

DEMANDS OF HARMONISATION OF REPRESSIVE MEASURES WITH REGARD TO FOOD FRAUD RELATED TO FINANCIAL FRAUD

di Antonella Madeo

*(Professoressa associata di diritto penale presso
Università di Genova)*

Sommario: 1. The extension of the concept of food safety over time. – 2. The relationship between agri-business and environment. – 3. The EU policy of economic support for environmentally sustainable agriculture and the new aspect of food security: financial security. – 4. Potential risks of food fraud. – 5. Relationship between food fraud and financial fraud: A) means to an end. – 6. Following: B) Relationship of occasionality. – 7. The criminal irrelevance of the teleological and occasional connections of financial and food fraud in the Italian penal system. – 8. Conclusions.

1. Food law has undergone a great evolution in the new millennium with Reg. 178/2002/CE, in that it is directed, in its contents and principles, to guarantee food safety throughout the entire supply chain according to the new integrated so-called “from farm to fork” strategy, whereas previously food law focused exclusively on the finished product.

Food nowadays must be safe from the moment it is made, to processing, to packaging, to transport for distribution, to trade, and in relation to everything that affects it, i.e. the environments, people and objects with which it comes into contact, as well as the animals and plants used for human consumption, which must also be healthy and wholesome. It follows from this new holistic view that the imposition of hygiene and quality requirements must be extended to feedstuffs, places and means used in animal husbandry and agriculture, as well as their control. This means that the concept of food safety, used to be a meta-interest instrumental to the protection of other legal assets, has over time become functional in guaranteeing an increasing number of collective interests, from public safety and public health, to correct and transparent information to the recipients of foodstuffs, to fairness and commercial and financial loyalty of food operators.

The well-known FAO definition¹, according to which food safety is to be understood as the right of all people to an adequate diet in a quantitative sense (food security) and qualitative sense (food safety)², has therefore been enriched with other aspects, in particular those relating to information and commercial fairness, interests that are closely linked, since the food product, only if it clearly, completely and accessibly reports information on its identity, composition, organoleptic properties and nutritional characteristics, origin, instructions for use and storage, enables consumers to make informed choices that are suited to their personal needs and conditions (physiological or pathological), and at the same time satisfies the common market's interest in fair trading by food operators, i.e. in carrying out their agri-food business in compliance with national and supranational rules, in particular with hygiene-quality standards and information obligations in the labelling/presentation of products.

2. In recent times, a further aspect of safety has developed, the so-called food eco-sustainability, in respect of which it should be noted that there is a two-way relationship between the modern agri-food chain and the environment. On the one hand, agriculture constitutes one of the sectors most responsible for environmental degradation, due to the overexploitation of natural resources (in particular soil and water) it entails, as well as the climate change it contributes to cause with its high emission of greenhouse gases.

On the other hand, climate change resulting from environmental pollution has negative effects on agriculture, since climate, weather, land and biodiversity are necessary conditions for the subsistence of agriculture: variations in climatic and meteorological conditions alter the suitability of land for the practice of certain types of crops or pastures, increase the spread of pests and diseases, and reduce the

¹ According to the definition coined during the World Food Summit, organized in Rome on 13-17 November 1996 by the FAO (Food and Agriculture Organization) and reported in the document adopted there, the Rome Declaration on World Food Security, food security represents «physical, social and economic access for all people, at all times, to sufficient, safe and nutritious food, adequate to meet their daily dietary needs and food preferences for an active and healthy life». The same definition was later transposed by the European Union in the Whereas n. 4 of the European Parliament Resolution of 18.1.2011 on the recognition of agriculture as a strategic sector in the context of food security.

² Food safety itself has evolved in meaning and content over time: initially understood in the sense of “hygienic safety” of the food, i.e. ensuring that the food is not harmful to health and is wholesome, it was then extended to integrity/genuineness, i.e. conformity to the natural or typical composition, and then further to nutritional value. Food safety today means that food is safe if it improves the quality of human life, tends to human well-being and counteracts the risk of disease.

availability of hydrological resources. In other words, agricultural activities are vulnerable to the effects of climate change on the environment.

