, COM(1999) 719 final, 3.

shifted the focus from the internal market to food safety and health protection, which should have become the priority of new food policies. The cornerstones of the new approach were identified: (i) in the establishment of an independent authority providing scientific advice on food safety issues; (ii) in the adoption of a new package of regulations covering the entire food chain; (iii) in the development of a new and more effective system of controls based of subsidiarity; and, not least, (iv) in the strengthening of consumer information, whereby not only health protection, but also consumer confidence in the food sold in the EU would be increased.<sup>221</sup>

## 2.2 EU food law in the new century

### 2.2.1 Introduction: Regulation No 178/2002

The contemporary recasting of EU food law, pivoting around the priority of increasing the level of food safety, started in 2002, when the Parliament and the Council adopted Regulation No 178/2002, known as the General Food Law regulation (GFL). Its main objectives were to lay down the principles for the new EU food law, to establish an independent EU authority, and to establish EU-wide mechanisms for the management of food safety crises. This regulation has a very broad scope of application, since it covers all kinds of foodstuff ('any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans'),<sup>222</sup> along the whole food chain, from 'farm to fork' (the so-called 'holistic approach').<sup>223</sup> It is not an exhaustive code, but lays down horizontal rules, which are integrated by plenty of other rules adopted both at the EU and national level.

According to the GFL, two general principles underline the general attitude of the EU toward the risk of food safety accidents: the science-based approach and precautionary principle. A science-based approach means that independent scientific analysis – instead of other criteria – must assess the risk of having unsafe food on the market. Such a risk analysis is a process including risk assessment, risk management and risk communication. The European Food Safety Authority (EFSA), established in 2002,<sup>224</sup> plays an important role especially in the first phase. Although it is labelled as an 'authority', the EFSA does not make decisions; rather, it conducts the 'risk assessment' through an independent scientific

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<sup>221</sup> Food law as such does not provide consumers with specific rights or remedies: general consumer law applies to legal actions and product liability legislation; nevertheless, it integrates some objective of consumer protection, going also beyond their safety (see Art 8 GFL).

<sup>222</sup> Art 2 GFL.

<sup>223</sup> Only primary production for private domestic use or the domestic preparation, handling or storage of food for private domestic consumption is exempted from the scope of application of GFL. See B van der Meulen, A Szajkowska, 'The General Food Law: general provisions of food law' in B van der Meulen (ed), *EU Food Law Handbook* (Wageningen, Wageningen Academic Publishers, 2014) 230.

<sup>224</sup> See Chapter III GFL.

analysis. The risk ‘management’ – the decisions and selection of appropriate measures – is ensured by the EU Commission itself and the national authorities.

When decisions need to be taken despite substantial scientific uncertainty, the precautionary principle comes into play by imposing the decision that best protects consumers. Already during the BSE crisis, the CJEU extended the application of this principle – expressly provided only for environmental protection – to food law, and clearly stated that ‘[w]here 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’.<sup>225</sup> Now Article 7 GFL codifies the applicability of the precautionary principle also to food law, although such a possibility – unlike environmental protection – is not expressly envisaged in the Treaties.<sup>226</sup>

This Regulation has introduced several obligations for public authorities. However, it has introduced even more obligations for business operators. It has been observed that the EU shifted from a buyer-beware to a seller-beware scenario, since it ‘perceives food safety accidents as something waiting to happen in a world of responsible food business operators who are in principle willing to contribute to the best of their abilities to prevent such accidents’.<sup>227</sup> Hence the main actors in the new system became the ‘food business operators’, ie those operating along the different phases of the food chain who are ‘responsible for ensuring that the requirements of food law are met within the food business under their control’.<sup>228</sup> Their main obligations concern: (i) the product as such, (ii) the process, and (iii) its presentation.<sup>229</sup>

### 2.2.2 Legislation on the product

As regards the legislation on the product, one can further distinguish between (a) product standards (ie, ‘vertical’ rules indicating how specific products should be); (b) food safety targets (ie. the indication of numerical limits on certain substances or micro-organisms in food);<sup>230</sup> and (c) authorisation requirements, or market access requirements (ie, rules and procedures ensuring that some products cannot be used unless they have been specifically authorised). As regards the latter, the EU aims to make sure that food can be introduced to

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<sup>225</sup> CJEU, C-180/1996, 5 May 1998, *United Kingdom v Commission*, §99. See also CJEU, C-157/1996, 5 May 1998, *Queen v National Farmers’ Union*, §63.

<sup>226</sup> Also for this reason, the application of this principle is quite controversial and very much debated – also on a global scale – since it can be used as a disguised form of protectionism. See especially M Ramajoli, ‘Dalla «food safety» alla «food security» e ritorno’ [2015] *Ammministrare* 271; C MacMaoláin, *Food law*, (n 12) 136.

<sup>227</sup> B Van der Meulen, ‘Is current EU food safety law geared up for fighting food fraud?’ (2015) 10(Suppl 1) *Journal of Consumer Protection and Food Safety* 519-520.

<sup>228</sup> See Art 3 GFL.

<sup>229</sup> Such a systematisation is expounded by B van der Meulen, ‘Systematic analysis of food law’ in B van der Meulen (ed), *EU Food Law Handbook* (Wageningen, Wageningen Academic Publishers, 2014) 223.

<sup>230</sup> See R Spirovska Vaskoska, ‘Biological hazards’ in B van der Meulen (ed), *EU Food Law Handbook* (Wageningen, Wageningen Academic Publishers, 2014) 311.

the market only if it is safe. Since sometimes lack of safety can be due to inherent properties of certain food (and not to accidents during its production) the EU follows an approach whereby the law states what is allowed, making the rest forbidden.<sup>231</sup> In other words, especially 'new' food or substances (ie, different from what is traditionally considered edible and safe) need to be included on a list before being placed on the market. Sectoral regulations determine in detail the procedures for obtaining this 'pre-market approval',<sup>232</sup> or safety assessment test: in general, it is worth highlighting that the authorisation procedure involves both national and EU actors, hence the lists of authorised substances are valid in the whole EU. Such procedures are very much criticised, in particular for being too cumbersome or not flexible enough to respect regional differences within the EU, especially as regards 'novel foods'<sup>233</sup> or 'genetically modified organisms' (GMO).<sup>234</sup>

### 2.2.3 Legislation on the process

As regards the legislation on the process, EU law regulates how a product should be prepared. These requirements concern the (a) prevention of; (b) traceability of; and (c) response to the risk of unsafe food on the market.<sup>235</sup> As regards prevention, EU law has generated a considerable body of rules on food hygiene, establishing measures and methods that need to be taken by food businesses EU-wide.<sup>236</sup> These rules consist of prescriptive rules,

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<sup>231</sup> See See D Sinopoli, J Kluijfhoot, B van der Meulen, 'Authorisation requirements' in B van der Meulen, *EU Food Law Handbook* (Wageningen, Wageningen Academic Publishers, 2014) 261.

<sup>232</sup> See eg, Regulation No 1331/2008 of 16 December 2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings [2008] OJ L 354/1; Regulation No 1332/2008 of 16 December 2008 on food enzymes [2008] OJ L 354/1; Regulation No 1333/2008 of 16 December 2008 on food additives [2008] OJ L 354/16; Regulation No 1334/2008 of 16 December 2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods [2008] OJ L 354/34.

<sup>233</sup> The concept of 'novel food' identifies products and ingredients that have not been used to a significant degree for human consumption in the EU before the adoption of Regulation No 258/1997. See for example the recent Commission Implementing Decision (EU) 2016/1189 of 19 July 2016 authorising the placing on the market of UV-treated milk as a novel food under Regulation (EC) No 258/97 of the European Parliament and of the Council.

<sup>234</sup> See Directive 2001/18 of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L 106/1; Regulation No 1829/2003 of 22 September 2003 on genetically modified food and feed [2003] OJ L 268/1; Commission Regulation No 641/2004 of 6 April 2004 on detailed rules for the implementation of Regulation (EC) No 1829/2003 of the European Parliament and of the Council as regards the application for the authorisation of new genetically modified food and feed, the notification of existing products and adventitious or technically unavoidable presence of genetically modified material which has benefited from a favourable risk evaluation [2004] OJ L 102/14.

<sup>235</sup> See R Spriovska Vaskoska, B van der Meulen, M van der Velde, 'Process: hygiene, traceability and recall' in B van der Meulen (ed), *EU Food Law Handbook* (Wageningen, Wageningen Academic Publishers, 2014) 329; B van der Meulen, 'Systematic analysis', (n 31).

<sup>236</sup> See in particular Regulation No 852/2004 on the hygiene of foodstuffs [2004] OJ L 139/1. See also Regulation No 854/2004 of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption [2004] OJ L 139/206.



on the one hand, and on procedures based on the Hazard Analysis and Critical Control Points (HACCP) system, on the other hand. According to this system all food businesses must analyse their processes, establish procedures to ensure an adequate level of hygiene, and monitor the functioning of those procedures; in other words, food businesses are required to formulate and enforce their own rules on hygiene. Alternatively, instead of using their own HACCP system, food operators can comply with guides on how to ensure food hygiene, which may be established by food business sectors and approved at the national<sup>237</sup> or EU level.<sup>238</sup>

This is an example of private standards, or 'self-controls', which are capable of identifying more detailed and tailor-made procedures than public regulation. However, EU law clarifies that the HACCP system 'should not be regarded as a method of self-regulation and should not replace official controls'.<sup>239</sup> Before the official controls conducted by public authorities, however, another layer of (private) controls may intervene. Food business operators – which bear 'primary responsibility for food safety'<sup>240</sup> – may decide to assess the reliability of their HACCP system through certifications issued by third parties.<sup>241</sup>

EU law also tells food business operators how to deal with safety problems. In this regard, Article 18 GFL provides that food business operators 'shall be able to identify any person from whom they have been supplied with a food ... or any substance intended to be ... incorporated into a food'. In order to do so, food businesses must have in place 'systems and procedures which allow for this information to be made available to the competent authorities on demand'. This provision exemplifies the approach whereby the possibility to identify the source of food up the food chain ('traceability')<sup>242</sup> is a necessary pre-requisite to ensuring an adequate response to food safety risks.<sup>243</sup> Such a response mainly consists of the obligation upon food business operators not to bring food onto the market if it is unsafe. This means that a food business operator who 'considers or has reason to believe that a food which it has imported, produced, processed, manufactured or distributed is not in

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<sup>237</sup> Art 8 of Regulation No 852/2004.

<sup>238</sup> Art 9 of Regulation No 852/2004.

<sup>239</sup> Recital 13 of Regulation No 852/2004.

<sup>240</sup> Art. 1 of Regulation No 852/2004.

<sup>241</sup> See B van der Meulen, A Freriks, 'Millefeuille. The emergence of a multi-layered controls system in the European food sector' (2006) 2(1) *Utrecht Law Review* 156.

<sup>242</sup> According to Art 3(15) GFL, traceability 'means the ability to trace and follow food ... through all stages of production, processing and distribution'.

<sup>243</sup> The modalities to ensure the traceability are mainly left upon the business concerned. Some specific requirement, however, are provided with regard to specific food. See eg, Regulation No 1760/2000 of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97 [2000] OJ L 204/1; Regulation No 1830/2003 of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC [2003] OJ L 268/24.

compliance with the food safety requirements<sup>244</sup> must withdraw that food from the food chain (ie, from the downstream businesses) or recall the products already supplied to consumers. At the same time, it must inform the authorities and consumers.

#### 2.2.4 *Legislation on the presentation of the product*

Finally, as regards the legislation on the presentation of the product, EU law sets some rules as regards the labelling, advertisement and presentation of food, in order not to 'mislead consumers'.<sup>245</sup> The protection of consumers, in this way, is integrated within the general framework mainly dedicated to ensuring food safety, on the assumption that a well-informed consumer is able to make better choices, avoiding dangerous products and choosing the healthiest nutrients.<sup>246</sup> Regulation No 1169/2011 even goes beyond the labelling, advertising and presentation of foodstuff envisaged by Article 16 GFL.<sup>247</sup> It provides for a broad variety of information that must be provided to consumers: it includes, for example, the name of the food, a list of ingredients, information on the presence of allergens, the quantity of certain ingredients or categories of ingredients, net quantity, date of minimum durability or the 'use by' date, the name of the responsible business or food operator, nutrients and energy present in the food product, and also the origin of the product if it could mislead the consumer (otherwise the indication of the origin remains non-compulsory).<sup>248</sup> Beside this Regulation, it is worth mentioning that further sectoral EU rules apply, for example concerning specific products<sup>249</sup> or in order to protect certain geographical indications and designations.<sup>250</sup>

#### 2.2.5 *Interim conclusions*

This field is evolving toward the centralisation of regulatory powers, where less and less discretion is left to Member States to regulate different aspects of food production and distribution. The EU policies on foodstuffs, however, are not limited to the setting of some standards, but aim to make EU food law a real system, 'governed by its principles, and with

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<sup>244</sup> See Art 19 GFL.

<sup>245</sup> Art 16 GFL.

<sup>246</sup> See L González Vaqué, 'EU: has the time come to simplify food law?', (n 3) 6.

<sup>247</sup> Art 16 GFL provides for the inclusion of food shape, appearance or packaging, packaging materials used, manner in which they are displayed.

<sup>248</sup> Art 9 of Regulation No 1169/2011 of 25 October 2011 on the provision of food information to consumers [2011] OJ L 304/18.

<sup>249</sup> See eg, Regulation No 1379/2013 on fisheries and aquaculture production of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products [2013] OJ L 354/1.

<sup>250</sup> See eg, Regulation No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ L 93/12; Regulation No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed [2006] OJ L 93/1; Regulation No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 [2007] OJ L 189/1.

its own internal consistence',<sup>251</sup> with its own supranational procedures and actors. Following the recent reforms, the responsibilities for legislation and for scientific advice have been separated.<sup>252</sup> The main discernible objective pursued by this system is food safety, ie to ensure that food is not dangerous for human beings and fit for human consumption. At the same time, however, the pursuit of such an objective entails a myriad of measures that produce effects well beyond the realm of food safety. Consumer protection in a broader sense is thus identifiable in this complex regulatory design. The obligations related to information provided to consumers on the origin of food products, for example, departs from the mere objective of ensuring non-dangerous food on EU tables, and goes in the direction of helping citizens to know what they are buying and to make conscious choices on their food consumption. The question at this point is: how is the EU law on the books translated into law in action? How is the regulatory apparatus concretely enforced?

## 2.3 The multi-level enforcement of EU food law

### 2.3.1 Introduction

Over the past few decades, literature and policy-makers have increasingly paid attention to features, challenges and consequences of shared regulatory and enforcement regimes, or 'multi-level governance', ie the changing relationships between actors situated at different territorial levels.<sup>253</sup> Such a process is particularly visible in the EU, where in certain policy areas some competences have been transferred from the national to the supranational level. Food law is a paradigmatic example of the complex interplay between different levels, both in the vertical (Member States – EU) and horizontal dimensions (public – private actors). In this field, as described in the previous section, one may quite clearly observe a transfer of the decision-making power to the supranational level as regards the substantive requirements that need to be met by a foodstuff for it to be placed on the common market: the EU legislator and EU-level actors (EFSA) provide most of the rules indicating how a product should look, how it should be produced and under what conditions it can be considered safe in the whole EU territory. The picture is a bit more complex as regards the enforcement side. In order to identify who ensures the application of EU food law it is necessary to raise two questions: who acts in case of a food safety crisis? And who is in charge of verifying the compliance of food business operators and practices with EU law?

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<sup>251</sup> L Russo, 'Agricultural and food law', (n 10) 141.

<sup>252</sup> T Havinga, D Casey, F van Waarden, 'Changing regulatory arrangements in food governance' in T Havinga, F van Waarden and D Casey (eds) *The Changing Landscape of Food Governance* (Cheltenham, Edward Elgar, 2015) 3, 12.

<sup>253</sup> See, among others: M de Cock Buning, A Ottow, J Vervaele, 'Regulation and Enforcement in the EU: Regimes, Strategies and Styles' (2014) 10(5) *Utrecht Law Review* 1; L Hooghe, G Marks, *Multi-level Governance and European Integration* (Lanham, Rowman, 2001); S Piattoni, *The Theory of Multi-Level Governance. Conceptual, Empirical, and Normative Challenges* (OUP, Oxford, 2010); C Panara, *The Sub-national Dimension of the EU. A Legal Study of Multilevel Governance* (Cham, Springer, 2015); MS Righettini, 'La regolazione della sicurezza alimentare tra globale e locale' (2015) *Amministrare* 293.

### 2.3.2 Risk management

EU law sets out procedures for the management of accidents – not necessarily due to a violation of legal provisions – which create risks for the food safety. In particular, the Rapid Alert System for Food and Feed (RASFF) is a network for exchanging information about direct risks for humans deriving from food and feed, and is also used with regard to food imported from third countries. It involves Member States, EFSA, and the Commission, as well as third countries or international organisations if they have concluded an agreement with the EU.<sup>254</sup> The network is managed by the EU Commission, who assess the information received and transmit it to EFSA and the Member States. EFSA supplies scientific and technical information, while Member States make the decision on the withdrawal of the food from the market.

The Commission, on the request of a Member State or of its own initiative, may adopt ‘emergency measures’ if there is a risk to human health, animal health or the environment, and such risk ‘cannot be contained satisfactorily by means of measures taken by the Member State(s) concerned’.<sup>255</sup> Such measures may consist of the suspension of the placing on the market of the product, laying down special conditions for the food in question, or even other unspecified ‘appropriate interim measures’.<sup>256</sup> In other words, the response to food safety risks is primarily provided at national level; should national authorities remain inactive, the EU Commission may secondarily intervene to protect EU citizens from those risks. Its decisions, however, must normally<sup>257</sup> be taken according to a procedure involving Member States; namely, with the assistance of the ‘Standing Committee on the Food Chain and Animal Health’ composed of representatives of the Member States and chaired by the representative of the Commission.<sup>258</sup>

### 2.3.3 Controls

Food business operators must comply with the extensive body of EU food law composed of horizontal and vertical/sectoral rules, which include the obligation to establish self-control procedures and to withdraw food products from the market if there is a potential safety risk. However, although the whole regulatory system is devised bearing in mind a ‘good’ business operator, EU law also anticipates the eventuality that some obligations are not met

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<sup>254</sup> RASFF serves also as EU contact point within the International Food Safety Authorities Network (INFOSAN) operated by the World Health Organisation (WHO).

<sup>255</sup> Art 53 GFL.

<sup>256</sup> Art 53 GFL.

<sup>257</sup> Art 53(2) provides that in case of emergencies the Commission can provisionally adopt the emergency measures, and later (at latest 10 days) confirm, amend, revoke or extend them following the procedure involving the Standing Committee on the Food Chain and Animal Health.

<sup>258</sup> Art 58 GFL, and Art 5 of Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L 184/24.

and, therefore, foresees the intervention of public authorities in order to verify compliance with legal requirements (and to sanction the infringement thereof).

In contrast to the regulatory side, such enforcement tasks have not been transferred to the supranational level; in other words, the EU has only indirect enforcement powers. Article 17 GFL clearly states that 'Member States shall enforce food law, and monitor and verify that the relevant requirements of food law are fulfilled by food and feed business operators at all stages of production, processing and distribution'. As such, Member States must maintain a system of official controls and provide for measures in case of infringement.

Nonetheless, the EU has a role in this context, and it can be observed on three levels: (a) it sets the standards for controls, ie it decides – to some extent – how such controls at national level should be performed, in this way aiming at the harmonisation of the discrete national systems; (b) it supervises the enforcers, ie it verifies that the enforcement at national level is done effectively; (c) it can become a sort of coordinator of enforcers' activities. Such a threefold role is clarified by Regulation No 882/2004, which is the centrepiece of the EU legal framework on food law enforcement.<sup>259</sup>

#### 2.3.4 *The EU as a controls standard-setter*

Regulation No 882/2004 provides for a 'harmonised framework of general rules for the organisation'<sup>260</sup> of national official controls. It requires that national public authorities conduct frequent inspections, without prior notice, on a risk basis and with appropriate frequency, ie taking into account the identified risks, past compliance records, and 'the reliability of any own checks that have already been carried out'.<sup>261</sup> In this sense, the EU legal framework acknowledges the importance of 'enforced self-regulation'<sup>262</sup> and allow national authorities to calibrate their control strategies on the basis of prior private enforcement activities.<sup>263</sup> It has been observed that since systems of self-control, such as the HAACP, have become mandatory in all food businesses, official controls have shifted their focus 'from the quality of the final product to the quality of these control systems'.<sup>264</sup>

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<sup>259</sup> Regulation No 882/2004 of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L 165/1. In 2013 the EU Commission presented a proposal for the reform of the EU legislation on official controls (COM(2013) 265 final, 6 May 2013). See L González Vaqué, 'The European Commission Proposal to Simplify, Rationalise and Standardise Food Controls' (2013) 8(5) *European Food and Feed Law Review* 308.

<sup>260</sup> Recital 4 of Reg No 882/2004.

<sup>261</sup> Art 3 of Regulation No 882/2004.

<sup>262</sup> Terms coined by I Ayres and J Braithwaite, *Responsive Regulation* (New York, Oxford University Press, 1992) 101.

<sup>263</sup> See M Garcia Martinez, P Verbruggen, A Fearn, 'Risk-based approaches to food safety regulation: what role for co-regulation?' (2013) 16(9) *Journal of Risk Research* 1101. P Verbruggen, *Enforcing Transnational Private Regulation* (Cheltenham, Edward Elgar, 2014) 214.

<sup>264</sup> B van der Meulen, A Freriks, 'Millefeuille', (n 43) 156, 170.

Regulation No 882/2004 provides for a non-exhaustive list of activities to be performed at national level,<sup>265</sup> as well as of methods and techniques to be used, such as monitoring,<sup>266</sup> surveillance,<sup>267</sup> verification,<sup>268</sup> audit,<sup>269</sup> inspection,<sup>270</sup> sampling and analysis.<sup>271</sup> It also lays down rules on the specific procedure for the accreditation of official laboratories that can carry out the analysis of samples;<sup>272</sup> general obligations for Member States, such as the duty to provide adequate training to staff and to ensure a high level of transparency when carrying out the audits; and guidelines for establishing multi-annual national plans in order to organise controls on food business operators.

Furthermore, Regulation No 882/2004 provides for a non-exhaustive list of measures that national authorities should take when they identify non-compliance with EU food law, such as withdrawal of a product from the market, destruction of a product, closure or suspension of the establishment's activities for an appropriate period of time, etc.<sup>273</sup> In addition, EU law pays specific attention to the controls that need to be conducted on food intended to be imported into the EU from third countries.<sup>274</sup>

In this context, EU law lays down rules for administrative cooperation between national authorities.<sup>275</sup> Such a cooperation includes exchange of information, administrative assistance (both spontaneous and on request), and joint administrative investigations.<sup>276</sup> Recently an EU-wide IT tool – the Administrative Assistance and Cooperation system (AAC) – has been launched in order to facilitate the transnational exchange of information.<sup>277</sup>

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<sup>265</sup> See Art 10(2) of Regulation No 882/2004.

<sup>266</sup> Monitoring means 'conducting a planned sequence of observations or measurements with a view to obtaining an overview of the state of compliance with feed or food law, animal health and animal welfare rules' (Art 2).

<sup>267</sup> Surveillance means 'a careful observation of one or more feed or food businesses, feed or food business operators or their activities' (Art 2).

<sup>268</sup> Verification means 'checking, by examination and the consideration of objective evidence, whether specified requirements have been fulfilled' (Art 2).

<sup>269</sup> Audit is defined as 'a systematic and independent examination to determine whether activities and related results comply with planned arrangements and whether these arrangements are implemented effectively and are suitable to achieve objectives' (Art 2).

<sup>270</sup> Inspection is defined as 'the examination of any aspect of feed, food, animal health and animal welfare in order to verify that such aspect(s) comply with the legal requirements of feed and food law and animal health and animal welfare rules' (Art 2).

<sup>271</sup> 'Sampling for analysis' means 'taking feed or food or any other substance (including from the environment) relevant to the production, processing and distribution of feed or food or to the health of animals, in order to verify through analysis compliance with feed or food law or animal health rules' (Art 2).

<sup>272</sup> Art 12 of Regulation No 882/2004.

<sup>273</sup> Art 54 of Regulation No 882/2004.

<sup>274</sup> See Chapter V of Regulation No 882/2004.

<sup>275</sup> See Title IV of Regulation No 882/2004.

<sup>276</sup> See Art 36(3) of Regulation No 882/2004.

<sup>277</sup> Commission Implementing Decision (EU) 2015/1918 of 22 October 2015 establishing the Administrative Assistance and Cooperation system ('AAC system') pursuant to Regulation (EC) No 882/2004 of the European

It is worth pointing out that not only does EU law contain provisions on the 'horizontal' cooperation between national administrative authorities, but also it provides for rules on 'vertical' cooperation between national authorities and the EU Commission.

In other words, the EU provides that the first layer of public controls is conducted at national level, which operates when other layers of controls have already been carried out by private actors (eg, third-party auditors and certification bodies). Every Member State is free to adopt the organisation and strategy that it deems most effective to ensure compliance with EU food law,<sup>278</sup> as long as national authorities are granted 'the legal powers to carry out official controls'<sup>279</sup> and 'access to premises of and documentation kept by feed and food business operators so as to be able to accomplish their tasks properly'.<sup>280</sup> These controls do not consist of 'enforcement investigations' conducted by judicial authorities on the basis of a suspected infringement,<sup>281</sup> but are general controls designed to verify the regulatory compliance of food business operators (monitoring) which have often been subject to private systems of food safety controls. It has been observed that at national level such a control often becomes a 'meta-control', in the sense that national authorities do not monitor regulation vis-à-vis the regulated, but their role is limited to assessing the enforcement activities carried out by auditors and certification bodies who use their systems to verify the regulatory compliance of business operators.<sup>282</sup>

### 2.3.5 *The EU as a supervisor*

Following the national official controls, another layer of enforcement is foreseen. Regulation No 882/2004 provides that the EU Commission conducts audits in Member States.<sup>283</sup> These audits are conducted by the Commission Directorate-General for Health and Food Safety (DG SANTE), namely by its Health and Food Audits and Analysis Directorate (previously, from 1997 until the end of 2015, these audits were conducted by the 'Food and Veterinary

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Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2015] OJ L 280/31.

<sup>278</sup> Regulation No 882/2004 provides that Member States must designate the competent authorities (Art 4). The competence to carry out official controls can also be shared between several national authorities: in this case, 'efficient and effective coordination shall be ensured between all the competent authorities involved' (Art 4, par 3). Specific tasks can also be delegated to one or more control bodies (Art 5).

<sup>279</sup> Art 4, para 2, let e, of Regulation No 882/2004.

<sup>280</sup> Art 8, para 2, of Regulation No 882/2004.

<sup>281</sup> According to Art 5 of Regulation No 882/2004 specific tasks (excluding enforcement measures) related to official controls may also be delegated to other (private) control bodies.

<sup>282</sup> P Verbruggen, T Havinga, 'Food Safety Meta-Controls in the Netherlands' (2015) 6(4) *European Journal of Risk Regulation* 512.

<sup>283</sup> See Art 45 of Regulation No 882/2004.

Office’).<sup>284</sup> Normally these audits are conducted on the basis of an annual work plan established by the EU Commission itself (ie, they are not carried out by surprise).<sup>285</sup>

The objective of EU audits is to verify the actual compliance of national control systems with the national (multi-annual) control plans, and with EU law. Since the Commission does not have coercive investigative powers, in order for it to effectively conduct these audits Member States are requested to ‘give all necessary assistance and provide all documentation and other technical support that Commission experts request’,<sup>286</sup> as well as to ‘ensure that Commission experts have access to all premises or parts of premises and to information, including computing systems, relevant to the execution of their duties.’<sup>287</sup> In other words, with the assistance of the national authorities the Commission carries out on-the-spot checks on food business operators in order ‘to make sure that the reality matches what should be implemented’.<sup>288</sup>

At the end of the audit, the Commission drafts a report, which is normally publicly available<sup>289</sup> (in line with the objective of risk communication outlined above). Such reports, where necessary, contain recommendations for Member States that are supposed to ‘take appropriate follow-up action’.<sup>290</sup> In principle,<sup>291</sup> under exceptional circumstances the Commission could adopt its own enforcement measures (‘safeguard measures’),<sup>292</sup> such as the suspension of the placing onto the market of certain foodstuffs: this may be done only after the Commission has issued a report and the Member State in question has failed to correct the situation within the time limit set by the Commission; furthermore, there must

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<sup>284</sup> The audit team is typically composed of two auditors, often with the presence of a national expert from a Member State authority. Gathering information prior to the audit (by sending out an audit plan) and pre-audit questionnaire the team arranges an audit programme that will typically visit the control authority, a number of regional and local authorities, laboratories and a number of accompanied site visits (e.g. to farms, processors, feed units, slaughterhouses and retailers). The information is gathered to provide a series of findings which are presented at a closing meeting.

<sup>285</sup> See: [http://ec.europa.eu/food/audits\\_analysis/audit\\_programmes/index\\_en.htm](http://ec.europa.eu/food/audits_analysis/audit_programmes/index_en.htm). Art 45, para 2, of Regulation No 882/2004 adds that ‘[s]pecific audits and inspections in one or more specific areas may supplement general audits. These specific audits and inspections shall in particular serve to: (a) verify the implementation of the multi-annual national control plan, feed and food law and animal health and animal welfare legislation and may include, as appropriate, on-the-spot inspections of official services and of facilities associated with the sector being audited; (b) verify the functioning and organization of competent authorities; (c) investigate important or recurring problems in Member States; (d) investigate emergency situations, emerging problems or new developments in Member States.’

<sup>286</sup> Art 45, para 5, let *b*, of Regulation No 882/2004.

<sup>287</sup> Art 45, para 5, let *c*, of Regulation No 882/2004.

<sup>288</sup> B van der Meulen and A Freriks, ‘Millefeuille’, (n 43) 156, 172.

<sup>289</sup> See: [http://ec.europa.eu/food/fvo/audit\\_reports/index.cfm](http://ec.europa.eu/food/fvo/audit_reports/index.cfm).

<sup>290</sup> Art 45, para 5, let *a*, of Regulation No 882/2004.

<sup>291</sup> So far this power has never been exercised by the Commission.

<sup>292</sup> Art 56 of Regulation No 882/2004.



be evidence of a ‘serious’ failure that ‘may constitute a possible and widespread risk for human health, animal health or animal welfare, either directly or through the environment.’

### 2.3.6 *The EU as a coordinator*

As said, differently from such a supervisory role, the Commission may also become a coordinator of the activities conducted by national enforcers.<sup>293</sup> This occurs in the context of mutual administrative assistance rules, ie when a critical situation for the respect of EU food law has a cross-border dimension. In particular, the Commission coordinates the action undertaken by Member States when suspected activities have been carried out – or have effects – in different Member States and they are unable to agree on the appropriate action to address the problem. The coordination of the Commission may also be triggered if a Member State reports that violations of food law have been committed in another country which exports food to its territory. In those cases, the Commission may carry out an official on-the-spot control in collaboration with the Member State concerned, and/or may request that the Member State intensify its national official controls and report to the Commission on the measures taken.

### 2.3.7 *The EU as an international actor*

The scope of the Commission’s enforcement activity may go beyond the EU borders: EU experts – possibly assisted by national experts – may carry out official controls in third countries in order to verify the compliance or equivalence of third-country legislations and systems with EU food law.<sup>294</sup> This may occur, for example, following a request for approval of pre-export checks issued by third countries intending to export food to the EU, ie a mechanism for ensuring easier access to the EU market for ‘foreign’ food compared with the ordinary import procedure.<sup>295</sup> The rules for these controls are laid down by implementing regulations, which differ depending on whether there is a bilateral agreement with a third country or not. Such controls may also lead to the adoption of emergency measures, such as suspension of the placing onto the market of certain foodstuffs.<sup>296</sup>

It is worth clarifying that the possibility of carrying out controls complements the Commission’s role with respect to the conditions for importing food into the EU.<sup>297</sup> It essentially consists of requesting that third countries intending to export food products to the EU provide accurate and up-to-date information on the general organisation and

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<sup>293</sup> See Art 40 of Regulation No 882/2004.

<sup>294</sup> Art 46 of Regulation No 882/2004.

<sup>295</sup> Art 23 of Regulation No 882/2004. See also, for example, Commission Decision 2008/47 of 20 December 2007 approving the pre-export checks carried out by the United States of America on peanuts and derived products thereof as regards the presence of aflatoxins [2008] OJ L 11/12.

<sup>296</sup> Art 46, para 5, of Regulation No 882/2004.

<sup>297</sup> See C Kühn, F Montanari, ‘Importing food into the EU’ in B van der Meulen (ed), *EU Food Law Handbook* (Wageningen, WAP, 2014) 443.

management of sanitary control systems;<sup>298</sup> and of the possibility to adopt implementing regulations supplementing Regulation No 882/2004 in order to detail the procedures to be respected when importing food.<sup>299</sup> The task of conducting controls in order to verify compliance of food and feed products with relevant requirements, however, is bestowed upon Member States. In this respect, it is worth mentioning that the current approach to import controls – as well as the substantive requirements in order for the food to be imported – greatly differs according to the sector; only in some cases (particularly in the case of animals and products of animal origin) there are mandatory checks at the border prior to entry into the EU.<sup>300</sup>

### 2.3.8 *Interim conclusions*

The primary responsibility to respect substantive EU food law rests upon food business operators, ie private actors operating along the whole food chain, which establish internal self-control mechanisms in order to ensure they comply with legal requirements, and may be subject to audits conducted by external private auditors (certifications). Private actors are, however, also monitored by public authorities, namely by national authorities. In this respect, Member States have some discretion as regards the organisation of controls and the allocation of powers to different authorities; however, they find many (binding) indications in EU law, and are not left alone. The EU executive power, indeed, intervenes not only to regulate, but also to supervise Member States, by verifying their activities and, in particular, ensuring that the controls performed at national level are effective and sufficient in order to ensure the implementation of EU food law. The EU Commission also has some limited possibilities to adopt enforcement measures if it deems national controls to be inadequate; however, these measures are mainly taken against Member States and not directly against business operators (private actors).

## 3 **The punitive dimension**

### 3.1 The impact of EU food law on national criminal law

Besides the ‘enforcement measures’ – ie the actions that must be taken in case of non-compliance in order to remedy the situation – national authorities are also requested to lay down rules on sanctions applicable to infringements of food law, and take measures to ensure that they are implemented. These sanctions, as often provided by EU law, must be ‘effective, proportionate, and dissuasive’.<sup>301</sup>

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<sup>298</sup> For the details, see Art 47 of Regulation No 882/2004.

<sup>299</sup> Art 48 of Regulation No 882/2004.

<sup>300</sup> In general, see Art 11 GFL. As regards vertical rules, see, for example, Commission Regulation No 669/2009 of 24 July 2009 implementing Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin and amending Decision 2006/504/EC [2009] OJ L 194/11.

<sup>301</sup> Art 55 of Regulation No 882/2004.

There is no other EU law instrument explicitly dealing with food-related criminal law offences or sanctions, ie expressly providing when a certain conduct should be criminalised and how it should be punished. Compared with the attention paid by EU law to regulation and controls, it is astonishing to see that so little is said on sanctions; and nothing on the kind of sanctions. Existing EU food law, on the other hand, has been adopted relying on legal bases other than those provided by the EU Treaties for the criminal law domain, because in principle it does not aim to influence the exercise of criminal jurisdiction in the Member States. Nonetheless, some effects can be observed, and can be distinguished between ‘negative’ (when the EU imposes an obligation not to exercise criminal jurisdiction), and ‘positive’ effects (when the EU imposes some obligations to act upon Member States).<sup>302</sup>

As to the negative side, some limitations to national punitive powers can derive from the general objectives of the EU in this field, namely from the functioning of the internal market. A national provision criminalising the commercialisation of products having different requirements to those set out in national law may have the effect of hindering the free movement of food. In the early phase of EU food law, the CJEU clarified this point in a case concerning the importation of whisky from Scotland into Belgium, which – contrary to other EU countries – required an official document from the exporting country. The CJEU observed that imposing criminal penalties, or other measures, on the Belgian importer for not having the official certificate would have represented an unjustified barrier to the marketing of a good that was already exported to other EU Member States. In other words, even criminal law may represent a restriction to the free movement of goods; similarly to other non-criminal measures, normally it is not permitted, unless there are specific needs to protect public health.<sup>303</sup> This judgment was issued in a context characterised by the absence of European rules – namely a European system guaranteeing the authenticity of a product’s designation of origin. Since then, EU law has increasingly regulated many aspects of food production and distribution. Nonetheless, the same reasoning would apply also to the present scenario: where criminal law is used to enforce rules that run counter to EU law, whether primary or secondary law, it must be set aside.<sup>304</sup>

But it is with regard to the positive effects of EU integration, particularly with respect to the enforcement of the EU policy on food safety, that the most interesting questions arise in

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<sup>302</sup> See, among others, A Bernardi, ‘Il principio di legalità alla prova delle fonti sovranazionali e private: riflessi sul diritto penale alimentare’ (2015) IX(1) *Rivista di diritto alimentare* 43. As regards the indirect effect on food safety of the EU sanctions adopted in the common agricultural policy area, see AM Mauerer, ‘Il sistema delle sanzioni comunitarie in materia di sicurezza alimentare: recenti orientamenti giurisprudenziali sui principi del potere punitivo comunitario’ in L Foffani, A Doval Pais, D Castronovo, C Pongiluppi (eds), *La sicurezza alimentare nella prospettiva europea: precauzione, prevenzione, repressione* (Milano, Giuffrè, 2014) 87.

<sup>303</sup> See the decisions of the EU Court of Justice: C-8/74, 11 July 1974, *Dassonville*; C-186/87, 2 February 1989, *Cowan*; C-179/78, 28 March 1979, *Rivoira*; C-298/87, 14 July 1988, *Smanor*; C-65/75, 26 February 1976, *Tasca*; C-788/79, 26 June 1980, *Gilli and Andres*; C-261/81, 10 November 1982, *Rau*; C-16/83, 13 March 1984, *Prantl*.

<sup>304</sup> See question III, 1) of the Questionnaire for National Reports. See also A Klip, *European Criminal Law*, 3rd ed (Cambridge, Intersentia, 2016) 176.

order to elucidate whether any harmonisation of national law could be expected. As outlined above, the EU prescribes what food business operators ought to do; Member States control whether food business operators are actually behaving as the EU provides; and the EU verifies whether Member States effectively control food business operators. But what if food business operators are not compliant with EU law? Beside the measures designed to prevent the negative effects of violations of food law ('enforcement measures'), who decides how to 'punish' the 'bad' actors in the food chain?

In general, the EU competence to impose duties of criminalisation – in absence of an express legal basis in that sense – had been long debated before the entry into force of the Lisbon Treaty (December 2009), not only in literature but also between national and supranational courts. Its full analysis would fall beyond the purposes of this report; however, it is worth recalling that on a number of occasions the CJEU supported the concept of a functional competence of the EU in the areas where it had already exercised its substantive competence (eg, environmental protection): imposing measures related to criminal law may be necessary to ensure the effectiveness of EU policies.<sup>305</sup> Furthermore, according to the principle of sincere cooperation, the CJEU held that Member States should sanction violations of EU law in the same way that they would sanction analogous violations of national interests.<sup>306</sup>

After the Lisbon Treaty, this question is less relevant,<sup>307</sup> since there is now a legal basis covering harmonised areas such as food law. Article 83(2) TFEU provides that '[i]f the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions'. Therefore, the policy question in this case would be whether criminal law is necessary to ensure effective enforcement. But it is not doubted that there is the legal possibility for the EU legislator to oblige Member States to provide for the criminalisation of certain violations of EU food law, for defining the conducts that should be criminalised, and for defining the sanctions that should be provided for such violations.

But this has not been done yet: whether because minimum rules on food-related offences are not considered 'essential' for the enforcement of EU food safety rules, or due to the difficulty of reaching a common approach between Member States, such offences are not part of the (ideal) special part of EU substantive criminal law. Article 17(2) GFL states that Member States shall lay down the rules on 'measures and penalties' applicable to infringements of food and feed law. These measures and penalties shall be 'effective,

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<sup>305</sup> See in particular: C-176/03, 13 September 2005, *Commission v Council*; C-440/05, 23 October 2007, *Commission v Council*.

<sup>306</sup> See C-68/88, 21 September 1989, *Commission v Greece*.

<sup>307</sup> The question of a residual legal basis, different than Art. 83 TFEU, could be important to determine whether a different legislative procedure should be followed: for example, unlike Art 83, other legal bases do not provide for the 'emergency brake'.

proportionate and dissuasive.’ Article 55 of Regulation No 882/2004, on the other hand, refers to ‘sanctions’ that must be ‘effective, proportionate and dissuasive’. One may argue that the fact that one instrument expressly mentions ‘penalties’ instead of sanctions means that Member States are obliged to provide also for criminal sanctions. Nevertheless, this interpretation would be too far-reaching, even because the same instruments in other languages (eg, French and Italian) do not differentiate between the terms adopted to identify sanctions. Therefore, so far the EU has not touched upon the autonomy of the Member States in deciding by which means violations of EU food law ought to be sanctioned.

As a matter of fact, an attempt to develop an EU policy also as regards criminal sanctions was made by the Commission in 2003, namely in the proposal for the regulation on official controls (the adopted Regulation No 882/2004).<sup>308</sup> Article 55 of the Commission proposal again mentioned ‘penalties’ and, most importantly, explicitly provided that certain conducts ought to be considered ‘criminal offences’, punishable with sanctions ‘of a criminal nature’.<sup>309</sup> Such conducts were identified, for example, in ‘[t]he contamination and placing on the market of food with substances that may seriously affect human health, in breach of the provisions of Council Regulation (EEC) No 315/93 of 8 February 1993 laying down Community procedures for contaminants in food (...) The illegal handling, illegal placing on the market and illegal use in animals of prohibited substances in breach of the provisions of Directive 96/22/EC and/or of the rules adopted by the Member States in order to comply with it. (...) The use of unauthorised or prohibited additives in food in breach of Article 2 of European Parliament and Council Directive No 95/2/EC of 20 February 1995 on food additives other than colours and sweeteners (...) The placing on the market of meat that has not been submitted to the official controls (...) The placing on the market of meat that has been declared unfit for human consumption at post-mortem inspection (...)’.<sup>310</sup> The Commission believed, indeed, that it was necessary to remedy the lack of certainty with regard to the Member States’ obligation to provide criminal penalties, as well as the absence of a ‘minimum standard with regard to the constituent elements of offences to the detriment

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<sup>308</sup> Proposal for a Regulation of the European Parliament and of the Council on official feed and food controls, COM(2003) 52 final.

<sup>309</sup> Art 5 of the 2013 Proposal: ‘1. Member States shall lay down the rules on penalties applicable to infringements of feed and food law and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions and any subsequent amendment to the Commission without delay. 2. For the purpose of paragraph 1, the activities referred to in Annex VI shall be criminal offences when committed intentionally or through serious negligence, insofar as they breach rules of Community feed and food law or rules adopted by the Member States in order to comply with such Community law. 3. The offences referred to in paragraph 2 and the instigation to or participation in such offences shall, as for natural persons, be punishable by sanctions of criminal nature, including as appropriate deprivation of liberty, and, as for legal persons, by penalties which shall include criminal or non-criminal fines and may include other penalties such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from engaging in business activities, placing under judicial supervision or a judicial winding-up order.’

<sup>310</sup> Annex VI to the 2003 Proposal.

of feed and food safety', on the assumption that '[i]n many cases, only criminal penalties will provide a strong dissuasive effect'.<sup>311</sup> For this reason, the specific offences that should have been criminalised, according to the Commission, should have also been 'made punishable 'per se', whether they eventually lead or not to the placing on the market of unsafe feed or food'.<sup>312</sup>

The Council, however, eventually did not endorse the Commission's proposal, resulting in the adoption of the limited provision mentioned above (providing only for sanctions effective, proportionate, and dissuasive). As said above, there is now a new proposal to review the legislation on official controls (Regulation No 882/2004); nonetheless, the Commission is not aiming to revamp a criminal policy on food safety with this proposal,<sup>313</sup> which only adds – compared with the 'usual' reference to effective sanctions – the introduction of 'financial penalties' in cases of certain intentional violations of EU law.<sup>314</sup>

Therefore, neither existing nor proposed EU instruments say when a certain conduct should be criminalised or when a sanction should be of a criminal nature. In reality, EU law does not even aim to harmonise the identification of the food operator that should be subject to those sanctions. In a recent case concerning a violation of microbiological criteria<sup>315</sup> detected on the premises of a food business operator active only at the distribution stage, the CJEU held that EU law does not preclude national law from imposing a sanction – be it administrative or criminal – on operators active only at the distribution stage for placing a foodstuff on the market. In other words, EU law does not define limits to the subjective scope of sanctions, nor on the criteria for determining liability (in this case strict liability). The task

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<sup>311</sup> Explanatory memorandum of the 2013 Proposal, where it added that '[t]he provision for such sanctions demonstrates social disapproval of a qualitatively different nature compared to administrative enforcement measures. There is also an additional guarantee of impartiality of investigating authorities, because other authorities than those who have granted exploitation licences will be involved in a criminal investigation.'

<sup>312</sup> *Ibid.*

<sup>313</sup> On the other hand, the harmonisation of national criminal law should be rather pursued with another instrument based on Art 83 TFEU, whereas this proposal is based on Art 43 (CAP), 114 (approximation of laws), and 168(4)(b) (public health) TFEU.

<sup>314</sup> Article 136 of the Proposal COM(2013) 265 final: '1. Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and take all measures necessary to ensure that they are applied. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by the date referred to in the second subparagraph of Article 162(1) and shall notify it without delay of any subsequent amendment affecting them. 2. Member States shall ensure that financial penalties applicable to intentional violations of the provisions of this Regulation and of the rules referred to in Article 1(2) at least offset the economic advantage sought through the violation. 3. Member States shall ensure in particular that penalties are provided for in the following cases: (a) where operators fail to cooperate during official controls or other official activities; (b) false or misleading official certification; (c) fraudulent production or use of official certificates, official labels, official marks and other official attestations'.

<sup>315</sup> Criterion laid down in Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005.

to ensure that sanctions are not only effective and dissuasive, but also proportionate, is left to Member States, and particularly to national courts.<sup>316</sup>

It is worth mentioning, at this point, that the apparent lack of EU criminal policy has been lamented also in literature. It has been observed that the EU Commission – even after the Post-Lisbon communication of 20 September 2011 ('Towards an EU Criminal Policy')<sup>317</sup> – has not clarified the policy criteria that should be followed in order to exploit the potential of Article 83 TFEU (particularly its second paragraph) and harmonise the criminalisation of conducts hindering the realisation of EU policies.<sup>318</sup> So far, the only attempt toward an harmonisation of national criminal law on food safety has been made within an academic project on the harmonisation of economic criminal law – not mandated by EU institutions – coordinated by Prof. Tiedemann.<sup>319</sup> In the final proposal, the research team elaborated six provisions on conducts related to: food safety (Article 29), food fraud and consumer information (Article 30), advertising of food products with therapeutic features (Article 31), marketing of novel food (Article 32), GMOs (Article 33), and protected geographical indication (Article 34). As said, however, this initiative has not been followed-up at the legislative level.

