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Demands of harmonisation of repressive measures with regard to food fraud related to financial fraud

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Concept of security in food sector

This concept evolved over time.

First **food security**, that means adequate food quantity;

then **food safety**, that is food quality in the sense of hygiene and genuineness;

up to new forms of security: 1) **environmental sustainability** of food; 2) **trade and financial loyalty** of food business operators.



Double relationship between agri-food chain and environment

A) **Agriculture** is one of the most **liable of environmental pollution** because it produces a large amount of CO₂ emissions and causes an over-exploitation of natural resources.

B) **Climate changes** caused by pollution have **negative effects on agriculture**, because lead to droughts, to spread of diseases and of parasites.

EU Green Deal



EU Green Deal is a plan with the goal of climate neutrality by 2050.

It provides funds for agriculture conversion to green by a series of measures, among which:

- **use of innovative environmentally sustainable agri-food production;**
- **production of environmentally friendly novel foods**

PAC constitutes one of the biggest costs for EU budget, especially for agricultural funds, granted through two EU funds: FEAGA and FEASR.



Financial food security

PAC 2023-27 imposes very stringent requirements for funds, and this carries risk to encourage frauds on EU agricultural funds.

Hence the need of food security in the sense of financial loyalty of agri-food operators.



Means-to-end relationship between food fraud and financial fraud

An agricultural enterprise, lawfully or unlawfully, obtains funds for transition to environmentally friendly processes (e.g. less polluting machineries, no use of pesticides) or to environmentally friendly food production, but it doesn't really allocate the funds this way and it goes on using pollutants in agriculture or in food production.

So enterprise needs to **conceal its financial fraud by indicating on the label false information**, such as components other than the real ones or that the product comes from environmentally friendly agriculture.



The repression in Italian penal system

For financial fraud:

- **misapplication** of public funds (EU funds included) (sec. 316-bis c.p.);
- **misappropriation** of public funds (EU funds included) **by use or presentation of false statements** or documents, or non-disclosure of due information (sec. 316-ter c.p.);
- **misappropriation** of public funds (EU funds included) **by other more serious act of fraud** (sec. 640-bis c.p.).



Continue repression in Italian penal system

For food fraud by false information on labeling:

Sec. 3 of Legislative Decree nr. 231/2017 (sanctioning discipline for the violation of the provisions of EU Reg. nr. 1169/2011) punishes, by a fine from 3.000 to 24.000 euro, the **violation of sec. 7 of EU Reg. nr. 1169/2011 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.**

No criminal offence is provided for this case.



Continue repression in Italian penal system

Labeling food fraud provided for in sec. 3 is an **administrative offence** and no criminal offence is provided anywhere.

So labeling food fraud, where aimed at concealing financial fraud, doesn't allow the application of the teleological aggravating circumstance referred to in the sec. 61 nr. 2 c.p. and in general **no criminal relevance** is attributed to **means-to-end relationship** between commercial food fraud and financial fraud.



Occasional relationship between food fraud and financial fraud

Where EU's funds are simply aimed at economically supporting agri-food activity, food enterprise **doesn't need to conceal its misappropriation or misapplication** by a labeling food fraud.

Because misappropriation of EU's funds is carried out for unlawful profit, it may be that agri-food activity is carried out for the same unlawful profit purpose by violation of food safety rules (correct production, hygiene, conservation rules) to guarantee the placing on the market of healthy, genuine and quality foods.



Continue occasional relationship

In enterprise **profit** can mean also **business cost saving** such as by use of ingredients of poor quality, or by failure of good practices for production, conservation, packaging of food.

Enterprise savings policy can result in lack of food production control systems, that can lead to negligent violations of food safety rules (e.g. residues of unlawful chemicals or forbidden microbial loadings).


This means that **unlawful context/“environment”** represented by financial fraud can facilitate/**encourage commission** of both **intentional and negligent food frauds** (negligent in the sense of violations of duty of care in agri-food activity).



Continue occasional relationship

Relationship between financial fraud and food fraud in this case **can be defined** as “**occasional**”, in the sense that the former constitutes the occasion, the “environment”, that facilitates the latter.

