

Section II: Criminal Law. Special Part

**XXth AIDP-IAPL International Congress of Penal Law
Criminal Justice and Corporate Business**

**Food Regulation and Criminal Justice
The Right to Food Fit for Human Consumption:
Harmful Foods and Food Fraud**

Questionnaire for National Reports

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I. General Questions on Food Regulation and Criminal Justice

- 1) What is the concept of food that is adopted in your criminal law? Especially, is it a broad concept that covers any substance that may be digested or is it a strict definition, limited to substances of nutritional value? Are cosmetic and tobacco products included in it?
- 2) Are administrative sanctions used together with criminal sanctions in this area? Which criteria are used to distinguish between them? Is the ne bis in idem principle applied?
- 3) Are civil or administrative remedies effectively utilised or is criminal law the prima ratio against food fraud?
- 4) Are the main criminal sanctions located into the Penal Code or are they situated in the food law, too? (please only a general overview, for more detailed questions see II. B 1 1 y II C. 3)
- 5) Is criminal liability of legal persons provided for in food fraud cases? What is the relationship between the liability of natural and legal persons, especially in cases of negligent conduct of the individual? Is it cumulative? Which liability is more important in practice?
- 6) Are there reform projects in this area? What are their principal aims?

II. Criminal Law Dimension of Food Regulation

- 1) Briefly describe the three most-important cases of food fraud that have affected the health of consumers over recent years.
- 2) What is the practical importance of these offences, especially offences designed to protect food safety? If there are any statistics on the number of annual convictions, please refer to them.
- 3) Does your legal system contain one or more (criminal) offence(s) that punish the hoarding of food in order to alter its value?
- 4) In your country, is it a (criminal) offence to manipulate the price in markets for derivatives based on food commodities?
- 5) In the case of destruction of a particular ethnic group or holding a part of the population hostage by provoking a famine or contaminating water resources, would the definition of genocide or crime against humanity apply?
- 6) Have (criminal) sanctions for crimes against intellectual or industrial property been applied to farmers in your country that have reused seeds from earlier harvests?
- 7) Does your (criminal) law provide an aggravating circumstance intended to sanction unfair administration or undue appropriation of humanitarian aid? Are courts in your country competent to

judge these behaviours if committed abroad or if they involve funds from an international organization?

A) Criminal liability for deaths and injury as a consequence of the production and commercialization of harmful foodstuffs.

1) How is the factual causation ("but for or condition sine qua non test") between the harmful foodstuffs and the deaths or injuries established?

2) How have circumstances in which poor health is only diagnosed after a lengthy period of time resolved?

3) Are negligent actions of the victim taken into account in deciding on the criminal liability of the manufacturer of a defective product? Is any case law available on this?

4) Does a refusal to withdraw products in case the products' harmful effects were unknown when offering them on the market lead to criminal liability for death or injury?

5) Is there a duty of due diligence obliging operators that form part of the distribution chain to verify the quality of food or those substances that are supplied from further down the supply chain? Or, does the principle of trust hold true, such that, unless there are evident indications to the contrary, they can trust that everybody "plays their role well"? In cases where there is a duty of due diligence, could its infringement give rise to liability on account of the harmful food, although the firm or operator may not have participated in its adulteration?

6) Is the fact of being in compliance with the legal norms relating to product safety a ground of exclusion of criminal liability for the commission of crimes of manslaughter or negligent bodily harm (for example, in cases in which the legal norms surrounding the products are clearly phased out)? Can the same be said of technical regulations (soft law)?

7) In cases where the manufacturer is aware of the health risks attached to food products, can he be sanctioned for an offence committed with criminal intent or for an offence that carries the same sentence as an offence committed with criminal intent? The manufacturer's awareness does not imply that he accepts or wants the harmful effects to manifest.

B) Other crimes against food safety.

B.1 Questions of legislative technique

1) Are offenses against food safety found in the Criminal Code or in special laws? Which criminal definitions exist for crimes against food safety?

2) Does one need to infringe upon food regulations in order to commit an offence against food safety?

3) Is it considered that the application of criminal norms to food safety law satisfies the expectations of legal certainty? Please briefly refer to any discussions on this topic among academics or policy makers.

4) What sort of criminal offences (violation, felony, misdemeanor...) constitute the most-important offences to sanction the production or marketing of fraudulent foods?

B.2 Description of behaviour and sanctions

1) Do definitions of offences against food safety distinguish between the different steps in the food production and distribution chain (production, distribution, transport, storage, presentation to the consumer, etc.)? Are there, in your judgment, important gaps: for example, the adulteration of a product as a consequence of not having used appropriate storage or means of transport is not sanctioned?