In conclusion, the EU could impose more specific obligations in the field of criminal law on Member States, who have conferred this competence to the EU legislator. However, such a possibility has not been exercised yet. For this reason, when it comes to the sanctioning stage of enforcement, one should not be surprised if – despite the substantial unification of food law<sup>320</sup> – Member States have quite different substantive criminal law systems. Of course, the full body of EU criminal law applies also to food-related offences, in a way that could influence the concrete exercise of criminal jurisdiction, once it has been triggered at national level. Consequently, Member States are bound, for example, by the Charter of Fundamental Rights of the EU, on the basis of which the CJEU has recently developed a body of case law on *ne bis in idem* that requires Member States to pay particular attention to the interaction between criminal and non-criminal sanctions.<sup>321</sup>

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<sup>316</sup> CJEU, C-443/13, 13 November 2014, *Ute Reindl v Bezirkshauptmannschaft Innsbruck*, 31-44.

<sup>317</sup> EU Commission Communication of 20 September 2011, 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', COM(2011) 573 final. See JAE Vervaele, 'The European Union and harmonization of the Criminal law enforcement of Union policies: in search of a criminal law policy?' in M Ulväng and I Cameron (eds), *Essays on criminalization & sanctions* (Iustus, Upsala, 2014) 185.

<sup>318</sup> See eg, A Klip, *European Criminal Law*, (n 106) 240.

<sup>319</sup> The results of the research have been published only in German, Spanish, and Italian. K Tiedemann (ed), *Wirtschaftsstrafrecht in der Europäischen Union. Rechtsdogmatik-Rechtsvergleich-Rechtspolitik. Freiburg-Symposium* (Köln, 2002); K Tiedemann – A Nieto Martin (eds), *Eurodelitos. El Derecho penal económico en la Unión Europea* (Cuenca, 2003); K Tiedemann – L Foffani – L Picotti (eds), *L'armonizzazione del diritto penale dell'economia nell'Unione europea: il progetto "Eurodelitti"* (Milano, 2006).

<sup>320</sup> It has been assessed that 98 % of food law is harmonised at EU level. See SWD(2013) 516 final.

<sup>321</sup> See, among others, JAE Vervaele, 'The Application of the EU Charter of Fundamental Rights (CFR) and its *Ne bis in idem* Principle in the Member States of the EU' (2013) 6(1) *Review of European Administrative Law* 113.

## 3.2 Beyond food safety: the problem of food fraud

### 3.2.1 Introduction: the concept

One of the most debated aspects of food law worldwide is the definition of food fraud and the extent of its criminalisation.<sup>322</sup> Food fraud may be construed as a particular modality of violation of food law, namely when it is intentional and motivated by the prospect of financial gain, for instance in the case of the horsemeat scandal. In this sense, the ambit of enforcement measures in relation to food fraud would be narrower than that in relation to food safety, since the latter aims to address any kind of violation, whether intentional or accidental. On the other hand, the concept of food fraud could be broader than the violation of food safety requirements, since it may also include the protection of values that are not regulated by substantive food law (consumers may feel swindled even if there is no real risk to their health). In other words, only in some cases may food fraud also represent a problem of food safety; in most cases, it concerns only the untruthful description of what a food product actually consists of.

Fraudulent practices have always been a known risk for food operators and consumers, since replacing expensive food with cheap ingredients is an appealing opportunity for criminals and criminal organisations. Such incentives and opportunities have steadily increased ever since the industrialisation and, later, globalisation of food markets.<sup>323</sup> Now the World Health Organisation identifies food fraud as a serious threat to public health, since fraudulent behaviours increase the risk of unsafe consequences.<sup>324</sup> At the same time, consumers' associations unveil more and more cases of deceptive practices in the production and distribution of foodstuffs. There is a significant body of literature analysing this criminal phenomenon, or rather these criminal phenomena. These studies, indeed, reveal that food fraud is a broad category encompassing a vast range of conducts.<sup>325</sup> Furthermore, they stress the common link with organised criminal networks, which always find new ways to increase their profit (eg, the trade of bush meat).<sup>326</sup> In most cases, although estimates are hard to

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<sup>322</sup> Outside the legal field, the debate concerns the methods and techniques to detect cases of food fraud by food business operators. See, for example, L Manning, JM Soon, 'Developing systems to control food adulteration' (2014) 49 *Food Policy* 23.

<sup>323</sup> For an overview of the evolution of food fraud, particularly in the US and UK, see B Wilson, *Swindled. The Dark History of Food Fraud, from Poisoned Candy to Counterfeit Coffee* (Princeton, PUP, 2008).

<sup>324</sup> See, for example: [http://www.searo.who.int/entity/world\\_health\\_day/2015/whd-what-you-should-know/en/#adulteration](http://www.searo.who.int/entity/world_health_day/2015/whd-what-you-should-know/en/#adulteration).

<sup>325</sup> See eg, N Lord, CJ Flores Elizondo, J Spencer, 'The dynamics of food fraud: The interactions between criminal opportunity and market (dys)functionality in legitimate business' [2017] *Criminology & Criminal Justice* 1; JM Ryan, *Food Fraud* (Amsterdam, Elsevier, 2016).

<sup>326</sup> See eg, L Manning, R Smith, JM Soon, 'Developing an organizational typology of criminals in the meat supply chain' (2016) 59 *Food Policy* 44; J Pointing, 'Food Crime and Food Safety: Trading in Bushmeat – Is New Legislation Needed?' (2005) 69 *Journal of Criminal Law* 42. In early 2016, one of the largest operations coordinated by Europol in this field (Opson V) led to the seizure, at the Zaventem airport in Belgium, of



substantiate, it is pointed out that the number of prosecutions appears minuscule when compared with the scale of the criminal phenomenon.

### 3.2.2 *The quest for a definition*

Is it possible to define exactly what food fraud is? This question, at the moment, does not find an answer on a global scale, nor on the EU level.<sup>327</sup> The common denominator of the various examples of food fraud is the intent of the wrongdoer (food fraud is only about intentional conducts), but already as to the motives differences might be noticed: whilst the more frequent threat is represented by economically-motivated adulterations, such frauds could also have a different motivation ('ideologically-motivated adulterations') which can even have a terrorist purpose ('food defence'). The types of material behaviours can greatly differ. They may consist of 'substitution', eg the use of ingredients other than those advertised, or the selling of species other than those declared, as often happens with fish; of 'mislabelling', ie false information provided to the consumer; of 'dilution', such as the 'tumbling' of chickens (water in poultry); or of 'concealment', ie measures taken to hide certain undesirable aspects. But the category of food fraud could be even broader: what about stolen food sold for a lower price in another market? Or counterfeit food, i.e. a product having the same qualities but illegally using a protected brand? Or a food product having different nutritional properties than those advertised? One might also argue, for example, that selling foodstuffs which are cheap due to the violation of labour law (making production cheaper), or using techniques dangerous for animals' welfare, could amount to fraud.

These are just some non-exhaustive examples of the types of actus reus that can fit within the conceptual box of food fraud, which is indeed a term mainly used in its non-technical connotation.<sup>328</sup> In order to help to develop an adequate response, some definitions have been proposed.<sup>329</sup> The most commonly referred to focus – besides the conducts of substitution, addition, tampering or misrepresentation – on the intent, the economic or financial gain, and the potential risk for human health. On the other hand, it has also been proposed to remove from the definition any reference to motives and the risk for consumer health, and to focus

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several kilos of monkey meat. See the press release at: <https://www.europol.europa.eu/content/largest-ever-seizures-fake-food-and-drink-interpol-europol-operation> .

<sup>327</sup> See F Lotta, J Bogue, 'Defining Food Fraud in the Modern Supply Chain' (2015) 2 *European Food & Feed Law Review* 114.

<sup>328</sup> In some cases, also the concept of 'food crime' is used. See the UK report 'Food crime. Annual Strategic Assessment. A 2016 Baseline', available at: <https://www.food.gov.uk/sites/default/files/fsa-food-crime-assessment-2016.pdf>.

<sup>329</sup> See eg, J Spink, DC Moyer, 'Defining the Public Health Treat of Food Fraud' (2011) 76(9) *Journal of Food Science* 157.

only on the intent.<sup>330</sup> This would allow for a widening of the scope of the concept in order to include as much illegal intentional behaviour as possible.

### 3.2.3 *The EU fragmentation*

Against such a blurred background, not even the EU legislation contains any definition of food fraud whatsoever. There is only a reference to ‘fraudulent and deceptive practices’ and ‘any other practices which may mislead the consumer’, the prevention of which is part of the protection of consumers’ interests – one of the objectives of EU food law.<sup>331</sup> Member States, therefore, are free to determine what violations should be criminalised and how (eg, what constituent elements, what penalties, etc). The recent horsemeat scandal exposed the diverging approaches of Member States to food fraud, which led to different national responses. This well-known scandal concerned the presence of horse meat in foods advertised as containing beef. Initially discovered in UK and Ireland, the scandal spread across 13 Member States, since the meat – originally produced as horsemeat in Romania – was traded by a Dutch company to be distributed in other EU countries labelled as beef.

Official controls were therefore triggered in several Member States, primarily in order to ascertain whether or not it was also a matter of food safety. They concluded that most probably the horsemeat contained in that product was not dangerous for human health or unfit for human consumption. It is the falsification of documents along the food chain that allowed the commercialisation of horsemeat with a different label. As a consequence, consumers did not get what they wanted, and eating horse in some cultures is considered taboo. For this reason, criminal investigations were also launched across the EU; their outcome largely differed due to the different applicable laws.<sup>332</sup>

In particular, the horsemeat scandal exposed how existing EU food law (primarily aiming at the protection of food safety) is not fully adequate to tackle cross-border cases of food fraud. One of the critical aspects, for example, concerned the applicability to similar situations of Article 19 GFL, which obliges food business operators to withdraw the food product from the market if they consider (or have reasons to believe) that it is not in compliance with the ‘food safety requirements’. Does it also cover situations in which no safety risk is proven, but only the violation of traceability requirements? During the scandal,

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<sup>330</sup> B van der Meulen, ‘Is current EU food safety law geared up for fighting food fraud?’ (2015) 10(Suppl 1) *Journal of Consumer Protection and Food Safety* 519, 522.

<sup>331</sup> Art 8 GFL.

<sup>332</sup> See S van der Meulen et al, ‘Fighting Food Fraud. Horsemeat scandal; Use of Recalls in Enforcement Throughout the EU’ (2015) 10(1) *European Food and Feed Law Review* 2. In England, recently (August 2016) three men have been charged with fraud offences; in October 2016 two of them plead guilty, while the third one will face trial in July 2017 <<http://www.thegrocer.co.uk/buying-and-supplying/food-safety/two-plead-guilty-in-uk-horsemeat-court-case/544109.article>>.

national authorities gave considerably different answers to this question, and only some of them issued recall orders.<sup>333</sup>

More generally, the horsemeat scandal made it apparent how the existing system of EU food law – although including some further objectives (such as consumer information) – was created to face another kind of crisis (the above-mentioned BSE in the 1990s) and is therefore devised to offer a coordinated and to a certain extent supranational response to safety scares. But food safety can ‘neglect the moral dimension in adulteration: while strong on poisoning, it is often weak on cheating’.<sup>334</sup>

In this context, certainly criminal law is not the only way to make the system stronger against food fraud. It is likely not even the most effective one: policies against food fraud should deal with consumer information and education, preventive actions, cooperation with the private sector, development of adequate technology to detect fraud, administrative controls, etc.<sup>335</sup> However, criminal law can be a component of such policies: EU actions in this field may therefore aim to have (some) impact upon 28 different criminal justice systems. Nevertheless, so far no action has been taken to develop a real EU criminal policy aiming at the approximation of national criminal laws. This may be due to the difficulties in going beyond the original absence of a common playing field and of an EU definition of food fraud. Even the EU Parliament ‘considers a uniform definition to be essential for the development of a European approach to combating food fraud; stresses the need to adopt swiftly a harmonised definition at EU level, based on discussions with Member States, relevant stakeholders and experts, including elements such as non-compliance with food law and/or misleading the consumer (including the omission of product information), intent and potential financial gain and/or competitive advantage’.<sup>336</sup> For this purpose, in 2014 the Commission launched a study on the legal framework that currently governs the fight against fraudulent and deceptive practices.<sup>337</sup>

#### 3.2.4 *EU initiatives*

It cannot be said that the EU institutions did not react to the horsemeat scandal. Alongside a Communication inviting Member States to intensify and coordinate their controls,<sup>338</sup> the EU Commission issued an action plan foreseeing a set of different measures – from testing

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<sup>333</sup> See S van der Meulen et al, ‘Fighting Food Fraud’, (n 134) 2.

<sup>334</sup> B Wilson, *Swindled*, (n 125) 323.

<sup>335</sup> See N Hirschauer, S Scheerer, ‘The Prevention of White-collar Crime in the Food Sector. An Interdisciplinary Applied Research Approach’ in HJ Kerner and E Marks (eds) *Internetdokumentation Deutscher Präventionstag* (Hannover, 2005).

<sup>336</sup> European Parliament resolution of 14 January 2014 on the food crisis, fraud in the food chain and the control thereof (2013/2091(INI))

<sup>337</sup> See the Commission press-release of 14 February 2014.

<sup>338</sup> Commission Recommendation of 19 February 2013 on a coordinated control plan with a view to establish the prevalence of fraudulent practices in the marketing of certain foods (2013/99/EU), 21 February 2013, OJ L 48/28.

programmes to horse passports – whose implementation required an internal reorganisation of the competent Directorate within the Commission itself. The EU Parliament has also invited the Commission to further act in this field.<sup>339</sup> In general, therefore, one could say that ever since the scandal, food fraud has appeared on the European agenda, and has stimulated the legislator's initiative.<sup>340</sup>

Looking at the aspects of such initiatives that may have an impact on criminal justice, it ought to be noted that the EU Commission has presented a proposal for the review of the legislation on official controls.<sup>341</sup> This proposal – currently under negotiation at the Council – would confer more powers on the Commission in order to request that Member States carry out (administrative) controls and tests within a coordinated control plan. Furthermore, it provides that national authorities should integrate into their national control plans regular unannounced official controls directed at identifying possible intentional violations of food law. In addition, it contains a specific provision on financial penalties for intentional violations, specifying that (whether administrative or criminal) they should 'at least offset the economic advantage sought through the violation'.<sup>342</sup>

Furthermore, the EU Commission has been trying to strengthen the EU's role of coordinator/facilitator of national enforcement. In particular, it has worked to boost some arrangements aiming at fully implementing the existing provisions on administrative assistance and cooperation (see supra).<sup>343</sup> One of the obstacle to effective enforcement has been identified in the difficult communication between national authorities. In 2013, therefore, the EU Commission created the 'Food Fraud Network' (FFN), where the authorities appointed at national level – the 'Food Fraud Contact Points' (FFCP) – can handle specific requests for cross-border cooperation in cases of food fraud. The exchange of information within the network takes place via a specific IT tool launched in November 2015 (see supra, 2.3.4).<sup>344</sup> In 2015, the network handled more than 100 cases.<sup>345</sup>

In conclusion, analysing the reaction to the scandal, one may observe that (i) the response of the EU to the recent cases of food fraud focus on the existing legal framework on official

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<sup>339</sup> European Parliament resolution of 14 January 2014 on the food crisis, fraud in the food chain and the control thereof (2013/2091(INI)).

<sup>340</sup> See the proposal for the review of the Regulation on official controls. See also the Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017 (Justice and Home Affairs Council meeting, Luxembourg, 6 and 7 June 2013).

<sup>341</sup> COM(2013) 265 final.

<sup>342</sup> Art 136(2).

<sup>343</sup> Articles 34-40 of the Regulation No 882/2004.

<sup>344</sup> Commission Implementing Decision 2015/1918 of 22 October 2015 establishing the Administrative Assistance and Cooperation system ('AAC system') pursuant to Regulation (EC) No 882/2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

<sup>345</sup> The yearly activity report is available at: [http://ec.europa.eu/food/safety/docs/official-controls\\_food-fraud\\_network-activity-report\\_2015.pdf](http://ec.europa.eu/food/safety/docs/official-controls_food-fraud_network-activity-report_2015.pdf).

(administrative) controls, aiming at both fully implementing it and improving it through a legislative reform; (ii) the new initiatives mainly aim to facilitate (decentralised) enforcement – an enforcement that does not necessarily presuppose the violation of EU law, since national provisions on food fraud may go beyond the domains regulated by EU law; (iii) these initiatives do not interfere with the institutional autonomy of the Member States (eg, they do not impose any sort of obligation to establish specialist investigative food departments); (iv) they have an effect only on administrative cooperation, leaving the criminal follow-up entirely to Member States and to the existing EU instruments and bodies (eg, Europol and Eurojust); (v) instruments harmonising national criminal law are only envisaged at this stage: various considerations related to legal feasibility and political willingness will determine whether such attempts will be made within the EU or other international organisations.<sup>346</sup>

#### **4 Conclusions**

The regulation of foodstuffs is highly harmonised in the EU in order to ensure a high level of safety of EU consumers. This means that most of the rules on the product, on the process, and on the presentation of the product, are European rules that apply to every food business in 28 Member States. However, the EU does not only lay down ‘substantive’ rules on food; it also aims to ensure that those rules are enforced. It has, therefore, established ‘procedural’ rules aiming at verifying compliance with the substantive requirements (see *supra* on official controls, 2.3.3), remedying non-compliance in view of managing, and diminishing the risk of foodborne illness for citizens (see *supra* on risk management, 2.3.2). For this purpose, EU law has defined some tasks and powers, and has allocated them either to national or (to a limited extent) supranational actors. In this sense, the overview provided by this contribution aims to show that the gigantic volume of EU provisions is evolving towards a coherent system of food law.

Food businesses have been placed at the centre of such a system, and they bear the primary responsibility for food safety. This entails, for example, that not every food product is tested by public authorities before entering the market; public controls rather assess the overall behaviour of food operators in the production or distribution of food. Furthermore, this means that every food business is required to become a ‘responsible’ actor and establish internal mechanisms to identify, prevent and neutralise the food safety risk. This has favoured the development of self-regulation mechanisms that accompany, without substituting, public intervention; the example of food hygiene (namely, the HACCP system) is the most evident in this regard.

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<sup>346</sup> The Council of the EU, for example, invites the Member States and the Commission ‘to propose that the Council of Europe study the feasibility of a Council of Europe convention on action against food crime, including substantive and procedural criminal law measures as well as preventive measures, and to strongly support such a study.’ See the Draft Council Conclusions on the role of law enforcement cooperation in combating food crime, 27 November 2014, doc No 15623/14.

At least one aspect, however, reveals that the system is not yet complete. The punitive dimension of enforcement powers has so far received very little attention at EU level. EU law provides that sanctions must be established at national level for the violation of EU food law, but does not specify at all what type of sanction is required, eg whether administrative or criminal. Since there is not even an embryo of a common definition of food offences and sanctions, it would not be surprising to find a great variety across the Member States. This scenario has been exposed by the recent horsemeat scandal, which has now put the issue of food fraud on EU and national agendas. So far, however, food fraud is not a legal concept in EU law, but merely a broad category including every intentional violation of food law – for which EU law does not necessarily require the use of criminal law. The EU has therefore started acting as a facilitator of cooperation between national authorities, which deal with transnational cases of ‘fraud’ according to their understanding of what amounts to ‘fraud’. A system designed to deal with food safety scares has proved to be unprepared to face conducts going beyond the mere violation of substantive rules.

Nonetheless, although the national legislative techniques and approaches to punitive law may differ, it would not be surprising to find that in many cases EU law provisions (the violation of which is sanctioned by national law) have been directly included in national offences. In this sense, EU law may have indirectly contributed to the definition of a common European narrative also in the punitive field. The principles underlying the EU system – which is probably the most advanced example of a multi-state system of food law worldwide – may be helpful to a reflection on the core interests that deserve the use of the criminal law sword. On the other hand, unfortunately, an analysis of the EU food law system cannot show the way in which such protection ought to be offered.

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# PRODUCT LIABILITY AND CRIMINAL LAW

By Susana Aires de Sousa\*

## 1 Introduction

The damaging consequences of the fabrication, selling or trading of dangerous or defective products, able to affect a large number of people (for example, a general intoxication caused by a spoiled edible good) have prompted juridical response, in particularly by means of criminal law. A lively discussion about the juridical consequences related to the consumption of defective or dangerous products arose in the last decades of the XXth century, both within the scope of civil and criminal law.

The designation 'criminal product liability' or criminal responsibility for the product<sup>347</sup> is now used throughout the European literature on criminal law, in order to characterize the responsibility of producers and distributors of defective or dangerous goods for the harm or endangerment of essential legal interests of the consumers, valued by criminal law when establishing, either in the Penal Code or in supplementary law, crimes protecting the consumer or its interests.

Similarly to the evolution followed within civil responsibility, the birth of product criminal liability *qua tale* occurred initially within the jurisprudence, when confronted with some serious

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\* This text corresponds essentially, with small formal changes, to the communication presented to the Conference 'Los dos filos de la espada: humanidad de las penas y tutela de intereses globales', organised by the Instituto de Derecho penal europeo e internacional of the Facultad de Derecho y Ciencias Sociales of the Universidad de Castilla-La Mancha, on 15 and 16 December 2016. We thank Prof Luis Arroyo Zapatero and Prof Adan Nieto Martín for the invitation to participate in the Conference. The text keeps the simplicity and orality characteristics of the presented communication.

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<sup>347</sup> According to E Hilgendorf, *Strafrechtliche Produzentenhaftung in der "Risikogesellschaft"?* (Berlin, Duncker & Humblot, 1993) 89, footnote no 1, the expression 'strafrechtliche Produzentenhaftung' was used for the first time in Maurach and Schröder, *Strafrecht. Besonder Teil* (6 Auflage, 1981) 57. In this context, the designations 'criminal responsibility of the producer' and 'product criminal responsibility/liability' are usually taken as synonyms, the former highlighting the subject and the latter underlining the object of the action. Taking into account the search for semantic precision, due to the fact that *Haftung* is a designation closer to the terminology of civil law but is uncommon in criminal law (where *Verantwortlichkeit* is often used in order to express responsibility), alternative expressions have been used by the German doctrine in order to designate the phenomena related to the criminal responsibility for the product, such as *strafrechtliche Produktverantwortung* or, influenced by north-American literature, *Produktkriminalität*. About this discussion on terminology, see M Colussi, *Produzentenkriminalität und strafrechtliche Verantwortung* (Frankfurt am Main, Peter Lang, 2003) 14. *Produkthaftung* is pointed out as originating in civil law by J Vogel, 'Stand und Entwicklung der strafrechtlichen Produkthaftung', *Festschrift für Werner Lorenz* (München, Sellier European Law Publishers, 2001) 66.

facts.<sup>348</sup> However, it soon spread out as a doctrinal topic, mostly in those countries where the cases of responsibility for the product had a large visibility in the public, mainly due to its tragic dimension, such as those occurring in Germany, Spain or Italy.<sup>349</sup>

We thus believe a brief reference is due to some of these cases, also because they can undoubtedly qualify as landmark cases in this topic, in the sense that they were essential in order to define both the problematic basis of this subject and the general principles characterizing the ‘criminal product liability’.

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<sup>348</sup> In the literature dedicated to the criminal responsibility for the product, it is often noted that the problem was first identified in the *praxis* and only afterwards by the doctrine, resulting in a ‘jurisprudential creation’. See JM Paredes Castañón, T Rodríguez Montañés, *El Caso de la Colza: Responsabilidad Penal por Productos Adulterados o Defectuosos* (Valencia, Tirant lo Blanch, 1995) 27; E O Toledo y Ubieta, ‘La responsabilidad penal por el producto. Un estudio general’ (2005) 17 *Revista Peruana de Ciencias Penales* 465.

<sup>349</sup> Beyond the many doctrinal papers, several monographies have been dedicated to the product criminal liability in Germany, a country where this topic has been more intensely investigated. The first attempts to present a systematic and deep investigation to this topic within penal law, which thus assume particular prominence, have been done by L Kuhlen, *Fragen einer strafrechtlichen Produkthaftung* (Heidelberg, CF Müller Juristischer Verlag, 1989), and E Hilgendorf, *Strafrechtliche Produzentenhaftung in der “Risikogesellschaft”?* (Berlin, Dunker & Humblot, 1993). These fundamental works, however, had not exhausted the topic and were thus followed, in Germany, by several monographies dedicated to the analysis of problematic aspects of the criminal liability for defective or dangerous products. For example, W Hassemer, *Produktverantwortung im modernen Strafrecht* (Heidelberg, CF Müller Juristischer Verlag, 1994); B Bock, *Produktkriminalität und Unterlassen* (Aachen, Shaker Verlag, 1997); H Eichinger, *Die strafrechtliche Produkthaftung im deutschen in Vergleich zum angloamerikanischen Recht* (Frankfurt am Main, Peter Lang, 1997); M Schwartz, *Strafrechtliche Produkthaftung. Grundlagen, Grenzen und Alternativen* (Frankfurt am Main, Peter Lang, 1998); H Höhfeld, *Strafrechtliche Produktverantwortung und Zivilrecht* (Berlin, Springer, 1999); AAVV, *Produkthaftung: Straf-, haftungs- und versicherungsrechtliche Fragen* (Bonn, Dt. Anwaltverlag, 2001); A Schmucker, *Die “Dogmatik” einer strafrechtlichen Produktverantwortung* (Frankfurt am Main, Peter Lang, 2001); M Colussi, *Produzentenkriminalität und strafrechtliche Verantwortung* (Frankfurt am Main, Peter Lang, 2003); C Holtermann, *Neue Lösungsansätze zur strafrechtlichen Produkthaftung* (Baden-Baden, Nomos Verlagsgesellschaft, 2007); M Mayer, *Strafrechtliche Produktverantwortung bei Arzneimittelschäden* (Berlin, Springer, 2008). Also in Spain, following the Colza case, several works dedicated to the problematics of the product criminal liability have been published. The Spanish doctrine traditionally includes this topic within the criminal protection of consumers. Among the monographies dedicated to this topic, J M Paredes Castañón, T Rodríguez Montañés, *El Caso de la Colza: Responsabilidad Penal por Productos Adulterados o Defectuosos* (Valencia, Tirant lo Blanch, 1995); W Hassemer, F Muñoz Conde, *La Responsabilidad por el Producto en Derecho Penal* (Valencia, Tirant lo Blanch, 1995); S Mir Puig, D M Luzón Peña (eds), *Responsabilidad Penal de las Empresas y sus Órganos y Responsabilidad por el Producto* (Barcelona, JM Bosch, 1996); M E Íñigo Corroza, *La Responsabilidad Penal del Fabricante por Productos Defectuosos* (Barcelona, JM Bosch, 2001); J Boix Reig, A Bernardi (eds), *Responsabilidad Penal por Defectos en Productos Destinados a los Consumidores* (Madrid, Iustel, 2005). Finally, in Italy, a particularly important and profound work has been done by C Piergalini, *Danno da Prodotto e Responsabilità Penale. Profilli Dommatici e Politico-criminali* (Milan, Giuffrè, 2004). Other bibliographic references about the criminal responsibility for the product within Italian doctrine can be found in D Castronuovo, ‘Responsabilità da prodotto e struttura del fatto colposo’ [2005] *Rivista Italiana di Diritto e Procedura Penale* 305, footnote 6. In the Portuguese literature, S Aires de Sousa, *Responsabilidade Criminal pelo Produto. Contributo para a Protecção de Interesses do Consumidor* (Coimbra, Coimbra Editora, 2014).

## 2 The cases: a summary of the facts

### 2.1 The Contergan case<sup>350</sup>

In 1954 a West German company discovered a compound related to glutamic acid, which would be known as thalidomide. This product would arrive to the market in 1956 with the commercial name *Contergan*. Due to its pharmacological characteristics and the fact that it could be sold in West Germany without medical prescription, it became a huge commercial success. It was then considered as a pharmaceutical drug without secondary effects and it was thus used as a sedative by pregnant women, adequate to treat insomnia and anxiety, as well as to alleviate morning sickness.

In the late 1950s, reports of the birth of malformed children appear. These lesions were then related to the consumption of that pharmaceutical drug, leading to the withdrawal of the product from the market in 1961. The Public Prosecution finally accused nine leaders of the West German company Grünenthal with charges of production and commercialization of the drug without following the expected procedures.<sup>351</sup>

The judgment court was then confronted with the problem of the determination of a causal relation between thalidomide and the severe malformations of the new-borns, taking into account that this was a newly discovered drug. The court established the following general guidelines for solving the problem of the causal connection: in cases as this, it is not possible to judge beyond any doubt on causality, 'so, what really matters is not the objective certainty characteristic of the natural sciences, but the subjective certainty'.<sup>352</sup> This was a much criticised paragraph in the literature about this case, in particular from a criminal procedure point of view.<sup>353</sup>

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<sup>350</sup> The literature on this case is large, but we must bring forward, both by its importance and by its temporal proximity to the facts, the paper by A Kaufmann, 'Tatbestandsmäßigkeit und Verursachung im Contergan-Verfahren' [1971] *Juristenzeitung* 569, which comments the decision of the LG Aachen, *ibidem*, 507.

<sup>351</sup> Cf J Schmidt-Salzer, *Produkthaftung*, Band I: Strafrecht (Heidelberg, Verlag Recht und Wirtschaft GmbH, 1988) 25.

<sup>352</sup> LG Aachen de 18 December 1970 [1971] *Juristenzeitung* 510. A review of this decision can be found in A Kaufmann (no 4); A Torio Lopez, 'Cursos causales no verificables en Derecho Penal', in *Anuario de Derecho Penal y Ciencias Penales*, Tomo XXXVI (1983) 229. Also W Hassemer, F Muñoz Conde (no 3) 129, and T Rodríguez Montañés, 'Incidencia dogmática de la jurisprudencia del caso de la colza y otros casos en materia de productos defectuosos', in J Boix Terig and A Bernardi (eds), *Responsabilidad Penal por Defectos en Productos Destinados a los Consumidores* (Madrid, Iustel, 2005) 122.

<sup>353</sup> Cf SAires de Sousa (n 3) 20 and 248, with additional bibliographic references.

## 2.2 The *Lederspray* case<sup>354</sup>

This case is related with a *spray* used for leather. In late Autumn 1980, several consumers of this spray reported to the associated group of companies various complaints regarding health damage, in particular lung oedema, breathing problems, cough, nausea, shivering and fever. Some patients were hospitalized and, in the more severe cases, had to be treated in intensive care units, with life danger.<sup>355</sup>

The first complaints triggered internal investigations in the companies. No fabrication errors were found. It was not possible, neither for the chemists of the company responsible for the fabrication, neither to the experts consulted by the court, to determine the exact substance or combination of substances of the product able to cause the referred symptoms, according to the general rules. However, the BGH (*Bundesgerichtshof*) considered that the causality between the use of the spray and the harm to physical integrity was demonstrated, based both on the existence of a close temporal relation between the use of the product and the lesions and on the lack of existence of any other causal explanation.<sup>356</sup>

Considering that the company board of directors had the duty of removing from the market a product presenting a danger to the health, the BGH confirmed the condemnation of those leading the company due to the physical damage, both by the omission regarding the removal from the market of the products already distributed and by the continuation of the direct commercialization of the product following a meeting of the board of directors where this issue was discussed. The court thus considered that the fabricant not only failed due to the omission of removing the products already distributed, but that it also acted directly when deciding to keep these products in the market.<sup>357</sup>

Both the BGH and the first instance court (albeit with different justification) have condemned the directors of the companies (the producer and its subsidiaries) as co-authors (successive co-authors on the case of the subsidiary companies) of physical injuries by the omission of removing the product from the market and by intentional physical injuries, through action, relatively to the products placed in the market after the meeting of the board of directors.

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<sup>354</sup> The BGH decision, taken in 6 July 1990, is published in *Neue Zeitschrift für Strafrecht* 1990, Heft 12, 588-592. This case is also known in some literature as 'case Erdal'.

<sup>355</sup> BGH (no 9) 588.

<sup>356</sup> Cf I Puppe, *La Imputación Objetiva* (Granada, Editorial Comares, 2001) 16.

<sup>357</sup> BGH (no 9) 591.

### 2.3 The rapeseed oil case<sup>358</sup>

This is probably the most important case in Spain regarding the responsibility for the product, both due to the seriousness of its consequences and the number of affected people, as well as to the importance of the judgment issued by the Spanish Supreme Court on 23 April 1992.

In the main process associated to this case, the criminal responsibility of several individual agents (especially directors of companies dedicated to importing, transforming and distributing rapeseed oil) was analysed with respect to the deaths and to the offenses to the physical integrity suffered by a great number of consumers. The main question was the distribution, for human consumption, of rapeseed oil denaturized with aniline – a poisonous substance that makes the oil inadequate for human consumption. This oil was distributed by several companies, travelling vendors, and distributors. The vast majority of those distributors did not know that the oil was denaturized, but did know that the product they were selling did not correspond to the attributed class and quality; they were, therefore, charged with fraud.

The consequences of these facts were devastating. The denaturized rapeseed oil was distributed throughout the country, mostly by travelling vendors, causing at least 330 deaths and affecting about 15000 people.<sup>359</sup> However, it was not possible to find a scientific justification for these, so the concrete causal mechanism of the infirmity remained basically unknown.<sup>360</sup> The Spanish Supreme Court convicted the director of the company importing the rapeseed oil, two intermediate responsible who bought and sold it, the responsible for the refinement trying to eliminate the aniline contained in the oil, the director of a company of trade of oils for human consumption who, aware of the facts, decided to buy the oil directly to the importing company, making the refinement and the distribution to travelling vendors, of the crime of production and selling of edible products harmful to health, aggravated by the result of death (Articles 346 and 348 of the Spanish Penal Code) as well as by the crime of Fraud.<sup>361</sup>

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<sup>358</sup> Taking into account its complexity, this case was analysed for some years by Spanish courts. Several decisions were taken, particularly by the National High Court (*Audiencia Nacional*) in 20 May 1989 and by the Spanish Supreme Court in 23 April 1992, where those importing, treating and distributing the oil were convicted. Other important decisions were taken by the National High Court in 24 May 1996 and its consequent reversal by the Spanish Supreme Court in 26 September 1997, both referring the responsibility of some administrative authorities and workers concerning the authorization for using aniline in the process of denaturizing the oil. Further developments and bibliographic references in S Aires de Sousa (no 3) 31 and 35.

<sup>359</sup> Cf E Gimbernat Ordeig, 'Las exigencias dogmáticas fundamentales hasta ahora vigentes de una parte general son idóneas para satisfacer la actual situación de la criminalidad, de la medición de la pena y del sistema de sanciones? (Responsabilidad por el producto, accesoriadad administrativa del Derecho Penal y decisiones colegiadas)' (2004) IV *Revista de Ciencias Jurídicas ¿Más Derecho?* 151.

<sup>360</sup> Cf T Rodríguez Montañés, 'Problemas de responsabilidad penal por comercialización de productos adulterados: algunas observaciones acerca del "caso de la colza"', in *Responsabilidad Penal de las Empresas y sus Órganos y Responsabilidad por el Producto* (Barcelona, Jose Maria Bosch, 1996) 265.

<sup>361</sup> This decision received an enormous attention from the *media*. As an example we can point out the highlight given to this decision by the journal *ABC* on 21 May 1989: < <http://hemeroteca.abcdesevilla.es/nav/Navigate.exe/hemeroteca/sevilla/abc.sevilla/1989/05/21/039.html> > (last\_access on 20 February 2017).

## 2.4 The case of the 'flour tablets'

Another famous case related with the commercialization of defective products took place in Brazil and has become known as the case of the 'flour tablets'.<sup>362</sup>

In 1998, a Brazilian pharmaceutical company placed in the market a set of boxes containing a defective anticonception drug (*Microvlar*), lacking any active principle. Consequently, an estimate of about 200 women got pregnant, but only a small number could prove in court the use of this defective pharmaceutical drug, since many women did not keep the box, and thus could not prove that they had used the defective product. According to the company, the pills without any active principle had been fabricated in order to test a packing machine. The company had no explanation for the fact that these pills finally ended in the market.

This case led to the civil conviction of the pharmaceutical company, confirmed in late 2007 by the Brazilian Superior Court of Justice.

In this case, the criminal responsibility was not established. However, the law on the falsification of pharmaceutical drugs was later changed so that the falsification, corruption, adulteration or changing of product meant for therapeutic or medical purposes is nowadays covered by the law of hideous crimes (Law No 8.072 of 25 July 1990, Article 1.<sup>o</sup> VII-B).

## 3 The law: a summary of legal problems

The particular problems associated to the criminal responsibility for defective products imply the general question of knowing whether the classical legal-criminal categories are still able to provide an adequate answer. When trying to find a solution to these questions, the court was forced to introduce some flexibility into some classical structures and categories of criminal law theory, such as causality, authorship or omission. There are, however, many other legal and doctrinal questions. We will now briefly address some of them, pointing out the most debated issues.

### 3.1 The (protected) legal interests

The exercise of the *ius puniendi* finds its legitimacy in the role, recognized to criminal law, concerning the subsidiary protection of legal interests. This dogmatic element lies at their core of both the systematics of punishment and the foundations of criminal offences. The identification of a legal interest, protected by the incrimination of particular behaviours, represents a *prius*, a previous condition, for the legitimation of the intervention of the state punishment, which entails some fundamental rights restrictions. This is the reason for recognising a critical task, but also a dogmatic task, to the protected legal interest as parameter of the crime: it becomes the substrate of an infraction, giving it the necessary substantive

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<sup>362</sup> There are several (civil) decisions concerning this case from the Brazilian Superior Court of Justice; most of them follow the Appeal No 866.636 – SP < [http://www.stj.jus.br/SCON/jurisprudencia/toc.jsp?i=1&b=ACOR&livre=\(\(%27RESP%27.clas.+e+@num=%27866636%27\)+ou+\(%27RESP%27+adj+%27866636%27.suce.\)\)&th esaurus=JURIDICO](http://www.stj.jus.br/SCON/jurisprudencia/toc.jsp?i=1&b=ACOR&livre=((%27RESP%27.clas.+e+@num=%27866636%27)+ou+(%27RESP%27+adj+%27866636%27.suce.))&th esaurus=JURIDICO) >.



material and determining its design (eg, as a danger or as a harm infraction). Finally, in the legal systems having a comprehensive criminal law code, such as the Portuguese, Spanish or German system, the legal interest plays an interpretative and systematic task, too, by determining the organization of the incriminations in the Special Part of the Criminal Code: crimes against life; against physical integrity; against freedom, etc.<sup>363</sup> These tasks represent an additional contribution of this principle for a criminal law system, understood as fundamental instrument for the human co-existence in society.<sup>364</sup>

A major problem posed by the criminal product liability is related to the recognition of new collective legal interests and its ability to fulfil those tasks in the legitimacy of the incrimination. Beyond the protection of 'classic' legal interests, such as life and of physical integrity, other collective interests have emerged, such as public health, security or genuinity and quality of consumption goods.

In fact, in continental criminal system such as the Portuguese, the Spanish or the German one, public health has been mainly criminally protected in an 'indirect' way, ie through the protection of other individual interests such as life or physical integrity. However, the difficulties posed by this model in some concrete cases have triggered the discussion about the need of considering public health as an autonomous legal interest, distinct from individual legal interests such as life and physical integrity and able to justify the criminalization of other conducts. This problem was particularly addressed in the flour pills case, where no injuries to individual legal interests occurred.

This means that the protection, through criminal law, of collective juridical goods, specially challenged by the selling and commercialization of defective products, has been highly discussed among criminal law experts.<sup>365</sup>

### 3.2 Causality

Secondly, a brief reference is due to the problems raised by the responsibility of the product with respect to the causal nexus required by some of the incriminations correlated to the fabrication and use of unsafe defective products (as regards, for example, physical injuries). When considered under the perspective of types of offences that imply a specific result – such as those protecting life and physical integrity – the cases associated to responsibility for the product present problems concerning to the objective imputation (*objektive Zurechnung*) of the result. This was a fundamental problem addressed in some of the cases exposed, such as the 'Contergan' or the 'Lederspray' cases. These difficulties in the verification of the concrete causal link leading to the violation of protected legal interests, as well as to the seriousness of the damages, led some authors to propose more flexible legal solutions, such as the criminal

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<sup>363</sup> About the tasks performed by the category of legal interest, see G Fiandaca, 'Il "bene giuridico" come problema teorico e come criterio di politica criminale' [1982] *Rivista Italiana di Diritto e Procedura Penale* 43.

<sup>364</sup> Further developments in S Aires de Sousa, *Os Crimes Fiscais: Análise Dogmática e Reflexão sobre a Legitimidade do Discurso Criminalizador* (Coimbra, Coimbra Editora, 2006) 171.

<sup>365</sup> See, in the portuguese literature, J de Figueiredo Dias, *Direito Penal* (Coimbra, Coimbra Editora, 2007) 133.

punishment of the production and commerce of dangerous defective products *per se*.<sup>366</sup> In this case, the incrimination would be based mostly on the dangerous nature of the conduct, not requiring the proof of the result and its causal connection with the conduct.

The problems arise essentially with causal processes that cannot be explained or demonstrated by empirical natural laws. It thus becomes difficult to establish scientifically some of these causal relations. Some authors, in reference to the *Lederspray* case, argue that the BGH substituted the theory of the 'adequate causality' based on laws of experience with a 'black box' model or a 'theory of plausible causality'. It is known what happened before the 'black box', as well as what came after, but it is not possible to determine what happened 'inside the box', hence its content remains in darkness. In this sense, it is known that the existing product has a sufficient relation with specific damage and that it is simultaneously possible to easily exclude other factors different from the product; however, it is not possible to determine, within the substances contained in the product, which one is causally decisive.<sup>367</sup>

Other problems exist with respect to the criminal relevance of the conducts related to the fabrication and commerce of dangerous or defective products and its integration in the criminal (legal) types. Even when the causal relation can be demonstrated according to the strictest classical criteria, it is not always possible to establish the objective imputation of the damage to the action. This occurs particularly, although not exclusively, within the domain of pharmaceutical drugs.

In this domain, the permitted risk plays a crucial role as an element of correction of the objective imputation. It can thus happen that the imputation of damages to life or to physical integrity due to a pharmaceutical drug should be excluded in the case where the damage is connected to lawful risks tolerated by society. That is, in principle, the case of secondary effects previously known and authorized by the authorities with competence of inspection and control. This is the domain of conflict of juridical interests, often concerned with the protection of the same goods: on one hand, the protection of the criminal juridical goods life and physical integrity and, on the other hand, the protection of life and physical integrity through the evident advantages brought by the use of the drugs. The concept of *allowed risk* thus becomes essential in order to establish what can be considered out of criminal law. In this context, it is essential to evaluate whether all procedures and rules have been addressed by the manufacturer in order to determine the limits of allowed risk. The violation of those duties is hardly compatible with actions within allowed risk.

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<sup>366</sup> This is particularly developed by J Vogel, 'La responsabilidad penal por el producto en Alemania: situación actual y perspectivas de futuro' (2001) 8 *Revista Penal* 102.

<sup>367</sup> W Hassemer, F Muñoz Conde (no 3) 133.

### 3.3 The guarantee duty of the producer (criminal liability founded in omission)

The duties associated to the producer are also discussed within the responsibility for the product. In particular, it is questioned whether they should be considered in a wide or a narrow perspective.

With respect to the products placed in the market, the question arises whether it exists a duty of (almost permanent) control, taking into account the safety in commerce and based upon a kind of dominion of the company itself (and of the goods there produced as potentially dangerous) or, in a narrower perspective, whether that duty exists only in the cases where the potential danger of the product is objectively foreseen when it is placed in the market, in which cases the removal of the product is due if the danger is confirmed. When this duty is not fulfilled, the criminal liability (by omission) of the manufacturer can be established with respect to the damage arising from the commercialization of the product. We are thus faced with the problem of determining in which terms the existence of a duty by the manufacturer, able to establish an omission crime, can be formulated.<sup>368</sup>

## 4 Conclusion

A final thought in conclusion: the responsibility for the product triggered new reflexions and new constructions which, in many ways and according to some authors, led to an enlargement of criminal law.

Various legal systems have reacted differently to the problem of responsibility for the product: some have created a significant new number of crimes in the Penal Code (Spain), others have created specific laws outside the Penal Code (Germany), other have not reacted specifically to this problem (Portugal). I believe it is necessary that the legislator pays specific attention to the particular characteristics of the production of dangerous goods. I agree with those authors who, like Vogel, consider that this specific problem requires a specific answer, demanding a specific intervention of the legislator. This does not require, however, a significant reform of the whole criminal law and, in my opinion, the creation of a single crime related to these cases of production of goods would be sufficient.<sup>369</sup> The advice of Don Quijote to Sancho Panza seems to maintain its value also in this context:

‘No hagas muchas pragmáticas, y si las hicieres, procura que sean buenas, y sobre todo que se guarden y cumplan, que las pragmáticas que no se guardan lo mismo es que si no lo fuesen, antes dan a entender que el príncipe que tuvo discreción y autoridad para hacerlas no tuvo valor para hacer que se guardasen; y las leyes que atemorizan y no se

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<sup>368</sup> About the doctrinal discussion with respect to the duty of the company see, among others, B Schünemann, *Unternehmenskriminalität und Strafrecht* (Köln, Carl Heymanns Verlag, 1979) 77.

<sup>369</sup> This legal proposal was accomplish and materialize in its legal elements in our study about criminal product liability *A Responsabilidade Criminal pelo Produto* (no 3) 640.

ejecutan, vienen a ser como la viga, rey de las ranas, que al principio las espantó, y con el tiempo la menospreciaron y se subieron sobre ella'.<sup>370</sup>

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<sup>370</sup> See the *Carta de Don Quijote de la Mancha a Sancho Panza, Gobernador de la Ínsula Barataria* (Letter of Don Quixote of la Mancha to Sancho Panza, governor of the Island of Barataria): 'Publish but few edicts, and see that they are good ones, and, above all, that they are well observed; for edicts that are not observed are as if they had not been made, and serve only to show that the prince, though he had wisdom and authority sufficient to make them, had not the courage to see them enforced; and laws that intimidate at their publication, and are not executed, become like the log given for a king to the frogs, which terrified them at first; but, in time, they contemned him, and leaped in derision upon his back'. See *Adventures of Don Quixote de la Mancha*. Translated from the Spanish of Miguel de Cervantes Saavedra by Motteux, 1800 <<http://www.archive.org/details/adventuresofdo00cerv>>.

