

## Commentary on the French Court of Cassation's Judgment on the Negligent Food Fraud: E-Coli Testing Oversight Case

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Received: 24- June -2023

Revised: 27- July -2023

Accepted: 21- August -2023

### Abstract

This commentary on the Negligent Food Fraud: E-coli Testing Oversight case, which was adjudicated by the French Court of Cassation in 2020, addresses three key aspects: the French perspective on the concept of unintentional criminal conduct, the analysis conducted by the Court of Cassation, and additional observations regarding the Court's analysis. Each of these issues holds significant importance concerning the framework of negligent food fraud within French criminal law. The comment suggests that the Court have provided a detailed analysis on the *mens rea* element of the offense and accepted the EU regulation as a source for a specific duty of care and safety within the meaning of Article 121-3 of the French Penal Code.

**Keywords:** Negligence, Food Fraud, Criminal Law, France, *mens rea*, Fault, Causation, EU Regulations

### Introduction:

This commentary on the Negligent Food Fraud: E-coli Testing Oversight case,<sup>1</sup> which was adjudicated by the French Court of Cassation in 2020, addresses three key aspects: the French perspective on the concept of unintentional criminal conduct, the analysis conducted by the Court of Cassation, and additional observations regarding the Court's analysis. Each of these issues holds significant importance concerning the framework of negligent food fraud within French criminal law. The comment proposes that the Court should have provided further elaboration on the moral component of the offense.

Food fraud represents a significant and pressing issue within any society, carrying substantial implications for public health and safety.<sup>2</sup> (Spink and Moyer, 2011, p. 157) Combating this pervasive phenomenon necessitates collective endeavors from individuals involved in various domains, including the legal sector and beyond.<sup>3</sup> While legal and regulatory frameworks serve as essential tools in addressing food fraud, they merely scratch the surface of a much broader and intricate landscape encompassing multiple facets of public policy and decision-making processes that inherently reflect societal priorities. "The legal definition of crime is the best indication of how the category of crime is created as a form of public policy."<sup>4</sup> (Clinard, Quinney and Wildeman, 2014, p. 5). This

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<sup>1</sup> The French Court of Cassation, Criminal, Criminal Chamber, March 31, 2020, 19-82.171, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000041810363>

<sup>2</sup> Spink, John, and Douglas C. Moyer. "Defining the public health threat of food fraud." *Journal of food science* 76.9 (2011): R157-R163.

<sup>3</sup> Hashesh, Adham, *The Criminal Entrepreneur: Rethinking Business Crime in a Global Legal Context*, University of Kansas, United States -- Kansas, 2015.

<sup>4</sup> Clinard, Marshall, Richard Quinney, and John Wildeman. *Criminal behavior systems: A typology*. Routledge, 2014 at 5

observation emphasizes the intrinsic connection between legal definitions, the creation of crime categories, and the underlying public policy considerations that shape our approach to addressing food fraud.

This commentary delves into the intriguing and thought-provoking Negligent Food Fraud: E-coli Testing Oversight case, which underwent judicial scrutiny and reached its resolution in 2020 within the esteemed chambers of the French Court of Cassation. This particular case encapsulates a myriad of important elements that warrant careful examination and analysis. In particular, it shines a light on three significant aspects: the French legal perspective on the concept of unintentional criminal conduct, the thorough and meticulous analysis conducted by the Court of Cassation, and additional observations that arise from scrutinizing the Court's analysis.

The gravity of these issues cannot be overstated, as they pertain directly to the intricate framework that governs cases of negligent food fraud within the realm of French criminal law. By delving deep into the nuances and intricacies of this case, we gain valuable insights into the approach taken by French authorities when dealing with unintentional criminal behavior in the context of food safety.

Throughout this commentary, one crucial point emerges prominently: that the Court of Cassation have provided detailed clarification regarding the moral component inherent in the offense at hand. By shedding light on this moral dimension, a more comprehensive understanding of the case can be achieved, allowing for a more nuanced and informed discussion on the intricacies of negligent food fraud within the broader context of French criminal law.

#### (1) Unintentional Criminal Behavior in French Law

Generally, unintentional behavior falls outside the purview of criminal law regulation. Similarly, criminal sanctions typically impose more severe penalties on offenders compared to the actual harms caused by the crime, unlike the sanctions in tort law. As highlighted by Harel and Hylton (2012, p. 3), this disparity in costs is often observed. They noted that “[t]ypically, criminal sanctions (unlike tort law sanctions (impose much greater costs on criminals than harms caused by the crime.”<sup>5</sup> (Harel and Hylton, 2012 p. 3) However, there are instances where a society may choose to employ criminal law to address unintentional behavior in order to preserve public order.<sup>6</sup> France adopted this approach, which will be further elaborated in the subsequent section.

