

An overview on the implementation of Regulation 1169/2011/EU in Italy: sanction models and check rules adopted

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1.- Introduction

This reports examines the provisions of Legislative Decree No 231 of 15 December 2017 and, in particular, the part regarding the national authorities responsible for controls and for imposing administrative monetary sanctions for violations of EU Regulation No 1169/2011 on the provision of food information to consumers. This legislative decree was issued by the Italian Government on the basis of the 2015 European delegation law (art. 5, paragraph 3, letter b). Pursuant to this delegation law, various delegated decrees have been issued and will be discussed below.

2.- Delegation Law No 170/2016

Art. 5 of Law No 170/2016 – the 2015 European delegation law – states in paragraph 3, letter b): *“Without prejudice to the types of offence in force, adapt the national sanctioning system for administrative violations of the provisions of (EU) Regulation no. 1169/2011 to the relevant implementing acts and national provisions, by identifying effective, dissuasive and proportionate sanctions for the seriousness of the violation, while delegating the competence to impose administrative sanctions to the State, in order to have a single reference framework of sanctions to*

allow uniform application at national level, with the identification, as the competent administrative authority, of the Department of Central Inspectorate for Fraud Repression and Quality Protection of Agri-Food Products (ICQRF) of the Ministry of Agricultural, Food and Forestry Policies (MIPAAF), while avoiding overlapping with other authorities, without prejudice to the competences due under the current regulations to the Italian Anti-trust Authority (AGCM), as well as those of the bodies responsible for checking for violations”¹.

From an analysis of the delegating legislative provision, the legislator's intention to delegate the responsibility for imposing administrative sanctions to the State emerges, as does the intention to identify a single central and competent administrative authority (ICQRF) to impose administrative monetary sanctions, while, however, leaving checking for violations to the responsibility of local bodies.

Firstly, with regard to this point, the delegating legislator assumed that with reference to foodstuff legislation, it should be applied the constitutional rule assigning competence to the State.

Art. 117 of the Italian Constitution, in the text amended by art. 3 of the Constitutional Law of 18 October 2001, No 3, provides that food is one of the subjects of concurrent legislation between State and Regions, and thus reserves only the definition of the basic principles to the legislation of the State. The most important innovation of art. 117 of the Constitution, is the reversal of the traditional criterion adopted when attributing this power: the institution to which the Constitution ordinarily assigns legislative power is now the Region, without prejudice to the matters attributed to the exclusive legislative power of the State and those falling under concurrent legislation².

Secondly, it can be seen that the will of the delegating legislator to avoid overlapping with other

(¹) Law 12 August 2016, n. 170 “Delegation to the Government for the transposition of European directives and the implementation of other acts of the European Union – European delegation law 2015”.

(²) See O. Forlenza and G. Terracciano, *L'attribuzione della potestà legislativa*, in “Regioni ed enti locali dopo la riforma costituzionale - un federalismo imperfetto”, Chapter III, Il Sole/24 Ore, 2002.

authorities is contradicted by the reserve in favour of the competence of the AGCM (the Italian Anti-trust Authority) and, above all, by maintaining the competence of those local bodies responsible for checking for violations. Therefore, the reserve in favour of the AGCM anti-trust authority, which safeguards competition and the market, based on Law No 287/1990³ which created that Authority, is understandable. The AGCM, by virtue of the powers conferred by the aforementioned law, intervenes with regard to the conduct of professionals⁴ who integrate unfair business practice⁵, to protect the damaged consumer (e.g.: misleading food labelling and misleading advertising) and establishes specific measures pursuant to art. 27, paragraph 1-bis of Legislative Decree No 206/2005, amongst which, the temporary suspension of unfair business practices and a ban on spreading unfair commercial practice or continuing, if such practice has already begun⁶. With the provision that bans unfair business practice the AGCM also provides for the application of an administrative monetary sanction, from € 5,000 up to € 5,000,000, considering the gravity and duration of the violation⁷. In the case of deceptive business practices, concerning products that could endanger the health and safety of consu-

mers or deceptive business practices that could directly, or even indirectly, threaten the safety of children and young people⁸, the sanction cannot be less than € 50,000.