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## **NATIONAL REPORTS**



# A BELGIAN PERSPECTIVE TO THE TACKLING OF FOOD CRIME

*By Ligeia Quackelbeen & Vanessa Reyniers \**

## 1 Introduction

In Belgium, food safety is a specialized domain of criminal law in which administrative sanctioning mechanisms are increasingly gaining importance. Contrary to the domain of social penal law in which minor infringements are exclusively dealt with at an administrative level, infringements on food safety regulations are not depenalized but remain under the general system of penal law (ie, every infringement can potentially be sanctioned criminally). To ensure the safety of the food chain, the Belgian legislator has taken a specialist approach whereby it grants far-reaching powers to administrative authorities who have the necessary expertise to control the entirety of the food chain while the Prosecutor keeps the prerogative to move forward with criminal procedures to tackle food crime.

Given that neither the Prosecutor's office nor the police have the necessary expertise to address violations to food regulations adequately, the legislator deemed it necessary to establish other entities. In 2000, the Federal Agency for the Safety of the Food Chain (FASFC), a specialized governmental agency falling under the competence of the Ministry of Public Health,<sup>371</sup> was established to ensure the safety of the food chain and protect the consumers' health by ensuring the quality of food.<sup>372</sup> The primary tasks of the FASFC are: 'control, analyses and expertise of food and feed and their primary compounds, inspection of and expertise in the production, transformation, conservation, transport, trade, import and export of food and feed and their primary compounds, granting approval and authorization to exercise certain activities in the food chain, integration and elaboration of tracing and identification systems of foodstuffs and

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<sup>371</sup> Since the federal elections in 2004, the FASFC falls under the responsibility of the Minister of Agriculture.

<sup>372</sup> Art 4 §1 of the Law of 4 February 2000 on the establishment of the Federal Agency for Food Safety, *B.S.* 18 February 2000 (hereinafter FASFC Law of 4 February 2000).

their primary compounds in the food chain incl their inspection and communication towards the different sectors involved and the consumers'.<sup>373</sup>

Furthermore, the Belgian legislation has adopted 'the farm to fork approach' whereby the food chain is protected entirely, from production to consumption. Although Belgian legislation does not mention explicitly the farm to fork approach, it foresees a system whereby similar to the European vision, it's primary goal is to cover the safety of the food chain in its entirety.<sup>374</sup> Largely influenced by the international Commission of the Codex Alimentarius,<sup>375</sup> Belgian food laws adopts an integrated approach by controlling the entire food chain from natural resources to end consumer,<sup>376</sup> and has adopted the Commissions' very influential Hazard Analysis Critical Control Points System (HACCP) which have enabled companies in the Belgian food industry to reduce risk for contamination.<sup>377</sup>

From the perspective of creating an European internal market,<sup>378</sup> it was found that the free movement of safe and wholesome food is impeded by the differences between the food laws of different member states. The EU's philosophy is therefore to approximate the concepts, principles and procedures of the national food laws in order to effectively safeguard the consumers' health. As such, the EU has been decisive for food security at the national level.<sup>379</sup>

The Belgian system largely follows the European and international developments in using an integrated approach with a large focus on the risks analysis and a determining role for administrative authorities. Yet some characteristic features stand out and the Belgian system: the dual criminal/administrative system, the non-existence of an endangerment crime countered by the broad interpretation of harm and a flexible causality theory.

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<sup>373</sup> JP Maudoux and others, 'Food Safety surveillance through a risk based control programme: Approach employed by the Belgian Federal Agency for the Safety of the Food Chain' (2006) 28(4) *Veterinary Quarterly*, 140.

<sup>374</sup> Article 4 § 3, 7\* of the FASFC Law of 4 February 2000 (n 2).

<sup>375</sup> FAO/WHO Codex Alimentarius Commission, *Codex Alimentarius*, see for further information: <http://www.fao.org/fao-who-codexalimentarius/en/>

<sup>376</sup> Parl. St. Kamer, 1999 -2000, *Doc. 50*, 0232/001, 3-5.

<sup>377</sup> B Horion, *Toepassing HACCP principes in levensmiddelenbedrijven*, *Handboek rond de toepassing van de regelgeving* (Brussel, ed 2, 2005) <http://www.health.belgium.be/nl/toepassing-haccp-principes-levens-middelenbedrijven> accessed on 23 March 2017.

<sup>378</sup> See CJEU, C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 00837, para 9; see also: CJEU, C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649.

<sup>379</sup> European Commission's White Paper on Food Safety of 12 January 2000: This White Paper sets out 80 measures in ensuring a comprehensive and integrated approach to food safety.

## 2 A general overview of the Belgian approach to food regulation

### 2.1 Defining food and establishing the scope of food laws

Belgian law adopts the definition of food and food security as provided in the General Food Regulation. Food product is defined as each product intended for human consumption, including stimulants, salt or spices; (...).<sup>380</sup> Food means 'any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.'<sup>381</sup> It includes drink, chewing gum and any substance, including water, intentionally incorporated into food during its manufacture, preparation or treatment.<sup>382</sup> It shall not include: feed, live animals unless they are prepared for placing on the market for human consumption, plants prior to harvesting, medicinal products,<sup>383</sup> cosmetics,<sup>384</sup> tobacco and tobacco products,<sup>385</sup> narcotic or psychotropic substances,<sup>386</sup> residues and contaminants.

The preamble of the General Food Regulation argues that in 'order to take a sufficiently comprehensive and integrated approach to food safety, there should be a broad definition of food law covering a wide range of provisions with a direct or indirect effect on the safety of food and feed, incl provisions on materials and articles in contact with food, animal feed and other agricultural inputs at the level of primary production'. The Belgian law conforms with this idea. Eg, although food packaging is not included in the definition of food, Belgian food laws, in conformity with European legislation, regulated the topic. Tobacco and cosmetics are explicitly excluded from the food laws but alcohol falls under the definition. Pursuant to

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<sup>380</sup> Law of 24th of January 1977 on the protection of the health of consumers with regard to food products and other products, *B.S.* 8 April 1977 (hereinafter referred to as the General Belgian Food Law).

<sup>381</sup> Art 9 of the Royal Decree of 14 November 2003 concerning self-checking, traceability and notification in the food chain, *B.S.* 12 December 2003. See also Art 2 of the Regulation No 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedure in matters of food safety [2002] OJ L 31/1. (hereinafter referred to as the General Food Regulation).

<sup>382</sup> As defined in art 6 of the Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption [1998] OJ L 330/32.

<sup>383</sup> See Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products [1965] OJ L 22/369.

<sup>384</sup> See Directive of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products [1976] OJ L262/169.

<sup>385</sup> See Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products [1989] OJ L 359/141. Within the Office of the Public Prosecutor, one magistrate is appointed to deal with Food & Pharma Crime, demonstrating that the topic of tobacco and cosmetics is closely linked to the expertise on food safety.

<sup>386</sup> Within the meaning of the United Nations Single Convention on Narcotic Drugs, 1961, and the United Nations Convention on Psychotropic Substances, 1971.

European legislation, novel foods and novel food ingredients are subjected to extensive analysis as to their safety for the food chain.<sup>387</sup>

### 2.1.1 Medicines

The distinction between medicinal products and food additives is not always easily made. The European Court of Justice (CJEU) has specified that all characteristics of a product should be taken into account but that it remains the responsibility of the member states to establish whether the products should be marked as medicines or food.<sup>388</sup> As a result, this specific field lacks harmonization and what is labelled as food in one member state can be labelled as medicine in another member state.

Under the Belgian legislation, a broad scope of products fall under the definition of ‘medicine’ and include even substances which *can* be used for human treatment. This means that, apart from products which are universally considered as ‘medicines’, also products that have no therapeutic effect, but which are merely presented as a product that can cure a medical condition, are legally considered to be medicines.<sup>389</sup> Eg, a food supplement that has no therapeutic characteristics, but labels that it can ‘cure bacterial pulmonary infections’ or ‘can cure cancer’, is considered as medicine.<sup>390</sup>

### 2.1.2 Food additives

Food additive refers to any substance not consumed as a food in itself and not used as a characteristic ingredient of food, whether or not it has nutritive value, the intentional addition of which to food for a technological purpose in the manufacture, processing, preparation, treatment, packaging, transport or storage of such food results, or may be reasonably expected to result, in it or its by-products becoming directly or indirectly a component of such foods. As a result, these additives are not entirely subject to the food regulations but only to the regulations on additives. Similar to the labelling of food and medicine, there is no full European

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<sup>387</sup> EU Regulation on Novel Foods and Food Ingredients as implemented by Royal Decree of 11 October 1997 on new food and food ingredients; See also joined Cases C-211/03 C-299/03 and C-316/03 to C-318/03 *HLH Warenvertriebs GmbH and Orthica BV v Bundesrepublik Deutschland* [2005] ECR I-05141; CJEU, C-383/07 *M-K Europa GmbH & Co. KG v Stadt Regensburg* [2009] ECR I-00115.

<sup>388</sup> See joined CJEU Cases C-211/03 C-299/03 and C-316/03 to C-318/03 *HLH Warenvertriebs GmbH and Orthica BV v Bundesrepublik Deutschland* [2005] ECR I-05141.

<sup>389</sup> Art 1 of the Law of 25 March 1964 concerning medicines, B.S. 17 April 1964: ‘each single or composed substance which can be used for human treatment, or (...) for either recovering, improving or modifying physiological functions by aiming to reach a pharmacological, immunological or metabolic effect, or in order to establish a medical diagnosis.’ Also veterinary medicine are included under its scope.

<sup>390</sup> On the basis of art 38 of the Royal Decree nr. 78 of 10 November 1967 regarding the medicinal practice, B.S. 14 November 1967 and art 3 of the Law of 28 August 1991 regarding the veterinary medicine, B.S. 15 October 1991, the Court of Cassation found (Belgian Court of Cassation, 25 September 1973) that anyone who sells a food product that has no therapeutic effect, or who uses such a product as a part of a medical treatment, but which is merely depicted as such, can be convicted for illegally practicing medicine respectively veterinary medicine if he or she doesn’t hold a medical degree.

harmonization as a result of which each member state should interpret what is food and what is merely an additives consistent with the European definition.<sup>391</sup>

### 2.1.3 Genetically modified food (GMO food)

Food stemming from GMO crops is labelled as food. Its modification does not alter its categorization. Pursuant Regulation No 1829/2003 genetic modification does bring about certain obligations and has consequences as to the legal regime: additional procedures for the authorisation, supervision and labelling and control mechanisms are set in place.<sup>392</sup> As such, GMO food and feed undergoes a safety assessment before being placed on the EU market. The regulation specifies that it covers food and feed produced 'from' a GMO but not food and feed 'with' a GMO. The determining criterion is whether or not material derived from the genetically modified source material is present in the food or in the feed. Processing aids which are only used during the food or feed production process are not covered by the definition of food or feed and, therefore, are not included in the scope of this Regulation. Nor are food and feed which are manufactured with the help of a genetically modified processing aid included in the scope of this Regulation. Thus, products obtained from animals fed with genetically modified feed or treated with genetically modified medicinal products will be subject neither to the authorisation requirements nor to the labelling requirements referred to in this Regulation.<sup>393</sup>

Regarding GMO's and GMO food, one has to take note of the fact that, in Belgium, the environmental care, and controlling environmental hazards, is a regional competence. Therefore, the FASFC is only competent regarding GMO products if such affect food safety. The federal authority has no right to intervene in the way the regions exercise their competences, even if the regions would harm the federal interests.<sup>394</sup> Currently, no GMO crops are cultivated in Belgium. As a result of the division of powers between the different regions and the different

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<sup>391</sup> CJEU C-333/08 *European Commission v. France* [2010] ECR I-00757.

<sup>392</sup> Regulation No 1830/2003 of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC [2003] OJ L 268/24.

<sup>393</sup> CJEU, C-442/09 *Karl Heinz Bablok and Others v Freistaat Bayern* [2011] ECR I-07419: honey that contained genetically modified pollen that originated from the honey bees feeding on genetically modified maize, was qualified as 'food (...) containing ingredients produced from [genetically modified organisms]' within the meaning of Article 3(1)(c) of Regulation No 1829/2003.' The Court specified that this classification is irrespective of whether contamination by the substance in question was intentional or adventitious.

<sup>394</sup> If the regions would violate the constitutional principles dividing the competences between the federal and regional level, the Federal State could have a regional legislation declared illegal by the Constitutional Court. However, the Constitutional Court can only judge if the constitutional principles have been respected, and can't check if a regional legislation harms the federacy. (contrary to the German constitutional context, where the principle "*Bundesrecht bricht Landesrecht*" (Federal law breaches regional law) applies.

approach that has been taken in those regions,<sup>395</sup> it can be expected that in the near future the policy lines will drift more apart.<sup>396</sup>

## 2.2 The general duty to ensure food safety

### 2.2.1 Procedure in short

The FASFC is tasked with detecting infringements on the food laws and as such has taken over part of the competence traditionally afforded to enforcement authorities. The inspectors of the FASFC are competent for the detection and investigation of all such infringements (eg use of growth promoting substances in meat production) but do not have the same competences as the police.<sup>397</sup> As such, they have the right to enter and investigate any location with the exception of premises exclusively used as a private residence.<sup>398</sup> The National Detection Unit of the FASFC deals with matters of fraud which involve a potential health risk to consumers. Furthermore, all inspectors of the FASFC have the competence to impose administrative measures, such as a temporary closure, seizure of products, etc.

When a warrant is drawn up, it is sent to a civil servant within the FASFC's legal department responsible for proposing an administrative fine. Over the last three years, civil servants received approximately between 6,000 and 7,000 warrants. Fines vary between € 200 to € 40,000.<sup>399</sup> Administrative fines proposed by the FASFC may never be higher than the amount that can be sentenced by the criminal judge, even though the maximum amount for the administrative fine is higher than the maximum amount in the specific penal law for the same infringement.<sup>400</sup> When the responsible civil servant takes notice of an infringement, he or she shall send a copy of the warrant to the Public Prosecutor. This is merely to inform the Prosecutor of the occurrence of an infringement. It nevertheless remains the prerogative of the Public Prosecutor to move forward and prosecute a specific violation of food laws. These food inspectors do not have an influence on the instigation of criminal proceedings. On the contrary, once a fine is paid the road to criminal proceedings is blocked (*ne bis in idem*). In coherence with the case law of the European Court of Human Rights (ECtHR), the Court of Cassation examines the nature of the violation as well as whether the sanction has a repressive character by analysing both the nature and severity of the sanction. As a result the Court of Cassation applies

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<sup>395</sup> The Walloon and Brussels-Capital Region have clearly discouraged the cultivation of crops, the Flemish policy is more open.

<sup>396</sup> For a detailed assessment of the Belgian GMO Policy see: L Lavrysens, F Maes and P van der Meer, Report on Section II.D 'Policies and regulations in Belgium with regard to genetic technology and food security' The 19<sup>th</sup> International Congress of Comparative Law (July 20-27<sup>th</sup> 2014 Vienna Austria).

<sup>397</sup> The inspectors of the FASFC do not hold the title of 'officer of judicial police'.

<sup>398</sup> Art 3, § 2 of the Royal Decree of 22 February 2001 organizing the controls carried out by the Federal Agency for the Safety of the Food Chain, B.S. 28 February 2001 (confirmed in the Law of 19 July 2001).

<sup>399</sup> Art 7, § 2, 2\* and 4\* of the Royal Decree of 22 February 2001 on FASFC controls (n 29).

<sup>400</sup> Eg Exercising an activity in the food chain can be fined with a maximum amount of € 1.800 (cfr. art 3bis, § 2 of the Royal Decree of 22 February 2001). Although administrative fines may be proposed up to the amount of € 30.000, the administrative fine for this infringement may not exceed € 1.800.



the *ne bis in idem* principle to administrative sanctions with a paramount repressive character.<sup>401</sup> The repressive character is deduced from the height of the fine given that it is clearly intended to go beyond compensating damages but more directed at deterring similar conduct.<sup>402</sup>

In 90 % of the cases an administrative fine is proposed. After receiving the warrant, the civil servant shall invite the transgressor to pay the administrative fine. The transgressor shall have the opportunity to appeal this decision.<sup>403</sup> Once the fine is paid, the public prosecutor will no longer be able to advance the case.<sup>404</sup>

	2012	2013	2014	2015
<b>Total number of warrants</b>	5012	5228	6062	6331
<b>Definitive proposal of an administrative fine</b>	4303	4227	4571	5076
<b>Withdrawal of administrative fine due to defence of the perpetrator or choice for an alternative<sup>405</sup></b>	410	490	561	455
<b>Warrants sent to the public prosecutor without a proposal of an administrative fine</b>	299	511	930	800

Despite the encroaching powers of these specialized administrative authorities, the Public Prosecutor has also made an effort to centralize and build up expertise in the matter by establishing points of contact for food and pharma crime in each district. Furthermore, to build a central point of expertise, one of the districts is appointed as a national point of contact.<sup>406</sup> In practice, the majority of cases is dealt with at the administrative level and the Prosecutor only in a small percentage of cases exercises its prerogative to prosecute a case. The system of administrative fines has proven effective given the fact that 60 % of fines are paid at once. Another 10 % is paid after intervention of the police.

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<sup>401</sup> Judgment of the Belgian Constitutional Court of 19 December 2013.

<sup>402</sup> Cass. 6 may 2002, 1216, conclusions of the attorney-general Th. WERQU.

<sup>403</sup> An appeal is introduced in 10 % of the cases.

<sup>404</sup> Art 7 § 2 of the Royal Decree of 22 February 2001 on FASFC controls (n 29).

<sup>405</sup> Year after year, we have to conclude that most warrants are made out to perpetrators active in the distribution sector. In order to improve knowledge of the food safety legislation in this sector, the FASFC decided to grant the perpetrators in this sector the possibility to follow a course on hygiene or to validate their self-checking system. In exchange, the perpetrator receives a once-only withdrawal of the fine.

<sup>406</sup> The points of contact with the Prosecutors' office are called 'Referentiemagistraten'. For food and pharma crime, the District of Ghent is the national point of contact.

	2012	2013	2014	2015
<b>Warrants with a definitive proposal of an administrative fine</b>	4303	4227	4571	5076
<b>Paid administrative fines<sup>407</sup></b>	2603 60,5 %	2542 60,2 %	2602 56,9%	2598 51,2 %

Every trimester a list of paid fines is sent to each district allowing the public prosecutor to close open cases. If a fine is paid after the warrant is sent to the public prosecutor for non-payment due to the intervention of the police, an individual letter is sent to the public prosecutor concerned so no further prosecution is initiated. In case of non-payment or when an administrative fine is deemed unfit,<sup>408</sup> eg because of multirecidivism,<sup>409</sup> the original warrant is sent to the public prosecutor. It is the public prosecutor who decides on the case. It remains quite unclear on the basis of which objective criteria the Public Prosecutor would decide to pursue prosecution. There are no legal criteria on the basis of which a distinction is made between the administrative or the criminal track. Since the Franchimont Law of 12 March 1998, it is however required that the Prosecutor motivates why not to proceed with a case. In the Prosecutorial Circular COL 12/98 it is specified that motivation to discontinue a case can be technical (eg, insufficient evidence), can be for reasons of expedience (eg, little damage or minor influence on the community) or for other reasons.<sup>410</sup> Under the latter category, the Prosecutor can specify that an administrative fine was deemed more fit than moving forward with prosecution. Unfortunately only statistics as to the year 2003 and 2004 were made available and these were limited to the illegal meat production and distribution.

Nevertheless, it is known that only a small amount of cases effectively result in a criminal judgment being handed down:

	2012	2013	2014	2015
<b>Total number of warrants sent to the public prosecutor</b>	2744	2978	3665	3125
<b>Administrative fines paid after intervention of the police</b>	400	434	405	316
<b>Case dismissal</b>	988	1050	1293	718
<b>Settlement</b>	40	67	116	91
<b>Judgment</b>	64	88	52	26

<sup>407</sup> These statistics are in constant evolution as payments keep coming in on a daily basis. The given percentages are not definitive.

<sup>408</sup> Art 7 § 1, 4<sup>th</sup> alinea of the Royal Decree of 22 February 2001 on FASFC controls (n 29).

<sup>409</sup> 4<sup>th</sup> warrant made up to the same perpetrator in 5 years.

<sup>410</sup> Directive of the College van of Attorney-Generals COL 1/1998 of 1<sup>st</sup> October 1998 on the Law of 12 March 1998 concerning the reform of the administration of criminal justice during a criminal investigation.

On top of the publicly available documentation on the topic, a confidential Prosecutorial Circular COL 15/2003 sets out in greater detail the criminal policy as to food crime. Although the Circular was not made public, it was specified that the Prosecutor only executes its prerogative to prosecute in case of serious violations, involvement of organized crime, a prior criminal record or other ongoing investigations identifying the same suspects.<sup>411</sup> In order to make a more clear-cut understanding of what should be dealt with administratively and what requires prosecution, the Belgian policy could benefit from setting out transparent and clear criteria to differentiate between the more severe food crimes and minor violations of food laws.

Apart from the administrative fines, the FASFC can take other administrative measures to ensure the safety of the food chain such as:

	2010	2011	2012	2013	2014
<b>Warnings</b>	13.431	14.892	13.952	13.512	15.557
<b>Definitive seizure of products</b>	936	1.477	1.601	1.443	1.761
<b>Suspension or revoking of an authorization<sup>412</sup></b>	11	13	14	16	26
<b>Temporary closure<sup>413</sup></b>	154	172	123	115	79

The FASFC and the Prosecutor's office are the two main actors dealing with food crime. However, in case of fraud the Federal Ministry of Economics (FME) also has enforcement competencies and thus also has the competence to sanction. Considering that the competences of the FASFC and FME overlap, a cooperation agreement was first established in 2007 and renewed in 2016 enabling these two authorities to avoid needless inspections, to attune their competences with regard to their overlapping competency as to the labelling, advertising and the composition of food products and to stimulate cooperation.<sup>414</sup>

Generally, the competences are divided so that the FME is competent to execute controls as to the composition, naming and economic fraud of food products. The FASFC is responsible for

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<sup>411</sup> Directive of the College van of Attorney-Generals COL 15/2003 of 1st December 2003 on making the FASFC operational.

<sup>412</sup> Before one can exercise an activity in the food chain, one has to apply for an authorization as specified in the Royal Decree of 16 January 2006 with regard to the specific rules concerning authorizations and prior registrations delivered by the Federal Agency for the Safety of the Food Chain.

<sup>413</sup> Based on art 54 of Regulation (EC) No 882/2004 of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2013] OJ L165/1.

<sup>414</sup> To enhance cooperation and contribute to expertise in the field, multiple working groups were established: The National Inspection Unit (NOE) within the FASFC is president of the Multidisciplinary Unit Investigating Fraud in the Food Chain (MCVV). In these meetings, concrete cases are discussed and decisions are made on whether to take joint action in the fight against food fraud. The NOE is also a member of the Inter ministerial Economical Commission (ICCV), the Multidisciplinary National Hormone Unit (MDHC) and the Interdepartmental Coordination Unit for Inspection of the Food Chain (ICVV). The meetings held between all concerned inspection departments ensure that urgent information is rapidly shared between all parties concerned

the controls with public health or food safety aspects. For each aspect, a pilot service is appointed that will execute the controls and deal with the further administrative procedure.<sup>415</sup> Should an infringement be detected by the agency not responsible for the further procedure, the file shall be handed to the competent authority. A Coordinating Unit between these two departments sees to it that this exchange of information and cooperation occurs efficiently. Finally, both departments can carry out audits on each other.

The prerogative of the Prosecutor to decide upon the instigation of criminal proceedings still remains. Although concrete cases are discussed between the administrative and prosecutorial authorities and the NOE brings grave cases to the attention of the Prosecutor and as such influences to a certain extent the instigation of criminal proceedings, the administrative authorities active involvement is not necessary for the prosecutor to engage in criminal proceedings. Also, consumer organizations cannot participate in the criminal proceedings, but do have a role of advice in the policy of the FASFC, through its advisory committee.<sup>416</sup> Although, the Law of 28 March 2014 put in place a limited class action through consumer originations, this enactment has not resulted in the consumer organisations to have the ability to participate in criminal proceedings. The proceedings are governed by civil law and consequently this limited class action cannot lead to punitive damages.

### 2.2.2 *Substantive key aspects*

Infringements to food laws are enforced both by means of administrative and criminal sanctions that can be found in specialist legislation as well as in the general Penal Code. The Belgian Penal System has three types of offences categorized on the basis of the penalty.<sup>417</sup> Most of the offences discussed in this report fall within the category of misdemeanours. Special Criminal Laws further stipulate specific offences related to meat distribution and inspection,<sup>418</sup> fish, poultry and venison distribution,<sup>419</sup> offences against the consumers' health,<sup>420</sup> and offences related to opposing controls or checks carried out by the FASFC.<sup>421</sup> European Legislation regarding Food Safety do not necessarily contain penalties. Therefore Belgian implementation laws further

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<sup>415</sup> Eg the FASFC is the appointed pilot for inspections concerning nutrition and health claims on foods and the FME is pilot for inspections with regard to specific requirements concerning wine labels.

<sup>416</sup> Art 7 of FASFC Law of 4 February 2000 (n 2). To this end, some consumer organizations and federations such as Fedis and Fevia are engaged in sensitizing producers and have proven influential in policy making.

<sup>417</sup> Infractions are punished with imprisonment no higher than 7 days and a fine no higher than € 25; misdemeanours are punished with imprisonment between 8 days and 5 years and a fine higher than € 25; crimes are punished with imprisonment for longer than 5 years and a fine of more € 25. To adapt penal fines to the rising consumer prices, decimes are added to the fines. For infringements committed since 1 January 2017, one should add 70 decimes to the amount, which implied that the fine is multiplied by 8.

<sup>418</sup> Arts 27-32 of the Law of 5 September 1952 regarding the commercialization and the inspection of meat, B.S. 16 March 1953.

<sup>419</sup> Arts 9-14 of the Law of 15 April 1965 regarding the inspection and commercialization of fish, poultry, rabbit and game, B.S.22 May 1965.

<sup>420</sup> Art 15 of General Belgian Food Law (n 11).

<sup>421</sup> Royal Decree of 22 February 2001 on FASFC controls (n 29).

stipulate sanctions as to the violations made against European Food Regulations.<sup>422</sup> As will be clarified further on, the offences can be divided into three categories according to type: regulatory offences against food regulations, offences against persons and offences against property.

### 2.2.3 Reform projects

The most fundamental changes to the Belgian system of food safety were adopted in the nineties after the Dioxin crisis. The last couple of years efforts have been mostly directed at simplifying legislation by consolidating the existing food laws into one single law (*Lex Alimentaria*). In order to make the legislation more accessible and understandable, the goal of this project is to combine all specialist legislation and bring coherence in the existent laws.

Also subject to discussion has been the system of administrative fining and to what extent it is still desirable to let the Prosecutor take over cases of non-payment of an administrative fine. Considering that the philosophy of the system is that a majority of food cases require the expertise of specialist authorities and administrative fining adequately addresses most violations, it is sought how to further unburden the Prosecutor. It is argued that moving more competence towards the administrative authorities to also deal with non-payment, would enable the Prosecutor to truly concentrate efforts on the more severe cases of food crime and would lead to a more efficient division of tasks.<sup>423</sup>

## 3 Criminal Law Dimension of Food Regulation

### 3.1 The dioxin crisis in 1999

In 1999, toxic dioxins were found in the food chain. The company Verkest declared on their invoices that they had delivered animal fat to the company Fogra whereas in reality they had delivered a mixture of animal fat and technical animal fat contaminated with a type of Polychlorinated biphenyls and dioxin. Fogra further distributed this contaminated feeding stuff to other fodder companies as a result of which these fats were used to feed cattle, poultry and so on. Consequently, the discovery of these contaminated fats led to food products being taken off the market, an export ban on Belgian meat, the temporary closure of several meat distribution companies, a ban on slaughter, etc. This crisis also had severe political consequences as the Ministers of Public health and Agriculture had to resign.

Criminal procedures were initiated against both companies. The Court of First Instance sentenced father and son Verkest for forgery and selling falsified food products to a suspended prison sentence of one year. On top of that they were fined for an amount of € 24,789 each. The Court of Appeal confirmed their conviction but pronounced a heavier penalty: the prison

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<sup>422</sup> Art 9, §§2 and 3 of the Royal Decree of 22 February 2001 on FASFC controls (n 29).

<sup>423</sup> Also note that after the horse meat scandal new efforts in the EU have been initiated. The Proposal to modify Regulation No 882/2004 (n 44) is directed at providing a comprehensive, integrated and more effective control system in the areas of food and feed safety rules.

sentence remained to be two years, but only half was suspended and the fine was increased to € 123,974.76. Properties were confiscated that were worth over seven million euro. Jacques and Jacqueline Thill from Fogra were sentenced to a suspended prison sentence of one year. The Supreme Court upheld their sentences.

According to several scientific studies, the effects of the dioxin crisis will have severe effects on public health. A study conducted by Professor Nik van Larebeke, based on official Public Health records, proclaims that there will be thousands of cases of severe illnesses in the coming years.<sup>424</sup> Despite this study, it is said that the causal link between the dioxin crisis and for instance cancer will be very hard to establish. It is therefore difficult to predict whether the dioxin crisis will ever result in criminal cases being brought against these companies for damages to health considering that it would be hard to establish that an illness was the result of this contamination and would not have occurred without it.

### 3.2 Offences that can be linked to food safety

For the purpose of this study, the offences endangering food safety are divided into three categories:

First, there are the **offences against the food safety laws** violating specific food laws (both European and national). Eg, the General Belgian Food Law specifies that the prohibition of selling beverages of over 0.5 % to children under the age of 16. Furthermore, royal decrees outline several crimes: related to meat distribution and inspection,<sup>425</sup> fish, poultry and venison distribution,<sup>426</sup> offences against the consumers' health,<sup>427</sup> and offences related to opposing controls or checks carried out by the FASFC.

Secondly, there are the **offences against persons resulting in an injury, damage to health or death**. These are on the one hand specified in the general penal code and on the other hand spread out across specialist legislation. The Penal Code specifies the following general offences: ingesting substances into food products that can cause severe health damages or death (Article 454), knowingly selling these damaging products (Article 455), or having them in one's possession (Article 456). Apart from these food specific crimes, the provisions of assault and

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<sup>424</sup> N van Larebeke and others, 'The Belgian PCB and dioxin incident of January-June 1999: exposure data and potential impact on health' (2001) 109(3) *Environ Health Perspect*, 265-273: 'Assuming that as a consequence of this incident between 10 and 15 kg PCBs and from 200 to 300 mg dioxins were ingested by 10 million Belgians, the mean intake per kilogram of body weight is calculated to maximally 25,000 ng PCBs and 500 pg international TEQ dioxins. Estimates of the total number of cancers resulting from this incident range between 40 and 8,000. (...) Because food items differed widely (...) other significant sources of contamination and a high background contamination are likely to contribute substantially to the exposure of the Belgian population.

<sup>425</sup> Arts 27-32 of the Law of 5 September 1952 (n 49).

<sup>426</sup> Arts 9-14 of the Law of 15 April 1965 (n 50).

<sup>427</sup> Arts 13-15 of the General Belgian Food Law (n 11).

battery (Articles 418-422) have a very broad scope and shall also demonstrate to have relevance in the context of food safety.

Thirdly, **offences related to unfair business-to-consumer commercial practices and fraud** are criminalized. Again the Penal Code specifies several fraud offences: a general provision on fraud (Article 496) falsifying food products (Article 500), selling falsified food products or knowingly having falsified food products in his possession (Articles 501 and 501bis). Also connected to these offences are the offences on the forgery of documents (Article 196). The most import specialist law concerning offences against property is the Law on Commercial Practices and Consumers’ Protection which can be used against unfair commercial food practices.

The interplay between the specialist rules and the Penal Code is regulated by Article 100 of the Penal Code stating that apart from minor exception<sup>428</sup> the general rules of criminal law are applicable unless the special legislation specifically departs from those rules.

As the wish to implement a more concise *Lex Alimentaria* demonstrates, the legislation today is very scattered – many special laws exist – and therefore has been criticised as being inconsistent with the principle of legal certainty. This is further complicated by the fact that not all European legislation is subjected to implementation laws. Another element that adds to the confusion is that most European Regulations do not contain penalties and so the Belgian legislation has provided for penalties in case of infringements of European Regulations.<sup>429</sup> Alos problematic in light of the principle of legal certainty is that these special laws often do not set out the constitutive elements of the crime, but refer to royal or ministerial decrees setting these out.

**4 Offences against the food safety laws**

In the special Belgian legislation concerning food law one needs to distinguish between the penal laws per sector and the horizontal penal laws.

**4.1 Penal legislation applied in a specific sector of the food chain<sup>430</sup>**

The General Belgian Food Law contains three levels of sanctions:

Perpetrator	Penalty	Example
Commercializing food or other products, without being the importer or the manufacturer of food and other products <sup>431</sup>	an imprisonment of 8 days to three months and/or a fine of € 208-8,000	Commercializing food which is unfit or deemed unfit for human consumption

<sup>428</sup> An exception is introduced for the rules governing participation to offences and mitigation circumstances. Those rules are not automatically applicable but require an explicit confirmation.

<sup>429</sup> Art 9, §2 and 3 of the Royal Decree of 22 February 2001 on FASFC controls (n 29).

<sup>430</sup> This report focusses on the three most important laws that specifically apply to food and food products.

<sup>431</sup> Art 13 of the General Belgian Food Law (n 11).

The importer or manufacturer of food and other products as well as the person who knowingly and willingly commercializes food and other products without being the importer or the manufacturer	an imprisonment of 8 days to six months and/or a fine of € 400-24,000 <sup>432</sup>	Knowingly and willingly commercializing, importing or manufacturing food or other products with labels in another language than the region in which these products are sold.
	an imprisonment of a month to a year and/or a fine of € 800 up to € 120,000 <sup>433</sup>	Importing, manufacturing or knowingly and willingly commercializing food or other products which contain forbidden additives

On top of these penal fines and/or prison sentences the criminal judge can also order a notice to be published containing his/her judgment. In addition to the general penal rules on recidivism, which may not so frequently be applicable because they require a prior conviction of at least one year imprisonment, the legislator has decided to provide special recidivism rules for food crimes. These provide that regardless of the duration of the imprisonment imposed, recidivism in less than three years may result in doubling the penalties or the decision to (temporarily) close the establishment.<sup>434</sup>

The penalties in the Laws of 5 September 1952 regarding the commercialization and the inspection of meat and of 15 April 1965 regarding the inspection and the commercialization of fish, poultry, rabbit and game are more or less the same. Both laws were built up in the same manner. Here, there is a difference in penalties for the perpetrator who acted with intent compared to the perpetrator who acted without (proof of) intent.

Perpetrator	Penalty	Example
Without intent	an imprisonment of 8 days to three months and/or a fine of € 208-2,400 <sup>435</sup>	commercializing or donating meat or meat products that are unfit or deemed unfit for human consumption
	an imprisonment of 8 days to three months and/or a fine of € 208-1,600 <sup>436</sup>	

<sup>432</sup> Art 14 of the General Belgian Food Law (n 11).

<sup>433</sup> Art of the General Belgian Food Law (n 11).

<sup>434</sup> Art 32 Law of 5 September 1952 (n 49); art 14 Law of 15 April 1965 (n 50).

<sup>435</sup> Art 27 Law of 5 September 1952 (n 49).

<sup>436</sup> Art 9 Law of 15 April 1965 (n 50).



With intent <sup>437</sup>	an imprisonment of 8 days to six months and/or a fine of €800- 8,000 <sup>438</sup>	slaughtering an animal in a slaughterhouse that doesn't comply with the regulation concerning hygiene, infrastructure...
	an imprisonment of a month to a year and/or a fine of € 800-40,000 <sup>439</sup>	He/she who commercializes or donates meat, fish, poultry, rabbit and game or their derived products from an animal which died a natural death.

On top of these penal fines and/or prison sentences the criminal judge can also order a notice with the judgment to be posted. Penalties can be doubled if the perpetrator commits the same offences in the three year after conviction. In this last case the judge can also order the closure of the establishment for a maximum duration of three months.<sup>440</sup> Furthermore, the opening hours for slaughter houses are regulated by law. Therefore, a specific penalty is given to the person who slaughters an animal on hours that the slaughterhouse is closed. Such a person can be sentenced with an imprisonment of eight days to a year and/or a fine of 300 euro up to 3,000 euro The judge can also order the closure of the establishment for a period of eight days to a month.<sup>441</sup>

#### 4.2 Horizontal Penal legislation

Penalties applied to operators active along the whole food chain are found in the Royal Decree of 22 February 2001 on FASFC controls. In this law there is no specification concerning the condition of criminal intent of the perpetrator. The following offences are sanctioned:

Offence	Penalty
Opposing visits, inspections, seizures, analyses or requests for information or documents by the inspectors competent to investigate crimes on food safety or giving these persons false information or false documents	an imprisonment of 8 days to three months and/or a fine of € 800 up to € 8,000 <sup>442</sup>
Exercising an activity in the food chain without authorization of the FASFC	an imprisonment of 8 days to three months and/or a fine of € 208 up to € 2,400 <sup>443</sup>

<sup>437</sup> Although the terms 'deceitful intent' are not literally mentioned in the stated articles, the terms have been adopted due to an *a contrario* interpretation with regard to the articles 27 of the law of 5 September 1952 on meat (n 49) and 9 of the law of 15 April 1965 on fish, poultry, rabbit and game (n 50).

<sup>438</sup> Art. 28 Law of 5 September 1952 (n 49); art 10 Law of 15 April 1965 (n 50).

<sup>439</sup> Art 29 Law of 5 September 1952 (n 49); art 11 Law of 15 April 1965 (n 50).

<sup>440</sup> Art 32 Law of 5 September 1952 (n 57); art 14 Law of 15 April 1965 (n 58).

<sup>441</sup> Art 30 Law of 5 September 1952 (n 57).

<sup>442</sup> Art 3, § 7 of the Royal Decree of 22 February 2001 on FASFC controls (n 29).

<sup>443</sup> Art. 3bis, §2 of the Royal Decree of 22 February 2001 on FASFC controls (n 29).

Exercising an activity in the food chain without respecting the rules on self-control, traceability and notification	an imprisonment of 8 days to six months and/or a fine of € 208 up to € 2,400 <sup>444</sup>
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### 4.3 European Legislation

European Regulations are directly applicable to citizens of the EU, but do not contain penalties and so the Belgian legislation has provided penalties on infringements of European Regulations regarding food safety in article 9, para 2 and 3 of the Royal Decree of 22 February 2001 on FASFC controls. Paragraph 2 refers to penalties applied in the specific Belgian food legislation: if the Belgian legislation concerned contains a penal sanction for the same criminal behavior, the penalty in the Belgian legislation can be applied on the offence against the European regulation. If this is not the case, the penalties in paragraph 3 are applied.<sup>445</sup>

## 5 Offences against persons resulting in an injury, damage to health or death

### 5.1 Involuntary crimes in the General Penal Code

Both intentional<sup>446</sup> and involuntary<sup>447</sup> manslaughter or assault and battery are criminalized within the General Penal Code (Articles 418-420) and can serve to qualify conduct whereby harmful foods cause deaths or injuries. The penalty for this involuntary manslaughter has been set on imprisonment of three months to two years and a fine of € 400 to € 8,000 when resulting in death, and eight days to one year and/or a fine of € 208 to € 1,600 when resulting in injury.

Contrary to the French penal code, the Belgian penal code does not contain a general criminalization of 'endangerment'<sup>448</sup> which prohibits the exposure to a risk by someone having a duty of due diligence or a duty to ensure safety. Essential to the French provision is that the transgressor is subject to a legal duty of safety or caution and that the violation of this duty has resulted in a risk that could cause serious injuries or death. It is not required that this risk effectively results in an injury. Contrary thereto, the general provisions of Belgian criminal law do require proof of injury.<sup>449</sup> In spite of this, the enactment of specialist food legislation has imposed upon all actors in the food chain several risk minimizing obligations that, if violated, can result in a sanction. The extensive nature of these obligations leads to the conclusion that a quasi-endangerment crime exists to the extent that merely creating a risk without harm often

<sup>444</sup> Art. 4, § 4 of the Royal Decree of 22 February 2001 on FASFC controls (n 29).

<sup>445</sup> An imprisonment of 8 days to five years and/or a fine of € 156 up to € 90.000.

<sup>446</sup> Arts 392-417 *quinquies* Penal Code.

<sup>447</sup> Arts 418-422 *quater* Penal Code.

<sup>448</sup> The French Penal Code specifies in article 223-1: 'Le fait d'exposer directement autrui à un risque immédiat de mort ou de blessures de nature à entraîner une mutilation ou une infirmité permanente par la violation manifestement délibérée d'une obligation particulière de sécurité ou de prudence imposée par la loi ou le règlement'.

<sup>449</sup> P Traest, 'Strafrechtelijke aspecten' in I Claeys and R Steennot (eds) *Aansprakelijkheid, veiligheid en kwaliteit*, (Mechelen, Wolters Kluwer) 771-772.

results in a violation. One of these obligations is the obligation resting on operators to notify the competent authority when a product can potentially be harmful to public health. The smallest suspicion of a harmful product triggers this obligation. If one of these obligations is violated, sanctions are imposed. If there is proof of injury, the general provisions on manslaughter or assault and battery can be applied.

The provisions of manslaughter or assault and battery in the General Penal Code have served to qualified a wide variety of cases and have a large scope. The three constitutive elements are discussed below after which a discussion on the specific due diligence standards shall follow.

### 5.1.1 *Negligence*

The negligence standard in Articles 418-420 of the Penal Code can be equated with a lack of caution or precaution.<sup>450</sup> This broad interpretation of the negligence standard results in any fault, however minor, being able to fulfil this standard. As a result even the violation of a legal obligation to precaution can constitute such a minor fault and trigger the application of Articles 418-420. A failure to comply with such legally imposed precautionary measures can for example be a violation of food safety obligations. Although there is no case law available on the application of these provisions to instances in which the violation of food safety standards resulted in injuries or death, the broad application of these articles to other cases seems to suggest that its application for injuries or deaths as a result of harmful food is very likely. Also when the transgressor is not subject to a legal obligation, the violation of the general due diligence standard (*bonus pater familias*) can fulfil the negligence requirement.<sup>451</sup>

### 5.1.2 *Injuries or death of the victim(s)*

The constitutive element of injury is broadly defined and does not require that the injury is permanent nor that it results in a disability. This adds to the fact that these general provisions have a wide scope and can be applied in a wide variety of cases. Furthermore, the statute of limitation as to the civil claim following from the crime only kicks in at the moment of discovery of the injury. The fact that the consequences to the health were only discovered at a later time do therefore not affect the statute of limitation. However, in the event that the injuries were already externalized but damages were not sought because the cause was not yet established prove to be a little more difficult. The statute of limitations for claim for damages following from a crime are set on five years after conviction.<sup>452</sup>

### 5.1.3 *Causation*

The general principles in the Penal Code do not specify how causation should be established, as a result of which doctrinal accounts on causality have theorized this extensively. The majority

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<sup>450</sup> P Traest (n 82) 775.

<sup>451</sup> Cass. 14 November 2012 AR P.11.1611.F.

<sup>452</sup> Art 26 Preamble of the Code of Criminal Procedure.

of the Belgian doctrine supports the doctrine of equivalence of conditions (*equivalentieleer/théorie de l'équivalence des conditions*) on the basis of which each fault or negligence that has contributed to the damage shall be taken into account.<sup>453</sup> The causal link is established when demonstrated that the damage would not have occurred or would not have occurred to the same extent, if the fault had not taken place. Contrary to the doctrine of adequacy causation, all antecedents are taken into account instead of only those that 'have significantly increased the objective probability of the damage'.<sup>454</sup> Although the Belgian Supreme Court has never explicitly rejected the theory of adequate causality, it consistently applies the theory of equivalence.

The doctrine of equivalence takes into account each act without which the damage would not have occurred and therefore each act that is *a conditio sine qua non* falling under the crime description shall be punishable. While it is possible that the victim's fault added to the crime and can serve as one of the antecedents to the crime, this shall not impede on the perpetrator's culpability for the crime committed if his act can be qualified as a *conditio sine qua non*. It might have an effect on damages obtained by the victim, but shall not obstruct the application of criminal law provisions.<sup>455</sup> This strict application of the doctrine of equivalence has been criticized for going too far in the causation chain by taking all antecedents into account and by not taking into account intervening factors such as the victim's fault. The jurisprudence nevertheless justifies this given the equation of the civil and criminal concept of fault. On top of that, an advantage of this doctrine it is that is very victim friendly. In any event, the negligent actions of the victim shall not affect the liability of a manufacturer bringing a harmful product on the market.

As a result of the broad application of the equivalence doctrine, establishing a causal link between harmful foodstuff and a death or injury would require proof of injury not having been externalized in the same way as would have occurred without the harmful foods. When health issues or death occur and it is reasonably expected that they are the consequence of harmful food stuff, a sample is taken of the product (food) from the same batch as suspected to have caused the injury or death of one or more people to be analysed in a laboratory certified by the FASFC. The victim is medically examined.

As was outlined in the 1997 European Commission Green Paper, the objective is to place the primary responsibility for safe food on industry, producers and suppliers using the in Belgium implemented HACCP type systems.<sup>456</sup>

One should take into account that when the same conduct can be qualified under these articles as well as under other provisions. Article 65.1 of the Penal Code specifies that only the heaviest penalty shall apply and the penalties shall not be accumulated. Considering that the penalty as specified in Article XV102 (knowingly bringing products on the market that are not in

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<sup>453</sup> Cass. 15 October 1973, *Pas.* 19742011.

<sup>454</sup> See also H Hoffman, 'Causation' in Richard Goldberg, *Perspectives on causation* (Hart Publishing 2011).

<sup>455</sup> Cass. 26 September 2012, AR P. 12.0377.F.

<sup>456</sup> This system has been implemented by the Royal Decree of 14 November 2003.

conformity with European or Belgian norms or bringing products on the market while they should have known that these are not in conformity with European or Belgian norms) is a fine ranging from € 208 to € 80,000 and that it can be expected that similar conduct can be qualified under these two provisions, the judge shall have to establish what the heavier penalty *in concreto* is and what to apply.

Apart from the general provisions on assault and manslaughter, that section of the Penal Code also specifies the crime of unintentionally administering harmful substances that result in illness or disability (Article 421 Penal Code). Considering the wide scope of application of the assault and manslaughter provisions, the relevance of this specific incrimination can be questioned. In spite of this the higher penalty (imprisonment of eight days up to a year and/or a fine of € 208 up to € 1600) in comparison to the general provisions (two to six months imprisonment) taken together with the Belgian rules on accumulation of penalties, Article 421 of the Penal Code shall more likely be applied when the necessary constitutive elements can be proven.<sup>457</sup>

The application of this provision requires proof of an intentional element (administering the substances) as well as an unintentional element (causing illness or disability). It is further required that the effects upon the health of the victim are severe. The concept of substances is however broadly interpreted as a result of which all sorts of examples can be qualified under this provision. Consequently, sectors such as the agriculture or meat industry, any sort of food producer or a restaurant can fall under the scope of Article 421 Penal Code. Also the term substances is broadly interpreted and as such Article 421 of the Penal Code has for instances been applied to the administering of spoiled meat.<sup>458</sup>

As the table underneath demonstrated Article 421 Penal Code is very rarely used:

Convictions per year	2015 <sup>459</sup>	2014	2013	2012	2011	2010
<b>involuntary<sup>460</sup> manslaughter or (article 419 Penal Code)</b>	69	115	160	169	156	164
<b>Involuntary assault and battery (article 420 Penal Code)</b>	718	3,797	5,486	7,579	4,895	5,771
<b>unintentionally administering harmful substances that result in illness or disability</b>	0	0	1	0	1	0

Unfortunately, this data does not allow us to see the food related crimes criminalized under the general provisions of Article 419 and 420 Penal Code. Yet, it does demonstrate the fact that the

<sup>457</sup> P Traest (n 82) 768-769.