##### (1.1) Criminal Law: Intentional vs. Unintentional Behavior

The primary focus of criminal law revolves around deliberate harmful actions, which are subject to criminalization and punishment.<sup>7</sup> As a result, criminal intent forms the central foundation for the majority of crimes, referring to the mental state or purpose of the offender. Establishing criminal liability often necessitates demonstrating that the individual possessed a culpable mental state or had the intention to engage in unlawful conduct.

Intentional behavior encompasses a wide range of criminal offenses, such as murder, assault, theft, fraud, and many others. These offenses typically involve a conscious decision to engage in conduct that is known to be illegal or harmful. The criminal justice system places a strong emphasis on holding individuals accountable for their intentional actions and imposing appropriate penalties as a means of deterrence and societal protection.<sup>8</sup>

Conversely, civil law typically addresses liability for negligent acts, which are characterized by careless or reckless behavior, rather than criminal law. Unintentional actions refer to situations where individuals cause harm or engage in prohibited behavior without any intention to do so. These actions arise from negligence, lack of

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<sup>5</sup> Harel, Alon, and Keith N. Hylton, eds. *Research Handbook on the Economics of Criminal Law*. Edward Elgar Publishing, 2012 at 3

<sup>6</sup> Hashish, Adham A. "Ijtihad institutions: the key to Islamic democracy bridging and balancing political and intellectual Islam." *Rich. J. Global L. & Bus.* 9 (2010): 61; Hashish, Adham A. "The Egyptian Second Republic: The Future of Litigating Islam Before the Supreme Constitutional Court." *Berkeley Journal of Middle Eastern & Islamic Law* 5.1 (2013): 4.

<sup>7</sup> El-Gheriani, Moatasem, and Adham Hashish. "Egypt Amends its Competition Law to Establish a Pre-Merger Control System." *Journal of European Competition Law & Practice* 14.2 (2023): 106-112.

<sup>8</sup> Hashish, Adham A. "Fighting Corruption: Civil Government under Development Law." *ARAB J. POL. SCI.* 28 (2010): 63.

awareness, or failure to meet a certain standard of care. In such cases, the emphasis is placed on the outcomes of the offender's actions rather than their mental state.

While criminal law primarily focuses on intentional behavior, there are instances where unintentional acts can still result in criminal liability. "Should criminal liability ever be imposed for negligent conduct? Commentators disagree radically."<sup>9</sup> (Husak, 2011, p. 199) Some legal systems recognize certain offenses known as strict liability crimes, where the mental state of the offender is not a requirement for conviction. These offenses typically involve activities that are inherently dangerous or involve a significant risk to public safety, such as selling contaminated food or driving under the influence of alcohol. In such cases, the emphasis is placed on the act itself rather than the intent behind it.

Overall, while criminal law primarily addresses intentional behavior, there are circumstances where unintentional actions can also lead to criminal liability, although such cases are generally the exception rather than the norm.

In the French Penal Code, unintentional criminal offenses are classified as misdemeanors rather than felonies under Article 121-3. While felonies align with the core purpose of criminal law, which is to deter intentional behavior, misdemeanors indicate a lesser necessity to utilize the mechanisms of criminal law for deterrence.

#### (1.2) Unintentional criminal offences: one category or more?

A legal system could treat certain unintentional criminal offenses as a single category when it comes to establishing criminal liability. This means that regardless of the level of negligence, the mere existence of the offense itself is enough to hold someone criminally responsible. If a driver exceeds the speed limit or fails to stop at a red light, they can be held criminally liable for the offense, regardless of their intent or level of negligence. Even if the driver did not consciously or intentionally violate the traffic rules, the mere act of committing the offense is enough to establish their criminal liability.

In addition, a legal system could attribute this offense to the actor, irrespective of whether it directly resulted from their actions or had a remote causal link, as long as the necessary causal connection is established. "Criminal law is not interested in determining all of the immediate and remote causes of every possible event, it is only concerned with the possible causes of legally recognised prohibited harms, and criminal law is interested in only a very few of those possible causes: The potentially culpable causes."<sup>10</sup> (Firkins, 2023, p.37) Under this approach, anyone involved in the commission of such an offense can be held accountable according to general rules and principles of criminal law.

