



Food Fraud and the Fraud Act 2006

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Chapter 4

Food Fraud and the Fraud Act 2006: complementarity and limitations

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Abstract

Food fraud has not been sufficiently addressed as a policy (or scientific) construct despite anecdotal concerns about the scope of the phenomenon, and the extent to which it undermines industry and consumer trust. The number of food fraud prosecutions remains negligible with authorities pursuing food-related offences for administrative breaches such as traceability and inappropriate record keeping rather than fraud offences. A recent consultation on whether the National Food Crime Unit (NFCU) should be given investigative powers has made clear the will of key stakeholders not only to provide more enforcement authority to the NFCU, but also to prosecute 'high profile' cases to deter business actors. However, food fraud prosecutions face substantial difficulties. First, food-related offences have been predominantly framed, at the European Union and the UK levels, as 'safety' concerns within the General Food Law and the Food Safety Act 1990, rather than as criminal, fraudulent behaviours. Second, those responsible for prosecution are consequently predisposed to regulatory, rather than criminal law, interventions, with corresponding enforcement powers geared towards strict liability offences, rather than towards the pursuit of dishonesty as criminal behaviour. We argue that the Fraud Act 2006, together with the common law offence of conspiracy to defraud, provide a broader conceptualisation of fraud that is not limited to financial gains and may include a diversity of motivations and criminals. This chapter addresses the question of whether reliance on the Fraud Act 2006 for food-related fraud offences would enable the successful prosecution of food fraud. This question gains significance if the NFCU is granted with investigative and enforcement powers. Whilst this chapter does not argue a departure from the General Food Law Regulation (EC) 178/2002 and the

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Food Safety Act 1990, it is our contention that the Fraud Act 2006 complements and better informs the understanding, investigation and prosecution of food fraud.

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4.1 Introduction

Food fraud has not been sufficiently addressed as a policy (or scientific) construct despite anecdotal concerns about the extent and scope of the phenomenon. Currently, there is no statutory definition of food fraud, either at the level of the European Union (EU), or within the United Kingdom (UK), and guidance for regulatory enforcement continues to be ambiguous, despite now differentiating between food fraud and food crime.⁴ Food fraud is not a new phenomenon; however, the focus on food fraud only took off after the horsemeat scandal shocked both the UK and the EU in 2013. Despite undermining the trust of both consumers and industry, the number of food fraud prosecutions remains negligible with authorities mostly pursuing food-related offences for administrative breaches, such as traceability, and inappropriate record keeping as opposed to fraud.

The horsemeat scandal is a case in point. Prosecutions following the scandal were related to breaches to traceability obligations under the General Food Law Regulation (EC) 178/2002,⁶ for which Peter Boddy was convicted and sentenced to a fine of £8000 for two counts for failing to comply with traceability requirements.⁷ Only four years later, Andronicos Sideras, Ulrich Nielsen and Alex Ostler-Beech were convicted for conspiracy to defraud under the common law for mixing horsemeat with beef and labelling the mixture as beef.⁸ More generally, the Food Standards Agency's ('FSA'), the regulator responsible for food safety in England, Wales and Northern Ireland, has begun to publicise prosecution data, which shows that from 2015 to 2016 there were circa 13 prosecutions related to food standards breaches under sections 14 and 15 of the Food Safety Act 1990, the remaining ones were related to hygiene and other offences, but none of them concerned food fraud under the Fraud Act 2006.⁹

The limited number of food fraud prosecutions, together with decisions to prosecute under the General Food Law or the Food Safety Act 1990, as opposed to the Fraud Act 2006 or the common law, raises questions about the potential limits and complementarity between the provisions in the General Food