<sup>458</sup> Cass. 10 November 1953.

<sup>459</sup> The data for 2015 has only partially been processed which clarifies the lower amount of convictions.

<sup>460</sup> Arts 418-422<sup>quater</sup> Penal Code.

specific criminal provision on unintentionally administering harmful substances that result in illness or disability is almost never used. This further substantiates the position taken by TRAEST that the relevance of this separate provision can be questioned.

#### 5.1.4 *General or specific due diligence standard and criminal liability of operators*

These unintentional offences do not require that there be a violation of legal norms relating to product safety or that the product violated the food safety regulations. Each producer is subject to the general due diligence standard and the *mens rea* requirement of negligence for these offences shall be judged against the standard of *bonus pater familias*. This negligence will nevertheless be more easy to prove if legal norms or even certain technical regulations (soft law) were in fact violated. It logically follows that in the event that the legal norms surrounding the products are so clear-cut and considered to be exhaustive and were abided by, it will be very hard to establish negligence. In that case, the qualification as manslaughter or negligent bodily harm is very unlikely. So to conclude, although in most cases, an infringement upon food regulations is a way to kick start criminal provisions, it is no necessary consequence.

Although at the Belgian level there is no specific due diligence norm in the food sector, certain broad interpretations do derive from the European Legislation that such a precautionary principle exists.<sup>461</sup> Eg, Article 17.1 of the General Food Regulation stipulates that food and feed business operators at all stages of production, processing and distribution within the businesses under their control shall ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met.

Since 2005, all operators active in the food chain have to implement a self-checking system in their establishment in order to provide better protection to consumers. In order to help operators meet this obligation, the professional organizations draw up self-checking guides which are validated by the FASFC.<sup>462</sup> In order to facilitate the implementation of self-checking in businesses, leniencies were provided. Until early 2013, these leniencies were limited to small businesses in the distribution sector, the hotel and catering industry and the very small enterprises in the processing sector, but since March 2013 these have been extended to all business to consumer-establishments by means of a new ministerial decree, regardless of the establishment's size. The leniencies allow establishments to implement the HACCP-procedures described in the guide, so that they won't have to conduct their own hazard analyses any more. This makes it easier to implement self-checking in small businesses that have little human resources and scientific expertise at their disposal.

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<sup>461</sup> C MacMaolain, *EU Food Law Protecting Consumers and health in a common market* (Oxford Portland Oregon 2007) 196: the 1993 EC treaty set out a precautionary principle in article 174(2) EC that had effect in relation to Community policy on the environment. Soon, this principle was broadly interpreted as to also apply to issues related to human health protection. This interpretation has been questioned and found to be an undue enlargement of the scope of article 174 EC.

<sup>462</sup> Royal decree of 14 November 2003 (n 13).

Also, Article 8, para 2 of Royal decree of 14 November 2003 concerning self-checking, traceability and notification in the food chain states that when an operator is of the opinion or has reasons to believe that a product that he/she has imported, produced, bred, cultivated, processed, distributed or commercialized does not comply with the regulations with regard to food safety, he/she immediately initiates procedures for recall of that specific product when the product has left the direct control of this operator. This operator also has to alert the FASFC of this event. If this product has already reached the consumer, the operator has to notify the consumer of the reason for this recall. If necessary, this can be done in a press release. If specific measures fail, a recall of the product is organized.

Given the wide scope of the provisions on involuntary manslaughter or assault and battery, it is imaginable that a product that has harmful effects which were unknown and causes injury can lead to criminal liability under these provisions. This can for instance be the case when negligence was in order and the causal link between the death or injury and the product can be established.

In relation to this, it is important to mention that the FASFC has the competence to seize products that are suspected to be in violation of the food regulations.<sup>463</sup> The FASFC then has the product tested or examined to confirm if the product is indeed in violation with food norms. When found that the product is in violation with food regulations, the person or company involved has the right to ask for retesting of the sample in a laboratory certified by the FASFC different to the one where the original sample was analysed. If this analysis confirms the results of the sample taken by the FASFC, the violation is confirmed. If not, there will be no further investigation and the seized products will be liberated. If non-compliance to food regulations is established, different possibilities arise:<sup>464</sup>

- if necessary to guarantee public health, animal health or for plant protection, the seized products must be destroyed;<sup>465</sup>
- if legally permitted products can also be sold, put to a different use than initially intended or be given back to the owner in exchange for a sum that is deposited to the tribunal of first instance;
- inspectors of the FASFC can give the owner of the products a certain period of time to see that the products do comply with the food regulations (eg, relabelling of products)

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<sup>463</sup> Art 6 § 1 Royal Decree of 22 February 2001 (n 37).

<sup>464</sup> Art 6 § 3 Royal Decree of 22 February 2001 (n 37).

<sup>465</sup> In certain cases there is no other option than to destroy the product. Eg when a product is found to be in a state that is legally described as being harmful or declared harmful for the consumer.

A failure to comply with these instructions can constitute an offence in itself.<sup>466</sup> The most important<sup>467</sup> regulation in this matter in Belgium is the Royal decree of 3 January 1975 regarding harmful products and products declared harmful. It sums up a list of situations where a product is unfit for consumption and therefore must be destroyed, although the product in itself may not be harmful to the health of the consumer (eg food in a bulging can).<sup>468</sup>

## 5.2 Intentional offences

Convictions per year		'15	'14	'13	'12	'11	'10
<b>Intentionally administrating of harmful substances</b>		6	4	8	6	2	2
<b>Misdemeanours in relation to the adding of harmful substances</b>	Adding of substances that can harm public health (art. 454 P.C.)	.	1	.	.	.	1
	Sale, palm off ... food ,knowing it contains substances that can harm public health (Art. 455 P.C.)	.	.	.	.	1	1
	<i>Total</i>	.	1	.	.	1	2

Unless otherwise specified, Belgian criminal Law only sanctions intentional conduct and holds intent as the default setting. Therefore, if the criminal provision does not further specify the *mens rea* requirement, it is presumed that the conduct should have been intentional.

The focus of the intent requirement can be directed at either the conduct and/or the consequences. The Penal Code sets out the offence of poisoning in Article 402. Again this crime is fairly broadly interpreted and does not require an intent to kill. It only requires the intentional administering of substances with the knowledge that they can be harmful. This broad interpretation has for instance led to a doctor administering weight-loss products to a woman being held liable under Article 402 because he knew that these products could result in injury.<sup>469</sup> The fact that the doctor had not wanted the consequence, did not block the application of this provision, since s/he had intentionally administered the weight-loss products because he could financially benefit from it. The offence is punished with three months to five years imprisonment and € 400 to € 4,000 of fine.

<sup>466</sup> Art 3, § 7 of the Royal Decree of 22 February 2001 (n 37): opposing any type of visits, controls, confiscations, testing of samples, or a refusal to show the necessary documents to the FASFC is punishable with a imprisonment of 8 days to 3 months and/or a fine of €600 to €6000.

<sup>467</sup> Also other Belgian regulations declare products harmful (eg at 6 of the Royal Decree of 29 August 1997 on the manufacturing and distribution of food containing plants or plant extracts, B.S.21 November 1997).

<sup>468</sup> Art 1 of Royal Decree of 3 January 1975 regarding harmful products and products declared harmful, B.S. 18 February 1975.

<sup>469</sup> Cass. 16 January 2002, R.D.P. 2002, 788.



## 6 Unfair commercial food practices and food fraud

### 6.1 Tuna scandal

In 2015 it was discovered that 30 % of the fish served in restaurants in Brussels was different to the fish mentioned on the menu and was variety that was 40 % cheaper than the fish advertised. In most cases, the customer order blue fin tuna but in fact got the cheaper version of yellow fin tuna. Following the report published by the environmental organization OCEANA, official inspections in 30 restaurants took place. In 15 cases infringements were discovered. In 11 cases a warning was given because a more expensive type of tuna was mentioned on the menu than was served to the consumers. In four cases actual fraud was detected for which an administrative fine was imposed. In all cases specific Belgian and European legislation with regard to consumer information when selling fish, were violated.<sup>470</sup>

### 6.2 Fraud offences

Convictions per year	'15	'14	'13	'12	'11	'10
Falsifying food products	2	1	2	2	.	.
Selling falsified food products	.	1	2	2	.	.
Intentional possession of falsified food products	.	.	.	.	.	.

The working definition outlined in the fraud policy of the NOE states that food fraud should be understood as the intentional replacing, adding, changing or wrongly advertising of food, ingredients, packaging or other elements related to food products, or making false or misleading claims as to these products, with the purpose of making economical gain, if possible with negative effects to public health. An issue that exists in many other legal systems and also has been deemed problematic at the level of the EU is that there is no specific legal definition of food fraud. This necessitates reliance on the general definition of fraud which has been criticized by many national practitioners dealing with the topic.<sup>471</sup>

#### 6.2.1 With regard to consumers

##### *Misleading practices towards consumers*

Apart from special legislation criminalizing conduct affecting food safety, the Belgian system relies upon the more general provisions of fraud and unfair commercial practices to address food crime. Although the statistical processing in Belgium does not allow to have clarity on how many food related activities were prosecuted under each provision, it is very likely that the

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<sup>470</sup> Regulation No 1169/2011 of 25 October 2011 on the provision of food information to consumers [2011] OJ L 304/18.

<sup>471</sup> J Spink, Moyer DC, 'Defining the Public Health Treat of Food Fraud' (2011) 76(9) Journal of Food Science 157.

most commonly used criminal provision as to food fraud is the forgery of documents (Article 196 Belgian Penal Code). Reliance on this provision is evident in the case of forged invoices or any other document related to the selling of food products. Second, Article 497 of the Penal Code criminalizes swindle and deceit and thereby can be used to address fraud related food crimes. Following the Unfair Commercial Practices Directive<sup>472</sup> directed at harmonizing the commercial practices between Member States in order to afford the consumer a higher level of protection, Belgium changed the Law on Commercial Practices and Consumers' Protection (LCCP).<sup>473</sup> In 2013, this law was again replaced and further supplemented in the Code of Economical Law.<sup>474</sup> Book VI of that code contains the relevant provisions with regard to unfair commercial practices.

The most difficult aspect in the implementation exercise was that the Belgian legal system does not distinguish between unlawful commercial practices from business-to-consumer (consumers protection) and commercial practices from business-to-business (rules of competition). This differentiation has been highly criticized considering that everyone and not only consumers should be protected against these practices. The Belgian legislator now differentiates between unlawful commercial practices towards consumers and those towards other persons than consumers but still affords a high level of protection to the latter.

For protection of consumers against unfair commercial practices, the European three steps system is utilized.<sup>475</sup> Article 93 of the Code of Economical Law has a general prohibition of unfair commercial practice:

'A commercial practice shall be unfair if (a) it is contrary to the requirements of professional diligence and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers'.

Second, and in conformity of the directive, Articles 96-99 and 100-102 Code of Economical Law set out a prohibitions against misleading commercial actions (which can constitute misleading actions and omissions) and aggressive commercial practices. Thirdly, a Black List in conformity with the Annex attached to the Unfair Commercial Practice Directive is outlined in Articles 100 and 103 of the LCCP containing commercial practices which are in all circumstances considered unfair.

This three step structure allows for a broad variety of conduct to be qualified as a violation. As such these fraudulent crimes can relate to any sort of misleading advertising or deceptive

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<sup>472</sup> See Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

<sup>473</sup> Law on Commercial Practices and Consumers' Protection of 14 July 1991, B.S. 29 August 1991.

<sup>474</sup> Code of Economical Law of 28 February 2013, B.S. 29 March 2013.

<sup>475</sup> Art 5.1 of the Unfair Commercial Practices Directive (n 104).

marketing. Article 7 of the Labeling Regulation similarly gives a wide enumeration of practices that should be deemed misleading and states that food information ‘shall not be misleading as to the characteristics’ (nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production); ‘by attributing to the food effects or properties which it does not possess; by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients; by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient’.<sup>476</sup> It further requires that the information ‘shall be accurate, clear and easy to understand for the consumer’. This provision applies to advertising; the presentation of foods, in particular their shape, appearance or packaging, the packaging materials used, the way in which they are arranged and the setting in which they are displayed.’ Also misrepresentation as to the quality and quantity fall under these provisions which have been implemented into the Belgian legislation. As for most fraud related violations, the correct labelling and representation of food products falls within the competence of the FME.

#### *The standard of average consumer*

The Unfair Commercial Practices Directive does not define the concept of the average consumer nor has the Belgian legislator defined this. The Directive does provide for some clarification in its preamble on how to harmonize this concept:

‘in order to enable food information law to adapt to consumers’ changing needs for information, any considerations about the need for mandatory food information should also take account of the widely demonstrated interest of the majority of consumers in the disclosure of certain information’.

The average consumer is a reasonably informed, careful and cautious consumer.

#### *The type of offender*

Each operator within the food industry, can violate the outlined rules. No differentiation is made between the different actors in the food industry. From the one extracting raw materials to the retailer and anyone in between that deals with production or commercialization, all are subject to the same rules.

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<sup>476</sup> Art 7 of the Regulation No 1169/2011 of 25 October 2011 on the provision of food information to consumers [2011] OJ L 304/18.

## 6.2.2 *Business-to-business relation*

Competition law has two dimensions: the European legislation deals with trade and competition rules that affect EU Member States. For aspects not having this European dimension, Belgian rules apply. Within both systems, fines can be imposed by either the European Commission or the national competition authority. Fines are established in relation to the gravity of the violation and the annual revenue of the legal person subject to that fine (10 % of their revenue).

For the protection of persons other than consumers – and generally found to address the business-to-business relation – the Code of Economical Law continues to specify prohibited market practices in relation to persons other than consumers. Book IV of that code outlines what is considered to be an unlawful market practice.

Although the hoarding of food is not specifically mentioned in the special food regulations, it can be found that economic hoarding can constitute ‘an act contrary to honest market practices by which a business harms or may harm the professional interests of one or more other businesses’.<sup>477</sup> Economic hoarding is often used as a way to manipulate the price and to that end can constitute a violation against honest market practices. Although there does not seem to be a specific offence against the manipulation of prices for derivatives based on food commodities, the penal code does specify in Article 311 the intentional manipulation of food or other commodities is punishable with a prison sentence of one month to two years and a fine of € 2,400 euro up to € 80,000.

The food crisis of 2006-08 is said to be at least partly caused by the ‘financialisation’ of the agricultural commodity futures trading.<sup>478</sup> Prices first declined and then steeply rose due to speculations by future traders; these price movements indicated that these could not have been caused by supply and demand relationships alone. In recent years, the EU has increasingly become aware of the need for more effective regulatory mechanisms in the financial markets. The new EU Rules for dealing with market abuse try to strengthen the existing framework in order to more effectively tackle market abuse across commodity and related derivative markets. The new EU Package consists of the Regulation on Market Abuse<sup>479</sup> and the Directive on criminal sanctions for Market Abuse<sup>480</sup> which both entered into force as of July 2016. The sanctions available to regulators were found to be weak and lack a deterrent effect. The solution to this problem was found in more harmonization of administrative sanctions and setting out criminal sanctions for some more severe violations. Not all member states provided for criminal sanctions for more serious breaches of the Directive 2003/6/EC (this instrument leaves the choice to Member State as to the sanction mechanism chosen in their implementation laws). These

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<sup>477</sup> Art VI. 104 of the Code of Economical Law.

<sup>478</sup> O de Schutter, ‘Food Commodities Speculation and Food Price Crises (September 2010), Briefing note, 3.

<sup>479</sup> Regulation No 596/2014 of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014], OJ L 173/1.

<sup>480</sup> Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse [2014] OJ L 173/179.

different approaches undermined 'uniformity of conditions of operation in the internal market and may provide an incentive for persons to carry out market abuse in Member States which do not provide for criminal sanctions for those offences'. Given that there is no Union-wide understanding of what constitutes a serious breach of the rules on market abuse minimum rules should be established with regard to the definition of criminal offences committed by natural persons, liability of legal persons and the relevant sanctions.<sup>481</sup> 'Member States should be required to provide at least for serious cases of insider dealing, market manipulation and unlawful disclosure of inside information to constitute criminal offences when committed with intent'.<sup>482</sup> The Directive on Criminal Sanctions for Market Abuse imposes upon the member states to ensure that the offences of insider dealing, unlawful disclosure of inside information and market manipulation are punishable by effective, proportionate and dissuasive criminal penalties.<sup>483</sup> Furthermore, the Directive restricts the Member States' competence by imposing maximum penalties.<sup>484</sup> The Directive enlarges the definition of market manipulation to a non-exhaustive list of acts that will in principle be deemed to constitute market manipulation and outlines criteria on manipulative market practices.

The Regulation introduces greater harmonisation of administrative sanctions. Common principles are proposed, notably that the maximum fine should be three times the amount of profits gained or losses avoided. For natural persons there are three levels of fines. For the offences of insider dealing and market manipulation a fine of at least € 5 million should apply, and fines of € 1 million and € 500,000 for the remaining offences. For legal persons there are also three levels of fines. For the offences of insider dealing and market manipulation a fine of at least € 15 million or 15% of annual turnover should apply and fines of € 2.5 million or 2 % of its total annual turnover € 1 million for the remaining offences of the Regulation, with Member States being free to exceed these limits. In imposing sanctions, competent authorities should take account of other aggravating or mitigating factors, such as the gravity of the offence, previous offences or a suspect's cooperation with an investigation.<sup>485</sup> It is yet to be seen how the implementation of these new provisions shall be translated in Belgian legislation.

Although Article 13 of the Unfair Commercial Practices Directive leaves the choice to Member States as to the sanction mechanism, the Belgian legislator has used the Directives implementation as an opportunity to strengthen criminal sanctioning against unlawful commercial practices. The LLCP Act, which entered into force at a later date than the General Food Act of 1997, specifies in Article XV.83 that when an infringement of the implementing decrees referred to in Article 9 of this Act or the European Directives related thereto also constitutes an infringement of the General Food Act of 1997, the penalties provided for by this

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<sup>481</sup> Ibid Preamble (7) of the Directive on criminal sanctions for Market Abuse.

<sup>482</sup> Ibid Preamble (10) of the Directive on criminal sanctions for Market Abuse.

<sup>483</sup> Ibid Arts 3-6 of the Directive on criminal sanctions for Market Abuse.

<sup>484</sup> Ibid Art 7: for insider dealing and market manipulation the maximum term of imprisonment is set on 4 years and for unlawful disclosure of inside information.

<sup>485</sup> Market abuse Regulation (n 111).

latter Act alone shall be applicable. Article 102 TFEU prohibits the abuse of a dominant market position which may affect trade between Member States. The implementation of this provision is defined in the EU Antitrust Regulation, which can also be applied by national competition authorities.

## 7 Transport and trafficking of food

### 7.1 Intra-EU transport of food

When it comes to the transport of food, the rules that apply have to a large extent been harmonized and are subject to the EU regulations. Within the EU, one has to differentiate products coming from third countries: these import rules differentiate between food products not of animal origin,<sup>486</sup> food of animal origin and animals,<sup>487</sup> feed,<sup>488</sup> and plant products<sup>489</sup> and the rules governing intra-EU products. With regard to the latter, the principle of free movement of goods implies that restrictions on import and export rules are barriers to trade should be removed. Although in principle intra-EU products should move freely throughout the Union, there are exceptions to this rule, also in the field of food security. On the basis of regulation 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, the FASFC<sup>490</sup> is competent to check these products and does so with regard to food being imported from third countries at a designated point of entry.

Controls at these designated points of entry, are conducted by doing documentary checks on all consignments, identity and physical checks including laboratory analysis, at the frequencies set out for each product in the Annex.<sup>491</sup> On the basis of this check, common entry document is completed and non-compliance documented therein. When there is a suspicion, the competent authority can place the consignment under official detention.<sup>492</sup>

In some cases Belgian implementation legislation specifies further how this intra-community control shall be organised.<sup>493</sup> In other cases, Belgian legislation goes further than is required by European legislation and regulates the import of products more strictly than other member

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<sup>486</sup> See General Food Regulation & Commission Regulation No 669/2009 of 24 July 2009 implementing Regulation (EC) No 882/2004 as regards the increased level of official controls on imports of certain feed and food of non-animal origin and amending Decision 2006/504/EC [2004] OJ L 194/11.

<sup>487</sup> See Directive 91/946/EEC and Regulation 882/2004 on official controls (n 44) for the import of live animals; Directive 97/78/EEC for the import of food products of animal origin.

<sup>488</sup> See Commission Regulation 669/2009 (n 118).

<sup>489</sup> See Commission Regulation (EC) No 136/2004 of 22 January 2004 laying down procedures for veterinary checks at Community border inspection posts on products imported from third countries [2004] OJ L 21/11.

<sup>490</sup> Art 1 of the Regulation 882/2004 on official controls (n 44).

<sup>491</sup> Art 8 of the Commission Regulation 669/2009 (n 118).

<sup>492</sup> Art 18 of the Regulation 882/2004 on official controls (n 44).

<sup>493</sup> Royal Decree of 22 May 2014 on veterinary controls in intracommunity trade of live animals and animal products, B.S. 2 July 2014.

states. This is always a delicate exercise as such a restriction on the free movement of goods can be found to be an excessively cumbersome import regulation violating the core idea of free movement. Furthermore, it can lead to an infringement procedure being initiated against the member state imposing these import restrictions. In this regard, it should be noted that Belgium is stricter in the trade of food supplements than most other European member states. Food supplements are subject to a notification obligation to the Department of Public Health before they can be brought on the Belgian Market.<sup>494</sup> The member state is also required to notify the Commission when it does not permit the introduction of feed or food.

## 7.2 Import of food products coming from third countries

Food products coming from third countries are also subject to quality control generally going beyond those for intra-EU products. For some third countries and some products, a more lenient system is allowed downsizing in the required controls for import. This system is expected to be expanded to more countries in the near future adopting the approach taken for intra EU transport that controls should be conducted where a risk assessment has indicated that it is necessary.

## 8 Liability of legal persons

On 4 May 1999 a bill was passed that introduced the criminal liability of legal persons in Belgian Penal law. Since this bill, Article 5 of the penal code states that a legal person is criminally liable for criminal offences which are either intrinsically linked with the realization of its object or the fulfilment of its interests, or which, according to the concrete circumstances, were committed at its own expense.

There is no limitation, nor interpretative restriction for the kind of offences for which a legal person can be held criminally liable, but in order to incur liability, there needs to be an established (physical) connection between the offence and the legal person. Article 5.1 of the Penal Code exhaustively establishes three ways this connection can be established. A legal person can be held criminally liable for offences which are (1) intrinsically bound to the realization of their social object; (2) intrinsically bound to the defence of their interests; (3) on the ground of a concrete facts-pattern, are committed for its account. This connection is established on a case-by-case basis and left to the judge's interpretation. Liability for legal persons can occur for all of the offences and as such, all legal persons can be held criminally liable in food fraud cases under Belgian law.<sup>495</sup>

The criminal prosecution of a liable legal person does not exclude parallel prosecution of the natural person/perpetrator and vice versa. There is however a cascade system in Article

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<sup>494</sup> Eg article 4 of the Royal Decree of 29 August 1997 (n 104).

<sup>495</sup> Art 5 of the Penal Code is applicable to both public and private legal persons but explicitly excludes certain specific types of public legal persons in its final paragraph: The Belgian federal state, regions and communities, provinces and communities are excluded, as are the public centers for social welfare (OCMW's).

5 Penal Code to establish liability should concurring liability issues arise. Firstly, it is established who committed the most serious error. The legal person will only be convicted if he had committed the most serious error. The decision that the most serious error has been committed by the legal person does however not mean that the natural person will automatically go free. Where the natural person has committed the act intentionally, both the natural person and the legal person can be convicted together. As such, when double (legal-natural person) liability might occur, the possibility for concurring liability is lost when the natural person did not act intentionally. As was identified by the IRCP 2012 study on the liability of legal persons, under the Belgian regime the outcome of liability was nuanced. In terms of attribution of criminal liability and the imposition of (criminal) sanctions, the outcome remained uncertain and depended on case-by-case judgments. No specific liability (legal or natural person) takes the upper hand.<sup>496</sup>

The Belgian legal regime foresees two main liability regimes: the criminal liability and administrative liability. In terms of administrative liability, the 2012 IRCP study established that, under administrative liability regimes in Belgian law, the sanction will ultimately be imposed on the legal person only.<sup>497</sup> Moreover, on the basis of certain special laws, a legal person can be held civilly liable to pay the fine to which their employees were sentenced based on their criminal liability. While the employee (physical person) remains criminally liable, the legal person will be responsible for the fine.<sup>498</sup> As a result, legal persons can be held liable as a perpetrator for the offence under criminal law and as the civilly liable party for acts committed by their employees. It is important to specify that this liability is limited to fine-sanctions, not to confiscation and/or forfeiting of (financial) assets. To avoid double sanctioning, Article 50*bis* of the Penal Code was introduced, based on which no one can be held civilly liable for the payment of a fine for which another person was convicted when they themselves were convicted under criminal law for the same acts committed.

In terms of parent-subsidiary relationships between legal persons, and specifically in terms of liability, the general principle under the Belgian regime is that each legal person is autonomous, even when different legal persons form a group.<sup>499</sup> As was established by scholars, there are no explicit, clear-cut Belgian rules on how to 'pierce the corporate veil'. According to the general principle, a parent company shall only be liable for the infringements committed by its subsidiary where the parent company itself has imposed,

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<sup>496</sup> G Vermeulen, W De Bondt & C Ryckman, *Liability of legal persons for offences in the EU* (Maklu 2012) 72, 201.

<sup>497</sup> *Ibid* 78.

<sup>498</sup> C Van den Wyngaert & S Vandromme, *Strafrecht en strafprocesrecht in hoofdlijnen* (Maklu 2014), 136-138.

<sup>499</sup> H Dewulf, 'Concernrechterlijke aansprakelijkheid' in I Cuypers et al. (eds), *Bestendig handboek vennootschappen aansprakelijkheid*, eds (Kluwer, Mechelen); S Demeyere, *Liability of a Mother Company for its Subsidiary in French, Belgian, and English Law* (2015) 3 *European Review of Private Law*, 385-414.



or participated in, the subsidiary's criminal conduct. In the 2009 *Akzo Nobel NV and Others v Commission* Judgment, however, the ECJ refined this (and broadened the scope) by looking at the amount of control exercised by the parent company on the subsidiary. In short, the Court ruled on the decisiveness of the influence exercised by the parent company and proclaimed a rebuttable presumption for corporate liability where the parent company has a 100% shareholding in its subsidiary legal person.<sup>500</sup>

## 9 Concluding Remarks

### 9.1 A more effective sanctioning mechanism

Today, the Belgian food safety field is entirely governed by criminal law, but in practice the most common violations are sanctioned at an administrative level due to a lack in expertise and resources at the Belgian Justice Department. This raises the question how judicial authorities can be further unburdened in order to obtain a more effective way of sanctioning perpetrators. This can be done by enlarging the enforcement competences of the administrative authority in having the final say on sanctioning. This would entail the FASC being able to collect the amount by means of a writ. Another possible route towards unburdening is to depenalize the smaller violations altogether by sanctioning them exclusively on an administrative level, as is already done in Belgian Social Penal Law<sup>501</sup> and in the Flemish environmental legislation,<sup>502</sup> where the public prosecutor no longer intervenes for a certain number of offences. Serious violations need criminal law protection but minor violations are still adequately deterred by administrative handling – certainly considering that the *ne bis in idem* principle between administrative and criminal provision is guaranteed.

### 9.2 Enhancing deterrent effect towards larger cooperations

If we look at certain maximum amounts of penal sanctions in the Belgian food legislation today, we can conclude that some maximum amounts of fines in practice, will not have a discouraging effect on the bigger corporations or the multinationals active in the food chain, although the offence can cause (grave) danger to public health. Eg, Article 3bis, para 2 f the Royal Decree of 22 February 2001 foresees a fine of € 200 up to € 2,400 if one exercises an activity in the food chain without the necessary authorization given by the FASFC. Not having such authorization means that the perpetrator is not known to the Belgian authorities and therefore is not inspected, which could cause a serious risk to public health. A maximum fine of € 2,400 if in violation of this rule, can hardly be considered as an effective penalty.

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<sup>500</sup> See CJEU C97/08 *Akzo Nobel NV and Others v Commission* [2009].

<sup>501</sup> The Belgian Social Penal Law of 6 June 2010 has as its most important objectives: the depenalization of the social laws and broadening the scope of administrative fining. As of 2011, all violations to social laws can be sanctioned with an administrative fine. These fines are not only imposed on the employer, but also on the employee, the agent of the firm and the socially insured. Now it is also possible to impose an administrative fine for certain offences that is not accompanied with a penal sanction (arts 74-91 of the Social Penal Code).

<sup>502</sup> Titel VVI of the Flemish Decree of 5 April 1995 with general regulations with regard to environmental policy.

Also, it is felt that fines should not be the only tools when sanctioning perpetrators in this domain. Only a few food safety regulations today, enable the criminal judge to close an establishment and this sanction is very rarely given by a judge, because it is often considered to go against the principle of free commerce. The closure of an establishment should be incorporated in the Belgian horizontal food safety legislation and should be applied in cases of skulled perpetrators (recidivism) and in cases which have a (grave harmful effect on public health).

Finally, food is something that concerns us all on a daily basis, as we cannot survive without it. Consumers today are very concerned with what they eat and drink and like to be informed of what is good for their health and what is not. Therefore, another sanction that the Belgian authorities should consider, is to inform the consumer when food is 'unsafe', as was deemed acceptable by the ECJ in the *Berger* case.<sup>503</sup> A critical note might be that this form of 'public shaming' might impact on the possible 'economical rehabilitation' of the company at hand. A thorough assessment should therefore be made on the desirability of such a sanction, an issue that has insufficiently been researched considering the recent date of the *Berger* case. It remains unclear whether this type of sanction would be legitimate in the case of no danger to health.

### 9.3 Self-regulation gone too far?

The self-regulatory capacity of the food industry has traditionally been strong and today we see an industry in which the system of auto-control and certification is well established. The industry itself applauds this high level of professionalisation. Yet, criticism of this system is not entirely absent. First, also in Belgium some actors mention that the private certification authorities (eg, Promag, SGS, Quality Partner) are quite close to the industry itself. It is not that their independence is questioned but rather that the trust in their competence is that high, as a result of which the level of supervision of the government decreases from the moment they give a company in the food chain a certification (*bonus malus* system).

At present, these private certification authorities have to comply with the terms specified in Article 9 of the Royal Decree of 14 November 2003 concerning self-checking, traceability and notification in the food chain. If one of the terms is violated, the certification can be suspended. For the future, the FASFC is planning to strengthen its approach by also foreseeing the possibility to withdraw the certification in case of for example fraud. The fact that the level of control decreases, can be very dangerous to the extent that these unannounced controls have a highly deterrent effect. Also, as the horse meat scandal demonstrates, being certified does not exclude the possibility of these legal persons engaging in criminal conduct. When these companies are controlled less *because* they are certified, this opens the door for (criminal) misconduct. To confront this problem, a reform project planned to go into force by the end of 2017 is being discussed to suspend a validation by a certified private authority, when the operator active in the food chain, does no longer comply with the conditions of the validation.

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<sup>503</sup> CJEU, C-636/11, *Berger* ECLI:EU:C:2013:227.

Although these reforms propose administrative sanctioning opposed to penal sanctions, the result for the parties concerned will be the same. Secondly, the European regulations concerning self-control, considering their often general nature, are shaped further at the national level by sectoral guides drafted by the different sectors operating in the food industry. After this initial drafting phase, the competent government authorities (FASFC) validate these sectoral guides. Again, we see that a high level of trust is offered to the sector in taking the 'quasi legislative' initiative in shaping these guides. Although these sectoral guides are merely soft-law mechanisms, it can be questioned to what extent too much is outsourced to the private sector and whether it would not be preferable to have the initiative come from the government with a say of the sector in this legislative process. We see this turn to privatization in the entire sector, but do not yet know the possible downsides of this evolution.

#### 9.4 Further research into the possible introduction of a crime of endangerment

The Belgian Penal system has no crime of endangerment. Whether the Belgian system would benefit from such a crime is debatable. Considering the low negligence standard for involuntary manslaughter or battery and assault combined with the fairly straightforward way to establish the causal link (the doctrine of equivalence), this provision has a high applicability. The fact that harm has to be established, gives the definition more body.<sup>504</sup>

In the current version of the draft of the reform project concerning a General Food Law (*Lex Alimentaria*), the Belgian legislator has considered introducing endangerment in this domain and sanction

'he who knowingly manufactures, fabricates, processes, possesses, exports, transports or commercializes products that do not comply with food safety regulations, that contain or **could** contain harmful organisms or an animal illness, that are contaminated **or could be** contaminated, that are harmful, declared harmful, are unfit for human consumption **or are dangerous for the safety of the food chain'** (emphasis added).

The introduction of an endangerment crime with regard to food safety could allow the sanctioning of perpetrators, even though the harmful effects of a product are not necessary established at the time of manufacturing. The downside is that such a crime is more 'fluid' and the *actus reus* less defined. This can give rise to issues in light of the legality principle.<sup>505</sup>

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<sup>504</sup> Cfr dioxine crises in 1999.

<sup>505</sup> C Billiet and S Rousseau, 'De zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse' (2005) *Tijdschrift voor Milieurecht* 19.

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# FOOD JUSTICE, FOOD SOVEREIGNTY, AND FOOD GOVERNANCE:

## A Brazilian Call for an Integrated Approach

*By Eduardo Saad-Diniz \**

### 1 Introduction

To connect all the pieces of the global food system, revision of the existing legal instruments is necessary as well as taking a more integrated approach in new regulatory initiatives. Nowadays, it is rarely possible to find international trade treaties and food chain controls that address more directly social movements' demands and needs of a more equal – and humane – approach to the social organization of food systems. Even more rarely can one find food security addresses concerns going beyond supply chain protection to consider alternative policies of food production. Such narrow perspectives have a tremendous impact on the set of rules, rights and values, and induces a biased food corporate regime. If the real purpose of engaging in food justice is indeed to reach a broader range of stakeholders and induce meaningful changes in the governance of food chain corporations, advancement is necessary and this omission in food security strategies and food sovereignty should be addressed.

Harmful conduct and systematic violations of human rights are committed daily without a fair criminal law response that ensures the right and accessibility to food. Based on this background, criminal law responses require a better understanding of their role beyond setting new supply chain standards. A critical review of criminal law could not only stimulate a better regulatory environment for food security, but also address the challenges of food injustice and, in the progressive words of Vandana Shiva, reclaim 'food democracy'<sup>506</sup>.

The current 'Brazilian call' could be considered as an appeal to challenge the traditional criminal law measure, opening its interpretation to the advances of a more integrated perspective that binds food justice, food sovereignty and food governance. After laying down Brazilian Law's narrow perspective on the issue at question, this essay aims at reviewing theoretical foundations of those three domains (justice, sovereignty and

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<sup>506</sup> V Shiva, *Stolen harvest: the hijacking of the global food supply* (Cambridge, South End, 2000) 117.

governance) and discusses possible cognitive connections between them. This essay is structured as follows: the first part explores the core ideas and implications of a food justice approach criticizing the Brazilian criminal law's narrow perspective. It is limited to offenses oriented to the protection of the food supply chain and have no more than symbolic effects. Based on that background, I analyse the moral foundations behind it and address potential ways of reshaping the right to food, bringing some reflexive observations on the lessons from food regime theorists. The second part examines food sovereignty according to the social movement's arguments against agribusiness (influenced by Hannah Wittman) and the Movimento dos Sem Terra's protagonist role in Brazil. The third part briefly explores McKeon's bottom-up governance model and recent approaches on constructive regime interactions. The recollection of many different perspectives might appear excessively propaedeutic, but the descriptive work would be necessary to extract more accurate theoretical references for future research, especially the one produced in the Brazilian context.

## 2 Food Justice

One of the worldwide most acknowledged Brazilian thinkers, Paulo Freire, drew the attention of governments and social movements with his captivating 'Pedagogy of the Oppressed', by inspiring entire generations to bring more realistic experiences to the debate and by rethinking the social organization of food. Paulo Freire also inspired Garrett Broad to use food 'as an access point to engage the community' and put food justice at the forefront of the food systems debate. In his book 'More than just food', Broad focused on 'the importance of praxis in the organization process ... reinforcing combination of dialogue and application'. The strategy is to move ahead with a 'hybrid praxis, an ever-evolving mix of philosophy and action that takes shape through an ongoing process of co-construction, collaboration, and conflict in food justice work'.<sup>507</sup>

If we look at the Brazilian experience on food security, there are many contradictions that require deeper context-sensitive investigation and cognitive ability to formulate more accurate solutions. In its generous territory, there is a vast amount of land available for immediate expansion of sustainable agriculture, whereas more than one million Brazilians are still suffering under child underweight, malnourishing and child mortality.<sup>508</sup> Despite

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<sup>507</sup> G Broad, *More than just food* (California, University of California, 2016) 8-9. His ethnographic exploration of community-based justice activism in urban America (local storytelling) highlights the food movement's conflicts, social dynamic and strategies 'to address food injustice faced by everyday people' (197). R Gottlieb, A Joshi, (Cambridge, MIT Press, 2010) 11; specifying contexts of institutional racism, hunger, and nutritional justice, AH Alkon, J Agyeman, *Cultivating food justice* (Cambridge, MIT Press, 2011) 23.

<sup>508</sup> Statistics from the 'Pesquisa Nacional por Amostra de Domicílios - PNAD', produced by the IBGE (Instituto Brasileiro de Geografia e Estatística) and the Social Development Ministry for Fighting Hunger verified: 52 million people (main profile: black, 'pardos' and women), living in 14.7 million of household evidenced some kind of food restriction, produced by lack of food. Hunger, the most severe face on food insecurity, affects 3.2% of Brazilians. The Brazilian Health Ministry, though, in cooperation with the United

the lack of systematic reviews to support a more consistent scientific knowledge on the social organization of food in Brazil, the country is indeed a fertile laboratory for food justice. On the one hand, the leading research organization EMBRAPA (Empresa Brasileira de Pesquisa Agropecuária) celebrates highly technological advancements in the enhancement of production and prepares the platform for giant conglomerates of industrial food system. On the other hand, it is common knowledge – with nothing to celebrate – that so many millions of Brazilians suffer under extreme poverty, hunger and malnutrition at suburban and marginalized communities (favelas) and rural areas. Many efforts to build environmental institutions, mobilization of environmental activism for pollution control and sustainable cities coexist daily with indiscriminate exploitation of natural resources, natural catastrophes caused by corporate misfeasance. The indiscriminate exploitation comes with complicity of local authorities and repugnant bribe schemes which cause even more damages and human tragedies to the most vulnerable communities, such as recently evidenced by the Samarco case in Mariana, Minas Gerais. The social organization of food in Brazil goes hand in hand with an ideological campaign that creates the illusion of a powerful nation proud of its unending natural resources. Brazil's ambitious strategies are intensively motivated by 'hope and political will' – eg, Lula da Silva's Zero Hunger Program –, but in official policies there is a silent complicity with a severe concentration of land, loss of biodiversity and food culture patrimony by means of imposed food chain standards.

In the compelling work of Anthony John Weis, he takes Eric Hobsbawm's standpoint analytics ('the death of the peasantry as the most dramatic and far reaching social change of the 20th century') and describes how 'ex-peasants' turned into vulnerable groups in poor urban areas, with 'dangerous expediency in food policy': 'the urbanization of food security problems in slums could, in turn, reinforce short-range national food policies such as trade liberalization designed to ensure access to the cheapest supplies on global markets'.<sup>509</sup> Weis strongly criticizes the unilateral dimensions of the regulation of global agricultural trades under the World Trade Organization (WTO), 'with power imbalances playing out through such things as the outright exclusion of many countries from key meetings, the back-room influence of corporate lobbyists and the extreme asymmetries in the sized of developing-country negotiating contingents'.<sup>510</sup> This culminates in deregulations strategies or regulatory captures 'in multilateral trade regulation (that) maximize their global flexibility by restricting the capacities of governments to intervene in domestic markets, while also ensuring that governments would uphold stringent intellectual property rights'.<sup>511</sup>

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Nation for Food and Agriculture and the Panamerican Organization for Health recently published that more than a half of Brazilian are suffering under overweight and obesity (20% adults), In *Jornal O Globo*, 24 January 2017.

<sup>509</sup> AJ Weis, *The global food economy: the battle for the future of farming* (London, Zed, 2007) 24-28.

<sup>510</sup> *Idem*, 130.

<sup>511</sup> *Idem*, 158.

Several analytical studies on the recent global food crisis<sup>512</sup> and the aggressiveness of agribusiness highlight its socioeconomic contradictions, especially concerning the biofuels euphoria experienced during that period.<sup>513</sup> The Brazilian economic agenda gained at that moment a very self-confident image of being an emerging global player on agrofuel's competition; however, it did not take long for the US to engage in a compelling competition. There are serious concerns about the dynamics of the ongoing international competition in agrofuel markets and their role in the food price crisis. According to Bello, there are 'structural adjustments, free trade, and policies extracting surplus from agriculture for industrialization, all of which have destroyed or eroded the agricultural sector in many countries'.<sup>514</sup> Criticisms, though, point towards the perverse side effects of the regulatory competition and protectionist measures. It reaches from limited food storage to asymmetric agricultural policies 'aggressively pushed by governments and the agribusiness corporations, the exacerbation of the food crisis through land conversion (and) harming the environment worldwide'.<sup>515</sup> The benign promises of biofuel appear to be economically inefficient and demand complementary fossil fuels.

At this stage, I assume that reshaping the right to food is more than a necessary task, since it affects dramatically the everyday life of millions of Brazilians. To challenge food justice is to move ahead the legislative framework beyond political passions, seeking for a humanistic appeal to solve malnutrition and hunger, and protect the environment against aggressive agroindustry offensives. Food injustice is strongly linked to a delicate climate change and global warming process that strongly impacts on poor food consumers, since it leads to a drastic reduction in food production in many developing countries, increases dependence on food imports and exerts upward pressure on food prices. Furthermore, injustice is felt in

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<sup>512</sup> See, for example, A Mittal, 'The blame game: understanding structural causes of the food crisis', in J Clapp et al (eds) *The global food crisis: governance challenges and opportunities* (Canada, WLU Press, 2009) 13-25.

<sup>513</sup> Didactic on the factors behind the food price crisis, confronting it to the demand and supply sides, KA Elliot, ..., in J Clapp et al (eds), *The global food crisis: governance challenges and opportunities* (Canada, WLU Press, 2009) 63.

<sup>514</sup> W Bello, *The food wars* (New York, Verso, 2009) 106. Walden Bello solutions: (1) agricultural policy should be food self-sufficiency; (2) a people have the right to determine their patterns of food production and consumption, taking into consideration 'rural and productive diversity'; (3) production and consumption should be guided by the welfare of farmers and consumers, not the profit projections of transnational agribusiness; (4) avoid 'malbouffe' or 'junk food'; (5) new balance must be achieved between agriculture and industry (to avoid a blighted countryside and massive urban slums of rural refugees); (6) equity in land distribution; (7) protection of small farmers vs end to dumping by transnational firms of subsidized agricultural commodities.

<sup>515</sup> 'Brazilian sugarcane-based ethanol is also facing competitive pressure from the heavy subsidization of the American agrofuels industry. Import tariffs on Brazilian ethanol amount to fifty-four cents per gallon. The South American variant is allegedly more energy efficient and cheaper to produce than the corn-based agrofuel made in the US, though, admittedly, self-interested Brazilian ethanol interests are among the voices making this claim', W Bello (n 11) 108. More comments on the abuse of corporate power and the expansion of agribusiness, S Ribeiro, H Shand, 'Seeding new technologies to fuel old injustices' (2008) 51 *Development* 496.



systematically produced environmental damages (deforestation in the Amazon natural region, losses in biodiversity),<sup>516</sup> appealing social consequences and in the so-called ‘new slavery’ (slave-like working conditions).<sup>517</sup> Whenever I start thinking about such harmful consequences, I realise how food injustice requires a better understanding of the role of corporations in addressing informal structures of governance, responsibility and commitment to preventive measures.

## 2.1 Brazilian criminal law’s narrow perspective

Unfortunately, not much has changed in the criminal law since the classic systematization provided by Arthur Herrich.<sup>518</sup> Even worse, looking at the Brazilian food law, it is characterized by an inconsistent legal framework, uninspiring normative approaches and a lack of integration. The Brazilian criminal law has adopted no meaningful creative approaches for the insurance of the right to food since the work of Nelson Hungria. Conceptions of food are constrained by generic definitions of ‘substance destined to nourish and sustain the body’, to consumption or ‘aimed to use or ingestion for an undetermined number of persons’.<sup>519</sup> Harmfulness affects organic and mental health integrity, with both a positive (causing directly harm) or negative side (reduction of nutritional value or beneficial effect of the substance, without immediate damage). These classic lessons, still common in major Latin American jurisdictions, refer to a particular right, regardless of its social realms and community expectations.

As mentioned *supra*, the mainstream concept of food remains limited to the nutritional value. Before recent modifications of the Brazilian Penal Code (Article 272, *caput*, CP), offenses were constrained to violations of public health. The current description of offenses at Article 272 CP addresses punishment to reduction of nutritional value evidenced by proof of harm. Nevertheless, an updated conception of nutritional value is questionable if the legitimacy of offenses is based on open-ended normative concepts. Instead, it was supposed to require cause of concrete harm on public health or at least exposure to risk, beyond the

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<sup>516</sup> ‘The UN projects that there will be up to 50 million people escaping the effects of environmental deterioration by 2020. The spectrum of associated health risks includes food and water emergencies and infectious, nutritional, and mental diseases. By increasing the scarcity of basic food and water resources, environmental degradation increases the likelihood of violent conflict. Conflict could emerge as a result of climate-change-related environmentally induced migration. Political refugees from violent regions are more likely to become involved in militant activities’, C Tirado et al, ‘The impact of climate change on nutrition’, in J Clapp, MJ Cohen (eds), *The Global Food Crisis* (WLU Press, 2009) 137.