The vicious circle created by the environment-food activity relationship (agriculture damages the environment and this consequently damages agriculture) leads to food insecurity in terms of both food quantity (*food security*) and food quality (*food safety*), the containment of which within acceptable limits requires an eco-sustainable agri-food system, to be implemented through a gradual shift to agriculture and the related processing and distribution activities carried out with no or low environmental impact, with an increase in the production of environmentally friendly, as well as healthy, wholesome, and whole foods.

3. The close correlation between food insecurity and climate change³, coupled with the recent macro-events represented by the Covid-19 pandemic and the Russian-Ukrainian war⁴, which have also had serious economic repercussions on the European and non-EU agri-food sector, has made the need for an environmentally friendly, robust and resilient food system evident.

With this in mind, the European Commission has adopted the so-called Green Deal⁵, a plan with the goal of climate neutrality by 2050, of which the post-2020 EU Common Agricultural Policy (CAP) is a key implementation tool.

The eco-sustainability of agriculture and forestry requires not only that companies comply with national and EU environmental protection regulations, but also that they convert to “green” production methods and processes. The latter entails considerable costs, which micro-small-medium enterprises, constituting almost the entirety of the European agri-entrepreneurial world, are unable to sustain. Therefore, the CAP of the new millennium foresees measures of financial support to agricultural enterprises to enable the concrete implementation of the ecological transition, as well as to support them in combating economic crises. In particular, it intervenes both with direct support measures, i.e. with direct payments made to farmers to manage their activities;

³ The Reg. 1119/2021/UE of the European Parliament and of the Council of 30.6.2021, establishing the framework for the achievement of climate neutrality, also confirms the close connection between (in)food safety and climate change: in Whereas n. 5, it refers to climate change as a health risk and a threat to food safety and, consequently, Whereas n. 9 emphasises that the EU and Member States’ action on climate aims at the protection of health, ecosystems, but also food systems.

⁴ The war, in particular, was the cause of the disproportionate rise in the market price of grain and natural gas.

⁵ The European Green Deal was initiated by the European Commission with Communication no. 640 of 11.12.2019, which the Council joined.

and with rural development measures, through funding to Member States, which disburse them to their farmers together with financial resources from their own national budgets for farms modernisation through innovative agricultural production techniques (so-called regenerative agriculture), as well as for other purposes such as the practice of organic farming.

In particular, the 2023-2027 CAP, in order to contribute effectively to the achievement of the Green Deal objectives (first and foremost climate neutrality), provides for premium support measures such as the so-called “eco-schemes”, which consist in allocating at least 25% of the budget to direct payments for farming practices and approaches that respect the climate and the environment, such as organic farming, agro-ecology, and carbon farming. Moreover 2023-2027 CAP introduces so-called enhanced conditionality, i.e. it subordinates the direct payments to a stronger set of mandatory requirements, such as that at least 3% of arable land on each farm is dedicated to biodiversity and non-productive elements.

The EU’s economic support of agri-business with the new CAP in the light of the ecological transition has engendered a further aspect of food security, “financial security”, which consists in the loyalty of businesses to the State and to European Union as the institutions that finance business activities with public resources. Loyalty and fairness that is expressed in the proper use of the funds received for the economic support and ecological transition of the productive or commercial activity.

4. The stricter preconditions under the 2023-27 CAP for receiving EU subsidies may increase the risk of financial fraud, in the form of undue claims or misappropriation of EU funds earmarked for environmentally sustainable practices. A risk that to some extent is unavoidable, almost physiological, when public subsidies are granted “non-reimbursable” rather than by means of low-interest loans; a risk that has therefore always existed in general in relation to European financial policy (and not only in the current CAP), as demonstrated by the fact that the EU legislator has felt the need to defend its financial interests through the instrument of last resort, criminal law.

The reference is to dir. 2017/1371/UE which aims to combat fraud affecting the EU’s financial interests through criminal law (so-called PIF)⁶. Similarly to the provisions of dir. 2008/99/CE to protect the environment against widespread pollution and disasters in the EU, the PIF intervened to require Member States to punish fraud

⁶ Dir. 2017/1371/UE of the European Parliament and of the Council of 5.7.2017.

affecting the financial interests of the EU⁷, identifying in artt. 3 and 4 a series of criminal offences of financial fraud that all Member States must provide for and, where they already provide for them, to punish them with imprisonment as a maximum penalty, which must have a maximum sentence of at least four years in the event that the financial fraud results in considerable damage or advantage, that is to say, damage or advantage with a value of more than euro 100.000⁸. The Directive also requires the punishability of attempt, inciting, aiding and abetting (art. 5), as well as the extension of liability to legal persons (art. 6), since this type of crime tends to occur in these ones.