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Law, the Food Safety Act 1990, the Fraud Act 2006 and common law. A recent consultation on whether the National Food Crime Unit ('NFCU') should be given enforcement powers has made clear the will of key stakeholders to provide more enforcement authority to the NFCU, as well as stakeholders' perception that fraudsters would be deterred if the NFCU prosecuted 'high profile' food fraud cases¹⁰; although there is currently no valid data to support the latter assertion. However, food fraud prosecutions face substantial challenges. First, the General Food Law and the Food Safety Act 1990 are both framed as a response to safety concerns after the bovine spongiform encephalopathy ('BSE') crisis, resulting in the conceptualisation of food fraud both at the UK and EU levels as administrative violations, rather than as criminal, fraudulent behaviours. Second, this has left those responsible for prosecution predisposed to responding to fraud offences within food supply networks through a regulatory rather than criminal law framework with corresponding enforcement powers geared towards strict liability offences, rather than the pursuit of dishonesty as criminal behaviour. There is no statutory offence of food fraud and this might present gaps and uncertainties for the prosecution of dishonest acts or omissions that, whilst potentially criminal in nature, do not constitute a safety issue. In this regard, the Fraud Act 2006 provides a broader conceptualisation of fraud that is not limited to financial gains and may include a diversity of motivations and criminals such as a broader definition of 'gain' and 'loss',¹¹ as well as offences related to the possession of,¹² or the involvement in making, adapting or supplying, articles for use in frauds.¹³ However, successful fraud prosecutions require a high level of evidence to prove beyond reasonable doubt the commission of a crime, which in turn creates notable obstacles to the authorities and leads to alternative means for concluding cases for pragmatic reasons.

This chapter addresses the question of whether reliance on the Fraud Act 2006 for food-related fraud offences provides a more suitable approach to prosecution, and sanctioning. Following the introduction, Section 4.2 explores the problems of the official conceptualisation of food fraud which restrict the motivations behind food frauds, preventing the identification of the offence of food fraud as distinct to regulatory breaches. Section 4.3 comprises three subsections exploring the limitations and

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complementarity between current food law and the Fraud Act 2006. Subsection 4.3.1 looks into the limitations of the General Food Law and the Food Safety Act 1990 to deal with food fraud, limitations arising from their regulatory focus on safety. In subsection 4.3.2, the chapter expounds on how the Fraud Act 2006 could fill-in the gaps in current food law. The complexity and fragmentation of law and regulatory enforcement are dealt with in subsection 4.3.3. Finally, Section 4.4 provides some concluding remarks. Rather than the dichotomy between General Food Law and the Fraud Act 2006, the chapter foregrounds the limitations, and therefore, complementarity of these statutory provisions. In so doing, we argue that the Fraud Act 2006 complements and better informs the understanding, investigation and prosecution of food fraud. The chapter contends that provisions for the successful prosecution of food fraud exist. Nevertheless, insofar as the concept of food fraud remains elusive and regulatory enforcement is fragmented, current provisions will fall short to successfully prosecute food fraud offences.

4.2 Food Fraud: the limitations of current official conceptualisations

The EU emphasises that despite the absence of a harmonised definition of food fraud, the EU Commission and Member States can take actions against 'fraudulent practices' in the food supply chain.¹⁴ As such, the EU commission has established that '[i]t is broadly accepted that food fraud covers cases where there is a violation of EU food law, which is committed intentionally to pursue an economic or financial gain through consumer deception'¹⁵ (though we might add that other communities can be deceived also eg trading partners). At the UK level, the NFCU, established by the FSA in 2014 following the recommendations of the *Elliot Review into the Integrity and Assurance of Food Supply Networks*,¹⁶ differentiates between food fraud and food crime. The NFCU states that whilst food fraud and food crime are usually used interchangeably, the conflation between the terms can affect our understanding of the 'range of threats we face to the safety and authenticity of UK food'.¹⁷ The NFCU

