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Repression and prevention of fraud on European agricultural funds.*

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Summary: 1. Introductory considerations. 2. Reasons and effects of fraud on European agricultural funds. 3. Critical aspects of the punitive system to combat agricultural fraud. 3.1. Next: the problem of convergence between administrative and criminal punitive offenses to combat agricultural fraud. 4. Prospects for reform of the regulation of European agricultural funds: between rationalization of the punitive system and strengthening of preventive control measures.

1. Introductory considerations.

My speech aims to highlight some critical issues of the Italian punitive apparatus to combat fraud on European agricultural funds and to highlight possible strategies for strengthening the contrast instruments.

2. Reasons and effects of fraud on European agricultural funds.

Before proceeding to illustrate some of the critical issues of the repressive apparatus to combat fraud on European agricultural funds, it is important to focus briefly on the criminological characteristics of the phenomenon of European agricultural fraud. From a quantitative point of view, the phenomenon of fraud on agricultural funds currently appears to be a widespread phenomenon on a large scale in Europe having reached particularly alarming dimensions, as also shown by the Special Report of the

EU Commission¹. Furthermore, we must consider how the phenomenon, characterized by a high risk of obscure figures, causes difficulties in identifying such fraudulent conduct.

In terms of forms of manifestation, it must be noted that fraud on European agricultural funds concerns the funds that the EU allocates for the implementation of European agricultural policies and is carried out through the falsification or alteration of the conditions envisaged for the disbursement of agricultural funds or through the violation of the conditionalities linked to the disbursement of the funds.

As regards the effects, the phenomenon of fraud on agricultural land affects assets of primary importance. Firstly, the financial interests of the EU are at stake, evidently damaged by the illicit hoarding by subjects who have no title. Secondly, agricultural fraud puts at risk the achievement of the objectives of European agricultural policies both in terms of the development of the agricultural economy and the social, environmental and labor policies to which these policies are today closely connected. Thirdly, fraud on EU agricultural funds negatively affects the correct functioning of the EU economic market given that the large quantities of illicit financing also obtained from organized crime are reinvested in the economic market, not only illicit but also licit, thus altering its correct functioning.

Coming to the causes of the large-scale spread of fraud on European agricultural funds, they appear to be multiple. First of all, consideration is given to the large quantity of resolutions coming from the EU intended for the implementation of community agricultural policies and the consequent interest of organized crime which sees fraud on EU funding as an opportunity to hoard significant quantities of economic resources to reinvest in legal and illegal activities. Secondly, characteristics of the regulation of European agricultural funds are taken into consideration from two different profiles. On the one hand, the more cumbersome and complex the national regulations, the more they risk encouraging the phenomenon of fraud. On the other hand, the regulation currently envisaged at the European level of the requirements for the granting of agricultural funds appears to favor/facilitate fraudulent behavior. In particular, reference is made to the EU regulation which links the granting of funds to the declared availability of a certain quantity of agricultural land and to compliance with conditionalities linked to the implementation of European agricultural policies regarding the development and conservation of agricultural land, the protection of livestock and social policies of agricultural work. This is a regulation that appears to make fraud easier than the previous one which anchored the right to EU funding to the achievement of certain production results (and not to the mere declared availability of

* Text in English of the outline of the intervention carried out (in Italian) at II virtual seminar European Agricultural Subsidy fraud patterns and complex schemes of cross-border agricultural frauds.

¹ The Commission Special Report: “The Commission's response to fraud in the common agricultural policy”, 2022, p. 17, in response to an audit by the Court of Auditors of the European Union on the 2019 financial year, available at the link: https://www.eca.europa.eu/it/publications/SR22_14.

agricultural land. Thirdly, the absence of a discipline aimed at shielding national paying agencies from criminal pollution/contiguity with fraudulent crime.