In these cases, the law places a higher burden of responsibility on individuals to comply with the prescribed standards, regardless of their intent or level of negligence.<sup>11</sup> This approach reflects the principle that individuals have a duty to act reasonably and take necessary precautions to prevent harm to others.<sup>12</sup> If someone fails to fulfill this duty and their actions result in a criminal offense, they may be held liable for the consequences.

By treating unintentional criminal offenses as a single category, the legal system aims to ensure that individuals are deterred from engaging in reckless or negligent behavior,<sup>13</sup> as they can be held accountable for the harm

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<sup>9</sup> Husak, Douglas. "Negligence, belief, blame and criminal liability: The special case of forgetting." *Criminal Law and Philosophy* 5 (2011): 199-218.

<sup>10</sup> Firkins, Grant. "Rethinking Causation in English Criminal Law." *The Journal of Criminal Law* 87(1), 18–38 at 37 (2023): <https://doi.org/10.1177/00220183231151918>

<sup>11</sup> Abdelaziz, Gehad Mohamed and Adham Hashish "Using Sanctions in Enforcing Digital Markets Act in the EU" Conference on Business Organizations Trends in light of Digital Transformation: Economic, Legal and Media, Zarqa University & Birzeit University (March 2023)

<sup>12</sup> Shalaby, Abdelrahman Gehad, Gehad Mohamed Abdelaziz, and Moustafa Elmetwaly Kandeel. "Using Artificial Intelligence to Resolve Disputes through Online Arbitration." 2022 Ninth International Conference on Social Networks Analysis, Management and Security (SNAMS). IEEE, 2022.

<sup>13</sup> Husak, Douglas. "Negligence, belief, blame and criminal liability: The special case of forgetting." *Criminal Law and Philosophy* 5 (2011): 199-218. (clarifying the distinction between negligence and recklessness).

caused. It also provides a framework for consistent application of the law, where the focus is on the act and its consequences rather than the intent behind it.

However, it is important to note that different countries or regions may have different approaches to handling unintentional criminal offenses. "Negligence is a problematic basis for being morally blamed and punished for having caused some harm, because in such cases there is no choice to cause or allow—or risk causing or allowing—such harm to occur."<sup>14</sup> (Moore and Hurd, 2011, p. 147) In this sense, some jurisdictions may distinguish between different levels of negligence or have specific statutes that govern particular types of unintentional offenses. Therefore, the exact treatment of unintentional offenses as a single category may depend on the specific legal framework in place.

Under Article 121-3 of the French Penal Code, unintentional criminal offenses can be categorized into two groups based on different degrees of fault: *simple* fault and *serious* fault. While it may be commonly assumed that *simple* negligence should not be treated as a criminal offense, French law, as well as laws in other jurisdictions, includes provisions that criminalize unintentional behavior leading to death or bodily harm. It has been noted that, in French criminal law, "the basic rule is that for offences other than the most trivial regulatory ones, guilt presupposes intention in the defendant. However, in the case of negligent homicide and negligent injury, the importance of protecting human life and the integrity of the human body are thought to justify a major exception. There is nothing new in this, because offences of negligent homicide and negligent injury were included in Napoleon's *Code Penal* of 1810,<sup>43</sup> and their origins go back to pre-revolutionary French"<sup>15</sup> (Spencer and Brajeux, 2010, p. 6)

In this context, unintentional behavior encompasses both simple and serious negligence. This approach can be subject to criticism, as some argue that criminal law should only address cases of gross or serious negligence, leaving simple negligence to be dealt with in civil law. Consequently, they believe that simple negligence, even if it results in death or bodily harm, should not be considered a crime. Others argue that criminal law should take into account the harm or damage caused. However, the discussion surrounding this topic extends beyond the scope of this article.

### (1.3) Indirect Perpetrator

The complexity increases when a case involves a person whose actions indirectly contribute to the commission of a crime. In such cases, the person is considered an indirect perpetrator, as there exists an indirect causal connection between their actions and the eventual criminal result. Their actions did not directly cause the criminal outcome, but rather established the circumstances that led to it. "Indirect causation is essentially where two continuing physical process chains are bridged together through moral principles, such as foreseeability and voluntariness."<sup>16</sup> (Firkins, 2023, p. 32) Failing to acknowledge this subtle differentiation between the two scenarios would lead to holding the offender responsible for their actions in all instances, regardless of the level of wrongdoing or whether they directly or indirectly brought about the criminal outcome.