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has defined food fraud as '[a] dishonest act or omission, relating to the production or supply of food, which is intended for personal gain or to cause loss to another party', whereas food crime has been conceptualised as '[d]ishonesty relating to the production or supply of food, that is either complex or likely to be seriously detrimental to consumers, businesses or the overall public interest'.¹⁸ The Food Law Code of Practice,¹⁹ which comprises statutory guidelines for local authorities, clarifies that food crime is not a legal term. Food crime, it states, is '*serious dishonesty* which has a *detrimental impact on safety or the authenticity* of food, drink and animal feed,' adding that 'food crime can be thought of as a serious food fraud'.²⁰ According to the Food Law Code of Practice, the difference between food crime and food fraud depends on the scale and complexity of acts or omissions, where the commission of food crime would be potentially cross-regional, transnational or international in nature, as well as representing a 'significant risk to public safety' or a 'substantial financial loss to consumers or businesses'.²¹

The NFCU has certainly taken steps to elucidate the difference between food fraud and food crime. Noticeably, the NFCU's definition of food fraud is more broadly construed on the elements of the offence of fraud as established in the Fraud Act 2006, where dishonesty, and the intention 'to make a gain for himself [sic] or another, or to cause loss to another or to expose another to a risk of loss'²² are constituent of the offence of fraud, ie fraud by false representation,²³ by failing to disclose information²⁴ and by abuse of position.²⁵ However, the authorities pursuing investigations on potential food frauds would have to abide by the guidance on the Food Law Code of Practice, where the concept of food fraud remains elusive and the assessment of whether an act or omission is 'serious' enough to constitute a food crime depends on the safety implications and the financial loss that such acts or omissions cause to consumers or businesses. Elsewhere we have argued that the concept of food fraud is too prescriptive and therefore, it limits the scope of motivations and criminals that might be involved in food frauds²⁶, an argument that applies *mutatis mutandis* to the concept of food crime. Hence, we have advocated for the conceptualisation of food fraud:

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[A]s relating to the abuse of an otherwise legitimate business transaction and an otherwise legitimate social/economic relationship in the food system in which one or more actors undertakes acts or omissions of deception or dishonesty to avoid legally prescribed procedures (processes) with the intent to gain personal or organisational advantage or cause loss/harm (outcome).²⁷

This concept encompasses a diversity of actors and motivations that can be conducive to food frauds, for instance, frauds that are a one-off act to dispose of products resulting from a production error, acts taken on a more consistent basis to keep a business afloat when margins are tight, and acts to ensure social ties are maintained (eg with key trading partners) even if such actions represent a financial loss.²⁸ The limitations to prosecute food fraud may arise from the official concept provided in the Food Law Code of Practice to the extent that the authorities dealing with potential food frauds are unable to identify that food frauds are distinct to food law regulatory breaches, therefore dealing with food fraud as a subset of their safety and hygiene inspection powers. Enforcement authorities, for instance, might not prosecute conduct that under the Fraud Act 2006 would be conducive to an offence of fraud, where the evidence is insufficient to demonstrate the financial gains of the alleged offender or the financial loss caused to another, or where the food fraud is not detrimental to safety.

4.3 Food Fraud and the Fraud Act 2006: their limitations and complementarity

4.3.1 Dealing with Food Fraud under a Regulatory Framework

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In the absence of a statutory definition of food fraud, the General Food Law and the Food Safety Act 1990 continue to be the main laws to investigate actions or omissions that could be constitutive of food frauds. The General Food Law, which is the basis for food law and regulation in the EU and its Member States, and the Food Safety Act 1990, were enacted as a response to the BSE crisis in the 1990s.²⁹ The General Food Law establishes under Article 1(1) and 1(2) respectively that it 'provides a basis for the assurance of a high level of protection of human health and consumers' interests' ... 'lay[ing] down the general principles governing food and feed in general and food and feed safety in particular, at the [European] Community and national level'. The objective to protect human health in the Food Safety Act 1990 is reflected in section 7 comprising the offence to render food 'injurious to health'³⁰ and section 8 regarding the sale of food without complying with food safety obligations.³¹ Furthermore, the protection of consumers is covered under sections 14 and 15 of the Food Safety Act 1990. In this regard, section 14 concerns the sale of food that is not of 'the nature or substance or quality demanded',³² whilst under section 15, a person commits an offence when (s)he falsely describes food,³³ or misleads as regards 'the nature or substance or quality of the food'.³⁴