<sup>517</sup> E Saad-Diniz, ‘Tutela penal de las libertades personales. El tipo penal de reducción a condición análoga a la de esclavo en Brasil’ (2014) 2 *Revista de Derecho Penal* 85. It is not limited to the new slavery concept: workers are literally dying in the fields. The question of ‘who is to blame for these senseless and preventable deaths’ remains unanswered. See in further details, A Rodriguez et al, ‘Cheap food: works pay the price’, in K Weber, *Food, Inc.* (New York, Public Affairs, 2009) 124; for more details on the ‘new slavery’ in Brazil, see Pastoral da Terra Commission on Slave Labor < <http://www.endslaverynow.org/comiss%C3%A3o-pastoral-da-terra> >.

<sup>518</sup> AD Herrich, *Food regulation and compliance*, vol 1 (New York, Revere, 1944).

<sup>519</sup> N Hungria, *Comentarios ao Código Penal*, v IX (Rio de Janeiro, Forense, 1958) 7.

mere reference of nutrition value's reduction. That is to say, food security affects Brazilian criminal law not only in cases of consummate results, but also in terms of exposure to danger to safety.<sup>520</sup>

The descriptive observation of the Brazilian legal framework offers no more than the absence of a strict planning legislation and leaves much room to learn from other experiences and theoretical references. A reorientation of the Brazilian criminal law requires a clearer connection to better food policy goals and a radical reassessment of needs, rights and obligations. In addition, there is much to be analysed in terms of networks between food systems and the criminogenic asymmetries produced daily in a systematic manner. Therefore, we need theoretical references for a better understanding of the role of criminal law beyond the mere insurance of food supply chain.

## 2.2 Offenses protecting the supply food chain

Offenses against public health and the Code of Consumer's Defense – the CDC (Law No 8,137/1990)<sup>521</sup> – are predominant in the Brazilian legal order. Among the most important offenses listed, we have the following: (1) labelling omissions (Article 63 CDC); (2) failure to remove harmful products from the market (Article 64 CDC) and its administrative regulation (ANVISA - National Sanitary Surveillance Agency) recall of food that exposes consumers to risk;<sup>522</sup> (3) fraudulent publicity (Article 67 CDC); (4) inducing consumers to meaningful error.<sup>523</sup> The doctrine is limited to identifying the legal interest protected – personal alimentation, public safety, or, more specifically, public health. Nevertheless, I assume here that the purpose behind the criminal policy of food security and food safety is far from being noble, which is to ensure the proceedings and consumer's freedom. The criminal relevance of a conduct is highly concentrated on capturing the potential of a food

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<sup>520</sup> Especially after Monsanto's transgenic soy (*round-up ready*), *novel food* started to be discussed in Brazil. The Brazilian Biosecurity Law (Law no 11,105/2005), referring to the 'precaution principle' (included at the Rio-92 Convention), it is usually interpreted as a preventive intervention (Principle 6, Stockholm Convention, cc Art 225, § 1, II and §§ 5 and 6; Art 196 and 198, II, Federal Constitution), recognized as an obligation to anticipate ecological dangers and exposure to risk and oriented to an emergent need (Principle 15, Rio-92 Convention, cc Art 5<sup>o</sup> and 196, Federal Constitution, Art 12, Law no 7,347/85, Ley 9,974/95 and Decree 2,519/98). VG Rodríguez, 'La precaución como principio rector de la Ley Brasileña de Bioseguridad: de los escollos a su aplicación hasta la fuerza meramente simbólica de la previsión normativa', in M Gomez Tomillo (ed), *Principio de precaución y derecho punitivo del estado* (Valencia, Tirant lo Blanch, 2014) 346. For more details on the precautionary regulatory framework, A Szajkowska, *Regulatory food law* (Wageningen, Wageningen, 2012) 101.

<sup>521</sup> Law no 8,137/1990 (Law against tax, economic and consumer offenses), besides the Law no 1,521/1951 (Law of offenses against the popular economy).

<sup>522</sup> It can be extended to who is supporting or spreading the product.

<sup>523</sup> At STJ-REsp 447303, 2002, Rel Min Luiz Fux the expression 'diet por natureza' (naturally diet) applied by the producer was considered to induct the consumer into error by use of fraudulent advertisement. Those solutions, though, require at least more attention to rapid responses and crisis management systems, communicating effectively the exposure to risk. Fraudulent advertisement is followed by insufficient enforcement measures.

fraud risk,<sup>524</sup> and due to ineffective enforcement measures, limited to protect the production, distribution and consumption. The majority of cases refer to labelling dilemmas and issues of food fraud intentional adulteration.<sup>525</sup>

From a macro-perspective, this policy is supposed to be influenced by economic policies provided by Article 170 of the Brazilian Federal Constitution, the so-called 'economic constitution'. However, a more realistic crime analysis would explore the elements of the supply chain and malign proceedings. From a micro-perspective, criminal law could be more aware of how the supermarkets are transforming the global agrifood value chains, seeking for a better coordination of production-distribution-consumption, not only focused on protecting the supply chain. Critical perspectives with a better empirical foundation still need to be targeted towards such issues in order to really 'know the supply chain'.<sup>526</sup>

Protecting the food supply chain, besides scandals that put in check the control of food safety – such as the mad cow, birds flu, or even the Chinese 'melanine for milk' case, the European horsemeat case, or Brazilian affairs on addition of caustic soda in milk – expresses no more than the international trend to enforce better market conditions and inclusion mechanisms.<sup>527</sup> Besides supply chain protection, regulatory burdens in Brazil are remarkably negligent on severe issues. There is no offense of market manipulation nor are there generic offenses of abuse of economic power (Article 4 Law No 8,137/90). Severe offenses against humanity, more specifically the ones regarding homicide caused by chronic hunger, can be identified as an ill-treatment offense (in case of authority, vigilance or

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<sup>524</sup> Abuse of economic power (Law no 8,137/1990), collusion (Art 4, I, II) and other offenses against the consumption (Art 7) are very rarely applied. Without a more rigorous quantification, though, it will not be an easy task to go beyond the supply chain protection. To the extent of my knowledge, there though is an intolerable lack of data and official statistics, neither informal evaluations are easily accessible. I am here forced to assume the low incidence of offenses against food security and food safety at the Brazilian Courts and negative symbolic effect of our legal framework.

<sup>525</sup> John Ryan broadly describes the protection of the food fraud risk: 'some of these risk opportunities include products using high value ingredients, ingredients that are easy to disguise, hard to see or test for, bulk products, globalization and trade, supply chains that are not vertically integrated (known suppliers, carriers etc.), suppliers without cGMP supplier certification and those with no incoming testing programs. Suppliers with previously reported poor food safety, poor food quality, or poor manufacturing processes represent another set of high-risk producers and processors', J Ryan, *Food Fraud* (Amsterdam, Elsevier, 2016) 32-45.

<sup>526</sup> According to the Council of Supply Chain Management Professionals (CSCMP), there are some criteria to analyze the food supply chain: (1) food safety: on-time delivery; traceability; temperature abuse; sabotage and tampering; contamination; theft; (2) availability of transport equipment: reefers, farm gondolas, intermodal, local customers; (3) sustainability of the supply chain, carbon reduction, packaging. Critical aspects of value chains analysis, including gender issues, S Barrientos, 'Gender, flexibility and global value chains' (2001) 32 *IDS Bulletin* 91. The linkage between different nodes of the chain and the ability to create value and affect behavior are still in need for more empiricism.

<sup>527</sup> An ideological orientation to stimulate consumption by means of the Federal Constitution (Art 170, V, CF) could be identified, according to ER Grau, *A ordem economica na Constituicao de 1988*, 14 ed (Sao Paulo, Malheiros, 2010) 253; more inclined to the autonomy by means of the contractual protection of consumption, RP Macedo, *Contratos relacionais e defesa do consumidor*, 2 ed (Sao Paulo, RT, 2007) 223.

exposure to risk of life or healthy integrity of somebody, Article 136, § 2o, CP), neglecting, however, a deeper approach on genocide or crimes against humanity,<sup>528</sup> or potential to terrorism.<sup>529</sup> Transnational consequences made this call urgent to promote the evaluation of new strategies for food policies.

As mentioned above, the sanctioning system is instable in terms of food security. It is covered by a wide spectrum of criminal, administrative and civil norms. Nevertheless, the essential quality of those sanctions is no more sophisticated than the classical Nelson Hungria's lessons on 'intensity of violation' as being the distinctive criteria among them. *Ne bis in idem* is recognized in Brazil though, enshrined by the Pact of San Jose (Article 8, no 4). Regulatory agencies, such as the ANVISA, are responsible for supplementary 'sanitary control' and legitimize numerous blanket criminal acts in the Brazilian legislative framework.

Criminal law scholars are, on the other hand, still absorbed by traditional legal interest theories. Such theories are uninspiring and offer a low performance when confronted to highly dynamic food chains and the need of resilience on food security. From this review on, it is possible to reach a normative concept of food, deduced from the right of life and health. According to the Brazilian juridical order, right to health is enshrined in Article 6 of the Federal Constitution, the programmatic chapter destined to the social rights (since the Constitutional Amend No 64/2010). Criminal law theories are suffering from the absence of some common concerns on basic social rights, which in turn is a sufficient argument to undermine not only the sanction's system, but the legitimacy of the entire Brazilian legal framework.

As far as corporate criminal liability is concerned, Brazilian laws only incorporates this for environmental offenses (Article 3, Law n. 9,605/1998). I assume here that formal social control over food systems requires the incorporation of corporate criminal liability<sup>530</sup> for

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<sup>528</sup> Great famine-genocide has been terribly repeated in the recent years, such as the *Holodomor*, in Ukraine, described in R Conquest, *The harvest of sorrow: soviet collectivization and the terror-famine* (New York, Oxford Press, 1986); or the Chinese famine of 1959-1916, which caused the deaths of up to 30 million people, considered to be the worst famine in the recent times, described in JL Margolin, 'Death by hunger reprise: China – The greatest famine in History', in WL Hewitt (ed), *Defining the horrific: readings on genocide and Holocaust in the 20th Century* (New Jersey, Pearson, 2004) 211. It is frustrating how we everyday neglect millions of deaths and human suffering under severe hunger worldwide, especially in the post-colonial Africa.

<sup>529</sup> 'Terrorist food tactics generally fall under food defense considerations but represent the worst type of food fraud activities. The intent to harm is real and can have huge consequences. Even worse, due to the lag between the development of tests and test strategies focused on food fraud and the variety of potential substitutes or added ingredients, opportunities for terrorists to impact thousands of people are literally unlimited', J Ryan (n 20) 20.

<sup>530</sup> Discussing recent international trends and the German approaches on company-related actions (*unternehmensbezogene Handlungen*) and the need of a 'third-track' to attribute liability to corporations, based on a vicarious basis, K Tiedemann, 'Corporate criminal liability as a third track', in D Brodowski et al (eds),

food safety violations. Corporate criminal liability could play a pivotal role to promote a more consistent integrative approach, since it does not seem credible that the private sector will change their values on their own. Despite the fact that companies are more aware of their social and human rights responsibilities, no real evidence is available on domestic corporations and MNCs are effectively being committed to creating a better environment for customers and sustainable practices,<sup>531</sup> instead of systematically 'violating the commons'.<sup>532</sup>

### 2.3. Food morality and the normative reshape of the right to food

At this point, I take the position that a more sophisticated normative approach to the right to food is needed. Drawn from the inspiration to foster human solidarity and create better conditions for a real exercise of a conscious access to food, I propose a refreshed perception of rights, duties and obligations. The most problematic issue is that to inscribe the right to food in the core of the criminal law protection against human rights violations requires more than political rhetoric, or moral justifications not bounded to a normative equilibrium between rights and obligations. As O'Neill simply puts, 'if obligations are unallocated, we have no more than rhetoric of charters and manifestos'.<sup>533</sup>

In taking a closer look at political justice, development and equality issues, it is not difficult to recognize how deep and true Amartya Sen's efforts are. His efforts try to encompass social boundaries of rights and food morality, going beyond the threshold of providing people basic needs. In more simple words, the basic needs approach<sup>534</sup> gives space for moral

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*Regulating corporate criminal liability* (Heidelberg, Springer, 2014) 15; analyzing the conditions of agency, C List, P Pettit, *Group agency: the possibility, design, and status of corporate agents* (Oxford, Oxford, 2011) 19; the idea of a 'constructive fault' originally refers to W Laufer, *Corporate bodies and guilty minds* (Chicago, Chicago Press, 2006) 68. For further descriptive details on the Brazilian legal framework for corporate criminal liability, A Manirabona, E Saad-Diniz, 'Towards efficiency in attributing corporate criminal liability: Canadian and Brazilian regimes compared' (2016) *Criminal Law Forum/Springer* 331-359.

<sup>531</sup> Criticisms pointed out that there is a 'coupling' of sustainable goals, reducing them to a marketing strategy of value creation, G Teubner, 'Self-constitucionalizing TNCs? On the linkage of "private" and "public" corporate codes of conduct', in GP Calliess (ed), *Governing transnational corporations: public and private perspectives* (Indiana Journal of Global Legal Studies, 2010) 3. Based on 'faux indignation' and 'corporate inauthenticity', see also W Laufer, 'Where is the moral indignation over corporate crime?', in D Brodowski et al (eds), *Regulating corporate criminal liability* (Heidelberg, Springer, 2014) 26-29.

<sup>532</sup> G Barak, *Unchecked power: why the crimes of multinational corporations are routinized away and what we can do about it* (London, Routledge, 2017) 68. For an accurate criticisms on social reporting and corporate compliance, W Laufer, 'Social accountability and corporate greenwashing' (2003) 43 *Journal of Business Ethics* 254.

<sup>533</sup> 'Helping others and developing human potential are not *substitutes for* but *supplements to* just action. If we are to meet our obligations, we must act to help develop human potential as well as to meet human needs', O O'Neill, 'Hunger, needs and rights', in B Harris-White (ed) *Food* (Oxford, Blackwell, 1994) 232.

<sup>534</sup> Amartya Sen converges, however, on the strategic importance of earlier studies to integrate the right to food to other basic needs, such as 'nutrition, health, shelter, water and sanitation, education, and other essentials', regarding to P Streeten et al, *First things first: meeting basic needs in developing countries* (New York, Oxford Press, 1981) 21.

justifications of offering the minimum requirements – ‘minimum needs and no more’ – and could ‘lead to a softening of the opposition to inequality in general’.<sup>535</sup>

According to Sen, income inequality leads to a dramatic decline in *per capita* food output which demands real responses that address food justice. It is ‘a matter of deciding what type of economic expansion would lead to a steady rise of real income in general and that for poor and vulnerable groups in particular’.<sup>536</sup> Bringing it into the developmentalism, ‘the process of development is not primarily one of expanding the supply of goods and services but of enhancing the capabilities of people’.<sup>537</sup> It is at least reasonable to expect that constructing capacities would embrace more sensitivity to rebuild trust in food justice. At his well-crafted book ‘Poverty and Famines’, Sen identifies the essential critical issue expressed by food justice: it is not only a question of lack of food, but also to provide people the equal access to the means to obtain food.<sup>538</sup>

In a similar regard, Henry Shue critically reflects about the moral justifications of the right to food. Protecting this right is morally defensible because it often refers to the ‘vital’ content of human life (‘if there is no right to food, no other right would mean much’) and because it extends the reach of protection to those who are in need of it and as such extends human solidarity across a community. However, moral justifications of rights – or, as I refer to Sen, enhancing capabilities – are not a simple question of redirecting economic prosperity to the poor.

A duty based-approach is severely constrained by scarcity of means to adequately protect the right to food. This right demands a more realistic – non-metaphysical – ability to deal with positive duties correlated with right and real conditions of its implementation. For this reason, Henry Shue advocates for the seriousness of duties<sup>539</sup> and the crucial reciprocity of ensuring negative duties.

The normative approach to the right to food advocates for a positive basis that not only provides an adequate access to food, but also protects its free exercise against violations of negative duties. The positive duty aims to not deprive other human beings of being fed.<sup>540</sup> Henry Shue poses a pungent critical framework to address ‘serious disputes’ of the need of positive protection against violations of negative duties. In other words, control measures

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<sup>535</sup> A Sen, ‘Goods and people’, in W Aiken, H LaFollete (eds), *World Hunger and Morality*, 2 ed (New Jersey, Prentice Hall, 1996) 191.

<sup>536</sup> *Idem*, 200.

<sup>537</sup> *Idem*, 203.

<sup>538</sup> A Sen, *Poverty and famines: an essay on entitlement and deprivation* (Oxford, Oxford, 1981) 39.

<sup>539</sup> ‘It is irresponsibly dreamy simply to muse wishfully about rights that it might be nice for people to have without moving to the next step of considering what arrangements, formal or informal, local or global, governmental or nongovernmental, are necessary for the rights imagined to be implemented’, H Shue, ‘Solidarity among strangers and the right to food’, in W Aiken, H LaFollete (eds), *World Hunger and Morality*, 2 ed (New Jersey, Prentice Hall, 1996) 119.

<sup>540</sup> *Idem*, 127.

should find the unacceptable threshold of distortions brought mostly by multinational agribusiness initiatives.<sup>541</sup>

This conceptual review renews efforts in setting social boundaries of norms, formulating common sense notions of duties and bringing more consistency to the concepts of food justice and the human right to food. On the one hand, public policies on food security and food safety are reflected in the Law on Food and Nutritional Security (Law No 11,346/2006). Based on that, new directives and objectives of the National System of Food Security (SISAN) were established with the main purpose of ensuring the human right to adequate food (Article 2). According to this system, no single public policy can be implemented without direct coordination of SISAN (Article 3). On the other hand, those prescriptions are though limited to symbolic effects.

#### 2.4 Lessons from food regime theorists

The analytics of food justice should draw from classical studies on food regime, such as the ones originally developed by Harriet Friedmann<sup>542</sup> and Philip Michael.<sup>543</sup> Their food regimes analysis brings a political science's (precisely: regulation theory and world systems theory) critical approach to the role of agriculture in the world economy in order to stress its internal contradictions and formulate alternative measures to the world food crisis. Food regime analytics provides us the means to critically reflect on social structures, institutions, actors, and processes of change in the rural areas of the developing world.<sup>544</sup> The way each element interacts with each other determines the concrete scope of a food regime.

The first scheme prepared by Friedmann and Michael is categorized in three different approaches: (a) the hunger frame addressing the corporate food regime (food aid, tech development to increase global food production); (b) the community frame analysing food sovereignty (control over policy); (c) the ethical frame studying the control over and access to food as an element of the confluence of economic, social, cultural, political and environmental rights. In the ethical frame, food is conceived as a human right, emphasizing a clear identification of how and by whom food is produced.<sup>545</sup>

The implementation of an ethical food regime allows us to make a didactic sociological observation of 'preferences' (ideological, political, economic) communicated during decision-making processes. In other words, a reflexive food regime's framework is a powerful analytical tool not only to identify power relationships, social asymmetries or rights violations, but also to establish innovative practices, incorporate real experiences of

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<sup>541</sup> *Idem*, 128.

<sup>542</sup> Harriet Friedman inspiring critical thoughts consist in a powerful tool to better understand the notion of 'self-sufficient agrarian societies', H Friedmann, 'The political economy of food: the rise and fall of the Postwar International Food Order' (1982) 88 *American Journal of Sociology* 282.

<sup>543</sup> PM Michael, 'A food regime genealogy' (2009) 36 *Journal of Peasant Studies* 139.

<sup>544</sup> PM Michael, 'A food regime analysis of the World food crisis' (2009) 26 *Agriculture and Human Values* 281.

<sup>545</sup> Hannah Wittman analyses those categories (see *infra* 3.1).

self-determination, and promote cooperation between both sides of the food supply chain. The analytical framework of food regimes is, for this particular reason, relevant to investigations of possible links between the three domains (justice, sovereignty and governance). It is also necessary to stress the role of criminal law in the integration of those approaches.

As I insist in this essay, a propaedeutic incursion from a more sociological point of view on the food supply chain could stimulate future research to find possible ways of reshaping the right to food. It would also require, indeed, a much broader and multidimensional comprehension fully describing the dynamics of the concept in terms of coordination of production, distribution and consumption. Recent advances in the food security literature demonstrate the need to intensively verify fundamental rights not only in relation to adequate<sup>546</sup> quantity or quality of food, but also in each single observed dimension of the supply chain (eg, health, privacy of rural workers or urban). As such the right to food would be oriented to a more legitimate perceptions of human dignity and concrete capabilities of decent life.

### 3 Food Sovereignty

#### 3.1 Social movements against agribusiness: Hannah Wittman in defence of food sovereignty

Hannah Wittman's criticisms on the lack of a more articulated defence of food sovereignty takes on an intense narrative against the abuse of corporate power. Her critical standpoint is directed at disarticulating the 'elaborate legal architecture' of the international rights-based approach, which is not effectively enforceable and fails to address problems of world hunger.<sup>547</sup> Wittman provides relevant comments on the social asymmetries brought by the new trade regime and superficial measures of agrarian reform. She also addresses the need of a more intense and effective agro-ecological production and protection of intellectual and indigenous property rights practices as well as a need for a review of gender relations and equity. According to her, 'although certainly not yet a consolidated food regime, food sovereignty can be regarded as a new, alternative paradigm and driver of change challenging the current food regime, in its efforts to re-embed economic, environmental, and equity-related concerns around agricultural production, consumption, and trade'.<sup>548</sup>

The main question raised by Wittman is how to map the right-based approach into a corporate-controlled research system, stressing the real demands for more responsibility and decision-making power to the community. Based on that background, Wittman makes

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<sup>546</sup> Under adequate food it is possible to understand the dangerous to the human safety, namely agrotoxics or additives to animal food harmful to health, long-term antibiotics, anabolic and hormones.

<sup>547</sup> 2008 Report UNHRC. V. Marcia Ishii-Eitemann, Food Sovereignty and the International Assessment.

<sup>548</sup> H Wittman, 'Food sovereignty: a new rights framework for food and nature', in B Weston, A Grear (eds), *Human rights in the world community*, 4 ed (Philadelphia, Penn, 2017) 200.



consistent thoughts on an alternative policy arena articulated around the 'concept of agrarian citizenship':

'the concept of agrarian citizenship creates explicit links between struggles for political and ecological rights and practices, which bring the rights of nature into the food sovereignty equation. The agrarian citizenship approach acknowledges a socioecological metabolism as a crucial law of motion in agroecological transformation, in which the advent of capitalism and relationships of unequal ecological exchange "commodified" nature, separated urban consumers from rural producers, disrupted traditional patterns of nutrient cycling and contributed to both hunger and environmental degradation'.<sup>549</sup>

Wittman's perception of food sovereignty has a persuasive strategy to access the nature of people's common-sense notions and connect them to the imaginative figure of 'agrarian citizenship'. Consequently, sovereignty is connected to a legitimate idea of justice since the most interested participants in the social organization of food are, now, included as part of it:

'Agrarian citizenship acknowledges the diverse voices of human actors within the food system, but also considers how these voices and practices interact with nature voice (such as changing weather patterns as a result of climate change). Political and ecological voices are actively reshaping food policy and practice, especially in light of the implications of climate change for agricultural systems'.<sup>550</sup>

Wittman's main lesson to 'food thinkers' is to give a voice to those individuals whom the call for an integrate approach at hand is supposed to ultimately benefit.

### 3.2 The MST's protagonist role in Brazil

Brazilian social movement leads worldwide campaigns to promote alternatives values and social practices proposing new power structures and social practices, with a considerable impact on the social organization of food supply chain. The Movimento dos Trabalhadores Sem Terra (The Landless Rural Workers Movement, MST) receives worldwide attention for its three fundamental goals: political, economic and informational democratization. Basically, the movement is engaged in three main social challenges: (1) genuine democratization of the politics (against 'the politics of patronage, favoritism, corruption, and exclusion are not conducive to social justice') and social inclusion of the excluded poor population; (2) democratization of the economy, via grassroots cooperativism ('not only as profitable economic units, but also as bridgeheads to advance the 'democratization of the

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<sup>549</sup> *Idem*, 201.

<sup>550</sup> *Idem*, 201.

means of production’); (3) democratization of technology and knowledge (‘innovations that contribute to the solution of the most diverse pressing problems confronting humanity’)<sup>551</sup>.

As far as agricultural policy is concerned, the MST plays an important role in denouncing serious consequences of corporate ownership of the national food security. Generically, the criticisms are focused on demonstrating that the cost-effective agricultural enterprises control the domestic food consumption and thereby generates exclusion of small and medium-scale agricultural producers. Given such a perverse food regime, alternative agricultural social practices fail in providing affordable and good quality food supplies and therefore, local farmers are forced to abandon agriculture.<sup>552</sup> As a social consequence, the country has more than 150 thousand peasants living in clandestine camps spread over its entire territory.<sup>553</sup>

The pioneering research of Elizabeth Maniglia<sup>554</sup>, aligned with the Brazilian sociological approach to the global movement of critical food thinking, emphasizes on the human right to adequate food. Maniglia collected local narratives about deaths, impunity, moral and social damages on the daily MST’s flag: the ‘*luta pela terra*’ (‘fight for land’). Besides the necessity of an intensive verification of fundamental rights in each single stage of the food supply chain (eg, health, privacy of rural or urban workers), the author recommends a political and philosophical review of food sovereignty (Article 6 of the Federal Constitution), under the primacy of decisional autonomy concerning food production and consumption.<sup>555</sup>

The need to strengthen food sovereignty surfaced as a result of the world food crisis which was collateral damage of the subprime crisis in 2008. While more state intervention was claimed, no meaningful changes on agricultural and land policies could be observed. In the same year, 2008, the State of São Paulo’s Parliament ordered a ‘*Comissão Parlamentar de Inquérito – CPI*’,<sup>556</sup> to investigate suspicious threats against food security and to propose alternatives to the instable scenario of low quality of life and socioeconomic underdevelopment. Unfortunately, to the best of our knowledge, no meaningful changes took place in form of public policies or even corporate initiatives.

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<sup>551</sup> W Robles, ‘The landless rural workers movement (MST) in Brazil’ (2001) 28 *The Journal of Peasant Studies* 146. For further details, the paper provides a translation of the Fundamental Principles for the Social and Economic Transformation of Rural Brazil (MST).

<sup>552</sup> *Idem*.

<sup>553</sup> Criminal law here shows its selectiveness by constraining clandestine camps and criminalizing social movements. A very inspiring participatory research on informal social control strategies promoted by the MST is to be found at FS Cardoso, *A luta e a lida: estudo do controle social do MST nos acampamentos e assentamentos da Reforma Agraria* (Sao Paulo, Ibccrim, 2013).

<sup>554</sup> E Maniglia, *As interfaces do direito agrário e dos direitos humanos e a segurança alimentar* (São Paulo, Cultura Acadêmica, 2009) 117.

<sup>555</sup> *Idem*, 235.

<sup>556</sup> ‘CPI da Segurança Alimentar’, Act no 34/2010, Legislative Assembly of the Province of São Paulo.

## 4 Food governance

### 4.1 Empowering communities, regulating corporations: McKeon's bottom-up model

In her powerful exploration of food governance, Nora McKeon<sup>557</sup> provides consistent arguments to understand the key determinants of the food agenda. McKeon's analytics are inclined to seek for 'real life' food problems, 'alongside those who have most to lose by faulty governance, most to contribute to solving the food problem, and yet are most marginalized in decision-making processes'. According to her diagnosis, corporations concentrate on the three main strategic segments of the food chain (provision of inputs, trade in agricultural commodities and food processing, and food retailing), and impose their power by shaping the rules of the game and the choices of consumers, and promoting financial speculation and price volatility<sup>558</sup> regardless the systemic risks involved with their operations.

McKeon makes an exhaustive description of those domains before criticizing the international policies of 'food security'. According to her, they are poorly reduced to ensure an efficient productivism focused on corporate profit. As we pointed out *supra*, the narrow application of criminal law in Brazil aligns itself to this logic and strongly focuses on ensuring the supply chain's integrity. Criminal law should be reoriented to better address a response to the harm produced by abusive agribusiness practices that damages vulnerable and marginalized people worldwide.

Following Patel and McMichael criticisms ('the modern food system has eaten itself out of a home. It has become the architect not of a solution to "food insecurity" but of an edifice that makes poverty and hunger more likely'), McKeon opens the floor to explore food sovereignty. According to her, food sovereignty 'means the primacy of peoples' and communities' rights to food and food production, over trade concerns. This entails the support and promotion of local markets and producers over production for export and food imports<sup>559</sup>, and encompasses some requirements: (1) placing priority on food production for domestic and local markets; (2) ensuring fair prices for farmers; (3) providing access to land, water, forests, fishing areas and other productive resources through genuine redistribution; (4) recognition and promotion of women's role; (5) community control over productive resources; (6) protecting seeds; (7) public investment in support for the productive activities of families and communities.<sup>560</sup>

The sensitivity scheme proposed by her, though, reveals the necessity of bringing other social actors to the dialog. We observe dilemmas in each single base-up interaction. From

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<sup>557</sup> N McKeon, *Food security governance: empowering communities, regulating corporations* (New York, Routledge, 2015) 7.

<sup>558</sup> *Idem*, 36, 40, 42.

<sup>559</sup> *Idem*, 78.

<sup>560</sup> *Idem*, 78. McKeon describes also the 'six pillars of food sovereignty' proposed at the Nyéléni Food Sovereignty Conference: focuses on food for people; values food providers; localizes food systems; puts control locally; builds knowledge and skills; work with nature (78-79).

the one hand, international donations from the private sector usually impose conditions that make food sovereignty extremely fragile. On the other hand, it is challenging to build capacities for smallholder food producers and engage local social movements in international policies.<sup>561</sup> In the eyes of the author, connecting ‘upward’ sovereignty with food governance is not ‘too often negative’. Being optimistic, the interactions of sovereignty and governance evidence some practical results and a solid argument to oppose to ‘the dynamics of power and law in developing effective ways to control the powerful’.<sup>562</sup>

#### 4.2 Food governance and constructive regime interactions

Many significant systemic models promise to take the constructive regime interaction approach. To put it simply, social interactions of food regimes enable cognitive openness and smarter forms of addressing food governance. Indeed, a coherent systemic construction would facilitate communication and a reciprocal learning process among the three domains proposed in this essay (food justice, food sovereignty, and food governance).

Corinna Hawkes and other leading scholars are committed to establishing a complex framework in order to help connect networks of different regulatory types (from statutory, government guidelines to self-regulatory initiatives). Their main sociological standpoint is based on observing decision-making behaviour and privileged *locus* of food governance<sup>563</sup> and drawing evidence-based interdisciplinary evaluations ‘to develop a theory of change to understand how food policies work’.<sup>564</sup> The cognitive openness of her analysis lies in her ability to provide for the theoretical support for meaningful changes in the perceptions and ethical compromises. She sets out creative thoughts for future researches, which ‘will depend on whether the key stakeholders manage to convince lawmakers and the public that food marketing targeted at the young population is either ethically unacceptable (however accurate and truthful it is) or acceptable (provided it is accurate and truthful)’.<sup>565</sup> In my point of view, an open-system based approach would prompt a dynamic interaction between

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<sup>561</sup> *Idem*, 142-143.

<sup>562</sup> McKeon accurately points out: ‘Combining negotiation of equitable – even if nonbinding – normative regulation at the global level with its transformation into enforceable legislation at national and local level is a key area for forward looking “what’s next” strategic reflection’ (208). In a similar sense, P Mooney, SA Hunt, ‘Food security: the elaboration of contested claims to a consensus frame’ [2009] *Rural Sociology* 469.

<sup>563</sup> C Hawkes, ‘Dietary implications of supermarket development: a global perspective’ (2008) 26 *Development Policy Review* 657.

<sup>564</sup> ‘Four pieces of evidence were especially important in the formulation of the theory: first, the importance of food preferences in the determination of what people eat, and the influence of food, social, and information environments in the shaping of these food preferences; second, the barriers that people face, especially people of low socioeconomic status, in accessing, preparing, and eating healthy diets; third, the effect of food prices and presentation on people’s purchase and consumption choices; and finally, the evidence that activities in the food system, *eg.* in production, distribution, processing, and marketing, affect food environments, and are affected by food policies’, C Hawkes, ‘Smart food policies for obesity prevention’ (2015) 385 *Lancet* 2410.

<sup>565</sup> C Hawkes, ‘Regulating Food Marketing to Young People Worldwide: Trends and Policy Drivers’ (2007) 97 *American Journal of Public Health* 1970.

justice and sovereignty demands with changes in statutory regulations and self-regulatory initiatives, giving a qualitative shift in the way injustice and lack of sovereign decision could be alternatively addressed.

Cheng-Fun Lin's findings go in a similar direction by assuming that a better regulatory capacity is essential for the effectiveness of Food Law.<sup>566</sup> 'The exponential increase in food safety incidents across the globe have resulted in mushrooming regulatory initiatives', which, according to Lin's diagnosis, have brought about a negative effect in the public trust in global governance of supply chains. Lin reveals that private governance and market-oriented mechanisms of multinational food companies 'effectively manage and control their upstream suppliers in different countries via standardization, certification, and third-party auditing methods'<sup>567</sup>. The idea is to find a feasible way of promoting a better learning capacity to help establishing regulatory frameworks. The methodological key to bring us to a broader perspective that encourages the involvement of the private sector in food safety regulatory processes lies in theoretically substantiating a constructive regime interaction and world system analysis through reciprocal observations (not properly centred in the State or arguing the need of a legislative harmonization)<sup>568</sup>. A polycentric governance may call for a new understanding of legitimacy, taking into consideration sustainability, labour rights and animal welfare<sup>569</sup> and giving the MNCs the opportunity to fight poverty and world hunger.<sup>570</sup> Private codes, still according to Lin's analytics, could also potentially strengthen food safety regulatory systems in developing countries.<sup>571</sup>

Christine Parker offers a broader regulatory approach. In her prolific work, free-range public health issues are discussed taking as assumption the complexity of food systems. Overproduction entails nutritional poor food, the high risk of low cost industrial agrifood and predatory production. Parker worries about the hidden outcomes of the unconnected food chain. After specifically analysing the regulatory patterns of animal welfare labelling of eggs, she assessed the network of voluntary regulation of free-range labelling,<sup>572</sup> and concluded that criminal law can only play an ineffective role ('they can at best only improve

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<sup>566</sup> CF Lin, 'Public-private regime interactions in Global Food Safety Governance' (2014) 69 *Food and Drug Law Journal* 144.

<sup>567</sup> *Idem*, 148.

<sup>568</sup> *Idem*, 159.

<sup>569</sup> *Idem*, 158. Effective participation, despite of all efforts to ensure the inclusion of 'the voices of those most affected by food security' (J Duncan, *Global food security governance: civil society engagement in the Reformed Committee on World Food Security* (London, Routledge, 2015) 144)), is still a rhetoric instrument, far from guaranteeing the integration of food justice, food sovereignty and food governance as here discussed.

<sup>570</sup> *Idem*, 159.

<sup>571</sup> *Idem*, 159. Lin supported his ideas on the notion of a 'New-Wal Mart Effect', where a weak regulatory ambience demands a network of private contracts to serve a public regulatory function, M Vandenberg, 'The new Wal-Mart effect: the role of private contracting in global governance' (2007) 54 *UCLA Law Review* 913. There is much to be evidenced on the effective power of change on the organizational climate promoted by large buyers best practices and compliance measures.

<sup>572</sup> C Parker, ..., 942.

standards for products that claim to be free-range'). Consequently, there is a need for 'the development of more innovative alternatives and create a consumer perception of free-range that does not match best practice possibilities' that could engage consumers and producers in a more intelligent way, ensuring transparency to 'free-range' food.<sup>573</sup> Parker is aware that 'a whole new legislative system with enforceability and resources for implementation is required'. As such, a more dynamic regulatory strategy to involve the entire food supply chain guided by a simple normative decision would provide a better social organization of food. Given the many illusions related to high tech initiatives on how to organize a food chain and fight world hunger, nothing could be more significant than to emphasize the acknowledgment of the basic value of an inclusive social organization.

Despite all these efforts, the solutions found to uncover the global food supply chain are still unconvincing. The role of private actors remains open and how to attribute liability to them has been not yet properly conceived. Strategic issues to stimulate criminal policy research beyond doctrinarism and command-and-control mechanisms of punishment, should be encouraged. Beyond abstract considerations of constructive regime interactions, a smarter cognitive openness of food governance should be effectively linked to justice and sovereignty. Notwithstanding the sophisticated composition of the complex thinking, collaborative efforts and cognitive connections face the risk of losing the sense of reality. By being affective to the coherence of its internal structures, the theoretical overcrowding can dissipate itself from the concrete basis of the social organization of food. The integrative approach based on the structural coupling of food justice, food sovereignty and food governance would be no more than an unreasonable abstraction if not grounded on solid and real experiences.

## **5 Concluding remarks: a Brazilian call**

The ambitious Brazilian message is to reshape the criminal law approach to food, based on the new advances of social organization of food systems. As featured earlier in this brief essay, it seems quite reasonable to affirm that criminal law scholars need to pay more attention to the developments and advances of the social organization of food systems. Many different perspectives recollected here attested real demands for a more coherent integrative approach and expectations for a more consistent legislative framework. There are significant lessons to be learned from other areas, from sociological standpoints to moral philosophy, over political economy to systems theory; a call for an integrative approach aims to formulate a more sophisticated background for a more context-sensitive examination of the social organization of food.

The strategy followed in this essay explored the political dimension behind the right to food and the juridical limitations of the Brazilian criminal law measures. It is not difficult to recognize the lack of legitimacy on criminal law mechanisms restricted to protect the food

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<sup>573</sup> *Idem*, 947.

supply chain and indifferent to other harmful conduct, especially those caused by corporate abuse of power. It was pointed out that a context-sensitive analysis of social movements' demands for sovereignty could bring more realism to decision-making processes and to face governance challenges. In addition, recent approaches on constructive regime interactions could open relevant opportunities for an integrative approach.

This should be at least a first step in the direction of improvements in the Brazilian legal framework. Improvements and better articulation among the three domains (justice-sovereignty-governance), based on the sociological background presented in this essay, could be assessed on the basis of their ability to: (1) establish rights, duties and tensions of positive protection against the threats to the implementation of rights; (2) address the allocation of scarce resources and the making of better-suited policies for the human rights that guarantee self-determined access to food; (3) ensure concrete social conditions to self-determine the right to food; (4) articulate the social organization of food, from production and distribution to consumption with a broader regulatory approach and less symbolic enforcement strategies, not only concerning individual accountability, but giving more consistency to corporate criminal liability; (5) verify intensively the free exercise of the right to food, in each single juridical relationship of the food system. An ambitious, but necessary call for future research.

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# FOOD AND CRIME IN FINLAND

*By Lähteenmäki-Uutela, Anu; Tähtkää, Satu; Nummela, Heidi; Marimuthu, Sharllene \**

## 1 General questions on food regulation and criminal justice

### 1.1 The concept of food

The definition of food applied in Finland is the European Union's definition: the Finnish Food Act (23/2006574), section 6, merely refers to Article 2 of the General Food Regulation of the EU.<sup>575</sup> The Finnish Criminal Code (39/1889<sup>576</sup>) refers to the Food Act. The concept of food includes food supplements and drinking water. Cosmetic and tobacco products are not included.

### 1.2 Administrative and criminal sanctions

In practice, administrative coercive measures are always imposed first when an infringement on the Food Act is detected. Municipal food control authorities and the Finnish Food Safety Agency (Evira<sup>577</sup>) may also set a threat of a fine in order to make the coercive measures more effective. Criminal sanctions will be imposed if the food business operator intentionally or repeatedly disobeys food laws and administrative decisions. Although setting or imposing a threat of a fine as an administrative measure does not prevent criminal prosecution, the imposition of punishment can be waived in such cases (Food Act, section 79). Similarly, a criminal penalty does not prevent the imposition of a threat of a fine.

Administrative coercive measures (such as a ban on production/import/sales, a withdrawal of products, a confiscation, or a cancellation of permit) are effectively utilized and they are the primary instrument used against food law offences. Criminal sanctions are not often applied in practice. The legislative proposal for revising the criminal rules on endangering

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<sup>574</sup> Elintarvikelaki 13.1.2006/23. The unofficial English translation of the Finnish Food Act can be accessed at <http://www.finlex.fi/en/laki/kaannokset/2006/en20060023.pdf>.

<sup>575</sup> Regulation No 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedure in matters of food safety [2002] OJ L 31/1.

<sup>576</sup> Rikoslaki 39/1889. The unofficial English translation of the Finnish Criminal Code can be accessed at <http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf>. The Finnish Criminal Code dates to the time when Finland was a grand duchy, an autonomous part of the Russian empire. The Code was officially given by the Russian emperor Alexander III, based on the proposition by the Finnish senate.

<sup>577</sup> Elintarvikevirasto, Evira. The English language web page can be accessed at <https://www.evira.fi/en/>.

health and safety (HE 17/2001) states that food-related criminal charges have rarely been brought, and that administrative measures are suitable in minor offences. Criminal law is the *ultima ratio* in implementing substantive rules.

The main criminal sanctions for serious offences (where custodial sentences can be imposed) are located in the Criminal Code. Minor food infractions (punishable by fines only) are covered in the Food Act.

### 1.3 General requirements for criminal liability

Natural persons (and for some criminalizations, legal persons) are responsible for ensuring that requirements of food law are met within the food business under their control. A prerequisite for criminal liability in Finland is that the perpetrator has reached the age of fifteen years at the time of the act and is criminally responsible.

The perpetrator is not criminally responsible if at the time of the act, due to mental illness, severe mental deficiency or a serious mental disturbance or a serious disturbance of consciousness, he or she is not able to understand the factual nature or unlawfulness of his or her act or his or her ability to control his or her behaviour is decisively weakened due to such a reason (criminal irresponsibility).

Subjective liability is necessary for food-related crimes: criminal liability requires at least negligence from the perpetrator.

### 1.4 Liability of legal persons

The Criminal Code (chapter 9) states that for each type of criminal offence separately whether corporate criminal liability is applicable or not. The corporate fine is at least 850 euros and at most 850,000 euros. When both individual and corporate liability are applicable, they are both important in practice. The two types of liability are cumulative, unless the company is very small.

Criminal liability of legal persons is not provided for in cases of fraud, health offence, endangerment of health, negligent homicide, or assault. Individuals will be held criminally responsible. Criminal liability of legal persons does apply to the marketing offence.

A corporation may be sentenced to a corporate fine if a person who is part of its statutory or management organs or who exercises actual decision-making authority therein has been an accomplice to the offence or allowed its commission or did not observe the operations of the corporation with care and diligence as a result of which the offence was not prevented. A corporate fine may be imposed even if the offender cannot be identified or is not punished (Chapter 9, section 2.). The offence is deemed to have been committed in the operations of a corporation if the perpetrator has acted on behalf or for the benefit of the corporation, and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation (chapter 9, section 3).

## 2 Criminal law dimension of food regulation

### 2.1 Particular Criminal offences

#### 2.1.1 Food Fraud

Thus far, food-related offences are not a very serious problem in Finland. No serious food frauds have yet been detected in Finland. The European horsemeat scandal of 2013 did not affect Finland: Evira did not find any horsemeat sold as beef.<sup>578</sup> However, fraudulent origin labelling occurs regularly: for example, foreign strawberries have been sold as Finnish strawberries, and ingredients such as additives and their amounts are occasionally stated inaccurately on labels.<sup>579</sup> Suspicious preparations for weight loss and for other health uses are continuously sold with exaggerating and medicinal claims. The participation of organized crime in food fraud has not been detected in Finland thus far.

#### 2.1.2 Hoarding of Food

The criminal code does not specifically criminalize the hoarding of food in order to alter its value. General rules on fraud<sup>580</sup> and marketing offence<sup>581</sup> apply. If the hoarding affects health, health offence<sup>582</sup> or endangerment of health<sup>583</sup> apply. Endangerment of health specifically lists poisoning of food as an example.

#### 2.1.3 Manipulation of prices for derivatives

Yes. The Finnish Criminal code (Chapter 51) includes regulations concerning security market offences. A person who in order to obtain financial benefit distorts the market price of securities shall be sentenced for market price distortion to a fine or to imprisonment for at most two years. When extensive financial loss is caused by market price distortion, or the offence is conducive to considerably weakening the credibility of the functioning of the security markets, and the market price distortion is also aggravated when assessed as a whole, the offender shall be sentenced to imprisonment for aggravated market price distortion for at least four months and at most four years. The provisions also apply to the conclusion of a derivative contract.

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<sup>578</sup> Evira report from 2014 is available at <https://www.evira.fi/yhteiset/ajankohtaista/suomesta-ei-loytynyt-naudanlihana-myytya-hevoselihaa/>.

<sup>579</sup> Interview of an Evira official by MTV news in 2012. Available at <http://www.mtv.fi/uutiset/kotimaa/artikkeli/ruokavaarennoksia-ilmenee-suomessa-vuosittain/1893158>.

<sup>580</sup> Criminal Code, chapter 36: section 1 fraud, section 2 aggravated fraud, section 3 petty fraud.

<sup>581</sup> Criminal Code, chapter 30, section 1.

<sup>582</sup> Criminal Code, chapter 44, section 1.

<sup>583</sup> Criminal Code, chapter 34, section 4 endangerment of health, section 5 aggravated endangerment of health.

#### 2.1.4 *Genocide and crimes against humanity*

In line with the Rome Statute, both the definition of genocide and the definition of crimes against humanity can be apply. Chapter 11 in the Finnish Criminal Code includes regulations on war crimes and crimes against humanity. Genocide is defined in section 1:

‘A person who, with the intent of entirely or partially destroying a national, ethnic, racial or religious group or another comparable group, kills members of the group or inflicts grievous bodily or mental illness or injuries on members of the group, and/or subjects the group to such living conditions that can cause the physical destruction of the group in whole or in part ... shall be sentenced to imprisonment for genocide for at least four years or for life.’

Section 3 in the same chapter defines crimes against humanity:

‘If a person who, as part of a broad or systematic attack on a civilian population, kills or enslaves another, subjects him or her to trade by offer, purchase, sale or rent, or tortures him or her, or in another manner causes him or her considerable suffering or serious injury or seriously harms his or her health or destroys a population by subjecting it or a part thereof to destructive living conditions, he/she shall be sentenced to imprisonment for a crime against humanity for at least one year or for life.’

There is also an aggravated form of crimes against humanity (section 4). If the offence is directed against a large group of persons, when the offence is committed in an especially brutal, cruel or degrading manner or in an especially planned or systematic manner, or when the offence assessed as a whole is also aggravated, the offender shall be sentenced to imprisonment for an aggravated crime against humanity for at least eight years or for life.

#### 2.1.5 *Crimes against intellectual or industrial property for the re-use of seeds by farmers*

Sanctions for crimes against intellectual or industrial property have not yet been applied to farmers in Finland yet. The re-use of seeds is protected by plant protection rights or patents and is penalized as other infringements of industrial property (Criminal Code chapter 49, section 2).