- 2) Are there specific criminal definitions that sanction the traffic of prohibited substances, because of the danger that they may enter the human food chain (pesticides, fattening substances, prohibited hormones, cattle feed, additives...), even though they have still not been used?
- 3) Is the non-withdrawal of harmful foods sanctioned, the harmfulness of which became known after it was made available to consumers?
- 4) Do the offences defined to protect food safety require some particular quality in the perpetrator? Are they special crimes or can anyone commit them?
- 5) Are there offences where a regime of objective liability is applied? In case subjective liability is necessary, what does it consist of?
- 6) Is there an offence of poisoning in which a person intentionally adulterates food or water supplies with the purpose of inflicting death or serious harm to the health of an indeterminate number of people?
- 7) Can legal persons be held criminally and/or civilly liable for these crimes? Is it the legal person, or the physical person, or both, who should be held liable for these crimes? Are legal persons liable for these crimes? Is it frequently only the legal person that is punished or the physical person or both?
- 8) In case the offence was committed by a subsidiary company, can the parent company be liable?
- 9) What are the most-frequent sanctions for this crimes? As well as prison sentences or fines, are other measures imposed such as closure of shops, injunctions etc..?
- 10) Is the participation of organized crime frequent in the production, distribution, transport, storage, etc. of harmful foods?

B.3 Principle of precaution and assessment of health risks

- 1) Does the application of criminal law always require recognition of an actual danger to consumer health or is the production and/or marketing of products sufficient in itself, which would (hypothetically), in the case of consumption, be harmful?
- 2) Does the severity of the sentences increase in the last link of the food chain that brings the product to the consumer or is it of greater relevance to those who have prepared, stored or trafficked harmful foods?
- 3) If a food (e.g. a novel food) needs authorization for its commercialization, would it be an offence to commercialize it without prior authorization? If yes, is this regulated in your criminal law or other law(s)? Please specify.
- 4) Does it constitute a criminal offence to market foods in breach of food regulations that enforce the principle of precaution, without demanding further confirmation of harmfulness in the criminal context?
- 5) How is the harmfulness of a product determined? Does it have to be harmful for consumers in general or is it enough for it to be harmful to a particular group (children, people with kidney disease...)?
- 6) Do sanctions apply to making food available to consumers that is unfit for human consumption, although not necessarily harmful?

C) Food fraud

- 1) Describe the three most-important cases in the past few years in which food has been sold in a fraudulent manner to consumers. Which cases are most frequently brought before the courts? What sanctions are usually applied? Please specify type of sanction and amount/length.
- 2) Does your legal system foresee offences other than fraud (which requires an effective loss of patrimony), which are intended to punish the commercialization of food that, because of its presentation, may be misleading with regard to its quality and quantity?

- 3) If so, are these offences described in the Penal Code or in special laws? What type of criminal offences (infractions, felonies, misdemeanours...) constitute the most- important offences that sanction the production or sale on the market of fraudulent foods? Describe the sentence foreseen for the offence or the main offences of misleading food advertising. On the sentencing grading in your country, do you consider that those crimes are of high, average, or low seriousness?
- 4) In cases where your national legal system foresees provisions to sanction misleading advertising or deceptive marketing of foods, what are the product characteristics to which deception can refer? Especially take into account if it can be linked to the following aspects:
 - Quantity and quality of the food (horse meat instead of beef)
 - Origin of the ingredients of the product
 - Denominations of origin. Does criminal law in your country protect the denominations of origin of other countries?
 - Nutritional values and effects (slimming products ...)
 - Natural or ecological nature (free of certain substances, waste products, free of GM foods)
 - Medicinal properties of the food
 - Food production that is respectful of basic working rights and other human rights (fair trade)
 - Other aspects.
- 5) Do the sanctions that are envisaged vary in accordance with the aspect of the food product at the centre of the deceptive marketing campaign? Is there a special definition or aggravating factor for those cases in which false or misleading marketing can affect consumer health?
- 6) Do these offences require that deceptive advertising of sufficient significance to mislead the consumer be demonstrated? How is the type of average consumer defined, at whom the misleading advertising is directed?
- 7) Who are the offenders in these crimes?

III. International Trafficking of Foods and Harmful Substances

- 1) Is it an offence in your country to market foods that are legally produced in other countries, but that contravene the legislation in force in your own country?
- 2) Is it legally acceptable to produce food in your country destined exclusively for export, with significantly lower levels of food safety than legally required at home, but which are legal in the country to which they will be exported?
- 3) Is it legally acceptable for legal persons –or their subsidiaries- to be able to produce or to distribute foods in other countries, with a notably lower food quality than legally required in the country where those legal persons have their headquarters?
- 4) Can hormones, herbicides or other substances that are illegal because they are harmful to health in your country be produced or exported to other countries where they may be acceptable?

IV. Prevention and Enforcement

- 1) What is the role of the food inspectorate in the prosecution of these offences? To what extent does the instigation of criminal proceedings depend on its active involvement?
- 2) Can consumer organizations participate in the criminal proceeding?
- 3) Is there an agency that specializes in investigating food fraud? What are its functions? What are its powers of investigation? Does it have the possibility of cooperating with similar (administrative) agencies from other states? What is the role of this agency once the criminal proceeding is underway?
- 4) Are there specialized police units, prosecution offices or tax inspectorates?