Arguably, selling food not of the quality or standard requested, falsely presenting food, or misleading as regards the quality or standard of food could be prosecuted as food fraud, if the elements of any of the three ways of committing the offence of fraud are proven – that is, intention, dishonesty and a gain, or causing loss to others or exposing others to risk of loss.³⁵ However, there seems to be a misconception that food fraud is captured under the General Food Law and the Food Safety Act 1990, particularly under sections 14 and 15 of the Food Safety Act 1990 protecting consumers' interest. Recent convictions for offences such as the substitution of beef for cheaper meats, the substitution for cheaper gins, and counterfeit alcohol were prosecuted under sections 14 and 15 of the Food Safety Act 1990. The penalties imposed for such offences were fines ranging from £2500 to £10000.³⁶ These convictions included Freeza Meats, a business operator involved in the horsemeat scandal, in which falsely describing burgers and selling burgers not of the quality requested were sanctioned with lenient fines.³⁷

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Hence, offences that could be constitutive of food fraud are more likely to be presented as regulatory non-compliance such as not following proper due diligence as opposed to criminal acts.³⁸

Indeed, Food Law ³⁹is ill-equipped to deal with food fraud prosecutions. The Food Safety Act 1990 comprises strict liability offences and was established to deal mainly with safety concerns. This is reflected on the sanctions which range from prohibition orders⁴⁰ and emergency control orders⁴¹ for the most serious breaches involving 'risk of injury to health', to fines and imprisonment. Breaches of section 14 of the Food Safety Act 1990, for instance, could be punishable with a fine of maximum £20,000 and/or imprisonment for a maximum time of 2 years (on indictment).⁴² Furthermore, Article 19 of the General Food Law imposes an obligation on business operators to recall products when there is reason to believe that such products might have a risk to health or do not comply with food safety requirements. Article 19 has led to diverse interpretations by Member States, for instance, Greece, the Netherlands and Portugal consider this provision to be applicable to respond to frauds such as the horsemeat fraud, whilst Ireland and Italy consider that a safety concern is required for a withdrawal to take place.⁴³ Van der Meulen argues that safety concerns entrenched on the General Food Law, along with the financial gain attributed to food frauds, does not seem conducive to a proper response to food fraud.⁴⁴ Certainly, food laws both at the EU and UK levels provide mechanisms to deal with hazards that are injurious to health and therefore present a safety concern – be they recalls, prohibition orders or emergency controls. However, the law is limited when dealing with food frauds despite the provisions in sections 14 and 15 of the Food Safety Act 1990. In addition to this, both the General Food Law and the Food Safety Act 1990 are foregrounded on the assumption that business operators are, and want to be compliant, an assumption that inhibits an understanding of a variety of motivations behind food frauds, as well as of the normalisation of behaviours in certain industries that lie between blurred lines of compliance and non-compliance.⁴⁵ The EU authorities' reliance on business operators to behave responsibly and according to the General Food Law was evidenced in the horsemeat scandal.⁴⁶ As the horsemeat scandal showed, business structures and complex supply chains enable the misuse and abuse

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of otherwise legitimate business structures for the commission of food fraud.⁴⁷ More significantly, following the horsemeat scandal, the policy discourse shifted towards a focus on *fraud* committed in food-related contexts but within a regulatory framework that does not provide a legal definition of 'food fraud'. This conflation has prevented an understanding that food frauds are not merely regulatory breaches. Rather, food frauds are food-related offences within the broader criminal offence of fraud, one which entails dishonesty and for which there is a statutory law, ie the Fraud Act 2006.