#### 2.1.6 *Unfair administration or undue appropriation of humanitarian aid*

Sanctions concerning offences committed by authorities are dealt with in Chapter 40 ‘Offences in Office’. Section 7 concerns abuse of public office, and section 8 its aggravated form. Abuse of public office applies when a public official, in order to obtain a benefit or to cause or loss to another violates his or her official duty or misuses his or her office. He or she shall be sentenced to a fine or to imprisonment for at most two years. Aggravating circumstances may exist when, in the abuse of public office, considerable benefit is sought, an attempt is made to cause considerable detriment or loss, or the offence is committed in a

particularly methodical or unscrupulous manner. For section 8 to apply, where the punishment ranges from four months to four years prison and a dismissal, the abuse of public office also needs to be aggravated when assessed as a whole. Humanitarian aid as an aggravating circumstance is not mentioned. The court might take it into consideration when assessing the offence as a whole. There is no instance of such cases.

Rules concerning the scope of the Finnish Criminal Code are given in chapter 1. Finnish courts are competent to judge offences which are committed abroad, if the criminal act is directed in Finland<sup>584</sup>, committed against a Finn<sup>585</sup> or by a Finn.<sup>586</sup> Dual criminality is required: the act must also be penalized in the country where it is committed (Criminal Code, chapter 1, section 11).

## 2.2 Criminal liability for deaths and injury as a consequence of the production and commercialization of harmful foodstuffs

In cases where a death or bodily injury is caused by negligence, the following offences are the most likely to apply:

- Criminal Code 21:8§, negligent homicide
- Criminal Code 21:9§, grossly negligent homicide
- Criminal Code 21:10§, negligent bodily injury
- Criminal Code 21:11§, grossly negligent bodily injury

If somebody has died because of a food-related offence, negligent homicide (Chapter 21, section 8) or grossly negligent homicide (chapter 21, section 9) may be applied. In intentional cases, manslaughter (chapter 21, section 1) and murder (chapter 21, section 2) would apply. In cases of negligently causing an injury, negligent bodily injury (chapter 21, section 10) and grossly negligent bodily injury (chapter 21, section 11) would apply. In cases of intentionally causing an injury, it would be possible to apply assault (chapter 21, section 5) or aggravated assault (chapter 21, section 6).

### 2.2.1 Causation between harmful foodstuffs and deaths or injuries

The conditions for factual causation are not defined in the Criminal Code. In criminal proceedings, the connection between the behaviour (marketing of spoilt or fraudulent food) and the consequence (death or injury) must be proven by the prosecutor. It must be established beyond reasonable doubt that the victim would not have died or been injured without the actions or omissions of the food marketer.<sup>587</sup> In practice, the cause of death or

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<sup>584</sup> Criminal Code, chapter 1, section 3.

<sup>585</sup> Criminal Code, chapter 1, section 5.

<sup>586</sup> Criminal Code, chapter 1, section 6.

<sup>587</sup> Melander, Sakari, Lectures on the basic principles of criminal law'. Helsinki, fall semester 2010. Available at:

injury shall often be established by resorting to medical testimony. On the basis of five stages of probability, the *condition sine qua non* is established. In medicine, causation is evaluated on a five-point scale, where a factor is either a very likely, likely, possible, unlikely, or very unlikely cause of the condition. 'Likely' means that as a whole, the specific cause is more likely than the other possible causes combined. In the criminal law perspective, 'likely' is in practice often considered sufficient.<sup>588</sup>

Finland has no experience with food-related cases in which poor health is only diagnosed after a lengthy period of time. However, similar cases related to environmental or workplace health hazards have been tried. Criminal product liability is a question of probability of the cause of the health problem. Poor health must be the likely result of an action or omission if it is to be regarded as punishable.

### 2.2.2 *Negligent action of the victim*

Contributory negligence (negligence of the victim) could be taken into account in cases of negligent homicide or assault. We have no case law on contributory negligence in cases of defective food products. If someone eats food that is clearly spoiled, it might be considered contributory negligence. In cases of intentional food fraud, high demands of vigilance would not be set for victims. Tolvanen (2015) is of the view that contributory negligence should be applied rarely in order to avoid weakening the preventive impact of criminal law.<sup>589</sup> In order to guarantee the rights of the perpetrator, the behaviour of the victim should be relevant (only) when the victim takes a conscious risk.

### 2.2.3 *Due diligence of operators*

In principle, it is allowed that one can trust that everyone in the chain acts according to the law and to the obligations that are known. However, criminal responsibility may occur if one has any reason to suspect fraud by a subcontractor, for example. The General Food Regulation of the EU requires responsibility from all actors in the food chain.

Food and feed business operators at all stages of production, processing and distribution within the businesses under their control shall ensure that foods or feed satisfy the requirements of food law that are relevant to their activities and shall verify that such requirements are met. When a food business operator considers or has reason to believe that food which it has imported, produced, processed, manufactured or distributed is not in compliance with the food safety requirements, it shall immediately initiate procedures to withdraw the food in question from the market and inform the competent authorities thereof. In the event that the product may have reached the consumer, the operator shall

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<http://www.helsinki.fi/oikeustiede/oppiaineet/rikosoikeus/materiaalit/Vastuuoppi%20sl%202010.Melander.pdf>.

<sup>588</sup> Hurmerinta, Anna (2012) Syy-yhteys potilasvahingoissa. Edilex referee-artikkeli.

<sup>589</sup> Tolvanen, Matti (2015) Tuottamus ja uhrin myötävaikutus. Defensor Legis 4/2015.



effectively and accurately inform the consumers of the reason for its withdrawal, and if necessary, recall from consumers products already supplied to them when other measures are not sufficient to achieve a high level of health protection (General Food Regulation, Article 19(1)).

When the firm or operator knows or should have known about the adulteration, liability according to the Criminal Code may apply. According to chapter 3, section 3, omission is also punishable if this is specifically provided in the statutory definition of an offence. An omission is also punishable if the offender has neglected to prevent the cause of a consequence that accords with the statutory definition and had a special legal duty to prevent the cause of the consequence. Such a duty may be based on an office, function or position, the relationship between the offender and the victim, the assumption of an assignment or a contract, the action of the offender in creating danger, or another reason comparable to these. A food business operator such as a retailer can be considered to be in such a relationship with a consumer.

Chapter 15, section 10 penalizes the failure to inform the authorities or potential victims about serious crimes when there still is time to prevent the offence. The list of crimes that should be reported includes aggravated assault and aggravated endangering of health. A food business employee or business partner could be charged if (s)he has noticed that goods endangering health are being sold and has not informed anyone about it.

#### *2.2.4 Compliance with product safety laws as a ground of exclusion of criminal liability*

Compliance with hard law and soft law norms is a sign of good faith. Still, criminal liability is not excluded, even when all product safety laws are followed. A food business operator might learn more about the effects of a product or substance than regulators have foreseen and prohibited. In such cases, it is the prosecutor's duty to present evidence of what the person has known.

#### *2.2.5 The manufacturer's awareness of the health risks attached to food products*

If the manufacturer learns that previously marketed products are harmful and still refuses to withdraw the products, criminal liability may apply.

The manufacturer's awareness does not imply that he accepts or wants the harmful effects to manifest. When the manufacturer knows about the adulteration, (s)he can be held responsible based on her/his function and/or position in the company (Criminal code, chapter 3, section 3), and can be estimated to have committed the crime intentionally. The manufacturer does not have to accept or want the harmful effects to manifest themselves. Chapter 3, section 6 of the Criminal Code defines intent as a perpetrator intentionally causing the consequence described in the statutory definition if the cause of the consequence was the perpetrator's purpose or he or she had considered the consequence as a certain or quite probable result of his or her actions. A consequence has also been intentionally caused

if the perpetrator has considered it as certainly connected with the consequence that he or she has aimed for.

## 2.3 Other crimes against food safety (besides those where a victim is killed or injured)

### 2.3.1 *Questions of legislative technique*

Offences against food safety are found both in the Criminal Code and in special (substantive) laws. Special laws contain the threat of fines for acts against specific legislation other than those that are described in the Criminal Code. Severe offences are contained in the Criminal Code. The following sections are the most likely to apply to offences against food safety where no death or bodily injury is caused:

- Criminal Code 30:1§, Marketing offence
- Criminal Code 34:4§, Endangerment of health
- Criminal Code 34:5§, Aggravated endangerment of health
- Criminal Code 34:7§, Negligent endangerment
- Criminal Code 34:8§, Aggravated negligent endangerment
- Criminal Code 36:1§, Fraud
- Criminal Code 36:2§, Aggravated fraud
- Criminal Code 44:1§, Health offence

The health offence section (Criminal Code, chapter 44, section 1) has a special focus on food safety issues:

A person who intentionally or through gross negligence in violation of the Finnish Food Act or of a provision or general order or order concerning an individual case issued on their basis produces, handles, imports or intentionally attempts to import, keeps in his or her possession, stores, transports, keeps for sale, conveys or gives goods or a substance, product or object so that the act is conducive to endangering the life or health of another, he/she shall, unless a more severe penalty for the act has been provided elsewhere in law, be sentenced to a fine or to imprisonment for at most six months for a health offence.

Regarding health offences, there is an important precedent from the Finnish Supreme Court (Korkein oikeus) KKO 2012:56. In this case, A was the board director of a company that had sold harmful food (grated carrot infected by *Yersinia pseudotuberculosis*) to municipalities and cities that had in turn delivered the food to schools and kindergartens. Altogether 507 people had fallen ill with a stomach disease, and the disease had been life-threatening for one person. The defendant had handled the carrot product, kept it for sale, conveyed it and been partly responsible for storing it. The question was whether person A had been grossly negligent.

According to the Supreme Court, gross negligence depends on the significance of the duty breached, the significance of the endangered good, the likelihood of the violation, the

deliberation in risk-taking and other circumstances related to the perpetrator. Food safety regulations were considered as important duties, as their goal is to protect the lives and health of consumers. In this case, the duty was considered even more important as the food was given to children. The perpetrator had knowingly prepared the product from the previous season's carrots, and disobeyed previous recommendations of the health control authorities and food control authorities to respect hygiene rules and to remove spoilt carrots from the storage facilities. The defendant had been aware that a long storage time can cause *Yersinia* bacteria to multiply and had taken a deliberate risk with consumer health. Omissions in reducing the health risks were considered to be grossly negligent. However, the nature of the epidemic and the guilt demonstrated were not considered to require a prison sentence. The number of people that had become ill was irrelevant. The final sentence was 50 day-fines, which amounted to 700 euros. In civil proceedings, the responsible persons had also been sentenced to jointly pay damages to the amount of 77,000 euros, and this amount of damages was not considered a factor that should reduce the criminal punishment. As we can see, the civil liability was much more severe from the economic perspective than the criminal sentence in this case.

Special laws (Food Act, Animal Diseases Act, Health Protection Act, Act on Veterinary Border Control, Radiation Act, and Organic Production Control Act) contain the threat of fines for acts against specific legislation other than those that are described in the Criminal Code.

A food infraction (Food Act, chapter 10, section 79) occurs when there is an infringement of the Food Act:

A person who deliberately or through negligence:

- produces, imports, exports, places on the market, serves or otherwise conveys food that does not meet the requirements laid down in this Act;
- practises operations under this Act in food premises or at a place of primary production that has not been approved in accordance with this Act, for which a notification has not been submitted in accordance with this Act, or whose operations have been prohibited temporarily, partially or in full;
- violates the obligation for in-house control laid down in this Act;
- violates an order issued by the control authority under this Act, a prohibition issued by the control authority, a decision on seizure issued by the control authority, a decision on rejection issued by the control authority, or a decision on cancellation of approval issued by the control authority;
- fails to submit the notification referred to in section 24 or 25;
- despite a reprimand or prohibition by the control authority, delivers from a place of primary production food that does not meet the requirements of the provisions or regulations laid down in or under this Act; or
- provides information about the food or its properties in a manner that violates this Act or gives otherwise misleading information about the food or its properties, shall

be sentenced to pay a fine for committing a food infraction unless a more severe penalty for the act has been provided elsewhere in the law.

Because a health offence is defined as selling food not complying with food law requirements, the general EU food regulation and the Finnish food Act prohibiting the sales of harmful foods, one will simultaneously be infringing both criminal law and food regulations when selling health-endangering food.

Generally, *nullum crimen sine lege* applies. According to the Constitution of Finland, 'No one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, which has not been determined punishable by an Act at the time of its commission'. According to the Criminal Code, a person may be found guilty of an offence only on the basis of an act that has been specifically criminalized in law at the time of its commission.

Criminal norms and sanctions concerning food safety are rarely used in Finland. Administrative coercive measures are considered primary tools in cases of non-compliance of food regulation. Administrative coercive measures are rarely used, and some recurrent non-compliance of orders given by control officials has been reported. As authorities have been relying on cooperation and negotiation with food business operators, resorting to criminal law right away would surprise food business operators and thus be questionable from the legal certainty perspective.

Health offence, endangerment of health, fraud, manslaughter, assault, and other major crimes are the more serious crimes (with prison sentences available) stipulated in the Criminal Code, and food infraction is a minor offence (with only fines available) as defined in the Food Act.

### 2.3.2 *Description of behaviour and sanctions*

#### *Definitions of offences against food safety and the different steps in the food production and distribution chain*

The definition of offences is the same for all food operators. The Food Act applies to food and the conditions in which it is handled and to food business operators and food control at all stages in the production, processing and distribution of food. The provisions on food also apply, as appropriate, to materials and articles intended to come into contact with food.

#### *Specific offences against the traffic of prohibited substances*

Health offences include the production, handling, import, etc. of illegal pesticides, chemicals and foods, so that the act is conducive to endangering the life or health of another (Criminal Code chapter 44, section 1) and thereby specify specific offence in relation to the traffic of prohibited substances.

A transport of dangerous substances offence may also apply:

'A person who intentionally or through gross negligence... sends, gives as freight, ships, transports, drives, loads, places on board, unloads, handles, keeps as baggage or temporarily stores a dangerous substance so that the action is conducive to endangering the life or health of another or it endangers the property of another, shall, unless a more severe penalty has been provided elsewhere in law for the act, be sentenced for a transport of dangerous substances offence to a fine or to imprisonment for at most two years.' (Chapter 44, section 13.)

### *The non-withdrawal of harmful foods*

If the food business operator does not withdraw a foodstuff known as harmful, he/she commits a food misdemeanour against the Food Act (referring to the General Food Law of the EU) and shall be punished accordingly unless a more severe penalty has been provided elsewhere in law for the act.

According to the EU General Food Law, food and feed business operators at all stages of production, processing and distribution within the businesses under their control shall ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met. If a food business operator considers or has reason to believe that a food which it has imported, produced, processed, manufactured or distributed is not in compliance with the food safety requirements, it shall immediately initiate procedures to withdraw the food in question from the market where the food has left the immediate control of that initial food business operator and inform the competent authorities thereof. Where the product may have reached the consumer, the operator shall effectively and accurately inform the consumers of the reason for its withdrawal, and if necessary, recall from consumers products already supplied to them when other measures are not sufficient to achieve a high level of health protection.<sup>590</sup>

### *Poisoning*

In relation to poisoning, endangerment of health according to the Criminal Code of Finland (chapter 34, section 4) applies.

A person who, by poisoning or by another comparable manner renders foodstuffs or other substances intended for human consumption or use dangerous to health, or keeps such dangerous substances available to others, so that the act is conducive to causing general danger to life or health, shall be sentenced to imprisonment for endangerment of health for at least four months and at most four years. An attempt is punishable. If the endangerment of health is committed so that serious danger is caused to the life or health of a great number of people and the offence is also aggravated when assessed as a whole, the offender shall be sentenced to imprisonment for aggravated endangerment of health for at least two and at most ten years. An attempt is punishable. (Criminal Code, chapter 34, section 5.) A person

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<sup>590</sup> General Food Regulation, Article 19(1).

who intentionally or negligently commits an act referred to here shall be sentenced, if the danger referred to in said provision results from the negligence of the offender, to a fine or to imprisonment for at most one year for negligent endangerment. (Criminal Code, chapter 34, section 7.) If negligent endangerment is committed so that serious danger is caused to the life or health of a great number of people and the offence is also aggravated when assessed as a whole, the offender shall be sentenced to imprisonment for gross negligent endangerment for at least four months and at most four years. (Criminal Code, chapter 34, section 8.)

In addition, the definitions of terrorist crime may apply:

A person who, with terrorist intent and in a manner that is conducive to causing serious harm to a State or an international organization, commits endangerment of health, shall be sentenced to imprisonment for at least four months and at most six years. (Criminal Code, chapter 34a, section 1, paragraph 3). An attempt is punishable. If the endangerment of health is aggravated, the punishment is 2 to 12 years. (Criminal Code, chapter 34a, section 1, paragraph 5). A person who, in order to commit an offence referred to here agrees with another person or prepares a plan to commit such an offence, prepares, keeps in his or her possession, acquires, transports, uses or gives to another ... a chemical or biological weapon or a toxin weapon ... a dangerous object or substance, or acquires equipment or materials for the preparation of ... a chemical or biological weapon or a toxin weapon or acquires formulas or diagrams for their production, shall be sentenced to a fine or to imprisonment for at most three years for preparation of an offence to be committed with terrorist intent. (Criminal Code, chapter 34a, section 2).

Legal persons can be held criminally liable for terrorist crimes. For endangerment of health, only physical persons can be held responsible. When the offence was committed by a subsidiary company, that legal entity shall be liable.

### *Sanctions*

In Finland, only a few prison sentences have been imposed concerning food crimes. There was one fish case where a suspended prison sentence was given. Typical measures imposed are administrative coercive measures: withdrawing food from the market and informing the public, seizure of foodstuffs, decision on the use or disposal of a foodstuff, rejecting foodstuffs of animal origin supplied from another Member State of the European Union at the first destination, cancelling the approval of food premises, cancelling the approval of a laboratory, marketing prohibition, correction of marketing, applying the Consumer Protection Act and the Unfair Business Practices Act, penalty payments, threat of performance, and threat of suspension.

### 2.3.3 *Principle of precaution and assessment of health risks*

The application of a health offence or endangerment of health requires that the product may cause danger to consumer health (...so that the act is conducive to endangering the life or health of another...) indicating an abstract danger to the health of consumers. The act can be considered criminal even if consumers did not have a chance to buy the product.

All operators in the food chain are equally obligated to follow the rules. However, responsibilities of the producers and the marketers of the harmful food are of the greatest relevance. Also, retailers can be held responsible if they have a reason to suspect fraud.

The mere commercialization of an unauthorized food may be an offence. A health offence requires the endangerment of health, but a food infraction does not. In principle, unauthorized novel foods are presumed risky, as the very goal of novel food regulation is to verify the absence of serious health risks. In practice, unauthorized novel foods have been withdrawn from the market without criminal penalties.

According to the Novel Foods Regulation EU 2015/2283, Member States shall lay down the rules on penalties applicable to infringements of the Regulation and penalties shall be effective, proportionate and dissuasive.

A health offence requires that the act is conducive to endangering the life or health of another. Products that have later proven to be safe cannot have caused such health risks. Dismissing precaution is not a criminal act as such. A food infraction does not require proof of an endangerment of health.

According to the General EU Food Regulation, the harmfulness of the product is determined by using the principle of precaution. Particular target groups are protected by law. Food shall be deemed to be unsafe if it is considered to be (a) injurious to health; or (b) unfit for human consumption.

In determining whether any food is unsafe, regard shall be had:

- (a) to the normal conditions of use of the food by the consumer and at each stage of production, processing and distribution, and
- (b) to the information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods.

In determining whether any food is injurious to health, regard shall be had:

- (a) not only to the probable immediate and/or short-term and/or long-term effects of that food on the health of a person consuming it, but also on subsequent generations;
- (b) to the probable cumulative toxic effects;
- (c) to the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers.

In determining whether any food is unfit for human consumption, regard shall be had to whether the food is unacceptable for human consumption according to its intended use, for reasons of contamination, whether by extraneous matter or otherwise, or through putrefaction, deterioration or decay.<sup>591</sup>

According to the Finnish Food Act, food must be fit for human consumption in terms of its chemical, physical, microbiological and health-related quality and composition and other properties, and must not present any hazard to human health or mislead the consumer. A person who deliberately or through negligence produces, imports, exports, places on the market, serves or otherwise conveys food that does not meet the requirements laid down ... shall be sentenced to pay a fine for committing a food infraction unless a more severe penalty for the act has been provided elsewhere in the law.

## 2.4 Food fraud

Fraud is defined in the Criminal Code chapter 36, section 1:

A person who, in order to obtain unlawful financial benefit for himself or herself or another or in order to harm another, deceives another or takes advantage of an error of another so as to have this person do something or refrain from doing something and in this way causes economic loss to the deceived person or to the person over whose benefits this person is able to dispose, shall be sentenced for fraud to a fine or to imprisonment for at most two years.

Aggravated fraud (chapter 36, section 2) may also apply to serious food fraud:

If the fraud (1) involves the seeking of considerable benefit, (2) causes considerable or particularly significant loss, (3) is committed by taking advantage of special confidence based on a position of trust, or (4) is committed by taking advantage of a special weakness or other insecure position of another and the fraud is also aggravated when assessed as a whole, the offender shall be sentenced to imprisonment for aggravated fraud for at least four months and at most four years.

Attempted fraud or aggravated fraud is punishable. Petty fraud (chapter 36, section 3) applies if the benefit sought or the loss caused is deemed to be petty, in which case the offender shall be sentenced to a fine.

Dietary supplements, health foods, and herbal medicines are the most common types of food sold in a fraudulent manner. A typical case of fraud in this area is fraud in weight-loss substances. These cases are not brought to court, as the products are considered quite harmless and the administrators cannot keep up with the new 'wonder' products. Administrative coercive measures are occasionally applied, but misleading marketing

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<sup>591</sup> General Food Regulation of the EU, Article 14



practices cannot in practice be rooted altogether. The Food Safety Agency tries to help consumers in detecting hoaxes and has published a hoax-detecting guide for this purpose.

The Finnish criminal justice system also foresees other offences than fraud and provides for specific marketing offences (Criminal Code chapter 30, section 1). A person who is in the professional marketing of goods and gives false or misleading information that is significant from the point of view of the group to which the marketing is directed, shall be sentenced to a fine or to imprisonment for at most one year for a marketing offence.

This marketing offence is described in the Criminal Code. However, it is low in the seriousness of crimes. Usually no criminal sentences are given. Administrative coercive measures including penalty payments are sometimes used.

In case of misleading advertising, the Consumer Protection Law, based on the EU directive on unfair commercial practices (2005/29/EC), prohibits and defines in the Criminal Code as a marketing offence all misleading advertising in relation to:

- Quantity and quality of the food (horsemeat instead of beef)
- Origin of the ingredients of the product
- Denominations of origin. Does criminal law in your country protect the denominations of origin of other countries?
- Nutritional values and effects (slimming products ...)
- Natural or ecological nature (free of certain substances, waste products, free of GM foods)
- Medicinal properties of the food
- Food production that is respectful of basic working rights and other human rights (fair trade)
- Other aspects.

It is stated in the Consumer Protection Law (chapter 2, section 7) that the marketer must always deliver the information that is necessary for the health and safety of the consumer. There is no aggravated form of marketing offence, but it would be considered a more serious type of marketing offence if health and not only the consumer's purse are impacted.

For the evaluation of fraud offence, the average consumer is seen as a person 'who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors', based on the EU directive on unfair commercial practices (preamble 18).

The offenders are the marketers of the food product. Retailers are responsible for the marketing information given by them and if they have a reason for suspecting fraud, they are also held responsible when selling fraudulent foods produced by someone else.

### 3 International trafficking of foods and harmful substances

Here, we discuss food crimes related to both Finland and Australia as an example of international trafficking of foods and harmful substances. Food safety is of paramount importance in Australia. Importers and exporters of food to and from Australia are governed by a comprehensive set of laws and regulations to ensure that adequate protections are in place to maintain high standards of safety to the humans, animals, plants and the environment which come into contact with food during its life cycle.

In Australia, food is broadly defined as ‘any substance or thing of a kind used, capable of being used, or represented as being for use, for human consumption (whether it is live, raw, prepared or partly prepared), an ingredient or additive in a substance or thing for human consumption’.<sup>592</sup> It includes chewing gum<sup>593</sup> or any substance or thing declared to be a food under the declaration in force.<sup>594</sup> It may include live animals and plants; however, it may not include a therapeutic good within the meaning of the Therapeutic Goods Act of 1989.<sup>595</sup>

At the domestic level, food is governed by the Food Standards Australia New Zealand Act 1991 (Cth), Food Standards Australia New Zealand Regulation 1994 (Cth), and the Australia New Zealand Food Standards Code (ANZS Code). The ANZS Code promulgates detailed standards in respect of the production, sale and importation of food.<sup>596</sup> It is administered by the Food Standards Australia New Zealand (FSANZ), the regulatory agency for food. Food is also overseen by the State Regulators and the Australian Consumer and Competition Commission (ACCC). The Australia New Zealand Ministerial Forum on Food Regulation (forum) is responsible for policy decision making regarding food.<sup>597</sup> All food imports into Australia must, in addition to observing domestic regulation, comply with the Imported Food Control Act 1992 (Cth), Biosecurity Act 2015 (Cth) and Export Control Act 1982 (Cth).

Marketing foods that do not comply with the Finnish Food Act is illegal and criminalized as a health offence in Finland. If a company based in Australia for example sold non-authorized novel foods to Finland, it would be an offence regardless of whether the marketing of such items are authorized and entirely legal in Australia.

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<sup>592</sup> *Food Standards Australia New Zealand Act 1991* (Cth), s 3A; similar definition is adopted in the *Imported Food Control Act 1992* (Cth), s 3; *Export Controls Act 1982* (Cth), s 3.

<sup>593</sup> *Food Standards Australia New Zealand Act 1991* (Cth), s 3A.

<sup>594</sup> *Food Standards Australia New Zealand Act 1991* (Cth) s 3A.

<sup>595</sup> *Food Standards Australia New Zealand Act 1991* (Cth) s 3A.

<sup>596</sup> The *Australia New Zealand Food Standards Code* (“the Code”) is devised under a co-operative arrangement between the governments of Australia and New Zealand and is given the force of law by the *Food Standards Australia New Zealand Act 1991* (Cth) s 21.

<sup>597</sup> This forum is chaired by the Ministers for Health for each State and Territory government and New Zealand.

In Australia, the Export Control Act applies to foods exported to Finland. It is an offence under the Export Control Act 1982 (Cth) to export (or intend to export) prescribed goods<sup>598</sup> which are prohibited under the law.<sup>599</sup> It is also against the law if the person has in his or her possession such goods with the intention to export.<sup>600</sup> Commission of these acts is punishable by imprisonment for a period not exceeding 5 years.<sup>601</sup> A person who intends to export goods must first give notice to the Secretary or an authorized officer of their intention to export goods so as to enable the goods to be inspected. Failure to do so will attract a penalty of 12 months' imprisonment.<sup>602</sup>

It is not legally acceptable to produce food in Finland destined exclusively for export, with significantly lower levels of food safety than legally required in Finland. However, it is unlikely that specific Australian standards are significantly lower in microbiological and chemical safety requirements than what is required in Finland (or the European Union). In any case, if such a difference in safety standards were to exist, producing foods with lower safety standards and exporting them to Australia could be considered a health offence in Finland. An offence is deemed to have been committed both where the criminal act was committed and where the consequence contained in the statutory definition of the offence became apparent. An offence of omission is deemed to have been committed both where the perpetrator should have acted and where the consequence contained in the statutory definition of the offence became apparent (Finnish Criminal Code, chapter 1, section 10.). It would probably be lawful to sell a specific plant-based novel food, insect-based novel food or genetically modified novel food to Australia that is still unauthorized in Finland (the EU), but which is already authorized in Australia based on scientific evidence, or is not considered to require pre-market authorization in Australia due to demonstrated history of use.

If a harmful food were to be sold in Australia, it would be against the Imported Food Control Act 1992 and/or the Biosecurity Act 2015. The Imported Food Control Act 1992 aims to 'provide for the compliance of food imported into Australia with Australian food standards and the requirements of public health and safety'.<sup>603</sup> The Act does not apply to food that is imported for private consumption or food imported as a trade sample.<sup>604</sup> If a Finnish

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<sup>598</sup> Prescribed goods means goods, or goods included in a class of goods, that are declared by the regulations to be prescribed goods for the purposes of Export Control Act 1982. Goods means: (a) an animal or a plant, or part of an animal or a plant; (b) an article or a substance (including reproductive material) derived from an animal or a plant, whether or not in combination with any other article or substance; or (c) food. See Export Control Act 1982 (Cth), s 3.

<sup>599</sup> Export Control Act 1982, s 8(1) – (4).

<sup>600</sup> Export Control Act 1982, s 8(1) – (4).

<sup>601</sup> Export Control Act 1982, s 8(5).

<sup>602</sup> Export Control Act 1982, s 6.

<sup>603</sup> Imported Food Control Act 1992 (Cth), s 2A.

<sup>604</sup> Imported Food Control Act 1992 (Cth), s 7.

marketer sold harmful foods either to Australian retailers or directly to Australia consumers, this act would be punishable in Finland.

Persons who import into Australia food that does not meet the applicable standards or poses a risk to human health can be charged and penalties of imprisonment of up to 10 years.<sup>605</sup> In determining non-compliance, the court will consider whether the person ought reasonably to have known that the food did not meet the applicable standards prescribed or posed a risk to human health. Factors such as the person's abilities, experience, qualifications and other attributes and the circumstances surrounding the alleged contravention, will be taken into consideration when determining the breach.<sup>606</sup>

The Imported Food Control Act also contains strict guidelines with regard to labelling. Non-compliance with applicable requirements relating to labelling information on food packages can result in imprisonment of up to 10 years.<sup>607</sup> A defendant who wishes to contest non-compliance bears the evidential burden in the matter.<sup>608</sup>

The Biosecurity Act 2015 (Cth) provides for the management of the biosecurity risks of food imported or brought into Australian territory.<sup>609</sup> It also 'gives effect to Australia's international rights and obligations, including under the International Health Regulations, the SPS Agreement<sup>610</sup> and the Biodiversity Convention'.<sup>611</sup>

Foods which are believed to raise biosecurity concerns are subject to biosecurity laws. Under the law, importers of such products are subject to certain biosecurity import conditions; for example, some foods are permitted with a permit. An importer of food may use the Import Conditions System (BICON) to determine if food intended for import into Australia will be either permitted or subjected to import conditions, or requires supporting documentation, treatment or permit.<sup>612</sup>

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<sup>605</sup> Imported Food Control Act 1992 (Cth), s 8.

<sup>606</sup> Imported Food Control Act 1992 (Cth) s 8.

<sup>607</sup> Imported Food Control Act 1992 (Cth) s 8A.

<sup>608</sup> Criminal Code Act 1995 (Cth), s 13.3(3).

<sup>609</sup> The Act aims to provide for 'managing the following: (i) biosecurity risks; the risk of contagion of a listed human disease; (iii) the risk of listed human diseases entering Australian territory or a part of Australian territory, or emerging, establishing themselves or spreading in Australian territory or a part of Australian territory; (iv) risks related to ballast water; (v) biosecurity emergencies and human biosecurity emergencies'. See Biosecurity Act, 2015 (Cth) s 4 (a), also see Chapter 3 of the Act.

<sup>610</sup> SPS agreement means 'the Agreement on the Application of Sanitary and Phytosanitary Measures set out in Annex 1A to the World Trade Organization Agreement, in force for Australia. See Biosecurity Act 2015 (Cth) s 9.

<sup>611</sup> Biosecurity Act 2015 s 4 (b). Note that the convention refers to the Convention on Biological Diversity, made at Rio de Janeiro on 5 June 1992, in force for Australia. Biosecurity Act 2015 (Cth), s 9.

<sup>612</sup> Australian Government, Department of Agriculture and Water Resources, Biosecurity Import Condition System (BICON), <http://www.agriculture.gov.au/import/online-services/bicon>.

The Biosecurity Act 2015 (Cth) contains various provisions providing officials with powers to ensure compliance with the Act. For example, it authorizes officials to carry out an investigation where there has been non-compliance. Enforcement can be in the form of civil penalties, infringement notices, enforceable undertakings and injunctions.<sup>613</sup> Under the Biosecurity Act 2015 (Cth), a person can commit an offence where the person brings or imports into Australian territory prohibited goods, suspended goods<sup>614</sup> or conditionally non-prohibited goods into Australian territory and a condition applying to the goods has not been complied with.<sup>615</sup> Where a person imports prohibited goods or suspended goods, the person commits a basic fault offence. The penalty could be imprisonment up to 5 years or 300 penalty units<sup>616</sup>, or both.<sup>617</sup> And if, as a result of bringing or importing the prohibited or suspended goods into Australian territory, the person obtains or is likely to obtain a commercial advantage over the person's competitors or potential competitors, the penalty is imprisonment up to 10 years or 2,000 penalty units, or both.<sup>618</sup>

Similar penalties apply if the person has imported 'conditionally non-prohibited goods' into Australian territory and a condition applying to the goods<sup>619</sup> has not been complied with.<sup>620</sup> Where the person, by importing the 'conditionally non-prohibited goods', obtains a commercial advantage<sup>621</sup> over the person's competitors or potential competitors, then the penalty is higher. The person could face imprisonment up to 10 years or 2,000 penalty units, or both.<sup>622</sup> Similarly, if harm has been caused or is likely to be caused to the environment or has the potential to cause economic consequence by the importation of 'conditionally non-prohibited goods', then the penalty is imprisonment up to 10 years or 600 penalty units, or both.<sup>623</sup>

Food that is brought into Australia is inspected under the Imported Food Inspection Scheme. This scheme aims to ensure that imported food is safe and that the importers have complied with the Australian food standards as required by the Food Standards Australia New Zealand Act 1991 (Cth) and the Australia New Zealand Food Standard Code (the Code). The inspection of food is carried out based on a risk assessment. Australia divides its imported food into three main categories: namely 'risk food', 'surveillance food', and 'compliance

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<sup>613</sup> Biosecurity Act 2015 (Cth), Chapter 9 & s 484.

<sup>614</sup> Biosecurity Act 2015 (Cth), s 185 (1).

<sup>615</sup> Biosecurity Act 2015 (Cth), s 186 (1).

<sup>616</sup> A 'penalty unit' means the amount of \$180. See Crimes Act 1914 (Cth) s 4AA (1).

<sup>617</sup> Biosecurity Act 2015 (Cth), s 185 (1).

<sup>618</sup> Biosecurity Act 2015 (Cth), s 185 (4).

<sup>619</sup> Biosecurity Act 2015 (Cth), s 174.

<sup>620</sup> Biosecurity Act 2015 (Cth), s 186 (1).

<sup>621</sup> 'Commercial advantages' are for example 'avoiding business costs associated with obtaining an import permit or meeting other requirements under this Act' or avoiding delays necessarily involved in complying with applicable biosecurity measures. See Biosecurity Act 2015 (Cth), 186 (4)(d).

<sup>622</sup> Biosecurity Act 2015 (Cth), s 186 (4).

<sup>623</sup> Biosecurity Act 2015 (Cth), s 186 (5).

agreement food'. The risk food and surveillance food are categorized according to the risk they pose, namely medium-to-high and low risk. The 'compliance agreement food' refers to an agreement entered into by the food importer. This Food Import Compliance Agreement aims to ensure that procedures with regard to food which may be imported are complied with and that records of compliance are maintained by the parties involved. Supervision, monitoring and testing of the person's compliance with these procedures are also carried out. The Agreement exempts them from being subject to inspection and testing of products at the border.

A biosecurity officer is empowered under the Biosecurity Act to carry out an investigation, including entering premises (with the consent of the occupier of the premises) where there are reasonable grounds for suspecting that there may be harmful material on the premises.<sup>624</sup>

Where it is found that the goods imported have a biosecurity risk, the risks are managed by either moving the goods,<sup>625</sup> treating,<sup>626</sup> destroying,<sup>627</sup> exporting the goods<sup>628</sup> or as deemed appropriate.<sup>629</sup> Failure by a biosecurity officer to attend on instruction to these measures may be subject to a penalty of imprisonment up to 5 years or 300 penalty units, or both.<sup>630</sup> A person may also be liable to a civil penalty of 120 penalty units if he or she fails to export the goods.<sup>631</sup>

Even if the criminal act is not deemed to have been committed in Finland, the Finnish Criminal Code may still apply to acts committed by Finnish legal persons. The Finnish Criminal Code applies to an offence committed outside of Finland by a Finnish citizen (chapter 1, section 6) as defined in the Criminal Code. However, the requirement of dual criminality (Criminal Code, chapter 1, section 11) applies: If the offence has been committed in the territory of a foreign State, here Australia, Finnish law applies only if the offence is also punishable under Australian law and a sentence could have been passed for it also by an Australian court. In this event, no sanction that is more severe than that which is provided by Australian law shall be imposed in Finland. Similarly, if the act is not punishable in Australia, it cannot be punished in Finland either, irrespective of whether the marketer is a Finnish citizen.

Hormones, herbicides or other substances that are illegal because they are harmful to health cannot be produced or exported to other countries where they may be acceptable. Producing and exporting such goods for example to Australia can be considered either a health offence

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<sup>624</sup> Biosecurity Act 2015 (Cth), s 486 and Chapter 9.

<sup>625</sup> Biosecurity Act 2015 (Cth), s 132.

<sup>626</sup> Biosecurity Act 2015 (Cth), s 133.

<sup>627</sup> Biosecurity Act 2015 (Cth), s 136.

<sup>628</sup> Biosecurity Act 2015 (Cth), s 135.

<sup>629</sup> Biosecurity Act 2015 (Cth), s 137.

<sup>630</sup> Biosecurity Act 2015 (Cth), s 140.

<sup>631</sup> Biosecurity Act 2015 (Cth), s 140.

(Criminal Code, chapter 44, section 1) or a transport of dangerous substances offence (Criminal Code, chapter 44, section 13).

#### 4 Prevention and enforcement

In Finland, there are no special agencies or units specializing in food fraud. In practice, criminal behaviour is detected by the municipal food control authorities and/or by Evira. These authorities function as expert witnesses in criminal proceedings. Also in practice, criminal proceedings in food-related offences would not be instigated without the involvement of these food control authorities.

Contrary thereto, consumer organizations cannot participate in criminal proceedings, at least not as plaintiffs. However, class action is available in food fraud offences and is led by the Consumer Ombudsman.

#### 5 Summary table of food crime and punishment in Finland

Food crime	Crime	Punishment
Selling food without a permit	Food infraction (Food Act, 10: 79§)	Fines
Providing false or misleading information	Marketing offence (Criminal Code, 30:1§)	Fines or max one year imprisonment
Causing economic loss by deception (fraudulent foods)	Fraud (Criminal Code, 36:1§) Aggravated fraud (Criminal Code, 36: 2§)	Fraud: fines or max two years imprisonment Aggravated fraud: four months to four years
Selling dangerous foods	Health offence (Criminal Code, 44: 1§)	Fines or max six months imprisonment
Negligently making a food poisonous	Negligent endangerment (Criminal Code, 34:7§) Grossly negligent endangerment (Criminal Code, 34:8§)	Negligent: fines or max one year imprisonment Grossly negligent: four months to four years
Intentionally poisoning foods	Endangerment of health (Criminal Code 34:4§) Aggravated endangerment of health (Criminal Code, 34:5§)	Endangerment: four months to four years Aggravated endangerment: from two to ten years imprisonment
Negligently causing an injury by selling dangerous foods	Negligent bodily injury (Criminal Code, 21:10§)	Negligent: fines or max six months imprisonment Grossly negligent: fines or max two years

	Grossly negligent bodily injury (Criminal Code, 21:11§)	
Negligently causing a death by selling dangerous foods	Negligent homicide (Criminal Code, 21: 8§) Grossly negligent homicide (Criminal Code, 21: 9§)	Negligent: fines or max two years imprisonment Grossly negligent: four months to six years
Intentionally causing an injury by poisoning foods	Assault (Criminal Code 21: 5§) Aggravated assault (Criminal Code, 21: §6)	Assault: fines or max two years imprisonment Aggravated assault: two years to ten years
Intentionally causing a death by poisoning foods	Manslaughter (Criminal Code, 21: §1) Murder (Criminal Code, 21: 2§)	Manslaughter: at least 8 years imprisonment Murder: life imprisonment

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# HEALTH PROTECTION AND FOOD SAFETY REGULATION IN ITALY: FROM THE CURRENT LEGISLATION TO THE REFORM PROJECT OF 2015

By Massimo Donini\*

## 1 Introduction

### 1.1 Definition

The precise definition of relevant food in Italian criminal law has been the subject of much discussion due to the use of different terminologies within the regulations: Law No 283/1962, for example, mentions alternately 'foodstuffs', 'substances intended to be food' or 'food and beverages'. Therefore, as it pertains to criminal law, we will refer to the broad European definition of food: 'any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans'.

Food includes drink, chewing gum and any other substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment.<sup>632</sup> In this definition of food cosmetics, tobacco and tobacco products are not included,<sup>633</sup> but they may be considered as such for criminal law purposes if they are ingested as normal consequence of their use.

### 1.2 Administrative or criminal sanctions

In cases of apparent convergence of crimes and administrative torts, the Italian legal system states that the special provision must be applied (see Article 9(1) of Law No 689/1981). Although this may lead to issues of *ne bis in idem*, when it comes to food safety protection the standard rule is expressly established: the penal sanctions embodied in Articles 5, 6 and 12 of Law No 283/1961 must be applied instead of administrative sanctions, even when the latter are incorporated in more specific provisions. In other words, the punitive norm prevails. This regulation assumes that both provisions apply to the same fact. These provisions must also respect the principle of *ne bis in idem*, but this depends on the interpretation and application of the concept of 'the same fact', which traditionally is understood not only as the same conduct but also as the same result. In the case of different results, or different protected interests, a problem of *ne bis in idem* has always been excluded

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<sup>632</sup> Art 2 of Regulation (EC) No 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 31/1.

<sup>633</sup> Art 2 of Regulation No 178/2002.

by Italian courts. In this regard, it is worth mentioning that a problem arises due to the different interpretation of the principle issued by the CJEU, whereby the same conduct is sufficient to determine the violation of the *ne bis in idem*.

Although administrative offences can be in principle quite effective in preventing food frauds (administrative fees combined with accessory sanctions), they are not frequently used in practice when public health is at stake, but only when related to hygiene, authorisation, packaging, etc. There are approximately one thousand administrative offences punishing the violation of rules on authenticity, hygiene, food composition, packaging, record keeping, accompanying documents, labelling, names, signs, information, authorizations, omission of communications, unjustified detentions, etc.

This is the first level of protection, which is strongly oriented towards the prevention of such violations.

Criminal law concerning food safety, both with regard to the protection of the food substance itself and of human health, is divided in two different tracks: an *extra-codicem* special law (Articles 5, 6 and 12 of Law No 283/1962) and the provisions in the Criminal Code (cc), namely Articles 440 et seq.

Based on 'abstract danger' the former provides for misdemeanours (*contravvenzioni*) aiming to protect on the one hand food safety and collective health and, on the other hand, the hygiene, authenticity and integrity of food. According to a translation of the most important *extra-codicem* provision of food criminal law (Article 5 of Law No 283/1962):

'It is forbidden to utilize in preparing food or drinks, to sell, to keep for sale, or to issue as payment or other reward to employees, or to distribute in any way for consumption, alimentary substances that:

- a) are even only partly deprived of the nutritional elements, or mixed with lower quality elements, or any so treated as to alter their natural make-up, save for what is specifically disposed by laws and special regulations;
- b) are in a poor state of preservation;
- c) contain microbial levels above the limits which will be established by working regulations or by ministerial orders;
- d) are dirty, infested by parasites, altered or in any way harmful, or have been subjected to preparations or treatments intended to disguise a previous state of alteration;
- e) [abolished]
- f) [abolished]
- g) have had any type of chemicals added which are prohibited by a decree from the Health Ministry , or, if so authorized, which have not been added according to the rules prescribed for their use. Such Authorizing Decrees will be revised annually;

h) contain residues of products used in agriculture to protect plants and preserve stored food substances, but that are toxic to human beings. The Health Ministry will determine, by ministerial order, each product authorized for such purposes, the limits of acceptability and the minimum time intervals that must transpire between the last treatment and the harvest, and, for stored foodstuffs, between the last treatment and distribution for consumption’.

In this larger frame of protected interests both health and economic interests (such as authenticity) are included. For example, both the production of prohibited food ingredients or additives or trade of them in a large scale (wholesale) and the production of a single food item containing those additives (for example a steak) is included in the same provision.

Criminal law is often the *prima ratio* against food fraud, and especially against food law violations that may cause diseases since it is intended to have a strong deterrent effect. However, it is not applied if the defendant complies with the requirements of administrative control agencies or of the prosecutor. Article 162a par. 3 CC states that the crime can be annulled in the case of “regularization”, ie elimination of the dangerous consequences (‘Pardon is not permitted when (...) damaging or dangerous consequences of the offense are not eliminated by the offender’).

The penalties for these offences are alternative criminal sanctions (detention or fine) and there is always the possibility to nullify the criminal offence by paying a non-criminal fine before the opening of the trial, or before the decree of sentencing, corresponding to half the maximum amount of the fine imposed by the law on the offense committed, plus the costs of the proceedings. However, currently there is not a general regulation of these conditions to avoid the criminal sanctions and they ultimately depend on the courts’ decisions. In this regard, the Reform Project of 2015 introduces a much more specific discipline (Article 39 of the Project and Article 12 *ter* until 12.ter.6 of the new Law no 283/1962), which is based upon the existing models of offence annulment in the fields of environment or labour risk offences.<sup>634</sup>

The Criminal Code clusters the different offences (*delitti*) according to the protected interest, namely public health or public economy. The crimes aiming to protect the first interest (public health) are defined as ‘crimes of concrete endangerment’ or ‘capable of causing actual or potential danger’, as defined in the case law. As a matter of fact, however, the most effective provisions have proven to be those regarding the punishment of an ‘abstract risk’ (ie, a risk which does not need to be proven in the specific case), and for this reason the proposed reform focuses on these types of crimes (see below).

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<sup>634</sup> On food safety reform, see: M Donini, D Castronuovo (eds), *La riforma dei reati contro la salute pubblica. Sicurezza del lavoro, sicurezza alimentare, sicurezza dei prodotti* (Padova, Cedam, 2007). See also A Gargani, *Reati contro l’incolumità pubblica*, Volume II, ‘Reati di comune pericolo mediante frode’, in CF Grosso, T Padovani, A Pagliaro (eds), *Trattato di diritto penale* (Milano, Giuffrè, 2013) 96; S Corbetta, *Delitti contro l’incolumità pubblica*, Volume II, in G Marinucci, E Dolcini (eds), *Trattato di diritto penale* (Padova, Cedam, 2014).

The crimes against public health provided by the Criminal Code are:

- Epidemic (*Epidemia*, Article 438 cc)
- Poisoning of water or food substances (*Avvelenamento di acque o di sostanze alimentari*, Article 439 cc)
- Adulteration and counterfeiting of water or food substances (*Adulterazione e contraffazione di sostanze alimentari*, Article 440 cc)
- Adulteration and counterfeiting of other things to the detriment of public health (*Adulterazione e contraffazione di altre cose in danno della pubblica salute*, Article 441 cc)
- Trade in counterfeit or adulterated foodstuffs (*Commercio di sostanze alimentari contraffatte o adulterate*, Article 442 cc)
- Trade of harmful food substances (*Commercio di sostanze alimentari nocive*, Article 444 cc)
- Other crimes based on negligent behaviour (Article 442 to 444 cc).