The facts contemplated therein are divided into four groups and are united by three requirements: the intentionality of the act; the conduct of deception; and the purpose of unjust profit. For all of them, the aggravating circumstance of the act being committed within a criminal organisation in the sense of Framework Decision 2008/841/GAI. The first group (sub-paragraph a) covers three offences: the use or presentation of false, incorrect or incomplete statements or documents, resulting in the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union or on its behalf; non-disclosure of information in violation of a specific obligation, with the same effect; and the misappropriation of such funds or assets for purposes other than those for which they were originally granted.

These cases are (also) perfectly suited to fraud committed by agri-businesses in order to unlawfully obtain funds or to use them for purposes other than those for which they are granted. In cases where subsidies are directed towards the ecological transition, there may be a *file rouge* between food and financial frauds, as an effect of the link between agri-food activities and the environment, which may manifest itself in two types of relationship, one of instrumentality and one of occasionality. It is therefore necessary to outline these relationships and to verify whether they are given criminal relevance by the PIF Directive and/or by our penal system.

5. Financial fraud of the types described in art. 3 c. 2 (a) of the PIF Directive can occur in the agri-food sector in various situations, one of which is when someone – a natural person or legal person, sometimes a front man for organised crime – “exploiting” the EU policy of financial support for agri-food enterprises for the

⁷ Art. 3 dir. 2017/1371/UE requires Member States to take the necessary measures to ensure that, when committed intentionally, fraud affecting the EU's financial interests constitutes a criminal offence.

⁸ Art. 7 dir. 2017/1371/UE.

ecological transition, requests and obtains, for undue enrichment, funds to which he is not entitled, because he does not meet the mandatory regulatory requirements to benefit from them, but declares their existence by attaching false certifications or false documents; or, while meeting the requirements and legitimately obtaining subsidies, he uses them for purposes other than those for which they are granted.

By way of example, a company might obtain funds for the transition to environmentally friendly manufacturing processes that involve little CO₂ emissions or no crop rotation or no use of pesticides, polluting food additives or preservatives, or for the production of environmentally friendly foodstuffs that require little use of energy or water; and then it doesn't really allocate the received funds for these purposes.

In such a situation, the company needs to conceal the financial fraud, and one way it easily does this is through commercial food fraud⁹, which may consist of falsely declaring on the label that the product comes from environmentally sustainable agricultural processes or that it has an environmentally sustainable composition, and falsely advertising that origin or composition.

In cases of this kind, there is a “means to an end” relationship between food fraud and financial fraud, as the former constitutes the instrument to cover up the latter. This combination of frauds is particularly serious because it involves a plurality of offences against collective interests: the “end” financial fraud is against the EU's economic interests; the “instrumental” food fraud is against consumers' interests in fairness of information and food quality, as well as fair trade and competition.

The latter interest is offended insofar as the “criminal” enterprise that fraudulently obtains funds to produce in a “green” way or to make eco-sustainable products, but which in reality continues to carry out a polluting activity or to produce food with ingredients that do not come from eco-sustainable crops, incurs costs that are significantly lower than those of ‘virtuous’ enterprises that actually employ eco-sustainable techniques and processing or use substances with a low environmental impact in the preparation of food. As a result, the fraudulent company may charge lower prices than those prevailing on the market, undermining fair competition and fair trade.

⁹ There are two broad categories of food fraud: health fraud, which is dangerous or damaging (directly or indirectly) to human health; commercial fraud, which is detrimental to the interests of the broader economic sphere, which include the patrimonial interests of consumers and businesses, fair competition, fair trade, and fair information to both end buyers (i.e. consumers) and intermediate buyers in the food chain.

6. EU subsidies in the food sector, if they are not granted for ecological transition, but for other purposes, such as financial support in contingent situations of economic crisis, as the one generated first by the Covid-19 pandemic and then by the Russian-Ukrainian war, do not determine the need for criminal enterprises to conceal their unlawful obtaining or misappropriation through the commission of other frauds, in particular through commercial fraud.