4.3.2 The Fraud Act 2006: filling a gap in food law

The General Food Law, and specifically the Food Safety Act 1990, provide a specialised regulatory framework for food inspections and/or investigations. However, the Fraud Act 2006 comprises a range of motivations and criminals that would enable the prosecution of, and a more *ad hoc* enforcement to, food fraud offences. The Fraud Act 2006 prescribes three ways of committing fraud: by false representation,⁴⁸ by failing to disclose information,⁴⁹ and by abuse of position.⁵⁰ In order to convict for fraud, three elements would have to be proven alongside the breach to food law, ie intention, dishonesty and the objective or purpose 'to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss'.⁵¹ The Fraud Act 2006 further expounds on the meaning of 'gain' and 'loss' in the context of sections 2 to 4. Both 'gain' and 'loss' are related to money or other property (inclusive of real estate or personal property either tangible or intangible) that can be either temporal or permanent.⁵² By 'gain' the Fraud Act 2006 comprises both keeping what one has and getting money or property that one does not have. Likewise, a 'loss' refers to 'not getting what one would get or by parting with what one has'.⁵³ In this regard, food fraud would not only entail a direct financial gain but might also include other indirect tangible benefits, such as generating future business contracts or connections, or less tangible benefits such as establishing or maintaining social ties. Previously, it was noticed that the NFCU's definitions for food fraud and food crime are more akin to the elements of

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fraud but are not legal statutory definitions. The Fraud Act 2006 would include, for example, acts or omissions in which a business operator commits a one-off fraud, even if this represents a loss for the company in order to maintain a contract with a supplier. The Fraud Act 2006 also comprises offences related to having possession or control of any article for use or in connection to the fraud,⁵⁴ or adapting, making or supplying articles used in the fraud.⁵⁵ Hence, individuals facilitating the commission of a fraud by adapting machinery or supplying foodstuffs (eg for diluting or mixing liquid foodstuffs) could also be prosecuted under the Fraud Act 2006. Moreover, the potential sanctions for a conviction of fraud range from 12 months imprisonment for a summary conviction and/or a fine, to a prison term of maximum 10 years and/or a fine. Convictions under the Fraud Act 2006 would enable the imposition of more stringent penalties that could act as a deterrent (general and specific) for the commission of food fraud, but only if potential or actual offenders perceive a high proportion of frauds are detected, or consider the likelihood of being caught to be high. However, the investigation, and potential prosecution, of food fraud under the Fraud Act 2006 would raise questions about the even-handedness of differentiating between offences that are categorised as regulatory breaches and those which constitute criminal acts, a distinction that could affect smaller businesses as opposed to big corporations.⁵⁶ Arguably, increasing training and resources could counter the problems of differential treatment as authorities would be better equipped to identify, and gather the necessary evidence, on food frauds. However, overcoming differential treatment is not straightforward when local authorities rely on businesses' private certification and auditing schemes,⁵⁷ and big corporations can get into partnerships with local authorities for advice through the Primary Authority System that protects businesses from enforcement actions from other authorities insofar as they follow the advice from their primary authority.⁵⁸ Thus, enforcement is not only a product of investigatory capacity and expertise, but can also be shaped by underlying political interests. However, in principle, the Fraud Act 2006 would generally complement the lack of a statutory provision for food fraud under current law and regulation.

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Indeed, the Food Law Code of Practice establishes that food crime would normally be prosecuted under the Fraud Act 2006, or as conspiracy to defraud under the common law, except for rare situations in which food crime would be prosecuted under food regulation or other appropriate legislation.⁵⁹ Thus, in order to prosecute for food fraud, the authorities would have to assess whether 1) the acts or omissions are constitutive of food fraud, although there is no clear definition in the guidelines; 2) the food fraud is serious enough to be prosecuted as a food crime; and, 3) the Fraud Act 2006 is the relevant statutory law to prosecute an alleged food crime. The prosecution of food frauds, as one offence within the broader scope of food crimes, would depend on the determination of seriousness. The guidelines establish that the subjective test for seriousness is one where the detriment to the general public, a food business or the UK food industry should be taken into account, as well as the geographic scope, scale, political sensitivities and media coverage.⁶⁰ According to the NFCU, the determination of seriousness does not necessarily entail a high threshold in order to prosecute food crime. However, in practice there seems to be a gap as the number of prosecutions remain minimum despite concerns in the increase in food frauds.⁶¹ Indeed, the decision to prosecute Andronicos Sideras, Ulrich Nielsen and Alex Ostler-Beech for food fraud offences related to the horsemeat scandal for conspiracy to defraud under the common law⁶², raises questions of whether, and if so why, the Fraud Act 2006 was not deemed appropriate for such prosecutions. The Attorney General's Guidelines to the Legal Profession establishes that those prosecuting ought to justify why statutory offences are inappropriate for the successful prosecution of a case, for instance when due to the diversity of offences and/or conspiracies, one single count could better reflect the nature of the criminal conduct.⁶³ The use of the common law offence of conspiracy to defraud would include, for example, offences where evidence for diverse types of criminality is needed, as well as those involving a number of jurisdictions, various types of victims or involving organised crime networks.⁶⁴