3. Critical aspects of the punitive system to combat agricultural fraud.

The Italian punitive system to combat agricultural fraud on EU funds is quite complex, being able to count on various criminal offenses and administrative penalties applicable to cases of fraud on European agricultural funds, and robust, given that consequences are linked to the commission of criminal and administrative offenses custodial sanctions or deprivation of personal liberty and pecuniary sanctions.

Coming to the critical issues of the Italian punitive system to combat fraud on EU funds, one is certainly represented by the stratification of offenses and the risks of overlap between different criminal offenses on the one hand and between criminal and administrative offenses on the other. The risks of overlap between punitive offenses appears problematic both in terms of the principles of criminal law and on the political-criminal side of the effectiveness of protection.

As regards the risks of overlap concerning criminal offenses against agricultural fraud on EU funds, first of all, the relationships between the crimes referred to in the art. 2 of the law 23 December 1986 n. 898 and art. 316 ter c.p. and secondly the relationships between the crime referred to in art. 316 ter c.p. and the much more serious one of aggravated fraud referred to in the art. 640 bis c.p..

As regards the relationships between the crime referred to in art. 2 of the law. 898/1986 and that referred to in art. 316 ter c.p. , the jurisprudence is not univocal: a) in some cases it has recognized the formal competition²; b) in others it has recognized the special relationship with consequent application only of the crime referred to in the art. 2 of the law. 898/1986; c) in more other cases it has recognized only the applicability of the crime referred to in the art. 316 ter c.p. without taking into consideration what is stated in the art. 2 of the l.cit³.

As regards the relationships between the crime referred to in art. 316 ter c.p. and 640 bis of the criminal code. the prevailing Italian jurisprudence (S.U. 2011) states that the case envisaged by the art. 316-ter would not be special compared to that provided for by art. 640-bis of the criminal code but rather in a relationship of subsidiarity in the sense that it punishes facts that do not fall within the sphere of application of the crime provided for by the art. 640-bis of the criminal code. And in fact, first of all, the conduct of omitting due information does not include the tricks or deceptions referred to in the art. 640 criminal code; secondly, the error of the provider body constitutes an essential element of the case of aggravated fraud against the State and a negative element of the case referred to in the art. 316-ter of the criminal code.

² Cass. pen., sez. VI 3 marzo 2022, 15620 in Dejure online.

³ Cass pen., sez. III, 15 maggio 2013, 42131.

However, this reconstruction of the relationships between the articles. 319 ter and 640 bis of the criminal code it does not appear satisfying either on the principle side or on the political-crime side. On the principle side, it must be said that the dividing line between the two crimes established by the jurisprudence is to evanescent as not to satisfy fully the principle of legality, leaving the judge with wide margins of discretion in the legal qualification of the fact. On the criminal political side, it should be noted that the evanescence of the distinctive criterion can also lead to weakening the level of effectiveness of criminal protection. And in fact, it should be noted that for the public prosecution the path of challenging the most serious crime referred to in the art. can be particularly risky. 640 bis c.p. for at least two procedural and substantive reasons. From a procedural point of view, it should be noted that if the crime referred to in art. is contested. 640 bis in relation to a case of fraud and the fact was subsequently classified as the least serious crime referred to in the art. 316 ter c.p. the proceedings carried out up to that point would be cancelled, as in our system it is foreseen that the crime referred to in art. 316 ter c.p. although less severely punished, it falls under the jurisdiction of the collegiate judge while the crime referred to in art. 640 bis c.p. it falls under the jurisdiction of the single judge. On the substantive side, to make the qualification of the fraud event as aggravated fraud pursuant to art. less attractive for the public prosecution. 640 bis c.p. it is also the fact that this rule constitutes, according to the orientation of the jurisprudence (Section Un. 2011), an aggravating circumstance and as such subject to the balancing regulation referred to in the art. 69 c.p.

3.1. Next: the problem of convergence between administrative and criminal punitive offenses to combat agricultural fraud.