To summarize, the differentiation between direct and indirect perpetration is vital for determining the extent of an individual's criminal liability, considering the precise causal link between their behavior and the resulting criminal outcome.

The French judicial system has displayed a tendency to broaden the sphere of criminal accountability for individuals, even when their unintentional error indirectly results in a criminal consequence. Nevertheless, the French legislative body has responded to this expansion by implementing various provisions designed to regulate criminal liability in such scenarios. The objective of these provisions is to restrict the scope of criminal responsibility for indirect causation and confine it to cases involving significant errors, rather than mere mistakes.

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<sup>14</sup> Moore, Michael S., and Heidi M. Hurd. "Punishing the awkward, the stupid, the weak, and the selfish: The culpability of negligence." *Criminal Law and Philosophy* 5 (2011): 147-198 at 147

<sup>15</sup> Spencer, John R., and Marie-Aimee Brajeux. "Criminal Liability for Negligence—A Lesson from across the Channel?." *International & Comparative Law Quarterly* 59.1 (2010): 1-24 at 6

<sup>16</sup> Firkins, Grant. "Rethinking Causation in English Criminal Law." *The Journal of Criminal Law* 87(1), 18–38 at 32 (2023): <https://doi.org/10.1177/00220183231151918>

(2) Legislative Developments in the French Law

Under French criminal law, the prevailing principle stipulates that the defendant must possess the intent to commit an offense, with minor regulatory offenses being an exception to this rule. However, in instances of negligent homicide and negligent injury, a noteworthy exception exists, driven by the fundamental significance of protecting human life and physical well-being. (Spenser and Brajeux, 2011, p. 6) <sup>17</sup>

(2.1) The 1994 French Penal Code<sup>18</sup>

In order to gain a deeper understanding of the Court of Cassation's analysis in this case, it is essential to delve into the legislative history of Article 121-3 of the French Penal Code. A commentator aptly noted that the initial legislative measure aimed at mitigating the potential criminal liability of mayors involved a statutory modification that abandoned the notion that fault, as determined for civil liability, automatically constituted fault for the purposes of criminal liability for non-intentional offences too."<sup>19</sup> (Spenser and Brajeux, 2011, p. 13) This objective was accomplished through the revision of Article 121-3. In its original rendition, the article read as follows:

“There is no felony (crime) or misdemeanour (delit) in the absence of an intent to commit it.

However, where statute so provides, there is a misdemeanour in the case of recklessness, negligence or deliberate endangerment.

There is no petty offence (contravention) in the event of force majeure.”

In this context, “French law originally operated on the basis of a unitary concept of fault, so that negligence that was bad enough to give rise to civil liability under the French equivalent of the law of tort was automatically bad enough to give rise to criminal liability in those offences which can be committed negligently.”<sup>20</sup> (Spenser and Brajeux, 2011, p. 11)

(2.2) The 1996 Reform

The 1996 Amendment aimed to mitigate the liability of local elected officials and project managers by providing a realistic assessment of unintentional fault, considering the specific nature of their roles, tasks, and authorities.<sup>21</sup>

Undoubtedly, this law was a much-needed response to the escalating number of convictions that followed significant incidents, such as the tragic nightclub fire on November 1<sup>st</sup>, 1970, known as the "Club Cinq-Sept" fire, took place in Saint-Laurent-du-Pont, resulting in the loss of 146 lives. The application of criminal responsibility to elected officials became increasingly common in the 1990s, particularly in notable cases like the fire incidents at the thermal baths of Barbotan-les-Thermes in 1991,<sup>22</sup> the Bruz Clinic in 1993,<sup>23</sup> and the Stade Armand-Cesari disaster where the of Furiani stadium collapsed in 1992. These incidents garnered substantial public attention, emphasizing the necessity for legislative measures to address concerns about the widespread criminal liability.<sup>24</sup> Accordingly, Article 121-3 was amended to read as follows:

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<sup>17</sup> Spencer, John R., and Marie-Aimee Brajeux. "Criminal Liability for Negligence—A Lesson from across the Channel?." *International & Comparative Law Quarterly* 59.1 (2010): 1-24 at 6

<sup>18</sup> Loi n° 92-683 du 22 Juillet 1992

<sup>19</sup> Spencer, John R., and Marie-Aimee Brajeux. "Criminal Liability for Negligence—A Lesson from across the Channel?." *International & Comparative Law Quarterly* 59.1 (2010): 1-24 at 13