However, decisions to prosecute under the common law as opposed to the Fraud Act 2006 might be more related to an assessment of the rates of success under the latter, instead of the inadequacy of the

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former. So, even though guidelines exist as regard the prosecution of food crimes, there are a diversity of factors that may prevent a prosecution for food fraud under the Fraud Act 2006. Limitations arise not only from squeezing a criminal offence into a regulatory framework, but also from the concept itself and the subjectivity of the guidelines, which remain elusive as regards those frauds that are not serious enough to be prosecuted as food crimes. These limitations inhibit the ability of the authorities to identify, investigate and potentially pursue a prosecution for fraud. The creation of the NFCU might fill-in this gap providing intelligence and guidance when possible. However, as the NFCU has described, food crimes tend to be complex. Thus, enforcement authorities might not recognise a food fraud as part of their statutory obligations, for which they have been given powers (eg entry or search) that are designed for strict liability offences. For local authorities, we might infer that the Food Safety Act 1990, specifically sections 14 and 15, suffices to pursue potential fraud investigations. Moreover, authorities have to decide whether to investigate a food fraud, or not, based on a diversity of reasons ranging from the limited resources they have to the lack of expertise in food fraud investigations.

4.3.3 Food Fraud Prosecutions: complexity and fragmentation

In the UK, food law and regulatory enforcement are complex and fragmented. The FSA focuses exclusively on safety in England, Wales and Northern Ireland and the Department for Environment, Food and Rural Affairs ('DEFRA') is responsible for food composition and authenticity. However, DEFRA has delegated enforcement to the FSA, which in turn has delegated this to local authorities. The horsemeat scandal evidenced the fragmentation of regulatory enforcement, in which the need for coordination amongst diverse authorities, in addition to the inexperience of some authorities to deal with fraud investigations, was highlighted in the Elliot Review.⁶⁵ However, the NFCU, which was created to oversee food crime in the UK, lacks credible authority for the enforcement of laws and regulation. The NFCU depends on local authorities and police forces to conduct food fraud and food crime investigations. The convictions of Andronicos Sideras, Ulrich Nielsen and Alex Ostler-Beech for the conspiracy to defraud related to the horsemeat scandal are but one example. The FSA passed their

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investigating responsibility to the police force, City of London, when it 'became apparent the evidence was suggesting potential fraudulent criminal activity beyond that which the FSA or local authorities would be in a position to pursue.'⁶⁶ However, the investigation was funded by the FSA, costing more than £400,000 pounds.⁶⁷ The success of food fraud prosecutions therefore depends on capacity both in terms of resources and expertise from the local authorities and police forces to investigate food frauds. There may also be an element of cultural preferences within policing authorities as 'cops' are unlikely to view food fraud, particularly where it is complex and time-consuming to investigate, as being 'real' policing or a local priority. In any case, the stringent cuts faced by local authorities and police forces inform the decisions on whether to pursue an investigation on food fraud or food crime, which is only one of their priorities, one that has a 'relative low status' for police forces.⁶⁸