Anyway those who commit a serious fraud, such as that against the EU's financial interests, highlight a criminal capacity that makes them more likely to commit other frauds as well. In particular, given that the undue receipt or misappropriation of funds obtained from the EU is carried out for profit, for the same purpose the agri-food activity could be carried out in violation of food safety rules, such as those concerning the correct production, hygiene, preservation, imposed by the EU and internal regulations, to ensure the release of healthy, genuine, intact and quality food. The aim of unlawful profit can, in fact, take on the nuanced form of cost savings in the enterprise, for example through the choice of ingredients of poor quality or in any case inferior to the typical components of the product, or through the failure of measures and systems aimed at ensuring the proper preservation and hygiene of food substances and environments, as well as the health of animals whose meat is intended for the production of food for humans, and the protection of plants intended for food use.

The company's cost-saving policy may also lead to structural and organizational deficits in food production control systems, which may result in negligent violations of food safety rules, such as food adulteration due to residues of forbidden chemicals or microbial loadings, as well as food deterioration, both due to lack of control by enterprise.

In these cases, the unlawful context represented by fraud against the financial interests of the EU is neither the end nor the means of food fraud, but it has a connection with the latter that is expressed in the possibility of encouraging the commission of food fraud, whether marked by a deceptive intention and the aim of profit or consisting of negligent non-compliance with food safety regulations. The relationship between financial fraud and food fraud can be defined in this sense as one of "occasionality", in the sense that the former constitutes the "environment" that favours the latter.

7. In our legal system, the three offences of financial fraud described in art. 3 c. 2 (a) of dir. 2017/1371/UE were already punishable. In particular, the first two (use or presentation of false, incorrect or incomplete statements or documents, resulting in the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the latter, or on its behalf; and no-disclosure of information in violation of a specific obligation, with the same effect) are provided for by art. 316-ter Cp (undue receipt of public funds), a crime introduced in 2000 in implementation of an earlier convention on the protection of the European Community's financial interests¹⁰, applicable unless the circumstances of aggravated fraud for the purpose of obtaining public funds pursuant to art. 540-bis Cp apply¹¹. The third EU offence (misappropriation of such funds or assets for purposes other than those for which they were originally granted) is covered by art. 316-bis Cp (misappropriation of public funds)¹².

Moreover, the offence of undue receipt of public funds, set forth in art. 316-ter Cp, did not comply with the Directive from a sanctioning standpoint, because c. 1 provided for a sentence of imprisonment from 6 months to 3 years. Therefore, d. lgs. 14.7.2020 n. 75, which implemented dir. 2017/1371/UE, reformed art. 316-ter Cp by adding in c. 1 the provision, as an exception to the aforementioned sentence framework, of a maximum of four years' imprisonment if the fraud involves a more than euro 100.000 damage or profit.

As far as food fraud is concerned, which may be instrumental in covering up the financial fraud of undue receipt or misappropriation of EU funds intended for the ecological transition of agri-food companies (commercial fraud detrimental to fair information and fair competition), our legal system punishes both possible forms described above.

Commercial food fraud consisting in false information on label is an administrative offence provided for in art. 3 of d. lgs. 15.12.2017 n. 231, containing the sanctioning discipline for the violation of the provisions of Reg. 1169/2011/UE, concerning the provision of food information to consumers. This section punishes by a fine from euro

¹⁰ Art. 316-ter Cp was introduced by l. 29.9.2000 n. 300 in implementation of the Convention on the Protection of the Financial Interests (PIF) of the European Communities of 26.7.1995.

¹¹ Misappropriation of public funds is a subsidiary offence to aggravated fraud for the purpose of obtaining public funds, by virtue of the specific reservation clause provided for therein («unless the act constitutes the offence provided for in art. 640-bis»).

¹² Art. 316-bis Cp was inserted by l. 26.4.1990 n. 86 and then supplemented by A-l. 7.2.1992 n. 181 with the addition of the reference to the European Communities as the grantor of contributions, subsidies or financing.

3.000 to euro 24.000 the violation of art. 7 of Reg. 1169/2011/UE that imposes fair information practices, i.e. information that does not mislead on a series of data including the composition of the product and the method of production. This administrative offence provides for the subsidiarity clause «unless the act constitutes an offence», but there is no criminal offence in our system that punishes fraud in labelling by the producer¹³.