<sup>20</sup> Spencer, John R., and Marie-Aimee Brajeux. "Criminal Liability for Negligence—A Lesson from across the Channel?." *International & Comparative Law Quarterly* 59.1 (2010): 1-24 at 11

<sup>21</sup> Loi n° 96-393 du 13 Juillet 1996

<sup>22</sup> AP News, Fire Kills 20 People at French Spa, June 28, 1991, available at <https://apnews.com/article/d1d67d43abb964f6512cc44856f8bfa5>

<sup>23</sup> New York Times, Fire in French Clinic Kills 17; Police Say Arson Is Possible, June 26, 1993, <https://www.nytimes.com/1993/06/26/world/fire-in-french-clinic-kills-17-police-say-arson-is-possible.html>

<sup>24</sup> Philippe Bluteau, Responsabilité pénale des élus locaux: trente ans d'évolution, *Le courrier des maires*, September 30<sup>th</sup>, 2013, <https://www.courrierdesmaires.fr/article/responsabilite-penale-des-elus-locaux-trente-ans-d-evolution.5677#>

“There is no felony (*crime*) or misdemeanour (*delit*) in the absence of an intent to commit it.

However, the deliberate endangering of others is a misdemeanour where statute so provides.

A misdemeanour also could be established, where statute so provides, when there is recklessness, negligence, or a breach of a duty to exercise reasonable care or precaution as required by statute or regulation. This applies when it is proven that the offender has failed to demonstrate the level of diligence expected under normal circumstances, considering factors such as their role, responsibilities, capabilities, and the resources at their disposal at the time.

There is no petty offence in the event of force majeure.”

However, despite the law requiring the judge to consider the contextual factors surrounding the unintentional error when assessing the actions of decision-makers in their official capacities, it did not result in a decrease in the number of convictions of local officials for unintentional errors. Judges continued to rely on their abstract evaluation of unintentional errors,<sup>25</sup> particularly in the cases of decision-makers such as local elected officials and project managers. This paved the way for another legislative amendment in 2000, as explained below.

### (2.3) The 2000 Amendment

Consequently, the 2000 Amendment introduced an additional paragraph at the end of Article 121-3.<sup>26</sup> The new paragraph specifically addressed the liability of indirect perpetrators in the commission of a crime. This paragraph pertained to individuals who did not directly cause the harm but played a role in creating or contributing to the circumstances that allowed the harm to occur either by their action or omission, i.e., failure to take the necessary actions and precautions to prevent it. To establish criminal liability in such cases, a specific type of error which is distinct from simple negligence, must be present.

“... In the case referred to in the preceding paragraph, natural persons who have not directly participated in causing the harm but have played a role in creating the circumstances that led to the occurrence of the harm or have neglected to take measures to prevent it, can be held criminally accountable. This is applicable when it is demonstrated that they have knowingly violated a duty of care or precaution prescribed by law or regulation in a clear and intentional manner or have engaged in specific misconduct that exposed another person to an exceptionally grave risk that they should have been aware of.”

Through this amendment, the law seeks to redefine unintentional misdemeanors with the objective of partially reducing the scope of criminal liability imposed on individuals. The aim is to prevent unjustified convictions for unintentional offenses, particularly those involving local elected officials, employees, or project managers. However, it is equally important to prevent the weakening of penalties, hinder compensation, and evade the responsibility of indirect actors. The intention is to strike a balance that ensures fairness and accountability while avoiding undue harm to those indirectly involved.

This amendment makes it evident that indirect actors will not face criminal liability unless they commit a qualified mistake, i.e., *faute qualifiée*, which can take one of two forms.

- The first is an intentional error, i.e., *faute délibérée*, where there is a clear and deliberate violation of a specific obligation of caution or safety as mandated by law or regulation.
- The second form is a characterized error, i.e., *faute caractérisée*, where others are exposed to a particularly severe risk that cannot be justified by claiming ignorance.

The subsequent case will delve into the details of the first type of error mentioned.

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<sup>25</sup> Westen, Peter. "Individualizing the Reasonable Person in Criminal Law." *Criminal Law and Philosophy*, vol. 2, no. 2, 2008, pp. 137-162. Doi:<https://doi.org/10.1007/s11572-007-9041-2> (noting that “Abstract Criminal law commonly requires judges and juries to decide whether defendants acted reasonably.”)

<sup>26</sup> Loi n°2000-647 du 10 Juillet 2000.