On the other hand, maintaining the reserve in favour of those local bodies that are responsible for checking for violations, such as Municipalities, is difficult to apply in practice, when taking into account the regulations on administrative monetary sanctions established by Law No 689/1981 concerning "amendments to the penal system", with particular reference to Section II - articles 13 to 18 on procedures for application. This law foresees administrative monetary sanctions instead of penal fines⁹.

Moving on to examine articles 13 to 18 of Law No 689/1981, the most innovative provision is represented by art. 13¹⁰. The powers of those responsible for carrying out checks are identified, for the first time, in this article. The first paragraph refers to the bodies responsible for monitoring compliance with the provisions for which the administrative sanction is foreseen, so having a specific competence; whereas the fourth paragraph provides for checking for administrative offenses, a general competence of qualified subjects: judiciary police officers and agents¹¹.

⁽³⁾ Law No 287 of 10 October 1990, "Rules for the protection of competition and the market".

⁽⁴⁾ The definition of professional is specified at art.3, letter c) of Legislative Decree No 206/2005 "Consumer code, pursuant to article 7 of Law 29 July 2003, n. 229", as: "the natural or legal person acting in the course of his business, handicraft or professional activity or through an intermediary". The Legislative Decree n. 206/2005 has been modified and integrated with the Legislative Decree n. 221 of 23 October 2007, laying down corrective and supplementary provisions of the Legislative Decree of 6 September 2005 n. 206, pursuant to art. 7, of Law 29 July 2003, No 229.

⁽⁵⁾ Article 20, paragraph 2, of Legislative Decree No 206/2005 defines unfair business practice: "a practice contrary to professional diligence which is false or liable to distort the economic behaviour in appreciable extent, concerning the product of the average consumer to which it reaches or it is addressed or of the average member of a group where the unfair business practice is directed to a particular group of consumers. Based on the article 20, paragraph 4, of Legislative Decree No 206/2005 the following business practices are unfair: misleading practices as set out in the articles 21, 22 and 23; aggressive practices as set out in the articles 24, 25 and 26. The articles from 18 to 27 of the Legislative Decree 206/2005 have been modified by the Legislative Decree n. 146 of 2 August 2007 "Implementation of the Directive 2005/29/CE on the unfair business practices between business and consumers in the internal market".

⁽⁶⁾ Art. 27, paragraph 8 of Legislative Decree No 206/2005.

⁽⁷⁾ Art. 27, paragraph 9 of Legislative Decree No 206/2005.

⁽⁸⁾ Art. 21, paragraphs 3 and 4 of Legislative Decree No 206/2005.

⁽⁹⁾ Law n. 689/1981 of 24 November 1981 No 689, "Amendments to the penal system".

⁽¹⁰⁾ See Laws of decriminalization No 317 of 1967 and No 705 of 1976.

⁽¹¹⁾ On the articles 13 "Acts of assessment"; 14 "Opposition and notification"; 15 "Checks through the analysis of samples" and 16 "Reduced payment", 17 "Compulsory reporting" and 18 "Order-injunction" of Law 689/81, see the comment of Elena Riva Crugnola in *Commentario delle "modifiche al sistema penale" (Legge 24 novembre 1981 n. 689)* of Emilio Dolcini, Angelo Giarda, Francesco Mucciarelli, Carlo Enrico Paliero, Elena Riva Crugnola, Ipsosa, 1982.