### 1.3 Reform projects

Currently there is no criminal or punitive responsibility of legal persons for fraud concerning agriculture or food cases connected to the criminal conduct of administrators or employees of the legal person. However, it may be introduced soon if the Parliament approves the reform proposed by the Caselli Commission (see below, section 2 and 3). In this case, the liability of natural and legal persons will be cumulative and the responsibility of legal persons will be the most effective with regard to the crimes analysed here as they are deeply linked to the prevention of those risks arising from industrial production (see below para 5).

## 2 Policy choices of the Caselli Commission (2015)

### 2.1 Objectives

The Minister of Justice has recently appointed a Commission for the drafting of reform proposals on crimes concerning food safety.<sup>635</sup> The Commission presented its Project on 14 October 2015.

The main objectives were the rationalisation of the regulatory system and the modernisation of criminal law provisions concerning agriculture and food matters. This was pursued through the development of different but complementary directions of criminal policy, such as the definition of the category of dangerous crimes against health, the revision of the system of sanctions against food fraud, the extension of the administrative (punitive) liability of legal persons for crimes related to food, and the creation of new conditions to avoid punishment focused on post-fact reparative actions of the offender. The proposed amendments concern the Criminal Code, both on the side of protection of public health (Title VI of Book II) and on the side of protection of public economy (Title VIII of Book II); the Law

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<sup>635</sup> President: Gian Carlo Caselli. See the Ministerial Decree of 31 April 2015.

No 283/1962; the Legislative Decree No 231/2001; as well as some parts of the Criminal Procedure Code.

In the field of substantive criminal law concerning public health the general significance of this proposed reform, consists of a significant distinction between food safety (covered by special legislation) and public health (covered by the Criminal Code), as well as a relevant decriminalisation of many offences included in Article 5 of Law No 283/1962.

As regards the relationship between the Criminal Code and special laws, the Project highlights the increased importance of prevention provided by a joint discipline – criminal and administrative – that regulates corporate liability for offences provided by the Criminal Code. The preventive aims of the reform emerge also with regard to criminal offences such as the production and sale of harmful substances for wholesale or distribution, as well as public health disaster resulting in long-term damages to unidentified victims, the refusal to eliminate hazardous food-substances and harmful food advertising.

## 2.2 Endangerment crimes

With respect to its preventative aim, the approach of the reform is characterised by the identification of food businesses as the real addressees of food criminal law. The effectiveness of criminal law related to crime and health damage prevention is best ensured by ‘crimes of risk’ or ‘crimes of abstract endangerment’. The rationale is that once actual damage occurs, it is already too late. Apart from the responsibility for individual harm and diseases, the other provisions (crimes of concrete endangerment) punish the offender after damage has already occurred, instead of seeking to prevent it.

In the current legislation, harmful consequences are neither an element of the offences based on risk (misdemeanours) nor of the crimes against public health, where the object of punishment is the endangerment of undetermined victims (so called ‘common danger crimes’). The specific harm to an individual is only helpful to prove and to prosecute the endangerment; however, the offence as such does not require actual injuries to persons.

The Project of 2015 improves both perspectives: 1) it provides for more endangerment crimes and crimes that result in danger to the public health where proof of individual causal chains is not necessary, but only the causation of harm to a group based on epidemiological tests. This aims to increase the prevention of accumulative diseases (arising from multiple exposures to hazards: *kumulative Delikte*); 2) it provides for new risk crimes and at the same time decriminalizes minor offences or offences not regarding health. However, the most important and the most discussed provisions concern the prevention of crimes, as well as some new rules concerning the responsibility of enterprises or their management.

### 3 The proposed reform of Law No 283/1962 on food safety

The re-writing of Article 5 of Law No 283/1962 was the most difficult part, as there had not been any attempt to reform it nor were there previous legislative proposals. Moreover, the European context is very complex.<sup>636</sup> The result has not been completely satisfying but some key points have been achieved from which each subsequent legislative reform must begin.

The Caselli Commission has intended to clearly distinguish between the cases of administrative criminal (crimes and misdemeanours) offenses, and did so starting from an Article contained in a general law of common cultural orientation. Thus a choice of criminal law. This represents an important innovation compared to the '2010 Project' which, with regard to the crimes (*delitti*), anticipated several solutions of the Caselli Commission but did not address the need for a reform of Article 5 of Law No 283/1962.<sup>637</sup> Namely, preventive non-compliances in the strict sense, except for a case originally designed for the Criminal Code (wholesale of harmful food) that will be mentioned later and which is also relevant to the criminal policy of the new 2015 Project.

#### 3.1 Principle of precaution and assessment of health risks

Non-compliance with pure precautionary prohibitions is designed as an administrative offence. These are defined by the proposal of the new Article 5-ter, para 2, of Law No 283/1962, and are the (only) violations in which the harmfulness to health or food depends on regulatory assessments that do not exhibit cognitive certainty of the scientific laws related to the existence of the danger for health, and result from relevant European or national regulatory provisions which refer to that principle. A crucial role is played by the harm principle and by the legal certainty principle. The significant innovation of the new discipline regarding the identification of the conducts 'prohibited' by the principle of precaution consists in the limitation of the punishable conducts to those that expressly 'result from' national or European regulatory provisions 'which refer to the precautionary principle'.

#### 3.2 Description of behaviour or sanctions

Offences related to the authenticity of food that are not considered commercial frauds, which are provided as criminal offenses by the Code, constitute an administrative offense, as they concern the fairness of business relationships, rather than health. See the planned Article 5-quarter of Law No 283/1962 on 'non-genuine food'.

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<sup>636</sup> See G Amara, 'La tutela sanzionatoria della sicurezza alimentare: uno sguardo d'insieme su alcuni ordinamenti europei' in L Foffani, A Doval Pais, D Castronovo, C Pongiluppi (eds), *La sicurezza agroalimentare nella prospettiva europea. Precauzione, prevenzione, repressione* (Milano, Giuffr , 2014) 301.

<sup>637</sup> In the mandate for the Project of 2009 there were no norms originating from complementary legislation, as the Commission's work for a 'food code' was still ongoing.

Negligent violations in the retail phase are also outlined as administrative offenses (Article 5, paragraph 4, last sentence). They constitute the most frequent cases of illegal marketing without significant consequences. Today the distinction between intent and negligence (*dolo/colpa*) has faded considerably because with regard to misdemeanours they are indifferent. However, the project clearly distinguishes them in the case of retailing. Even though (at least initially) the procedure will start with the indictment of a wilful misdemeanour offense, the decriminalizing effect should be appreciated since proof of intent would be otherwise quite hard to demonstrate.

The previous version of Article 5, Law No 283/1962 has been rewritten with the inclusion of the complete list of all the most relevant behaviours within the food chain ('Everyone who prepares, produces, transports, imports, exports, introduces in temporary storage or customs warehousing, ships in transit, holds for trade, administers or markets food in every way'), from the preparation to the distribution of products or substances, which result in concrete harm or are unfit for human consumption (the text approved in Commission defines them 'unsafe, or for some other reason harmful to health or unfit for human consumption': see *infra*) and subjecting the description of the legal fact to a previous failure to comply with legal or regulatory prohibitions ('for non-compliance with procedures or safety requirements prescribed by national or European laws or regulations'), except for non-compliances in the preservation, in the treatment or in exceeding the limits established by regulations or ministerial dispositions.

A decisive criminal selection that cannot be delegated to non-compliances (referred to and implemented by national or European laws or regulations) is due to the objective of preventing harm to health. Only the violation of certain rules makes the products 'unsafe'. However, 'unsafe' is an expression which is still too neutral, apparently compatible with that of 'harmfulness' or 'dangerousness' and prodromal violations. But this is not the sense of the adopted 'criminal selection', as will shortly be discussed.

This number of punishable conducts is now common among several crimes, misdemeanours, or administrative offenses (if committed for retail purposes) also included in Article 5. Obviously, the fact takes into account the existence of numerous administrative offences and sanctions existing in several special regulatory bodies, following autonomous selection criteria which must remain, and in some cases be increased, without being absorbed by criminal law.

Article 5 establishes an offense due to violation of laws or regulations (ministerial or European) according to several parameters. On the objective side, the first relevant aspect is that of the harmfulness (more precisely, 'unsafe' or 'health damaging' according to the text adopted by the Commission)<sup>638</sup> or the condition of being unfit for consumption

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<sup>638</sup> The 2015 Project provides for a definition, in Art 5-*bis*, of unsafe food: 'Foods are considered unsafe when they are, even in relation to ingredients, components, or feed used for animals, contrary to the requirements

(‘putrefaction, deterioration or decay’) of products or substances that are prohibited not only for health protection reasons, but also for non-compliance aimed at the ‘prevention of damage’ to health. The concept of damage to health is not a European or regulatory concept but falls in the legal definition of the fact. Prevention of damage is not prevention of danger, which should have been clarified in the Guidelines. It is true, however, that the concept is not defined by law either - but how many criminal laws do self-define their normative concepts? On the other hand, even the concept of ‘harmfulness’ is not defined by Article 5, Law No 283/1962. It should be made clear that if the non-compliances are related to working conditions, either hygienic or behavioural, or to the workplace, or to food authenticity and not to its healthiness, or to the packaging, authorizations, documentation etc, these aspects are *per se* not related to the harmfulness or specific unsafe conditions of the food, but to previous or concomitant situations or conditions, and so this fact cannot on its own, without technical analysis of the substance, constitute a criminal offense if the violation is not reflected in the food.<sup>639</sup> It will be considered a different violation, if provided, in the case that this fact not constitute by itself the ‘same fact’ provided by Article 5. Here still on the objective side, the destination of use to the purposes of wholesale or large-scale retail trade makes the fact committed with intention (*dolo*) a crime. At the subjective level, however, the same fact becomes a misdemeanour if committed with guilt (*colpa*). Conversely, intentionally committing the offence on the part of a retailer constitutes a misdemeanour, not an administrative offense.

As mentioned above, Article 5-*bis*, para 2, Law No 283/1962 also contains a new definition of food ‘dangerous to health’ which is distinct from unsafe food due to violation of regulations aimed at preventing damage to health:

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established by law for the prevention of damage to health’. Just an irregularity is not enough, even if hygiene-related: it must be a breach of regulatory requirements ‘for the prevention of damage to health’. In this sense, harmfulness is a requirement implicitly contained in the text in relation to the types of conduct causing different violations as an alternative to the one that recognizes food which is prejudicial to health due to the presence of harmful factors known only to the producer, but certain (Art 5 *bis*, para 2), and food unfit for human consumption because of contamination or putrefaction, deterioration or decay (Art 5 *bis*, para 3).

<sup>639</sup> The referral to regulatory sources does not fulfil *en bloc* the definition of unsafe/harmful food, as the violation of rules aimed to prevent health damages must be ‘impressed’ on the particular food and not on its preparation or packaging. The food or one of its elements must be autonomously recognisable as unsafe for health, and thus harmful, which is not the case for all violations in situations that are not physically connected to the food, to its composition, preservation, etc. Following current practice, the food must be subjected to scientific tests. Tests will be not necessary for food that is obviously unfit for consumption at first sight (*ictu oculi*). It is true, however, that if the text had expressly referred to ‘harmful’ products, instead of ‘unsafe’, some misunderstandings could have been more easily avoided. The reason behind the exclusion of ‘harmfulness’ is to permit the inclusion of violations that are prohibited because they are only gradually dangerous, (they do not make the product immediately harmful)but only after prolonged consumption. Even in this case a scientific test will be necessary, as the ‘gradual harmfulness’ is linked to the product itself, and not related to other conditions such as preparation, transportation or processing.



'2. Food is considered dangerous to health when its harmfulness or that of the individual ingredients, components, or feed used for animals, even if not emerging under current legislation, is ascertained and known by the manufacturer or by the food-operator'.

The intended meaning: a substance, an additive or a component may be known to be harmful only by the producer who produced tested it in a lab. It might have effects identical to another prohibited known substance but it helps sell the product due to the positive effects on colour, flavour, preservation etc. It is clearly not required that it be classified as prohibited by the law to be considered harmful. If the producer secretly uses it in production, such violation falls under Article 5.

It is worth mentioning that this provision has provoked strong reactions from *Federalimentari*, as also noted in a footnote to the text (14 October 2015) of the Reform Guidelines. What consequences would its elimination have? If this provision had not been expressly included, ie if only 'harmful' substances were mentioned, unifying the first (unsafe food) and the second paragraph (food dangerous to health) in the concept of harmful foods, the distinction would have not been clear, but the relevance of hidden harmfulness known only to the producer would certainly have been excluded. There would have been only the reference to a concept of harmfulness, which does not necessarily require a formal qualification, but only a substantial one.<sup>640</sup>

Of course, if in the legislative process this explicit distinction will be removed, this could not be intended as an endorsement of the choice to authorise the producers to use hidden harmful substances known only to them, as this is already prohibited *ex ante* (Article 5, let d) Law 283/1962), and is also prohibited by the principle of *ex post* relevance of the imputation of generally unknowable facts, which are instead known only by those who have caused the event and are aware that these causes are concurrent to the conduct (Article 41, para 1 and 2, cc).

This curious resistance to the 'social parties' and the difficulty of understanding that this is not intended to innovate, but only to make an important cultural message more explicit, could eventually convince the legislator to unify the concepts into that of 'harmful food' without any further specification. Except in the case that the law opts to introduce an even more specific definition for unsafe substances linked to the lack of proof of their risk to safety when introduced in the market.

Already anticipated by the 2009 Project – which introduced a similar crime in the Criminal Code<sup>641</sup> - a particular criminal policy is endorsed: the street vendor who sells battered

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<sup>640</sup> As it is happening today with the current Article 5, let d): '...or harmful anyway', or 'subjected to treatments intended to mask an existing state of alteration'.

<sup>641</sup> Under the heading of 'wholesale of harmful food products', the 2009 Project provided (in a new Art 442 cc) the fact of 'whoever, apart from cases of complicity in the crimes set out in Articles 440 and following, imports, exports, stores, transports, holds for sale, sells, or distributes in the forms or for the purposes of

*mozzarella* cannot be compared – as it conversely happens today in the current Article 5, Law No 283/1962 – to the industrial producer of *mozzarella* who uses additives that are prohibited for health reasons. The conduct of the street vendor, if committed with guilt, would represent an administrative offense, and if wilful, an offense punishable with an alternative penalty. On the other hand, the conduct of the producer would constitute a crime if wilful, and a misdemeanour punishable with detention if negligent.

The representatives of such industries – present as 'social parties' in the meetings with the Minister and the Commission – have strongly criticised this innovation, arguing that it would not adequately identify the conduct, would punish only certain types of industries, would not explain the concept of mass distribution, and would be easily bypassed by trading the same substances on the retail market.

These objections only recommend a restyling of the legal text without entailing substantive changes. However, the timeframe for the Project approval did not allow an opportunity make all the suggested changes (ie, the definition of mass distribution and the specification that the conduct must be aimed *ab origine* at such contexts of mass distribution and not simply have 'the form' of such commercial realities).<sup>642</sup> Furthermore, identification is not based on the type of offender, as some have claimed, but on the level of harm, since the greatest risk is that triggered by wilful production and marketing that – being not harmful in itself, but usually related to gradual damage due to cumulative effects – are directed to very broad contexts of sale. The value of the criticism would be quite different if the only reference was to substances *per se* resulting in damage once consumed, which would make Article 5 a form of 'attempt' of the crimes provided by the Code: in this case it would be senseless to distinguish between a small trader or producer and wholesaler, but this is not the kind of 'production' here considered. Its violations may possibly represent, depending on the case, a form of 'anticipated' Article 440 cc, but it is not required that this occurs in a typical or normal manner.

With regard to activities that are *ab origine* unlawful, the widespread phenomenon of illegal introduction or import of dangerous food products for wholesale purposes, as it constitutes a crime punishable up to four years of detention, can be subjected to the application of the concept of 'criminal enterprise', and consequently to all the measures applicable to these types of businesses. This is a real crime focused on prevention which above all addresses the enterprises. It is also one of the most significant policy innovations in the European context. Probably due to mere inattentiveness, the Project did not extend to this case the liability of

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wholesale trade foodstuffs in poor condition, expired, soiled, infested by parasites, in a state of alteration or however harmful, or subjected to treatment or treatments intended to conceal any of the above conditions, shall be punished with imprisonment from four to twelve years'.

<sup>642</sup> Otherwise, to be punished for the crime (*delitto*) it would be sufficient to produce small quantities and sell them occasionally in a large supermarket, but this is not the aim of the Project.

legal entities, which is provided for food crimes within the Criminal Code. Such an inconsistency will hopefully be remedied during the ongoing legislative process.

In principle, the intention of the Commission was not to extend the area of criminal law with respect to the existing crimes, but to make it more effective.<sup>643</sup> All conducts provided by the new Article 5 were already recognized as offenses under the current Article 5, Law No 283/1962, but now the latter are partially decriminalised, partly elevated to 'crimes' (*delitti*) and partly remained misdemeanours (*contravvenzioni*), but with a different penalty, such as fines or detention. Of course, a legislative technique could have been preferred, such as the categorization of different and very detailed conducts. However, a different model has been chosen, actually more typical for criminal law, which is focused on the harm principle (*offensività*) and guilt (*colpevolezza*) as a basis, with offenses aimed at prevention, and whose real addressees are mainly the producing enterprises.

Therefore, the harmfulness of food may be caused by two factors: 1) either because as an individual marketed product it can result in damage to health once placed on the market; or 2) because damage occurs only through cumulative consumption. In the first case, the 'anticipated offense' is punishable before it becomes a crime of the Code, but will probably become one later (Article 440 cc): this is not however the reason why Article 5 (old and new) is useful or decisive. In the second case, what is punished is only the level of risk, and it is not possible that it will ever become a crime since the cumulative damage depends on further production or marketing, with the exception of a health disaster caused by intentional violations of wholesale or mass distribution regulations, where cumulative damages are relevant even later in time if committed during macro-events resulting in damage.

#### **4 The new crimes against public health in the Criminal Code<sup>644</sup>**

The 2015 Project redefines (and partially reduces) the criminalised area of the Italian Criminal Code, with respect to the already existing crime of poisoning (Article 439 cc), due to the new crime of water or food adulteration or contamination (Article 439 *bis* cc); it

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<sup>643</sup> There are several examples of different National or European regulations in matters of hygiene, packaging and food preservation, which could not be included in the referral '*en bloc*' to any irregularity believed to exist in this new Art 5. In this case, it would therefore contain more criminally relevant violations of the current Article. But many administrative violations do not relate to the harmfulness of the product in the sense that it is harmful to health, even if in the abstract assessment of inherent characteristics relating to past or anticipated conditions, which remain regulated at the administrative level. Of course, the only way to obtain a descriptive certainty that will allow those who apply laws 'not to think' is to include at least a hundred detailed legal schemes of conducts, with the related sanctions. This would not, however, mean that only the most 'offensive' facts are punished by criminal law. Obviously a choice typical of administrative offenses, and, not of criminal law. It is true however that a definition of 'unsafe food', translatable also into 'harmful food', could be improved to provide a more certain guide for the interpreter.

<sup>644</sup> Articles 439 ss cc.

implements the model of a unified offence of production, import, export, trade, transport, sale or distribution of counterfeit or dangerous foods (Article 440 cc), which brings together and rewrites the existing Articles 440, 442, 444 cc, with due regard to the legal certainty, the harm and guilt principle, and the increasing level of harm.

Finally, the Project introduces three new offences of low procedural incidence rate – failing to withdraw dangerous food (Article 442 cc); dangerous deceptive commercial information (Article 444 cc); health disaster (Article 445 *bis* cc) – but that fill an obvious gap in the offense, and aim to integrate the punitive and preventive objectives. In particular, among these, the health disaster offence introduces a form of responsibility in case of damages inflicted upon populations even at a lengthy temporal distance, which constitutes one of the greatest innovations of indictment techniques and criminal policies of contemporary criminal law.

#### 4.1 Food contamination or adulteration

In particular, the new water or food contamination or adulteration crime (Article 439 *bis* cc) aims to redefine the relationship between the current Articles 439 cc and 440 cc, ie the regulatory vacuum existing between the conduct of ‘true poisoning’ and those of mere ‘adulteration’ of water or nutrients. The typical cases of industrial pollution involving the aquifer, or of the spilling of substances into drinking water that are not immediately harmful and end up being dangerous only due to significant cumulative effects, should not be classified – as frequently stated by judges – as poisoning. In the case of damages that can be caused only by the cumulative effects of additional, subsequent contamination, a criminal assumption of concrete danger – similar to the one provided by the Italian Criminal Code mentioned above – should not even be proposed.

In the Criminal Code system, Article 439 cc is equivalent to slaughter: it is elaborated on the basis of an idea of harm that is similar to immediate danger for people’s lives (in other words, a real case of disaster).

At the same time, a crime of mere food or water ‘adulteration’ (Article 440 cc),<sup>645</sup> which does not require a disaster as a consequence of the conduct in the current application under case law, does not apply to dangerous contamination due to external factors, such as normal non-food industrial production, because it is much less severe and in any case focuses on different types of behaviors.

Adulteration concerns the conduct of typical industrial food production of an intentionally fraudulent nature and is not merely harmful, as opposed to contamination or corruption. Hence, the need to introduce a serious crime of concrete danger, concerning water or food

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<sup>645</sup> ‘Anyone who contaminates or adulterates water or food, before they are sold or distributed for consumption, making them dangerous for public health, shall be punished with imprisonment from three to ten years. The same penalty applies to anyone who counterfeits, in a way that poses a threat to public health, food substances intended for trade. The penalty is increased if medicinal substances are adulterated or counterfeit’.

contamination or adulteration, by 'making them effectively dangerous to public health,' according to the new text.

At the same time, a common definitional rule (Article 445 *ter*: common provisions) introduces the concept (that must be understood as applicable to all new offences of the Code on foodstuffs) according to which 'under criminal law, the event which poses a danger to public health also includes the that arising from cumulative consumption in normal quantities of water, foods or nutrients already distributed or sold, with reference to the moment of their distribution, sale or entry into service for the consumer'.

This Project, therefore, fills a gap: it balances protection and has a positive assurance effect to guard against extremely grave variations of the offence, according to which nowadays those facts are punished under a crime (the current Article 439 cc: poisoning) the punishment for which is equal to that applicable for slaughter.

The new Article 440 cc is entitled 'Production, import, export, trade, transport, sale or distribution of counterfeit or dangerous foods'. As in the Project of 2009, it combines the current Articles 440 (adulteration and counterfeiting of food substances), 442 (trade in counterfeit or adulterated food substances), 444 (sale of harmful food substances) cc into a single indictment. In the version of Project 2015, the unitary legal scheme, partially transposing the Pagliaro Project of 1992, provides that:

'Whoever produces, imports, exports, ships in transit, introduces in temporary storage or customs warehousing, transports, holds for trade, administers, sells or distributes non-food substances prejudicial to health, counterfeit, adulterated or unfit for human consumption concretely endanger public health through consumption of the product, shall be punished with imprisonment from two to eight years'.

This text, in the terms of the Project 2015, requires a concrete danger linked to the consumption of the product, and therefore may not apply during transport or during production, possession or import of products. The same discipline is intended for Articles 440, 442, 444 cc.

In summary: On the one hand, in Article 5, Law No 283/1962 a mere risk, and an abstractly-presumed danger, related to cumulative effects or situations without concrete events. On the other hand, in the Criminal Code, a real danger assumed according to damage in progress. A danger to public health connected to consumption. A danger, even in this case, as in the case of contamination and adulteration, which cannot be based on the assumption of cumulative damage arising from multiple productions or sales different from those related to the food mentioned in the indictment. Article 5 shall be applied in cases of potential cumulative damages. The crime in the Criminal Code concerns real dangers for consumption which have reached an advanced *criminis iter* threshold. Irregular food, 'able to endanger the health of several consumers, is not enough. Such capacity is not distinguishable from the mere toxicity of the substances as it marks the presence of an abstractly implicit element of the types described in Article 5.

One thing is therefore clear in the Project: the crime established by the new Article 440 cc presupposes Article 5, Law No 283/1962, and in fact cannot concur with it, thereby deepening it in terms of harm and real danger.

As far as all the offending behaviours suppose a violation of the agriculture and food law in the prior stage of production, preparation, marketing etc, their increased dangerousness could not be held *in re ipsa* in the assessment of these same infractions. The legal scheme requires a specific 'risk link' between the previous non-compliance and the subsequent dangerous results.<sup>646</sup>

The object of the intentional offence is not a disaster event, but simply the real possibility of a danger, and therefore of an injury against third parties as a result of the consumption of those substances placed on the market. Nonetheless, the intention is not directed against individual victims. It is, on the contrary, *in incertam personam* and indeterminate. Its structure is the so-called '*dolo di pericolo*'.<sup>647</sup>

## 4.2 Withdrawal of dangerous food

The new offences of failing to withdraw dangerous food (Article 442 cc) and dangerous misleading commercial information (Article 444 cc) also fill a gap and improve the corresponding texts of the previous Project of 2010.

The crime of failing to withdraw dangerous food (Article 442 cc)<sup>648</sup>, as specified in the Project Guidelines, is a necessarily intentional crime which can be committed even before or apart from the assumption of production, distribution or sale punished under Article 440 cc.

The omission described by Article 442 cc derives from the breach of an obligation related to the same perpetrator, namely the food business operator, and in particular producers,

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<sup>646</sup> On the 'risk link' and, therefore, on the *imputazione oggettiva dell'evento* (objective *Zurechnungslehre*) in intentional crimes, see M Donini, 'Imputazione oggettiva dell'evento (diritto penale)' in *Enciclopedia del Diritto* (Milano, Giuffrè, 2010).

<sup>647</sup> As regards the *dolo di pericolo* see M Donini, 'Modelli di illecito penale minore. Un contributo alla riforma dei reati di pericolo contro la salute pubblica' in M Donini, D Castronuovo (eds), *La riforma dei reati contro la salute pubblica. Sicurezza del lavoro, sicurezza alimentare, sicurezza dei prodotti* (Padova, Cedam, 2007) 317; M Donini, *Teoria del reato. Una introduzione* (Padova, Cedam, 1996) 337-339, footnote 83; S Canestrari, *Dolo eventuale e colpa cosciente* (Milano, Giuffrè, 1999) 225 and 237; S Canestrari, 'L'elemento soggettivo nei reati di pericolo concreto' [2000] *Studium Iuris* 533, 536. See also T Rodríguez Montañés, *Delitos de peligro, dolo e imprudencia* (Madrid, Escuela de Derecho Judicial, 1994) 41 and 141.

<sup>648</sup> Art 442 cc is substituted by the following: 'Art. 442 (Failing to withdraw dangerous foodstuffs) - Aside from the cases of accomplices in the offence provided by art. 440 - an imprisonment from six months to three years is foreseen for the operator of the health sector which, having become aware of the danger to consumption of foodstuffs, held or sold by the latter, fails: a) to take measures, where possible, aiming at their withdrawal from the market or their recall from the purchaser or current holders; b) to immediately inform the competent authority. The same punishment is valid for the operator of the health sector which fails to respect the legal provisions issued by the competent authority aiming at the elimination of danger referred to in the first paragraph'.

distributors or sellers, who, having in good faith stored or sold food for consumption, have – later – become aware of the danger linked to the consumption of the food without intervening in order to neutralize it (as indicated by that provision). More specifically, in this hypothesis, it is necessary to distinguish the obligation for food business operators to provide, where possible, the withdrawal from the market or recall from the purchasers or current holders of such foods, or to immediately inform the competent authorities.

In this respect, the rule represents the necessary adjustment to the instructions contained in the Regulation (EC) No 178/2002, which imposes on operators in the field of food (Article 19) and feed (Article 20) obligations of withdrawal from the market and recall from buyers, as well as specific duties of providing information to the competent authorities.

The constitutive element of the crime mentioned above – that underlines the differences from the omissions punished under Article 3 of Legislative Decree No 190/2006 in case of breaches of the obligations under Articles 19 and 20 of Regulation (EC) No 178/2002 and 112 of Legislative Decree No 206/2005 (Consumer Code) - is identified in the danger of food consumption as an essential precondition of the obligation to act.

#### 4.3 Dangerous deceptive commercial information

In the case of dangerous deceptive commercial information (punished under Article 444 cc)<sup>649</sup> the judge shall verify the subsequent danger posed by the consumption of food affected by omissions, lies and bias contained in its advertising.

Consumer safety can be infringed or otherwise exposed to danger not only because of the structural and functional characteristics of the food (which is relevant under Article 440 cc), but also in light of the distinct and autonomous manner of its use as depicted by the advertisements.

In order to affirm the criminal liability under Article 444 cc, the consequence of this way of understanding the negative value of misleading or deceptive advertising imposes verification of — the cumulative effects of consumption of a normal quantity of the food in question.

#### 4.4 The crime of health disaster

As previously mentioned, the crime of health disaster (Article 445 *bis* cc) is an important political and criminal innovation in the prevention of cancer and eating disorders arising from cumulative effects and is introduced by the following provision:

‘Article 445 *bis* (health disaster). - When from the facts set out in Articles 439 *bis*, 440, 441, 442, 443, 444 e 445 follow, as a consequence of negligence, a serious injury or the

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<sup>649</sup> Art 444 cc (Dangerous deceptive business information): ‘Aside from the cases of accomplices in the offence provided by Articles 440, 441, 442, 443 and Art 5, para 2, of Law No 283/1962, whoever endangers the safety of consumption with real danger to public health through false or incomplete commercial information regarding foods shall be punished with imprisonment from one to four years’.

death of more than three persons and the significant and widespread danger of similar results among other persons, the penalty of imprisonment is from six to eighteen years’.

It is an aggravated offense, not a crime which is independent from other offenses, even though it has the autonomous status of a crime. It is also applied in the case of intentional violation of Article 5, Law No 283/1962 in the context of a production enterprise for wholesale or general storage purposes (see Article 5, para 6 of Law No 283/1962, reformed). This provision demonstrates that the Project has followed a restrictive notion of disaster and, in particular, of intentional disaster.

No one plans a health disaster without wilfully causing a massacre (Article 422 cc), an epidemic (Article 438 cc) or a poisoning (Article 439 cc) Therefore, these cases cannot be aggravated by the health disaster because they are already an intentional disaster. On the contrary, if a party external to the food industry, or an operator within that sector, unintentionally causes a disastrous event as an effect of fraudulent manipulations of food or water consumption, and this occurs through water or food contamination or adulteration, or illicit production aimed at trade and do not harm health, or through failure to withdraw dangerous or misleading sales information will not be considered crimes committed ‘in order to’ cause actual disaster events. However, when such events occur, the perpetrator shall be punished for aggravated health disaster. Conversely, if the perpetrator stops at an earlier stage of danger to public health, they shall be held liable for the basic crimes mentioned.

Therefore, the most serious event arises from an intentional dangerous conduct –which, having caused the death or serious injury of three or more people as individual events, produces a far more wide-ranging danger for public health. Consequently, there is a ‘disaster’, consisting in serious and widespread damage which can be linked to the original presence of danger.

In concrete terms, this means that since it is a crime against public health, with no relevance of individual causality, epidemiological assessment criteria shall be used in order to verify the disaster event, as is made clear by the Guidelines. The presence of tumours definitely caused by diffusion and consumption of such substances (for example, prohibited carcinogens used by a producer) even after many years, and as a typical effect of the causation of disease at a temporal distance, may lead to responsibility for the crime of public health disaster. This is the case even if those people within a population who have suffered injuries are not individually identified. The only element required is that a percentage of the affected population is definitively connected to the harmful effects of substances actually marketed and utilized in that territory.



## 5 The decisive level of prevention and the partial implementation of enterprise responsibility and restorative justice

The reform pursues an aim of general prevention as well as an aim of balanced sanctioning: a) by means of the introduction of corporate liability arising from the commission of a crime and b) by means of new forms of negotiated transactions with formal notice and prescriptions in the case of misdemeanours (Article 12 *ter* ss, Law No 283/1962).

These are crucial aspects of Project 2015 in terms of criminal policies. The three most relevant purposes of the aforementioned intervention are: a) the implementation of prescriptions for their 'true addressees' (the enterprises of the sector); b) subsequent general prevention for the entire agriculture and food sector; c) restorative justice with individualised effects of protection rebalancing.

As far as agri-food safety is the consequence of an improved productive policy, the agri-food enterprises are the true target of the legal provisions. It is a fact that corporate liability always arises from the individual commission of a crime. Nonetheless, enterprises still carry the economic and organisational weight of any regularization. Therefore, individual liability is designed to grant safety.

All misdemeanours in the Project are subjected to the mechanism of regularisation with prescriptions and formal notice;<sup>650</sup> which is typical of other sectors, such as labour law and environmental law. This scheme leads to exoneration from the crime for the single person charged, but also entails the direct involvement of the company, upon whose shoulders rests the corresponding obligation. Therefore, the true criminal liability for misdemeanours fails (Article 12-*ter* of Law No 283/1962 reformed) in the case of violations that 'do not cause damage or actual danger, and actual damage to public health and food safety, and whose realization depends on risks inherent to a production, organizational, commercial or otherwise working context, that can be neutralized or removed'.

This rule permits a regularisation of all culpable violations of the production cycle, excluding willfully illicit production (aimed at wholesale or large-scale retail trade) but including intentional retail violations. This assumption rebalances the responsibility for abstractly dangerous facts: only if there is no real and present danger of harm to public health (and food security) can the regularization be achieved (and the crime annulled) by means of a simple reorganization of work. Therefore, the annulment also pays the price of security and not only in terms of a financial penalty. This significantly rebalances individual criminal responsibility.

The restorative justice aims would not make sense for the *ab origine* illicit-purpose companies, which shall be held liable under Article 5. It would make sense, however, in the

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<sup>650</sup> The administrative agencies (food agencies) prescribe the measures which are necessary in order to neutralize - within a certain period - the risks of production; in case of full compliance the crime is annulled.

case of licit businesses, which only have a production line which is wilfully in violation of the rules on food safety and health protection.

In that event, it would be possible, as proposed by the Commission, to introduce not an annulling provision, but at least a strong mitigating factor, up to the half of the penalty incurred, in the case of regularization *ex post* (as in the case of misdemeanours).

The introduction of specific restorative justice mechanisms, moreover, formed part of the specific objectives of the mandate received by the Commission in the appointment decree.

All of what has been stated above is closely connected to company liability.

In the event of a crime under Article 5, Law No 283/1962, the Project does not provide for corporate liability, but aggravates individual responsibility. This choice has not been discussed within the Commission and is apparently the result of an oversight, which should definitely be revised by the legislature. The lack of liability in the case of crimes punished under Article 5 (which is the result of a deliberate corporate policy or of an intentional act of an individual in the interest, or for the benefit of, society) and parallel liability in the case of crimes punished under Articles 439 and following the Italian Criminal Code is nonsense. Equally meaningless is that the business can be held liable under Decree No 231/2001 for a health disaster (Article 445 *bis*), which can aggravate the intentional offense of Article 5, Law No 283/1962, and that the company itself cannot be held liable under this same intentional offense that unintentionally causes a disaster.

Furthermore, Project 2015 introduces an innovative regulation of food business organization models (Article 6 *bis* of Legislative Decree No 231) and it is obvious that the intentional breach of food safety legislation on the part of a manager or an employee falls among the first preventive purpose of the safety organization, with parallel corporate liability.

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# REPORT ON CRIMINAL PROTECTION IN THE FOOD MARKET IN SPAIN

By Miriam Cugat Mauri \*

## 1 Potential ways to criminally prosecute abuses affecting food security

As discussed in the General Report, the main problem in food security (or the right to food) currently lies at the level of international relations, which are dominated by multinational corporations that have the power to transform their buying decisions into indirect mandates relating to production and work organisation, so that products adapt *ab initio* to their desires concerning quality and price. In this way, multinational corporations can thus become the ultimately responsible players for the labour-related and/or environmental exploitation of the third world, directly affecting the possibilities that third world country inhabitants have concerning access to food. The substantive and procedural requirements for criminal repression of the most serious abuses committed by such corporations are not always met.

First of all, it is difficult to hold multinational corporations accountable for illegal practices when in appearance they simply limit themselves to requesting the product from the producer in the third world at the price desired for the consumer in the first world. Second, relocation of production may become a procedural obstacle in the prosecution of abuses abroad, especially when the multinational corporations indirectly deciding on production conditions have a different legal personality than the third world suppliers in which abuses are verified. It thereby makes it unlikely that suppliers will fall under the active personality principle on which the possibilities of extraterritorial legal prosecution generally depend.

In this context of international commercial relations, the position of Spain cannot be identified with either of the two extremes of abusive relationships. According to official data<sup>651</sup> published by the Bank of Spain<sup>652</sup> and the Ministry of Agriculture<sup>653</sup>, our country stands out for agricultural exports, while at present no concerning situation of dependence has been detected with respect to the commercial designs of third countries.<sup>654</sup> Nevertheless,

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<sup>651</sup> According to the information provided by the Customs and Special Taxes Department of the National Tax Agency.

<sup>652</sup> 'Balance of payments and international investment position of Spain, 2014', <http://www.bde.es/f/webbde/SES/Secciones/Publicaciones/PublicacionesAnuales/BalanzaPagos/14/Fich/bp2014.pdf>, 25.

<sup>653</sup> <http://www.mapama.gob.es/es/ministerio/planes-estrategias/lineas-estrategicas-para-la-internacionalizacion-del-sector-agroalimentario/lineasestrategicas.aspx>

<sup>654</sup> Warnings about the risks of the concentration of the productive sector do not point to the agrifood industry, but rather to the tourism industry.

if Spain were to be in the situation described above, it would encounter the same obstacles for criminal prosecution which are warned about in the common document.

### 1.1 Gaps and shortcomings in categories of criminal offences

In some cases, difficulties stem from the fact that offences have not been properly defined. This occurs, for example, when a multinational corporation imposes a giveaway price on a producer dependent on orders from it, an act which is difficult to be considered as the violent offence of extortion outlined in Article 243 of the Spanish Criminal Code (CC) or even the offence of price alteration outlined in Article 284 CC, although, as will be seen later, not impossible.

### 1.2 Limits in holding multinational corporations and their agents liable: offences against workers or environmental offences

In other cases, the offence exists, but is not directly attributable to the multinational corporation, as occurs, for example, with labour-related or environmental abuses over which the agricultural producer with a formally independent legal personality and decision-making capacity has direct control. In such cases, it is nearly impossible to sentence for offences against workers' rights those who do not have these workers 'in their service', as required by Article 311 CC. The same occurs with environmental offences (Articles 325 ff CC), where it cannot be assumed that it is the multinational corporation who is causing pollutant emissions, etc. And once again with the use of seeds of plant varieties. Inasmuch as they may be patented<sup>655</sup>, they may be subject to the industrial property fraud outlined in Articles 273 ff CC.<sup>656</sup> However, it is difficult to attribute it to the multinational corporation which simply benefits from this practice and which may even be the holder of the patent.

In sum, the formal disconnection between the producer and the multinational corporation – who controls the rest of the food chain – will result in the fact that it is difficult to directly hold the latter liable for actions performed by the former. This void could be offset by imposing on multinational corporations the duties of information and control regarding their suppliers or subsidiaries (akin to the 'know your customer' duty in the area of money laundering). Nonetheless, breaching these duties will never be enough to make the multinational responsible for previous offences.

### 1.3 Potential ways to hold multinational corporations and their agents liable: offences against the market and consumers

When it comes to abuses committed by multinational corporations, it is a different situation when such abuses are committed towards workers or consumers in the third world with whom the corporations do not have a direct relationship than when they are committed

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<sup>655</sup> Law No 3/2000, 7-1 on the legal system for the protection of plant varieties.

<sup>656</sup> Provincial Court Ruling (SAP) Ávila 174/2009, 18-11, SAP Teruel 21/2007, 5-9.

towards a market with which the corporations do have a relationship, in which case, from the standpoint of Spanish law, they could be construed as the following offences:

- a) First, the offence of 'removal from the market of raw materials or products of basic need' stipulated in Article 281 CC, with a qualified punishment 'if the act is carried out in situations of serious or catastrophic need' (Section two of the same article).

However, despite the difficulties always resulting from the presence of a subjective element of the crime ('in order to interrupt supplies to a sector thereof [the market], to force an alteration in prices, or to seriously affect consumers'), the requirement that the product must be removed or taken away from the market means that this sort of offence will not include those situations in which the raw materials or products of basic need are simply, because of the price, unattainable for the consumer (who may also be the exploited worker in the third world) or even the producer (who needs to buy raw material like seeds).

- b) Second, the offence of alteration of prices stipulated in Article 284 CC may serve to punish situations in which prices are imposed through illicit means such as violence, threat, deception, dissemination of news and rumours, or use of inside information.<sup>657</sup>

Nevertheless, some of the cases identified as the most concerning by the rapporteur-general will continue to remain outside the Criminal Code. These cases include situations in which the price is in theory negotiated between the multinational corporation and the producer (whose only option is to agree), the creation of cartels among competitors in order to impose their market conditions (which would entail nothing more than an administrative offence), or the buying or selling *en masse* of a product to cause the market price of the share or financial instrument to go up or down.

- c) Lastly, when discussing consumer protection offences we cannot leave out 'false advertising' (Article 282 CC), which is mentioned in the general report as one of the abusive practices towards consumers, who may eventually buy goods without sufficient information to take a buying decision in their best interest or in accordance with their principles, as exemplified by aggressive campaigns to use infant formula or the advertising of products allegedly unrelated to child exploitation.

However, advertising offences are still at a very early stage in our country. To the extent that cooperations implement ethical codes or policies against child exploitation, animal abuse, etc., and are perceived to abide by these ethical compliance programmes or policies, it is very difficult to detect when violations occur. In practice, it will be very difficult to find criminal damage in cases when such false information is provided.

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<sup>657</sup> In this regard, SAP A Coruña 23/2002, 12-2, which condemned mussel farmers for attempting to prevent others, through violent means, from unloading the product and introducing it into the market.

Apart from this class of offence, there is also the possibility of applying other fraud-related crimes, although without much possibility for success. Making false statements in an otherwise authentic document is not generally deemed a criminal offence when committed by a private individual, including in a commercial document (Article 392 CC); meanwhile, investment fraud provided for in Article 282 *bis* CC, the falsification of annual accounts outlined in Article 290 CC, or tax fraud outlined in Article 310 CC do not encompass non-legal or non-financial information. As a result, the only possibility remaining is the offence of forgery of certificates outlined in Articles 397 ff CC when the information offered on the company or product is transmitted through this channel.

#### 1.4 Liability of third parties other than multinational corporations

So far, we have discussed the offences against the market and consumers that may be committed by multinational corporations,<sup>658</sup> but they are not the only ones mentioned in the general report. Alongside them are offences that can be committed by other people. I am referring, for example, to fraud in humanitarian aid. In Spain, there is a case which stands out among all others: the case of fraud in aid to Western Sahara.<sup>659</sup> There is no impediment to qualifying the conduct in this case and similar cases under the offence of swindle (Article 248 ff CC) or misappropriation (Article 253 CC), depending on whether the fraudulent intent originated before or after the aid was received.

Moreover, in both cases, the punishment could be increased if there is also any of the aggravating circumstances outlined in Article 250 CC, which take other factors, including the (social, vital or financial) value of the good or the need of the recipient, into special consideration.<sup>660</sup>

Furthermore, the offence of embezzlement of public funds could also be considered in the event that the conduct were to take place within the scope of public office, by virtue of the reference that Article 432 CC makes to Article 253 CC.

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<sup>658</sup> According to the Spanish Criminal Code, legal persons can be punished for each of the above mentioned criminal offences against the market rules (Art 288 CC) and for the accounting offence against the Public Treasury (Art 310 bis CC). On the contrary, they cannot be held liable for generic and corporate documentary falsehoods (Arts 392 ff and Art 290 CC).

<sup>659</sup> < <http://www.sahara-social.com/Sahara-Occidental/Argelia-y-el-Polisario-desv%C3%ADan-la-ayuda-humanitaria-internacional-destinada-a-la-poblaci%C3%B3n-de-Tinduf--OLAF---160-647-5540.aspx> >

<sup>660</sup> Particularly, cases where: a) the offence falls on staple items, housing or social utility goods (ap.1, 1<sup>o</sup>); the offence is especially serious, in view of the nature of the injuries and economic losses caused to the victim (ap. 1, 4<sup>o</sup>); c) the fraud amount exceeds € 50,000, or affects an exceptionally large number of people (ap. 1, 5<sup>o</sup>); d) 'it is committed by abuse of personal relationships between the victim and the fraudster or taking advantage of his/her business or professional credibility'.



## 1.5 Possibilities for extraterritorial prosecution of previous offences

Finally, mention should be made of the obstacles to extraterritorial prosecution of observed offences: .

The criteria that come into play are those of the active personality principle or the principle of universal jurisdiction. However, it is unlikely that the active personality principle will serve to prosecute abuses by multinational corporations in third world countries, when the multinationals appear to be formally disconnected from those directly taking decisions. As a result, the only remaining possibility would be the principle of universal jurisdiction, which does not seem easy either. Offences allowing this principle to be applied could include genocide or crimes against the international community (Article 23(4)a of the Organic Law on the Judiciary 1984 (LOPJ) for the famines that may be caused by the most aggressive business practices, or also the offences of criminal group or organisation outlined in Article 23(4)j LOPJ. Nevertheless, the difficulties in attributing liability to the multinational corporation for these offences may be an insurmountable obstacle, while it is also unfair to translate and concentrate all the responsibility on the (pressured) producer.

## 2 Protection of food safety through criminal law

While the food security problems described in the general report are not the ones that most directly and seriously affect Spain, the same is not true as regards the problems related to food safety. The current production model represents a constant challenge for food authorities, and awareness of these kinds of abuses is increasing. Having sufficient food is no longer all that matters; the quality and safety of what we eat also counts. As a result, we are being faced with new crimes whose genesis is explained by the emergence of new risks (the consequences of which are not always known) together with increased expectations by citizens concerning quality of life.

### 2.1 Classification of food offences

To specifically protect food health, the Spanish Criminal Code has an extensive range of offence categories which, through the technique of so-called 'blank criminal laws' (*leyes penales en blanco* in Spanish, which are criminal laws that define the punishment for an offence but refer to another non-criminal law to define some elements of the offence), refer to continuously evolving administrative regulations.