(3) Negligent Food Fraud: E-coli Testing Oversight Case

The French Court of Cassation issued a ruling on March 31, 2020, shedding light on the distinguishing features of *faute délibérée*, i.e., a specific kind of mistake called deliberate violation of a particular duty of care and safety. This type of mistake would be established when there exists an indirect connection between an individual and the ensuing harm, with the person acting indirectly.

(3.1) Facts of the Case:

During June 2011, a notable incident arose concerning sixteen children who displayed symptoms associated with haemolytic uraemic syndrome (HUS), a condition commonly attributed to the E-coli O157H7 bacterium and can result in acute renal failure. The subsequent investigations uncovered that these children had consumed minced meat manufactured on May 11, 2011, at a company where the accused individual had been the manager since its inception in 1966.

Subsequent inquiries revealed that among the 13 production units created on that particular day, only 3 had undergone testing for E-coli. Troublingly, one of the tested units yielded an unsatisfactory outcome, indicating the presence of 770 E-coli bacteria per gram. This exceeded the accepted threshold of 150 per gram, which mandates the need for a targeted search specifically for E-coli O157H7, as outlined in the approved health control plan authorized by the authorities (PMS 2). Additionally, it came to light that no such test had been conducted, thereby disregarding the essential precautions that should have been taken.

The accused individual was presented before the criminal court for blatantly and knowingly disregarding a legal duty of ensuring safety and caution. This violation led to injuries suffered by sixteen children. Moreover, the defendant faced charges specifically related to deceiving consumers regarding the crucial characteristics of minced meat, which posed a threat to human health. Additionally, they were prosecuted for the promotion and sale of hazardous products derived from animals, as well as the possession of food items intended for consumption that had been falsified, adulterated, or contaminated, thus posing a risk to human health.

(3.2) Lower Court's Opinion

The defendant, after being found guilty by the lower court, lodged an appeal with the Court of Cassation based on various grounds. The central issue addressed by the lower court was whether the defendant intentionally violated a specific obligation of caution or safety, as defined in Article 121-3 of the Penal Code, "as stipulated by law or regulation." In defense, the defendant contended that the provisions outlined in Regulation (EC) 853/2004 dictate that the raw materials utilized in minced meat production must originate from approved cutting facilities. These regulations further specify that businesses must perform compliance checks on both received and manufactured products by establishing a control plan (PMS) that adequately addresses the risk of E-Coli bacterium contamination, including E-Coli 0157H7. Furthermore, the plan must be approved by the relevant authorities.

Furthermore, the lower court made reference to Regulation (EC) No 178/2002 of the European Parliament and the Council, issued on January 28, 2002. The court emphasized the pivotal role of the PMS as a vital element for food companies, particularly in the production of frozen minced meat. On May 11, 2011, it was discovered that the approved PMS 2, sanctioned by the authorities, had not been followed. No analysis of the raw materials had taken place, and there was a failure to examine the finished products for E-Coli 0157H7, despite the requirement to do so following the identification of an alarming level of 770/g of "classic" E-Coli in certain products. Consequently, the lower court concluded that by knowingly releasing a potentially dangerous food product into the market without conducting the necessary analyses, the defendant clearly and intentionally violated the obligations of caution and safety stipulated in Regulation (EC) No 178/2002.

(3.3) Court of Cassation's Opinion

The defendant contended that the lower court made an error in considering Regulation (EC) 853/2004 of the European Parliament and the Council, dated April 29, 2004, as meeting the requirement of "law or regulation" stipulated in Article 121-3 of the Penal Code. The defendant argued that administrative acts of a general and impersonal nature, such as a health control plan (PMS), should be excluded from this requirement.

However, the Court of Cassation disagreed with the defendant's argument and upheld the lower court's conviction. In its analysis, the Court emphasized that the specific obligations of caution and safety are established by the provisions outlined in Articles 14, 17, and 19 of Regulation EC No. 178/2002 of the European Parliament and the Council, issued on January 28, 2002, rather than the health control plan. According to these provisions, when a hazardous food product is part of a batch or load of food products belonging to the same category or description, it is presumed that all the products in that batch or load are also hazardous, unless a detailed assessment provides evidence to the contrary. In such cases, the operator is obligated to remove the food products from the market.

Furthermore, operators in the food sector bear the responsibility of ensuring compliance with applicable food law requirements related to their activities at every stage of production, processing, and distribution within their supervised businesses. They are also responsible for verifying adherence to these requirements. These obligations are in place to uphold the safety and quality of food products throughout the entire supply chain.