3.- *Delegated legislative decrees and ministerial decrees*

Implementing the delegation law No 170/2016, the Government and the Ministries competent in matters of nutrition have established a series of decrees, in execution of EU Reg. No 1169/2011. First of all the *Legislative decree n. 231 of 15 December 2017 which establishes the discipline for sanctions for violating the provisions of (EU) Regulation No 1169/2011, concerning the supply of food information to consumers and the adequacy of national legislation to meet the requirements of (EU) Regulation No 1169/2011 and Directive 2011/91/EU, pursuant to art. 5 of law 12 August 2016 No 170 "the 2015 European delegation law"*.

Secondly the following delegated legislative decrees and ministerial decrees listed below:

a) *Inter-ministerial Decree MIPAAF/MISE of 9 December 2016 "Indication of the origin of the raw material for milk and dairy products on the label, in implementation of (EU) Regulation No 1169/2011, concerning the supply of information on food to consumers"*;

b) *Inter-ministerial Decree MIPAAF/MISE of 26 July 2017 "Labelling indicating the origin of durum wheat for durum wheat semolina pastas"*;

c) *Inter-ministerial Decree MIPAAF/MISE of 26 July 2017 "Labelling indicating the origin of rice"*;

d) *Legislative Decree No 27 of 7 February 2017 "Discipline on sanctions for violating the provisions of (EC) Regulation No 1924/2006 concerning nutritional and health information provided on food products"*;

e) *Legislative Decree No 145 of 15 September 2017 "Discipline on compulsory indication on labelling of the legal office and the address of the production unit or, if different, packaging plant, pursuant to article 5 of Law 12 August 2016, No 170 - the 2015 European delegation law"*;

f) *Ministerial decree of 16 November 2017 "Labelling indicating the origin of tomato"*.

The above mentioned Legislative Decree No 231/2017, which came into force on 9 May 2018, in the Final Provisions under Title IV provides for

a complex system of controls aimed at imposing administrative monetary sanctions, since these are violations relating to information requirements.

This Legislative Decree, adopted by the Presidency of the Council in conjunction with the Ministry of Economic Development (MISE), the Ministry of Agricultural, Food and Forestry Policies (MIPAAF) and the Ministry of Health, provides a single reference framework for sanctioning violation of food supply information to consumers and allows uniform application of sanctions on a national level. For this purpose, and in compliance with the aforementioned legislative delegation, the Department of Central Inspectorate for Fraud Repression and Quality Protection of Agri-Food Products and Foodstuffs (ICQRF) of the Ministry of Agricultural, Food and Forestry Policies (MIPAAF) is designated as the administrative authority responsible for imposing the administrative monetary sanctions provided for therein. These sanctions, concerning in particular the mandatory informations, are proportionate to the seriousness of the breach of the provisions foreseen by the EU Regulation on food information to consumers.

4.- *The administrative monetary sanctions adopted in our national law system*

The principal violations and the respective administrative monetary sanctions adopted in our national law system are regulated in title II "Penalty provisions referred to in the Regulation" of Legislative Decree No 231/2017.

The most relevant penalty provisions for violations of the EU Regulation No 1169/2011 are the following:

i) art. 3 of Legislative Decree No 231/2017 "Violation of loyal information practices pursuant to art. 7 of the EU Reg. No 1169/2011".

Art. 7 of the EU Reg. No 1169/2011 provides that: food information shall not be misleading:

a) as to the characteristics of the food and, in par-

ticular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production;

b) by attributing to the food effects or properties which it does not possess;

c) by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients;

d) by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient.

In this case the administrative monetary sanction ranging from a minimum of € 3.000,00 up to a maximum of € 24.000,00.

ii) art. 4 of Legislative Decree n. 231/2017 – “Violation of the disclosure obligations by the FBOs - *Food Business Operators* of the distribution chains (the FBOs of the chains) different from the FBO subject responsible for food information¹², that is the name indicated on the label of those who distribute food in the EU or the importer in the EU for extra-EU products.

Art. 4 n. 1 refers to article 8, paragraph 3 of the EU Reg. No 1169/2011, which foresees: the FBOs of the chain must not supply foodstuffs of which they know or presume to know the non-conformity with the articles 7 and 9 of the Regulation.