Commercial food fraud consisting in false or misleading advertisement about sustainable food composition or origin from sustainable agriculture is also an administrative offence, provided for in art. 8 c. 9 of d. lgs. 2.8.2007 n. 145, implementing dir. 2005/29/CE about misleading advertisement, that punishes by a fine from euro 5.000 to euro 500.000, taking into account the seriousness and duration of the breach (false or misleading advertising message)¹⁴; moreover, the diffusion of misleading or false advertisement is prohibited, if it has not yet been brought to the public's attention, or the continuation, if it has already begun.

The nature of administrative offences, rather than criminal offences, of both food fraud by false labelling and by misleading/false advertisement for the purpose of concealing financial fraud in EU funds, prevents the application of the teleological aggravating circumstance referred to in the art. 61 n. 2 Cp, and in general the attribution of criminal relevance to the means-to-end relationship between commercial food fraud and financial fraud.

With regard to food fraud linked by an occasional or contextual relationship with financial fraud, which takes the form of non-compliance with food safety rules, our penal system provides for various offences known as health fraud. The most serious ones, consisting in handling food and beverages in a way that is dangerous to public health, are punishable, whether intentional or negligent, under art. 439, 440, 442 and 452 Cp.

Handling that is not concretely hazardous to health and conducts that don't comply with the rules of proper storage are punishable under the offences referred to in artt. 5, 6, 12 of l. 30.4.1962 n. 283 about the hygienic regulation of food and beverage.

Even though in cases of this type there is a concurrence of frauds of a criminal

¹³ Criminal Code only provides for commercial food fraud offences of the trader, such as fraud in the exercise of trade (art. 515 Cp), sale of non-genuine food substances as genuine (art. 516 Cp), sale of industrial products with mendacious signs (art. 517 Cp), putting into circulation of products with false or misleading indications of origin (art. 1 c. 49 l. 350/2003).

¹⁴ In the case of advertisements that may pose a danger to health or safety, as well as are likely to reach, directly or indirectly, minors or adolescents, the fine may not be less than euro 50.000.

nature, the absence of an instrumental relationship between them, since the financial fraud is not the end of the food fraud but constitutes its (illicit) context, the environment in which the latter is carried out, again the aforementioned aggravating circumstance set out in art. 61 n. 2 Cp, is not applicable to the offence of undue receipt or misappropriation of public funds and the offence of adulteration of foodstuffs or the offence of using adulterated, harmful or ill-preserved foodstuffs. Nor is there a special aggravating circumstance in our penal system for food fraud committed by a person who carries out agri-food activities having unlawfully obtained or misappropriated funds received from the EU, i.e. an aggravating circumstance of “occasionality” similar to that provided for in art. 576 n. 5 Cp, consisting in the death caused during the commission of certain serious crimes indicated therein, such as ill-treatment of family members or group rape.

8. The profile of the connection between financial fraud and food fraud, devoid of relevance in our legal system, assumes instead some relevance in the dir. 2017/1371/UE, even if not in a very evident way.

If, in fact, we do not stop at the provisions of the text, but also look at the premises that form an integral part of it, we can see that Whereas n. 31 obliges the Member States to punish with criminal sanctions also acts of fraud connected to fraud affecting the financial interests of the Union. «Acts of fraud related to fraud affecting financial interests» may include also those food frauds that are instrumental in justifying/covering financial fraud committed upstream.

It is true that, as we have just pointed out, our legal system punishes as a crime some food frauds connected to financial fraud (others as an administrative offence), but there is no provision for a form of criminal relevance, such as an aggravating circumstance, for the connection itself, although expressly taken into consideration by the Directive, just as there is no aggravating circumstance for financial frauds under art. 316-ter, 640-bis and 316-bis Cp when committed in the context of organized crime.

In a *de iure condendo* perspective, it would therefore be appropriate to introduce in our penal system, as well as in that of the other Member States, a special aggravating circumstance of connection (be it teleological or “occasional/contextual”) between the crimes of fraud against the financial interests of the EU and frauds of another kind, not necessarily of a criminal nature, thus including also food fraud, whether criminal or administrative offences.