#### (4) Commentary

The ruling of the Court of Cassation provided valuable elucidation on this particular error, defining it as a *deliberate* breach of a legal or regulatory obligation of safety or caution.<sup>27</sup> It is worth noting that this case addresses the criminal liability of the manager, i.e., a natural person, since the scope of Article 121-3 of the Penal Code applies only to natural persons not legal persons.<sup>28</sup> (Deckert, 2011)

##### (4.1) Three Requirements for the Intentional Fault (*faute délibérée*)

The manager's wrongdoing stemmed from non-compliance with the officially approved health safety plan, which encompassed quality control protocols for the company's manufactured products. Consequently, the accused knowingly released the potentially hazardous product into the market without conducting the required analyses, despite being fully aware of the associated risks.

The Court's analysis can be perceived as establishing three essential elements that must be satisfied for a conviction in similar cases:

1. The presence of a *particular* duty to exercise care and ensure safety.
2. The basis of this duty originating from a law or regulation, as stipulated in Article 121/3 of the French Penal Code.
3. The *intentional* and *apparent* breach of this duty.

In this specific case, and in accordance with the Court's rationale, all three conditions were met:

1. The intentional nature of the breach of obligation was *apparent*. The defendant knowingly released the food products into the market, despite the unfavorable analysis results.
2. The obligation that was violated pertained to health and safety. The defendant neglected to conduct the analysis for the entire quantity of products. Establishing this aspect poses no challenge when the obligation is clearly defined and imposes a specific behavioral standard, necessitating a *particular* course of action.
3. The origin of this obligation can be traced back to a law or regulation of a general nature, as outlined in the European regulation.

It is important to emphasize that in assessing the presence of intentional fault, the prosecution needs to establish the existence of a specific duty of care or safety mandated by law or regulation.<sup>29</sup> To be clear, the mere existence

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<sup>27</sup> Solaiman, S. M. "Laws Governing Manslaughter by Food Safety Crimes in the United Kingdom, Australia, Bangladesh and India: A Critical Review." *NCJ Int'l L.* 47 (2021): 75 (discussing the requirements for prosecuting food fraud offenses in light of two English cases).

<sup>28</sup> Deckert, Katrin. "Corporate Criminal Liability in France." *Corporate criminal liability: Emergence, convergence, and risk* (2011): 147-176.

<sup>29</sup> The French Court of Cassation, Criminal, Criminal Chamber, October 28, 2020, 19- 85.037, available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000042509961>



of a general duty is not sufficient to establish criminal liability in case. The duty has to be specific. The nature of the duty determines the type of error in question. A specific duty is one that provides a detailed framework of conduct, rather than general guidelines. A specific duty imposes an objective standard without room for discretion on the part of the person tasked with this duty.<sup>30</sup> The duty must be sufficiently precise, outlining a detailed course of action or behavior.<sup>31</sup>

For instance, if a physician fails to comply with the obligations outlined in public health laws, which establish general rules of conduct such as ensuring informed care based on scientific knowledge and exercising caution in making diagnoses, this alone does not satisfy the requirement of *specific* duty within the meaning of Article 121-3. In this case, the obligation is considered a general one rather than a specific duty. To identify a violation of a specific duty, the text must be sufficiently precise and clearly define the required behavior in a specific situation. A clear example of a specific duty can be found in Article 12 of the Decree of February 11, 2002, which mandates surgeons to utilize qualified nurses during surgical procedures. This article imposes a specific obligation on surgeons, leaving no room for ambiguity or interpretation.

#### (4.2) EU Regulations: A Potential Source for Imposing Specific Duties

The foregoing analysis highlights a key aspect of this case, namely, the presence of necessary conditions for the establishment of *faute délibérée*, i.e., conscious negligence, wherein the indirect perpetrator breaches a specific obligation of caution or safety as prescribed by law or regulation. Central to the case is the pivotal issue pertaining to the origin of this obligation, specifically whether the European Union regulation can be deemed a suitable source for such an obligation as outlined in Article 121-3, paragraph (4). The accused contended that the EU regulation does not fall within the ambit of the aforementioned provision. However, the Court of Cassation disagreed concluding that the EU regulation qualify as a regulation under Article 121-3. To illustrate this position, the following paragraphs would discuss further the status of the EU regulations within the member states.