The NFCU reliance on local authorities and the police to conduct investigations leaves a gap in regulatory enforcement, at a time when local authorities have limited resources to comply with their statutory obligations to inspect registered food establishments. The Annual Report on UK Local Authority Food Law Enforcement acknowledges, for example, that increasingly food standards authorities follow an intelligence-led approach to the inspection of low risk category establishments, in addition to reporting that 21% of local authorities had more than 20% of their registered establishments waiting for their first inspection.⁶⁹ Hence, the prospect of local authorities engaging in fraud investigations in addition to their statutory obligations seems limited. Furthermore, the powers granted to the authorities have been designed to investigate strict liability offences, limiting their capacity to gather the sufficient evidence of guilty knowledge to prosecute for fraud under the Fraud Act 2006.⁷⁰ In any case, the hierarchy of enforcement established in the FSA's prosecution policy limits the number of cases brought to court, only pursuing those that have a realistic prospect of conviction, and are in the 'public interest'.⁷¹ One would assume that it would be in the public interest to prosecute food fraud as a means of increasing the consumers' trust both in the regulator and the food system. However, full enforcement of the law has long been recognised as idealistic, particularly given extensive police

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The absence of investigative capacity of the NFCU has led to the underuse of valuable intelligence, in which intelligence packages developed by the NFCU have not been taken forward by the police.⁷⁴ In this regard, the reduced number of prosecutions for food fraud, and the restraint to pursue food fraud prosecutions, particularly under the Fraud Act 2006, seems to be related not only to the limitations arising from Food Law itself, but also from the dependence of the NFCU on the police and local authorities, even when the FSA is the one generally funding food fraud investigations and the NFCU provides intelligence and guidance. In these terms, there is an internal incompatibility in the NFCU's base within the FSA, as the former seeks to foreground the fraudulent, criminal nature of dishonesty within the food system, while the latter seeks to regulate violations of administrative offences. In any case, there are blurred lines between food-related offences, food frauds and food crimes, making their separation artificial. However, a recent review of the NFCU recommended that it operates as an Arm's Length Body of the FSA in order to facilitate the engagement of the food industry and other stakeholders in the sector, as well as to transfer knowledge and experience in food crime into the FSA's thinking on food policy and regulatory enforcement.⁷⁵ So, food fraud and food crime, whilst being a subset of a broader offence of fraud, cannot be disconnected from their food roots as their prevention and enforcement relies on their complementarity.

4.4 Final Remarks

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In this chapter we argue that the Fraud Act 2006 can supplement current food law by filling-in the gaps produced by the absence of a statutory definition of food fraud, the incorporation of the criminal offence of food-related fraud within a regulatory framework, and the safety focus within the General Food Law and the Food Safety Act 1990. In this regard, the Fraud Act 2006 complements and better informs the understanding, investigation and prosecution of food fraud. Nevertheless, the chapter has identified a number of difficulties for the prosecution of food frauds that are not restricted to the limitations deriving from current food law. Firstly, there is a need to revise the conceptualisation of food fraud in order to encompass a variety of motivations and criminals that are excluded from official concepts that continue to emphasise safety concerns and financial gains or losses. Despite differentiating between food fraud and food crime, official conceptualisations, and interpretations thereof, still prescribe characteristics that do not facilitate the adequate investigation and prosecution of food frauds. Secondly, the assumption that business operators act responsibly, and are willing to act in accordance to the law, whilst valid, underestimates that legitimate business structures, complex supply chains and dysfunctional markets provide ready-made structures for the commission of food fraud.⁷⁶ Thirdly, the complexity and fragmentation of current food law, and particularly of regulatory enforcement, inhibit the adequate investigation and prosecution of food frauds. Since its inception, the NFCU has provided intelligence and guidance to local authorities as regard food fraud and food crime. However, the NFCU's dependence on local authorities and the police forces to take forward food fraud investigations puts to rest otherwise valuable intelligence. The NFCU's lack of investigative capacity as opposed to the Scottish Food Crime and Incidents Unit and other food agencies in the EU which do have them, places the NFCU at a disadvantage to pursue food fraud.