These offence categories are primarily defined in Articles 363 ff CC and coupled with generic crimes against public health outlined in Articles 359 ff CC which have been enhanced with each food crisis:

- In the 1980s, the crisis caused by the 'rapeseed oil' case <sup>661</sup> (Supreme Court Ruling, henceforth referred to as STS, 23 April 1992, which led to the reform of the Criminal Code by Organic Law 8/1983).<sup>662</sup>
- In the 1990s, the case of meat contaminated with 'clenbuterol'<sup>663</sup> was responsible for the inclusion of art 364 in the Criminal Code of 1995,<sup>664</sup> which penalises, among other things, giving to animals intended for human consumption prohibited substances that pose a health risk (Section 2. 1).<sup>665</sup>

## 2.2 Characteristics of food offences

The basic features of these categories of offences can be summarised as follows:

- a) The use of legal concepts (such as the concept of 'foodstuff' or 'additive') and the technique of the so-called 'blank criminal laws' (which refer to the requirements set forth in laws or regulations on expiry or composition, etc.).
- b) The impact on different stages of the food chain<sup>666</sup> and not only in the retail segment,<sup>667</sup> notwithstanding whether any criminal liability loopholes have been detected.<sup>668</sup>

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<sup>661</sup> Case of massive food poisoning (toxic syndrome) (more than 15,000 affected persons) related to the ingestion of denatured rapeseed oil, which during the 1980s was sold through street trading for 'human consumption' when it was actually for industrial purposes. The facts were qualified as constituting an accomplished crime against public health resulting in death (Art 348 CC of 1973), plus five attempted crimes of the same nature and five crimes of fraud.

<sup>662</sup> M Gómez Benítez, 'La protección penal de los consumidores: reflexiones sobre el juicio del síndrome tóxico' (1988) 13 *Estudios sobre consumo* 75.

<sup>663</sup> This is the name given to the food scandal caused by the use of prohibited substances for the artificial fattening of livestock, which resulted in 700 people poisoned between 1989 and 1994 and was detected in 1,500 additional cases between 1992 and 1997. See A Doval Pais, *Delitos de fraude alimentario* (Pamplona, Aranzadi, 1996) 353.

<sup>664</sup> Among others, SSTS 1546/1999, 6-9; TS 18/2001, 20-1; TS 1/2004, 12-1. The main case law on the case can be found in J Díaz-Maroto y Villarejo, *El derecho penal ante los fraudes alimentarios* (Cizur Menor, Civitas-Thomson Reuters, 2010) 106 and C Andrés Domínguez, *Los delitos contra la salud pública: especial referencia al delito de adulteración y tráfico de animales (art. 364.2)* (Valencia, Tirant lo Blanch, 2002).

<sup>665</sup> However, according to case law, the facts could already be sanctioned applying Art 346 CC of 1973, punishing those who 'alter drinks or food' with a mixture harmful to health.

<sup>666</sup> In this sense, see SAP Pontevedra 79/2007, 19-6, which condemned those who were caught by surprise with the possession of freshly caught toxic scallops, considering that the intention to deal with the trafficking of such is enough to be sentenced. Likewise, SAP Pontevedra 231/2014, 9-10.

<sup>667</sup> That includes the 'input' or 'set of elements that take part in the production of other goods'.

<sup>668</sup> Possible regulatory omissions affect: (a) Art 363.2 CC, only covering the manufacture or sale of food commodities, but not making them available to the consumer for free, for instance, for promotional purposes. Nevertheless, such an omission can hardly be considered as a true regulatory loophole due to the profusion of offences against public health. For example, ap 1 of the same article, in the case the toxicity was due to the infringement of the rules of shelf-life or composition, or even Art 359 CC, which is applicable to whatever the nature of the toxic substance is. (b) Moreover, according to SAP Ciudad Real 222/2002, 9-12, Art 364 does not include the mere possession in sealed containers of substances that have not yet been used for the adulteration of food or supply to animals. (c) MA Iglesias Río ('La tutela penal de los consumidores en torno a los delitos

- c) The combination of offences that can be committed by anyone (such as the poisoning of water or foodstuffs described in Article 365 CC)<sup>669</sup> and offences that can only be committed by a restricted circle of professionals (thus, Article 363 CC, which punishes ‘producers, distributors or traders’,<sup>670</sup> or Article 364 CC, which punishes the ‘owner or production manager’,<sup>671</sup> although leaving aside the person in charge of a cattle ranch.<sup>672</sup>

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de fraude alimentario nocivo’) has also pointed out another regulatory loophole regarding the handling of food (included in Art 2.1 b) Law No 28/2015, 30-7 on safety and food quality, henceforth referred to as Law on safety and food quality 2015; transportation (included in European Parliament and Council Regulation (EC) No 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1) or storage (European Parliament resolution (UE) 2013/2091(INI) of 14 January 2014 on the food crisis, fraud in the food chain and the control thereof [2016] OJ C482/04). (d) Lastly, at present, the preparation of the banned substance for animal feeding could be considered alien both to the first subparagraph of Art 364.1, applicable to foodstuffs, substances or beverages intended for the final consumer, as well as to ap 2, which does not apply to the prior stages of its supply to animals (against, STS 1442/2002, 14-9, annulled by STC 165/2004, 4-10). Nevertheless, once again, there is always the possibility of applying Art 359 CC, as SAP Tarragona 7-1-2000 did with Art 341 CC 1973, applied to the producer and distributor of ‘clenbuterol’; or also of applying Art 363.4 CC, considering that it is enough that the ‘product’ has does not have authorised uses.<sup>669</sup> In those cases, where the conduct does not entail adulterating water, but in supplying what is already adulterated or poisoned, it would also be possible to consider the application of generic offences against public health contained in Arts 359 and 360 (in this sense, SAP Valencia 259/2016, 29-4, which nevertheless was acquitted due to lack of evidence of water toxicity), or 363.2 CC, amongst food crimes. In addition, the application of the environmental offence of Art 325 CC could also be considered (in this sense, there was a case of water poisoning by pig manure, SAP Barcelona 27-1-1999), particularly if a restrictive interpretation of Art 365 excludes cases of water poisoning that, according to administrative rules, cannot be considered ‘potable’ but are indeed ‘sanitarily tolerable’ (regarding the meaning of this concept, with legal and doctrinal references, see SAP Huelva 263/2000, 13-7.

<sup>670</sup> Another problem posed by these rules is that of establishing which subjects match these categories and, more specifically, if they have to be accredited and authorised professionals or it is enough that they usually act as so. In favour of the second position, SAP A Coruña 611/2013, 3-10, considers that the shellfish poacher (included in Art 335.2 CC from the legal reform of 2015) can also commit the special offence in Art 363 CC; also, SAP Pontevedra 231/2014, 9-10. Anyway, to sentence one of the above mentioned professionals, it would be necessary for the prosecution to be directed against them, which is not always the case. In this sense, see STS 2216/1992, which only judged who sold the anti-mite spray for hams and not who actually sprayed it.

<sup>671</sup> In this sense, the SAP Palencia 12/2002, 20-2, underlines that especially since the reform of the CC in 1983, the safety and risk prevention policy has led to criminal intervention in stages of the production cycle prior to the time of final human consumption. On this basis, this contests the argument of the defence, stating that the sole administration of banned substances to livestock without their immediate supply for consumption is a preparatory act that remains unpunished. Therefore, supplying prohibited substances to food producing animals can be punished according to Art 364.2, 1<sup>o</sup> CC, and it could also be punished according to the previous CC of 1973. Hence, SAP Tarragona 7-1-2000.

<sup>672</sup> A Doval Pais, ‘Problemas aplicativos de los delitos de fraude alimentario nocivo. Especial referencia al umbral del peligro típico en la modalidad de administración de sustancias no permitidas a animales de abasto’, in J Boix and A Bernardi, *Responsabilidad por defectos en productos destinados a los consumidores* (Madrid, Iustel, 2005) 343, 355. Therefore, even if they fall under the reform remit, they could only be sentenced according to the law in force at the time of the facts (Art 346 CC 1973), nowadays in Art 363.2 CC, according to STS 20-1-2001.

- d) The use of the technique of crimes of endangerment, with different formulas that allow for varying degrees of danger, from abstract to specific, including different varieties in between, thus resulting in endless problems for interpretation.
- e) The penalty of intentional and negligent behaviour<sup>673</sup> (Article 367 CC in relation to the previous ones).<sup>674</sup>
- f) The provision in Article 366 CC of corporate criminal liability for any of these offences, excluding the negligent acts set forth in Article 367 CC and, possibly, the offences committed by de facto administrators (for example, in the case of orders from the parent company to the subsidiary), from which, since the reform of 2015, it is debated whether liability may be attributed to legal entities.<sup>675</sup>

In short, generally speaking, our criminal legislation regarding food is in line with the incrimination models predominating in comparative law, which use the technique of ‘crimes of endangerment’ (which can be observed in various stages of the food chain) in order to better protect against the diffuse risks.

The same is true as regards the concept of foodstuff outlined in our law, which has also followed the developments of international and European texts. While initially the definition focused on the nutritional, fruitive (*frutiva*) or dietary function of the substance (as remains the case in our Food Code, henceforth referred to as CAE),<sup>676</sup> that criterion currently coexists with that of ‘ingestion’<sup>677</sup> (inspired by European law),<sup>678</sup> although it does not in fact totally coincide with the criteria of ‘consumption’ from which the *Codex Alimentarius* stems.

With the modern defining criteria accepted in our legal system, the problem that may arise today is that of a conflict between varying criteria. Thus is the case, for example, in instances when one ingests something that is neither nutritional, fruitive or dietary (such as certain

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<sup>673</sup> In 1983, a specific rule to punish ‘negligent’ behaviour in food fraud was introduced through Art 346.3 CC 1973. Despite this, in the STS 23-4-1992 (‘rapeseed oil case’), the Spanish Supreme Court stated that the knowledge of the toxicity of the substance could not be considered a subjective element that excluded the possibility of negligent behaviour, concluding that Art 346.3 CC was introduced to assure the punishability of it, even if there was not any previous regulatory loophole.

<sup>674</sup> Anyway, some penal offences are considered impossible to be committed because of negligence. This was the case of food fraud in Art 346 CC 1973, which required that somebody ‘incorporated’ harmful substances’ (SAP Girona 64/1999, 16-2 in a case of food poisoning caused by croquettes contaminated by salmonella). The same could be said of Art 363.5 CC. While the offence consists of the intention to commercialize hidden goods, an intentional element is required, J Díaz-Maroto y Villarejo, *El derecho penal ante los fraudes alimentarios* (Cizur Menor, Civitas-Thomson Reuters, 2010) 85. Likewise could be said of Art 363.5 CC, punishing the poisoning or adulterating of elements for discarding or disinfecting.

<sup>675</sup> G Quintero Olivares, ‘La reforma del régimen de responsabilidad penal de las personas jurídicas’, in G Quintero Olivares (ed) *Comentario a la reforma penal de 2015* (Cizur Menor, Aranzadi, 2015) 90.

<sup>676</sup> Decree 2484/1967, 21-9, Art 1.02.01.

<sup>677</sup> Law on safety and food quality 2015 (Arts 2.1, a) y 4, a)).

<sup>678</sup> Regulation (EC) No 178/2002 (Art 2).

additives) or, conversely, when what is actually nutritional, fruitive or dietary is consumed without ingestion (eg through inhalation or skin patches or intravenously).<sup>679</sup> Apart from explicitly excluded cases, such as medicines and cosmetics,<sup>680</sup> or explicitly included ones, such as chewing gum,<sup>681</sup> in the other cases, there may be different interpretations over the meaning of these administrative concepts that could have an impact on the definition of criminal offences.<sup>682</sup>

Regardless of the doubts that may arise regarding the limits of the concept of foodstuff, the main problem in the legislative technique is due to the fact that these offences are construed as crimes of abstract or specific endangerment, because of the reservations caused by how close they are to administrative offences and the limited role of the judge in verifying the crime, as explained below.

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<sup>679</sup> The classification of tobacco has posed a special problem. From an administrative point of view, tobacco can be seen as having one of the three defining functions for food according to the CAE; that of pleasure. Moreover, it is specifically included among these (8<sup>th</sup> Section of Chapter XXV regarding stimulant products). As a result, it has been considered as a 'foodstuff' by some authors, F Pérez Álvarez, *Protección penal del consumidor* (Barcelona, Praxis, 1991) 100. The problem is the apparent contradiction between the CAE and the Food safety Regulation No 178/2002 (Art 2), which explicitly excludes tobacco from the definition of foodstuff. Instead, from a criminal point of view, the only sure thing is that tobacco cannot be included as a drug offence, in Arts 368 ff. (limited to illegal substances). Aside from this assumption, the application of the rest of offences against public health could be considered when the substance – initially legal – could be especially harmful under specific circumstances. The possibility of applying these offences is not linked to the definition of tobacco as a foodstuff (which is controversial), as there are other more generic offences against public health, as in Art 359 or Art 363.3 CC.

<sup>680</sup> Some authors have defended the possibility of treating cosmetic products as foodstuff, considering that, as happens with lipstick, they come into contact with the oral cavity and may have harmful effects on health. See F Pérez Álvarez, *Protección penal del consumidor* (Barcelona, Praxis, 1991) 66. Nevertheless, under current regulation, there is reason to conclude otherwise. According to European regulation, both foodstuffs and cosmetics are mutually excluding, as while the first requires swallowing (Art 2, e) Regulation (EC) No 178/2002, and Arts 2 and 4, a) Law on safety and food quality 2015), the latter not only does not allow it (Art 2.1 Regulation EC 1223/2009 and Art 2 Royal Decree 1599/1997, 17-10), but explicitly excludes cosmetics from the definition of foodstuff (Art 2, e) Regulation (EC) No 178/2002). The remaining doubt is about foodstuffs with added cosmetic effects.

<sup>681</sup> In this sense, F Pérez Álvarez, *Protección penal del consumidor* (Barcelona, Praxis, 1991) 98.

<sup>682</sup> The interpretation and mutual delimitation of the concepts of 'foodstuff' and 'food product' used in Arts 363 and 364 CC have also been controversial. The CAE does distinguish them. On the one hand, Art 1.02.13 CAE distinguishes 'foodstuff' and 'food product', defining the latter as that without nutritional value, as additives. On the other hand, Law on safety and food quality 2015 – following Regulation (EC) No 178/2002 – identifies 'foodstuff' with 'food product'. See A Doval Pais, 'Problemas aplicativos de los delitos de fraude alimentario nocivo. Especial referencia al umbral del peligro típico en la modalidad de administración de sustancias no permitidas a animales de abasto', in J Boix and A Bernardi (eds), *Responsabilidad por defectos en productos destinados a los consumidores* (Madrid, Iustel, 2005) 343, 346, fn 6, underlines that the meaning of 'food product' used in Art 363 CC cannot be identified with that of art1.02.13 CAE, as it would exclude 'foodstuff' in the sense of Art 1.02.01 CAE. In the same sense, case law interprets 'foodstuff' in a broad way, including drinkable and edible things (SAP Cuenca 104/2004, 7-10).

### 2.3 The complicated relationship between crimes of endangerment and administrative offences: overlapping, confusion and criminal liability loopholes

In the area of food crimes, all the problems usually related to crimes of endangerment are reproduced, including those concerning how their nature is defined (according to the classification contained in the general report), evidentiary requirements and their conflictive relationship with administrative offences.<sup>683</sup>

#### *Forensic evidence for food crimes*

Defining the nature of the danger is a debated problem (the analysis of which falls outside the objective of this report) that requires an urgent solution, as it directly affects the forensic evidence requirements for the crime. A good example of this is the case law resulting from the scandal of the meat contaminated with clenbuterol, where the application of Article 364(2)1 CC was considered, which is a provision that punishes whoever ‘administers prohibited substances that generate risk to the health of persons ... to animals whose meat or produce is intended for human consumption’, among other alternative hypotheses.

The general understanding of the crime as a crime of abstract/abstract-specific endangerment by jurisprudence<sup>684</sup> has not prevented consideration of the special harmfulness of the product for groups particularly sensitive to it.<sup>685</sup> Nevertheless, it has limited the possibilities of defence in the following points:

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<sup>683</sup>Art 16 Law on safety and food quality 2015 intends to solve possible conflicts between both jurisdictions; R García Albero, ‘La tutela penal y administrativa de la salud de los consumidores en materia alimentaria. Consideraciones críticas en torno a su articulación jurídica’ (1990) 4 *Revista Jurídica de Catalunya* 963; J Boix Reig, ‘La jurisprudencia constitucional sobre el principio *non bis in idem*’, in J Boix and A Bernardi (eds), *Responsabilidad por defectos en productos destinados a los consumidores* (Madrid, Iustel, 2005) 65.

<sup>684</sup>The case law in favour of the interpretation of the nature of the offence as one of abstract endangerment is overwhelming: SSTS 1397/1999, 4-10; 1546/1999, 6-11; 517/2000, 22-3; 1973/2000, 15-12; 1210/2001, 11-6; 2169/2002, 23-12; 1767/2003, 15-4; SSAP Navarra 135/1999, 10-9; Teruel 38/2001, 4-7; Murcia 56/2001, 12-9; La Rioja 135/2001, 10-10; La Rioja 175/2001, 19-12; Toledo 3/2002, 3-1; La Rioja 3/2002, 10-1; Madrid 64/2002, 6-2; Huesca 89/2002, 14-5; Cantabria 19/2002, 7-10; Zaragoza, 319/2003, 17-10; Barcelona 35/2004, 12-1; Lugo 187/2008, 22-10. Critically, A Doval Pais, ‘Problemas aplicativos de los delitos de fraude alimentario nocivo. Especial referencia al umbral del peligro típico en la modalidad de administración de sustancias no permitidas a animales de abasto’, in J Boix and A Bernardi (eds), *Responsabilidad por defectos en productos destinados a los consumidores* (Madrid, Iustel, 2005) 343, 364; P Lloria García, ‘Algunas consideraciones sobre el momento consumativo en los delitos de fraude alimentario nocivo. Especial referencia al artículo 364.2.1º del CP’, in J Boix and A Bernardi (eds), *Responsabilidad por defectos en productos destinados a los consumidores* (Madrid, Iustel, 2005) 465, 465; MA Iglesias Río, ‘La tutela penal de los consumidores en torno a los delitos de fraude alimentario nocivo’; and some isolated judgments: SAP Palencia 68/1998, 23-10.

<sup>685</sup>In this sense, CAE (Art 1.02.12 CAE) and Regulation (EC) No 178/2002 (Art 14.4) take into consideration the way of use, reiteration, maximum quantities allowed and sensibility to it for specific consumer groups. Regarding the ‘clenbuterol case’, see eg: SAP Palencia 68/1998, 23-10, regarding consumer groups with allergy risks, who are especially weak, or who have a serious disease; SAP Murcia 43/1999, 21-5; SAP Navarra 135/1999, 10-9; STS 1973/2000, 15-12, with special mention to pregnant women, children under six, elderly

- It is considered irrelevant that the substance was no longer present in the edible parts of the animal (like the muscle) at the time it was sold. It suffices to have evidence of toxic residues in the eyeball or hair, from where it takes longer to disappear and which also serve to indicate prior administering of the substance, which is considered sufficient to constitute a crime.<sup>686</sup>
- The defensive argument relating to the quantity needed to endanger health is rejected when the substance is considered in any case prohibited.<sup>687</sup>

The foregoing explains that the evidence of the safety of the substance (for its therapeutic uses, for example) was considered not to preclude the requirements of the criminal legal category but rather its punishability.<sup>688</sup>

The problem occurs with respect to other criminal categories, in which expressions like 'endanger' the health of consumers (Article 363 CC), 'damaging to health' (Article 363(2) CC) or 'damaging' (Article 363(4) CC) can be understood in an abstract sense or a specific sense, with case law inclining toward the former.<sup>689</sup>

However, an inflexible defence of crimes of abstract endangerment contrasts with the fact that, in practice, a case is normally only brought to criminal court (although not always) when harm caused to consumer health is verified (see below).

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persons or persons with coronary artery disease; SAP Palencia 12/2002, 20-2; SAP Segovia 9/2002, 11-4, also regarding pregnant women, children and teenagers. In the same sense, with respect to sulfadiazine, SAP Zaragoza 319/2003, 17-10.

<sup>686</sup> In this sense, STS 1210/2001, 11-6; 1767/2003, 15-4; y SSAP Palencia 68/1998, 23-10; AP Valencia 9/2000, 12-1; AP La Rioja 135/2001, 10-10; AP Huesca 89/2002, 14-5; AP Cantabria 19/2002, 7-10.

<sup>687</sup> In this sense, on clenbuterol, eg SAP Lugo 187/2008, 22-10, but the same could be stated of other substances. SSTS 1973/2000, 15-12, 1007/2001, 31-5; SSAP La Rioja 135/2001, 10-10; Palencia 12/2002, 20-2; Ciudad Real 222/2002, 9-12, on topazol. The case is different when involving offences with a minimum amount of substance required. Thus, SSTS 1546/1999, 6-11; 517/2000, 22-3; SSAP La Rioja 3/2002, 10-1 y Huesca 82/2006, 10-4. Regarding medicinal substances, SAP Lleida 477/2005, 20-12. Regarding sulfadiazine, SSAP Zaragoza 319/2003, 17-10; Barcelona 35/2004, 12-1.

<sup>688</sup> In this sense, STS 1546/1999, 6-11; or SAP La Rioja 135/2001, 10-10, on the supply of clenbuterol for inducing tocolysis in pregnant cows. Against this, SAP Tarragona 490/2005, 26-5, in a case of supply of Sulfadiazine to cattle, considering that the therapeutic purpose prevents the application of the offence, since if the waiting or quarantine periods are respected, the purpose of introducing the meat into the market with the toxic substance cannot be deduced; also, SAP Girona 75/2004, 30-1. The truth is that only according to this latter interpretation can sense be granted to the existence of an offence consisting of supplying meat for human consumption without respecting the waiting periods of art 364.2, 4<sup>o</sup> CC (SAP Granada 171/2006, 20-3).

<sup>689</sup> In this sense, on art 363.2 CC, SAP Granada 228/2000, 3-4- confirmed by STS 774/2002, 6-5. In the same sense SAP Barcelona 492/2007, 28-5. Regarding Art 363.3 CC, SAP Pontevedra 137/2011, 1-9, in a case of contaminated shellfish, where the court states that for the full commission of the offence, it is not necessary to sell the product; also about the illegal collection of shellfish, SAP Pontevedra 23/2015, 11-2; and SAP Pontevedra 79/2007, 19-6. In the same sense, regarding a case of possession of rotten meat in the cold storage of the establishment SAP León 45/2003, 14-4. On Art 363.5 CC, SAP Salamanca 69/2001, 30-7. On art 365 CC, SAP Huelva 263/2000, 13-7.

### *Overlapping provisions and loopholes*

Leaving aside the problems of forensic evidence, at a formal level, there is a risk of overlapping between criminal and administrative offences, whenever proof of the former is deduced from verification of the latter. Moreover, as stated in the general report, the lack of coordination between the two could result in criminal liability loopholes or contradictions, such as:

- a) Instances in which there is formal respect for 'positivised' duties of care, when they are already outdated.

Strict compliance with administrative rules may prevent the finding of crimes of endangerment that depend on formal breaching of such rules.<sup>690</sup> However, it does not prevent the finding of crimes of endangerment that only require proof of material harmfulness,<sup>691</sup> or of reckless result crimes in which the required duty of care must be identified in consideration of the context and possibilities of the subject.

- b) Instances in which there is no specific administrative duty of care for the case.

As in the previous case, the impossibility to determine a crime of endangerment based on the infringement of administrative law does not hinder finding an offence of recklessness or more 'open' kinds of offences of endangerment.<sup>692</sup>

- c) Instances in which the infringement of the formal duty of care is allowed by the defence of necessity

This is what happened in the case of the blood transfusions at the Bellvitge hospital,<sup>693</sup> in which two issues were raised. First, the possibility that the crime against public health had different meanings in each Autonomous Communities where different standards of safety are required<sup>694</sup> and second, the need to choose between probable death (caused by transmission of unscreened blood) and certain death (caused by failure to perform a

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<sup>690</sup> Thus, Art 363, section 1, 4 or even section 5, if it is interpreted that when section 5 refers to effects 'intended to be rendered unusable or disinfected', refers to those which are legally enforceable (ie, SAP Granada 228/2000, 3-4 - confirmed by STS 774/2002, 6-5), or Art 364, in several of its sections.

<sup>691</sup> Likewise, MA Iglesias Río, 'La tutela penal de los consumidores en torno a los delitos de fraude alimentario nocivo', regarding Art 363.2 CC.

<sup>692</sup> This occurred in the case of rapeseed oil (STS 23-4-1992), in which convictions for offences against public health resulting in death (Art 348 CC 1973) were based on the infringement of generic care standards derived from Civil Code Art 1101, although it would not be until later, through the Royal Decree Act 1/2007, 16-11 on Protection of Consumers and Users, when the care standard would be specifically applicable to cases of a similar type.

<sup>693</sup> STS 18-11-1991; JA De Vega Ruiz, *Los delitos contra el consumidor en el Código Penal de 1995* (Madrid, Colex, 1996).

<sup>694</sup> About this, M García Arán, 'Remisiones normativas, leyes penales en blanco y estructura de la norma penal' (1992) 16 *Estudios penales y criminológicos* 63.



transfusion), as was raised in the forensic discussion, although not included in the Supreme Court ruling.

#### 2.4 The role of offences resulting in reckless injury and homicide

The list of offences against food safety is supplemented by offences resulting in injury which, without being specifically addressed to this task, may be applicable when failure to comply with necessary cautions causes effective harm to the life or health of consumers. From this standpoint, they could be considered residual offences that only come into effect when previous controls fail. However, the opposite often occurs; the production of the injury is what triggers the investigation of the regulatory infringement on which the crime of endangerment is based. In any case, these are the offences which are at the centre of major food scandals (such as the rapeseed oil scandal and the clenbuterol scandal),<sup>695</sup> so proper definition of them should make it possible to respond to risks emanating from our current system of food production and trade.

Advances in defining these offences include the reception of the probability theory stemming from the 'rapeseed case' (STS 23 April 1992).<sup>696</sup>

Among the matters that need to be addressed is the need to combat the shirking of responsibility caused by the fragmentation of the food production and transmission chain, ensuring that each successive participant does not become an impediment to liability but rather helps to reinforce guarantees for consumers.<sup>697</sup> For this to happen, personal liability must not be limited to the material contribution of each participant to the harmfulness of the product, but rather must be extended to the failure to fulfil obligations to control what is received from previous or inferior links as well as obligations related to the duty of

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<sup>695</sup> In both cases, the existence of crimes of endangerment was overshadowed by the numbers of deaths and injuries that resulted from both health catastrophes, and the same happens with other cases. Thus, SAP Cáceres 27/2001, 22-3, in a case of the alteration of the expiration date in foods (Art 363.1 CC); SAP Cáceres 547/2015, 14-12, in another case of the street vending of fresh cheeses made with goat's milk affected by brucellosis.

<sup>696</sup> Critically, JM Paredes Castañón and T Rodríguez Montañés, *El caso de la colza: responsabilidad penal por productos adulterados o defectuosos* (Valencia, Tirant, 1995) 114, 129.

<sup>697</sup> To this end: European Parliament resolution (UE) 2013/2091(INI) of 14 January 2014 on the food crisis, fraud in the food chain and the control thereof [2016] OJ C482/04; and Art 2 Law on safety and food quality 2015. On the issue, SAP Badajoz 8/2006, 14-2.

information or withdrawal<sup>698</sup> of what has already been transmitted.<sup>699</sup> And all of this, logically, can only work with the implementation of adequate traceability measures.<sup>700</sup>

In our case law, there have already been pronouncements concerning the possibility of fault-based (*in omittendo*) liability of those involved in intermediate links of the food chain. Prominent among these are again those regarding rapeseed oil,<sup>701</sup> where the toxic oil continued to be sold after discovering the health hazard, and those regarding contaminated meat, which was sold after the prohibition order to analyse for toxic substances.<sup>702</sup> Applying identical criteria, there are also cases in which there is a denial of responsibility due to the absence of the subjective element of intent.<sup>703</sup>

Thus, when knowledge of the harmfulness of the product by the acting person is verified, there are no difficulties in determining criminal liability. In fact, the opposite problem, that of punitive excess, could exist, if the affirmation of intent prevented invoking the principle of legitimate expectation in an absolute manner, in the purest line of the *versari in re illicita* doctrine.<sup>704</sup>

However, it is more uncommon to attribute liability based on recklessness, which is actually unsatisfying in an industry whose criminological reality is that the harm caused to consumer health is not usually caused intentionally but rather by way of collateral damage, with a different degree of acceptance by the food industry.

This is where it would be advisable to strengthen administrative regulation of product control duties that affect each phase of the chain in relation to what they receive from previous or lower links (from farm to fork). Thus, the existence of duties of care consistent with the risks inherent in our system of division of labour and segmentation of the food chain would make it possible to attribute responsibilities for the respective role in bringing the harmful product to the consumer, even if the party did not participate in the adulteration of the food or act knowingly.

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<sup>698</sup> Arts 4 and 10 ff RD 1801/2003, 26-12 on product safety or Art 5 Law on Protection of Consumers and Users 2007.

<sup>699</sup> Regarding the possibilities of criminal accusation by omission or imprudence in cases of infringement of the duty to withdraw, see J Díaz-Maroto y Villarejo, *El derecho penal ante los fraudes alimentarios* (Cizur Menor, Civitas-Thomson Reuters, 2010) 68; with respect to the categories of criminal offences of the previous Code, see F Pérez Álvarez, *Protección penal del consumidor* (Barcelona, Praxis, 1991) 152.

<sup>700</sup> See Regulation (EC) No 178/2002.

<sup>701</sup> STS 23-4-1992.

<sup>702</sup> STS 517/2000, 22-3.

<sup>703</sup> Thus, in the SAP Palencia 68/1998, 23-10, which does not find the President of the Slaughterhouse guilty of the crime covered by Art 364.2, 2º, for the lack of malice and collusion with the supplier; in the same way, SAP Teruel 38/2001.

<sup>704</sup> In this sense, it is worth analysing the criticism against the automatic irrelevance of the principle of trust in intentional crimes by JM Paredes Castañón and T Rodríguez Montañés, *El caso de la colza: responsabilidad penal por productos adulterados o defectuosos* (Valencia, Tirant, 1995) 133.

The benefits of reviewing and strengthening monitoring and control duties in this context would not only be manifested in the fact that it would be easier to attribute responsibilities for reckless damage, but also for crimes of endangerment, which are in a mutually complementary relationship. While the former allow liability from breaching duties of care not predefined by law but based on the production of an injurious result, the latter do not require this result but are constrained to a range of infringements that are much more delimited by the law.

Henceforth, in order to perfect the criminal instrument, it is not only necessary to improve the definition and delimitation of monitoring duties which if breached could result in liability for recklessness, but also to review the range of crimes of endangerment in order to prevent inopportune gaps. This is the case, for example, in Article 364 CC, which punishes whoever adulterates foodstuff but not who distributes or sells it, so that either the conduct of the latter must be redirected toward the rest of the food offences or the party goes unpunished.

In some way, we must reduce the dark figure in food crime<sup>705</sup> and improve detection mechanisms in order to more efficiently detect violations actually committed.<sup>706</sup> A review and clarification of duties of information and control in the sense discussed above would help identify those responsible for the offences and facilitate complaints.

### **3 Food fraud**

The panorama of crimes that in Spain can be applied to prosecute financial fraud in the area of food ranges from crimes against the property of certain individuals to false advertising to industrial property crimes, which affect consumers as a whole.

#### **3.1 Requirements and possibilities for fraud**

The offence of fraud (Article 248 CC) is configured as an ordinary offence of an interpersonal nature (with necessary participation of the victim) involving injury to personal property by fraudulent means.

Consequently, this criminal definition could serve to pursue each transmission of the product along the food chain, provided that one party in the business relationship, aware of the lack of qualities offered, misleads the other. Nevertheless, this does not work in cases in

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<sup>705</sup> A Doval Pais, 'Problemas aplicativos de los delitos de fraude alimentario nocivo. Especial referencia al umbral del peligro típico en la modalidad de administración de sustancias no permitidas a animales de abasto', in J Boix and A Bernardi (eds), *Responsabilidad por defectos en productos destinados a los consumidores* (Madrid, Iustel, 2005) 343, 350.

<sup>706</sup> According to the figures on food crimes, outlined in the annual directory of the Ministry of the Interior, in 2014 (<http://www.interior.gob.es/es/web/archivos-y-documentacion/documentacion-y-publicaciones>): the total number of people arrested or charged for food crimes was 83, without the National Statistics Institute (INE) offering disaggregated figures on the convictions for food offenses (<http://www.ine.es>).

which the successive transmitters of the product are unaware of the defects, since there would be no malice in whoever has the interpersonal relationship and, vice-versa, the interpersonal relationship in who acts fraudulently.

Thus, when fraud occurs in the early stages of the food chain, its effects may be transmitted to the rest, because if the producer manages to deceive the importer, the importer may introduce the foodstuff in the market, hence providing the opportunity for the foodstuff to reach the final consumer without anyone who comes into contact with the foodstuff (distributor, storekeeper, etc) being aware in any way of the foodstuff's harmfulness. In such conditions, everyone involved may contribute to bringing the product to the consumer ('from farm to table'); however, they cannot be considered authors or victims of the fraud, if they acquire the foodstuff from someone acting in error and transmit it in the same way. This is where the recommendation in the General Report to impose rules on self-regulation and traceability makes perfect sense, as this makes it possible to identify all participants and their responsibilities in controlling food quality.

In this context of relationships, the only way to demand that those who introduce fraudulent foodstuffs without direct relationship with the consumer or other agents in the food chain be held criminally liable is by way of consumer protection offences (see below).

Once these obstacles have been overcome, there are still others that must be addressed in order to determine if there is fraud: first, the assertion of the appropriateness of fraud to provoke misconception on the recipient of the false message, and second, verification of the required property damage.

As for the first, the special professional qualifications that are or should be held by those involved in the food chain obstructs the allegation of error; although of course, it does not exclude it, especially when it is reinforced by the provision of false certificates or documents regarding the properties or quality of the product.

As for the injury defined by law, as posed in the rapeseed oil case (Supreme Court Ruling 23 April 1992), existence thereof could be combated when, although the product did not have the qualities offered (edible oil), with the qualities it did meet, it did not exceed the market price of what was actually supplied (industrial oil). Applying a personal concept of property would make it possible to integrate the legally defined injury. However, this is a controversial solution, because for some Spanish authors, in order for there to be economic injury, the price paid for the good must exceed its ordinary cost. Otherwise, it will not be considered a crime, even if the good received is not the advertised one. Therefore, protection of the interests of the final consumer can only occur if violation of the duties of information are punished as a consumer protection offence, which does not need to pass through the filter of the frauds characteristic of interpersonal dealings.

In its case, the commission of the offence of fraud would make it possible to demand responsibilities not only of a natural person, but also of a legal entity, by virtue of Article 251 *bis* CC.

### 3.2 Offences against the market and consumers

#### *The underutilised advertising offence*

Alongside the offence of fraud, we also have the advertising offence set forth in Article 282 CC.

This would enable the fraud in which there is no direct contact with the consumer to be reached. Thus, for example, a canning company that accompanies the product with a label with false statements about the composition or quality of the product. There is a different problem here, and that is if it is possible to determine a crime when the recipient of the information is not the final consumer but rather another agent in the food chain.

Moreover, if it is accepted that not only the financial interests of the consumers are protected,<sup>707</sup> we would not have the same problems here as those to prove the existence of fraud. It would suffice if the damage caused was considered serious, which cannot always be proved (as has occurred with some cases of alleged fraud in the sale of distillates).<sup>708</sup>

Legal persons can also be punished for advertising offences according to Article 28 CC.

Despite all the possibilities opened up by this category of offence, it continues to be an underutilised criminal offence.

#### *Possibilities by way of industrial property crimes*

Lastly, it would also be possible to consider industrial property crimes (Articles 373 and 374 CC), which are found in some cases.<sup>709</sup> However, this would be limited to instances in which commercial requirements regarding industrial property are met.

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<sup>707</sup> MM Carrasco Andriano, *La publicidad engañosa y el Derecho Penal (una aproximación al tipo del artículo 282 del C.P.)* (Valencia, Ediciones Revista General de Derecho, 2000) 108.

<sup>708</sup> STS 357/2004, 19-3, with an explanation of the concept of 'serious prejudice'; SAP Granada 228/2000, 3-4, confirmed by STS 774/2002, 6-5.

<sup>709</sup> Thus, SAP Barcelona 720/2007, 18-9, in a case of marketing bottles of JB whiskey with false seals, acquitting the offense against public health owing to the lack of evidence. Also, SAP Granada 228/2000, 3-4 - confirmed by STS 774/2002, 6-5 -, in a case of similar characteristics, where crimes against public health, falsehood and fraud were also applied, but without assessing the offence of misleading advertising as a result of non-compliance with the requirement of the appropriateness of the conduct to cause serious injury to consumers; SAP La Rioja 201/2003, 23-12; SAP Barcelona 796/2005, 30-6.

## 4 Conclusions

With regard to food security, the formal disconnection between the producer and the multinational corporation – who controls the rest of the food chain – there is no way to directly hold the latter liable for actions performed by the former. This void could be offset by imposing on multinational corporations the duties of information and control regarding their suppliers or subsidiaries (akin to the ‘know your customer’ duty in the area of money laundering). Nonetheless, breaching these duties will never suffice to make the multinational responsible for previous offences.

With respect to food safety, leaving aside some loopholes, our Criminal Code has been updated after each major food scandal, and today it contains a broad spectrum of offences, ranging from concrete to abstract endangerment crimes, that could take place along the whole food chain. Nonetheless, there are still difficulties when it comes to prosecuting those acting without intent, which is what generally occurs. It is necessary, therefore, to consider reinforcing administrative information duties and the possibility of establishing criminal responsibility for the most serious cases of infringement.

Finally, in Spain, advertising offences are controversial and not often applied. The discussion about food advertisement crimes can only be addressed in the context of a more general reflection about consumer rights.

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## ANNEX



## QUESTIONNAIRE FOR SECTION 2: FOOD REGULATION AND CRIMINAL JUSTICE

*General Rapporteur: Adán Nieto Martín*

### I. General Questions on Food Regulation and Criminal Justice

- 1) What is the concept of food that is adopted in your criminal law? Especially, is it a broad concept that covers any substance that may be digested or is it a strict definition, limited to substances of nutritional value? Are cosmetic and tobacco products included in it?
- 2) Are administrative sanctions used together with criminal sanctions in this area? Which criteria are used to distinguish between them? Is the ne bis in idem principle applied?
- 3) Are civil or administrative remedies effectively utilised or is criminal law the prima ratio against food fraud?
- 4) Are the main criminal sanctions located into the Penal Code or are they situated in the food law, too? (please only a general overview, for more detailed questions see further on).
- 5) Is criminal liability of legal persons provided for in food fraud cases? What is the relationship between the liability of natural and legal persons, especially in cases of negligent conduct of the individual? Is it cumulative? Which liability is more important in practice?
- 6) Are there reform projects in this area? What are their principal aims?

### II. Criminal Law Dimension of Food Regulation

- 1) Briefly describe the three most-important cases of food fraud that have affected the health of consumers over recent years.
- 2) What is the practical importance of these offences, especially offences designed to protect food safety? If there are any statistics on the number of annual convictions, please refer to them.
- 3) Does your legal system contain one or more (criminal) offence(s) that punish the hoarding of food in order to alter its value?
- 4) In your country, is it a (criminal) offence to manipulate the price in markets for derivatives based on food commodities?

- 5) In the case of destruction of a particular ethnic group or holding a part of the population hostage by provoking a famine or contaminating water resources, would the definition of genocide or crime against humanity apply?
- 6) Have (criminal) sanctions for crimes against intellectual or industrial property been
- 7) Does your (criminal) law provide an aggravating circumstance intended to sanction unfair administration or undue appropriation of humanitarian aid? Are courts in your country competent to judge these behaviours if committed abroad or if they involve funds from an international organization?

**A. Criminal liability for deaths and injury as a consequence of the production and commercialization of harmful foodstuffs.**

- 1) How is the factual causation (“but for or condition sine qua non test”) between the harmful foodstuffs and the deaths or injuries established?
- 2) How have circumstances in which poor health is only diagnosed after a lengthy period of time resolved?
- 3) Are negligent actions of the victim taken into account in deciding on the criminal liability of the manufacturer of a defective product? Is any case law available on this?
- 4) Does a refusal to withdraw products in case the products’ harmful effects were unknown when offering them on the market lead to criminal liability for death or injury?
- 5) Is there a duty of due diligence obliging operators that form part of the distribution chain to verify the quality of food or those substances that are supplied from further down the supply chain? Or, does the principle of trust hold true, such that, unless there are evident indications to the contrary, they can trust that everybody ‘plays their role well’? In cases where there is a duty of due diligence, could its infringement give rise to liability on account of the harmful food, although the firm or operator may not have participated in its adulteration?
- 6) Is the fact of being in compliance with the legal norms relating to product safety a ground of exclusion of criminal liability for the commission of crimes of manslaughter or negligent bodily harm (for example, in cases in which the legal norms surrounding the products are clearly phased out)? Can the same be said of technical regulations (soft law)?
- 7) In cases where the manufacturer is aware of the health risks attached to food products, can he be sanctioned for an offence committed with criminal intent or for an offence that carries the same sentence as an offence committed with criminal intent? The manufacturer’s awareness does not imply that he accepts or wants the harmful effects to manifest.

## **B. Other crimes against food safety**

### **B.1 Questions of legislative technique**

- 1) Are offenses against food safety found in the Criminal Code or in special laws? Which criminal definitions exist for crimes against food safety?
- 2) Does one need to infringe upon food regulations in order to commit an offence against food safety?
- 3) Is it considered that the application of criminal norms to food safety law satisfies the expectations of legal certainty? Please briefly refer to any discussions on this topic among academics or policy makers.
- 4) What sort of criminal offences (violation, felony, misdemeanor...) constitute the most-important offences to sanction the production or marketing of fraudulent foods?

### **B.2 Description of behaviour and sanctions**

- 1) Do definitions of offences against food safety distinguish between the different steps in the food production and distribution chain (production, distribution, transport, storage, presentation to the consumer, etc.)? Are there, in your judgment, important gaps: for example, the adulteration of a product as a consequence of not having used appropriate storage or means of transport is not sanctioned?
- 2) Are there specific criminal definitions that sanction the traffic of prohibited substances, because of the danger that they may enter the human food chain (pesticides, fattening substances, prohibited hormones, cattle feed, additives...), even though they have still not been used?
- 3) Is the non-withdrawal of harmful foods sanctioned, the harmfulness of which became known after it was made available to consumers?
- 4) Do the offences defined to protect food safety require some particular quality in the perpetrator? Are they special crimes or can anyone commit them?
- 5) Are there offences where a regime of objective liability is applied? In case subjective liability is necessary, what does it consist of?
- 6) Is there an offence of poisoning in which a person intentionally adulterates food or water supplies with the purpose of inflicting death or serious harm to the health of an indeterminate number of people?
- 7) Can legal persons be held criminally and/or civilly liable for these crimes? Is it the legal person, or the physical person, or both, who should be held liable for these

crimes? Are legal persons liable for these crimes? Is it frequently only the legal person that is punished or the physical person or both?

- 8) In case the offence was committed by a subsidiary company, can the parent company be liable?
- 9) What are the most-frequent sanctions for this crimes? As well as prison sentences or fines, are other measures imposed such as closure of shops, injunctions etc..?
- 10) Is the participation of organized crime frequent in the production, distribution, transport, storage, etc. of harmful foods?

### B.3 Principle of precaution and assessment of health risks.

- 1) Does the application of criminal law always require recognition of an actual danger to consumer health or is the production and/or marketing of products sufficient in itself, which would (hypothetically), in the case of consumption, be harmful?
- 2) Does the severity of the sentences increase in the last link of the food chain that brings the product to the consumer or is it of greater relevance to those who have prepared, stored or trafficked harmful foods?
- 3) If a food (e.g. a novel food) needs authorization for its commercialization, would it be an offence to commercialize it without prior authorization? If yes, is this regulated in your criminal law or other law(s)? Please specify.
- 4) Does it constitute a criminal offence to market foods in breach of food regulations that enforce the principle of precaution, without demanding further confirmation of harmfulness in the criminal context?
- 5) How is the harmfulness of a product determined? Does it have to be harmful for consumers in general or is it enough for it to be harmful to a particular group (children, people with kidney disease...)?
- 6) Do sanctions apply to making food available to consumers that is unfit for human consumption, although not necessarily harmful?

### C. Food fraud

- 1) Describe the three most-important cases in the past few years in which food has been sold in a fraudulent manner to consumers. Which cases are most frequently brought before the courts? What sanctions are usually applied? Please specify type of sanction and amount/length.
- 2) Does your legal system foresee offences other than fraud (which requires an effective loss of patrimony), which are intended to punish the commercialization of food that, because of its presentation, may be misleading with regard to its quality and quantity?
- 3) If so, are these offences described in the Penal Code or in special laws? What type of criminal offences (infractions, felonies, misdemeanours...) constitute the most important offences that sanction the production or sale on the market of fraudulent foods? Describe the sentence foreseen for the offence or the main offences of misleading food advertising. On the sentencing grading in your country, do you consider that those crimes are of high, average, or low seriousness?
- 4) In cases where your national legal system foresees provisions to sanction misleading advertising or deceptive marketing of foods, what are the product characteristics to which deception can refer? Especially take into account if it can be linked to the following aspects:
  - Quantity and quality of the food (horse meat instead of beef)
  - Origin of the ingredients of the product
  - Denominations of origin. Does criminal law in your country protect the denominations of origin of other countries?
  - Nutritional values and effects (slimming products ...)
  - Natural or ecological nature (free of certain substances, waste products, free of GM foods)
  - Medicinal properties of the food
  - Food production that is respectful of basic working rights and other human rights (fair trade)
  - Other aspects.
- 5) Do the sanctions that are envisaged vary in accordance with the aspect of the food product at the centre of the deceptive marketing campaign? Is there a special definition or aggravating factor for those cases in which false or misleading marketing can affect consumer health?

- 6) Do these offences require that deceptive advertising of sufficient significance to mislead the consumer be demonstrated? How is the type of average consumer defined, at whom the misleading advertising is directed?
- 7) Who are the offenders in these crimes?

### **III. International Trafficking of Foods and Harmful Substances**

- 1) Is it an offence in your country to market foods that are legally produced in other countries, but that contravene the legislation in force in your own country?
- 2) Is it legally acceptable to produce food in your country destined exclusively for export, with significantly lower levels of food safety than legally required at home, but which are legal in the country to which they will be exported?
- 3) Is it legally acceptable for legal persons –or their subsidiaries- to be able to produce or to distribute foods in other countries, with a notably lower food quality than legally required in the country where those legal persons have their headquarters?
- 4) Can hormones, herbicides or other substances that are illegal because they are harmful to health in your country be produced or exported to other countries where they may be acceptable?

### **IV. Prevention and Enforcement**

- 1) What is the role of the food inspectorate in the prosecution of these offences? To what extent does the instigation of criminal proceedings depend on its active involvement?
- 2) Can consumer organizations participate in the criminal proceeding?
- 3) Is there an agency that specializes in investigating food fraud? What are its functions? What are its powers of investigation? Does it have the possibility of cooperating with similar (administrative) agencies from other states? What is the role of this agency once the criminal proceeding is underway?
- 4) Are there specialized police units, prosecution offices or tax inspectorates?



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