It worth noting that EU regulations carry the force of law and must be fully implemented across all EU member states. An instance of this can be observed in the expiration of the EU regulation concerning the elimination of roaming charges within the Union in 2022. To maintain a consistent approach to roaming, the Parliament and the Council adopted a new regulation that extends the provisions for another ten years. European Regulations, as "unilateral acts," are autonomously adopted by the European Institutions based on the constituent treaties of the EU, thereby becoming a part of the Union's "subordinate law."

Furthermore, EU regulations can acquire a legislative nature when they are adopted through the ordinary legislative procedure. This involves a joint decision by the European Parliament and the European Council, following a proposal from the Commission, in accordance with Article 294 of the Treaty on the Functioning of the European Union. Alternatively, regulations can be established through a special legislative procedure, whereby the Council makes a decision, often in consultation with or with the consent of the Parliament, as specified in the relevant provisions of the European treaties.

The Commission can adopt European regulations through enforcement procedures as outlined in Article 291 of the Treaty on the Functioning of the European Union. These procedures are employed when the implementation of legislation necessitates consistent application across the entire EU.

In light of the *Francović* ruling by the Court of Justice of the European Union on November 19, 1991, it became possible to pursue claims of state liability if a member state fails to comply with European standards. This entails an obligation for member states to compensate individuals for alleged violations of EU law, thus addressing any resulting harm.<sup>32</sup>

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<sup>30</sup> Mayaud, Yves. Répertoire de droit pénal et de procédure pénale. Dalloz, 2007, Risques causés à autrui, §29

<sup>31</sup> Puech, Marc. "De la mise en danger d'autrui." Recueil Dalloz (1994): 153

<sup>32</sup> The European Court of Justice, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, 19 November 1991, ECLI:EU:C:1991:428, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61990CJ0006>

In a landmark ruling on 8 July 2019 (case C-543/17), the European Court of Justice interpreted and applied Article 260(3) of the Treaty on the Functioning of the European Union (TFEU) for the first time, allowing fines to be imposed for non-compliance with obligations related to the transfer of Union directives.<sup>33</sup> The Court determined that the phrase "obligation to submit measures for transfer" should be understood as a requirement for member states to provide clear and precise information on the measures taken to transpose the directive. To ensure legal certainty and the complete transfer of provisions from the directive to national law, member states are obligated to explicitly highlight the national provisions that achieve the transfer of each directive provision. As a result of this judgment, the advisory departments of the State Council of the Republic of France are now required to request ministries, when examining the transfer of specific directives, to compile a table of harmonization between the directive's provisions (article by article) and the corresponding national transfer measures. This decision highlights the importance and timeliness of addressing the issue of transposing European directives into the national legislation of member states (Michel, 2020).<sup>34</sup>

The judges, acknowledging the supremacy of collective law within the European Union, now consider it to be superior to any national law, including constitutional law.<sup>35</sup> Consequently, they reject the notion that a European law can be subject to constitutional review. It is worth noting that this matter has been brought up multiple times before the German and Italian constitutional courts since the late 1960s (Walter, 1997).<sup>36</sup>

#### Conclusion

This commentary implies that the Court's analysis extensively addressed the *mens rea* component of the offense and thoroughly examined whether the defendant had the necessary mental culpability to be held criminally liable in light of the 2000 Amendment of Article 121-3 of the French Penal Code.

The Court also recognized the European Union (EU) regulation as a valid basis for establishing a specific obligation of care and safety as defined in Article 121-3. In this sense, the Court accepted the EU regulation as a legitimate source for establishing a specific duty of care and safety. This means that the Court acknowledged the EU regulation as a valid standard that outlines the specific obligations and responsibilities that individuals must adhere to in order to ensure caution and safety in the food industry across member states of the EU. This suggests that the Court considered the provisions of the EU regulation as binding and enforceable in determining the defendant's legal obligations.

The E-coli Testing Oversight case played a significant role in providing clarity and enhancing our comprehension of the amended Article 121-3, particularly with regards to one specific type of error known as "*faute délibérée*" or deliberate fault. While this case has shed light on this aspect, it would be beneficial to examine another Court of Cassation case that elucidates the second type of error introduced in Article 121-3, namely "*faute caractérisée*" or characterized fault. Exploring this additional case could serve as a promising subject for future research endeavors.

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<sup>33</sup> The European Court of Justice, *Commission v Belgium*, 8 July 2019 (case C-543/17), Judgment ECLI:EU:C:2019:573, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-543/17>

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26. Declaration of Conflicting Interests
27. The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

28. Funding

29. The author received no financial support for the research, authorship, and/or publication of this article.