The number of food fraud and/or adulteration incidents reported from April 2016 to March 2017 is considerable.⁷⁷ During this period there were 91 cases related to adulteration and/or fraud.⁷⁸ The number of cases is restricted due to the narrow definition used by the NFCU by which incidents are not accounted as adulteration or fraud if there is limited evidence of the intention to deceive. So far,

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prosecution data for the same period is unavailable to determine the percentage of incidents that were successfully prosecuted for food fraud. However, numbers would most likely remain negligible. The problems in the prosecution of food fraud go beyond the existence of current regulatory offences under the General Food Law and the Food Safety Act 1990 (eg traceability) and the broader offence of fraud under the Fraud Act 2006. We contend that the provisions for the successful prosecution of food fraud exist. Despite their limitations and potential improvements, the General Food Law, the Food Safety Act 1990 and the Fraud Act 2006 complement each other. Nevertheless, insofar as steps are not taken to provide a clear and broader conceptualisation of food fraud, one which encompasses a variety of motivations and criminals, and regulatory enforcement remains fragmented, current provisions will most likely fall short for the successful prosecution of food fraud offences. Overall, a strategy to enforce food fraud will require a better understanding of the motivations behind, and the constitutive elements of, food fraud so that authorities are capable to identify, investigate and gather sufficient evidence to prosecute for food fraud. Only then, sentences will reflect the severity of the crimes.

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6 Hereinafter General Food Law.

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20 *ibid* (emphasis added).

21 *ibid*.

22 Fraud Act 2006 ss 2(1)(b)(i) and (ii); 3(b)(i) and (ii); and, 4(1)(c)(i) and (ii).

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27 *ibid*.

28 *ibid*.

29 For the history of Food Law, see C MacMaoláin . *Food Law European, Domestic and International Frameworks* (Hart Publishing 2015); J Phillips & M French. 'Adulteration and Food Law, 1899 -1939' (1998) 9(3), *Twentieth Century British History* 350-369.

30 Food Safety Act 1990 s 9 (a) adding any article or substance to food; s 7 (b) using any article or substance as ingredients in the preparation of food; s 7 (c) abstracting any constituent from food; and, s 7 (d) subjecting the food to any other process or treatment.

31 *ibid* s 8(2) food which is unsafe within the meaning of Article 14 of Regulation (EC) No 178/2002.

32 *ibid* s 14 (1).

33 *ibid* s 15 (1) (a) and s 15 (2) (a).

34 *Ibid* s 15 (1) (b) and s 15 (2) (b).

35 Fraud Act 2006 s 2 (fraud by false representation); s 3 (fraud by failing to disclose information); and, s 5 (fraud by abuse of position) .

36 FSA, Local Authority and Food Standards Agency Food Law Prosecution Outcomes 2015-2016 (n 9). Latest data is currently unavailable.

37 *ibid*. See: <http://www.bbc.co.uk/news/uk-northern-ireland-33317601>, accessed 3 April 2018.

38 N Lord, CJ Flores Elizondo, & J Spencer, 'The Dynamics of Food Fraud: the interactions between criminal opportunity and market (dys)functionality in legitimate business' (n 26) 611-612.

39 Food law is an overarching term referring to both EU and domestic legislation regarding safety and standards, i.e. the General Food Law and the Food Safety Act 1990.

40 Food Safety Act 1990 s 11.

41 *ibid* s 13.

42 *ibid* s 35.

43 B van der Meulen, 'Is Current EU food safety law geared up for fighting food fraud?' (2015) 10 *Journal of Consumer Protection and Food Safety* 19-23

44 *ibid*. For van der Meulen, food fraud should be dealt with financially.

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48 Fraud Act 2006 s 1(2)(a).

49 *ibid* s 1(2)(b).

50 *ibid* s 1(2)(c).

51 *ibid* ss 2, 3 and 4. It is worth noting that the Fraud Act 2006 is gender specific in relation to the commission of fraud.

52 *ibid* s 5.

53 *ibid*.

54 *Ibid* s 6.

55 *Ibid* s 7.

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