Coming to the overlap between criminal and administrative offences, first of all the criminal offense referred to in art. 2 l. 898/1986 and the administrative punitive offense provided for by art. 3 of the l. cit. applicable in case of undue receipt of EU agricultural funds exceeding 5000 euros. In these cases, given that by express indication of the art. 3 of the law. cit. the principle of specialty provided for by the art. does not apply art. 9 of law 689/1981 which regulates administrative offenses will both be applied with consequent cumulation of criminal and administrative punitive sanctions for the same fact and duplication of criminal and administrative assessment procedures.

Well, the competition between the criminal and administrative punitive offense poses problems in terms of the principle of procedural and substantive ne bis in idem, now peacefully recognized by the jurisprudence of the European Court of Human Rights⁴. However, up to now Italian jurisprudence has always considered the competition between the two punitive cases to be legitimate on the basis of the fact that the administrative offense would not have a punitive character and would therefore be

⁴ Corte Europea Dir. Uomo 15 novembre 2016 A e B c. Norvegia.

exempt from the principle of *ne bis in idem*. The Constitutional Court rejected the question of constitutionality that had been raised, stating that in the case that had been submitted to it, the recipients of the criminal and administrative sanction were different⁵.

However, the problem of the violation of the procedural and substantive *ne bis in idem* principle affirmed by the European Courts seems rather evident, given that on closer inspection the administrative sanction provided for by the art. 3 of the law. cit. it does not seem to be recognized as compensatory but actually punitive in nature.

Furthermore, the problem intensifies further if we consider that art. 6 of the law. 42/2023 introduced a new administrative punitive offense applicable in cases of declaration of an agricultural area larger than that for which all the criteria and obligations relating to the conditions for granting aid are satisfied, which provides that in the event of a difference exceeding 50 % the loss of the right to payment and the payment of a sum calculated on the basis of the greater surface area declared. And in fact, this administrative punitive offense will also be applicable in the case of commission of the crime referred to in the art. 2 of the l. cit.

4. Prospects for reform of the regulation of European agricultural funds: between strengthening preventive control measures and rationalizing the punitive system.

In conclusion and coming to the prospects for reform of the regulatory apparatus to combat fraud on EU agricultural funds, it must be said that first of all it is necessary to intervene to rationalize the punitive system which is currently characterized by criminal rules that tend to overlap and avoid the risks of multiple sanctions. A solution could be represented by the inclusion of a single incriminating case linked to the extra-criminal disciplinary regime aimed at anticipating protection and punishing the mere presentation of documents with false data regardless of the actual achievement of public funding, on the model of § 264 of StGB. However, this solution could discount the risk of coming into tension with the principle of offensiveness to the extent that the anticipation of protection would produce an excessive rarefaction of the offensive content of the punishable facts. So perhaps a rationalization of the punitive system for European agricultural fraud could also be achieved by limiting itself to the elimination of the most ancient punitive rules.

In any case, it must be considered that on the criminal political side the capabilities of criminal law in combating fraud in EU agricultural funds should not be overestimated, as there is a real difference in scale between the criminal instrument and the phenomenological characteristics of frauds on funds EU agricultural products.

⁵ Corte cost. 24 gennaio 2018, ord. 54.

Therefore, it seems more satisfying to intervene especially on the prevention side of fraudulent phenomena. From this point of view, three interventions among the others can be carried out:

a) firstly, it is necessary to intervene on the regulation of access to European funds for agriculture, on the one hand, simplifying it and making it more accessible and transparent and on the other hand rethinking the regulation of the requirements for access to European financing currently anchored to declaration of availability of quantities of agricultural land and certain conditionalities.

b) secondly, it is necessary to intervene on the organization of the bodies responsible for the payments of EU funding by imposing homogeneous organizational models, aimed at avoiding the infiltration of crime, and control, capable of identifying the most recurring risks of fraud and activating the necessary preventive controls (prior to the disbursement of the funds).