Repression in Italian penal system



Food fraud or adulteration by use of polluting components in food production (e.g. unlawful chemicals) is punishable in **sec. 5 of Food Hygiene Act n. 283/1962**, if there's **no public health risk**, by imprisonment not exceeding 1 year or a fine from 309 to 30.987 euro, both in case of intentional act and of negligent act (lack of control or violation of duty of care).

If there is **public health risk**, a more serious crime, **adulteration of food products**, punishable by imprisonment from 3 to 10 years, provided for in **sec. 440 c.p.**, is applied.




No teleological aggravating circumstance

In these cases fraud to financial EU's interests is **neither the end nor the means** of food fraud, **but** it's simply **the occasion** that facilitates the commission of intentional or negligent food fraud.

Lack of a teleological relationship **precludes the application** of the aggravating circumstance set out in **sec. 61 nr. 2 c.p.** in case of commission of both the offence of misappropriation/misapplication of public funds and the offence of adulteration of foodstuffs.

Continue



Moreover there is no aggravating circumstance for commission of food fraud in occasion of exercise of agri-food activity financed with misappropriated or misapplied EU's funds.

We mean an aggravating circumstance of “occasion” intended as similar to that one provided for murder in sec. 576 nr. 5 c.p., consisting in the death caused during the commission of some specific offences (ill-treatment against family members, rape and group rape etc.).



EU Directive 2017/1371 for protection of financial EU's interests

Sec. 3 obliges Member States to ensure that **fraud** affecting the Union's **financial interests** constitutes a **criminal offence** when committed intentionally.

It identifies four groups of financial fraud offences, all distinguished by three requirements:


- **intention** of the conduct;
- act of **deception**;
- aim of **profit**.

Continue EU Directive 2017/1371

First group of financial frauds, provided in sec. 3 subsec. 2 (a), includes 3 offences:

- **use or presentation of false, incorrect or incomplete statements or documents**, which has as its effect 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;
- **misapplication of such funds or assets** for purposes other than those for which they were originally granted.

Continue EU Directive 2017/1371



Sec. 7 obliges Member States to ensure that the criminal offences in sec. 3 are punishable by a **maximum penalty of imprisonment**; and this maximum penalty must be of **at least four years imprisonment when fraud involves more than 100.000 euro damage or advantage**. If damage or advantage is **less than 10.000 euro**, Member States may provide for **sanctions other than criminal sanctions**.

Sec. 8 obliges member States to provide for an **aggravating circumstance** where these criminal offences are **committed within a criminal organization**.

Sec. 6 requires the **possibility of legal person liability** for financial fraud offences, where these are committed by an **apical subject for legal person's benefit**.



Whereas nr. 31: acts of fraud-related

The most relevant Directive's provision, as it can apply to the **connection between financial fraud and food fraud**, is “whereas” nr. 31, that obliges Member States to provide for **criminal offences** not only in respect of the acts of fraud affecting the Union's financial interests to which the Directive applies, but **even in respect of acts of fraud-related criminal offences**.

Expression “**acts of fraud-related**”, referred to criminal offences affecting the Union's financial interests, **can include** also both **teleological and occasional relationship** between financial fraud and food fraud, so to get criminal relevance.



Comparison between EU Directive provisions and Italian penal system

All the financial fraud offences provided for in the Directive were already provided for in sec. 316-bis and 316-ter c.p.

Legal person (administrative) liability for fraud offences against EU's financial interests was already provided for in sec. 24 of legislative decree nr. 231/2001.

Differences:

- misappropriation of public funds by false statements (sec. 316-ter c.p.) was punishable in any case by the maximum penalty of three years; so legislative decree n. 75/2020, implementing the EU Directive, raised the maximum to four years' imprisonment in the case of advantage or damage exceeding 100.000 euro;
- no specific aggravating circumstance is provided for the case of commission of financial fraud offence within a criminal organization



Comparison and conclusion

No measure, such an aggravating circumstance, is provided to give relevance to acts of fraud-related offences. Neither legislative decree nr. 75/2020 introduced an aggravating circumstance, nor any subsequent Acts.

In a **de iure condendo perspective** it would be appropriate the **introduction** in Italian penal system, as well as in all Member States penal systems, of a specific **aggravating circumstance of connection between commission of fraud against the EU's financial interests and other fraud offences** (such as food fraud), so that teleological or occasional relationship can have finally criminal relevance.