In this case the administrative monetary sanction ranging from a minimum of € 500,00 up to a maximum of € 4.000,00.

Art. 4 n. 2 concerns art. 8 paragraph 4 of the EU Reg. No 1169/2011 on the FBOs of the chain (also organized in groups) which modify the man-

datory indications referred to in art. 9 paragraph 1 of the Regulation.

In this case the administrative monetary sanction ranging from a minimum of € 2.000,00 up to a maximum of € 16.000,00.

Art. 4 n. 3 refers to art. 8 paragraph 6 of the EU Reg. No 1169/2011 on the FBOs of the chain that do not transfer information on non-prepacked food to the FBO of the chain that receives these foods.

In this case the administrative monetary sanction ranging from a minimum of € 1.000,00 up to a maximum of € 8.000,00.

Art. 4 n. 4 refers to art. 8, paragraph 7 of the EU Reg. No 1169/2011 on the FBOs of the chain that do not ensure the correctness of the compulsory indications pursuant to Articles 9 and 10 in relation to pre-packaged foods for the final consumer, but marketed at a stage prior to sale to the final consumer, as well as on prepacked foods intended to be supplied to the community to be prepared, processed, fractionated or cut.

In this case the administrative monetary sanction ranging from a minimum of € 1.000,00 up to a maximum of € 8.000,00.

iii) Art. 5 of Legislative Decree n. 231/2017- “Breach of the obligations relating to the affixing of the mandatory food information”.

Art. 5 n. 1 refers to the art. 9 paragraph 1, letter c) concerning the omission of the indications of the ingredients that contain substances that cause allergies listed in Annex II of the EU Reg. 1169/2011.

In this case the administrative monetary sanction ranging from a minimum of € 5.000,00 up to a maximum of € 40.000,00

The sanction does not apply to all the FBOs that have proceeded with the withdrawal and to inform the competent authorities before ascertaining the violation by the competent authority.

Art. 5 nn. 2 and 3 of Legislative Decree No

⁽¹²⁾ See article 8, paragraph 1 “Responsibilities” of EU Reg. No 1169/2011 and art. 9 “List of mandatory particulars”, paragraph 1 letter h) of EU Reg. No 1169/2011.

231/2017 refer to the art. 9, paragraph 1 excluding letter c), to the art. 10, paragraph 1¹³ and to the Annex III¹⁴: omission of the mandatory indications on the label and omission of the supplementary mandatory indications for specific types or categories of food referred to in Annex III.

The administrative monetary sanction foreseen ranging from a minimum of € 3.000,00 up to a maximum of € 24.000,00

iv) Art. 7 of Legislative Decree n. 231/2017 – “Distance selling (e-commerce)”, refers to art. 14 of EU Regulation No 1169/2011¹⁵ concerning the violation of the supply of mandatory food information¹⁶ in e-commerce.

The administrative monetary sanction foreseen ranging from a minimum of € 2.000,00 up to a maximum of € 16.000,00.

v) The art. 10 of Legislative Decree n. 231/2017 – “Violations concerning the requirements in the indication of allergens”, refers to the art. 2117 and to the Annex II “Substances or products that cause allergies or intolerances”: violations of the correctness of the modalities used to indicate the ingredients that contain substances that cause allergy.

The administrative monetary sanction foreseen ranging from a minimum of € 2.000,00 up to a maximum of € 16.000,00

vi) Art. 12.3 of Legislative Decree n. 231/2017 refers to art. 24 and Annex X of the EU Reg. 1169/2011 provides for the application of a very high monetary level of administrative sanction

when the food is sold for any reason or sold to the final consumer beyond its expiry date.

In fact the administrative monetary sanction foreseen, ranging from a minimum of € 5.000,00 up to a maximum of € 40.000,00.

vi) Art. 15 of Legislative Decree n. 231/2017 – “Violations concerning nutrition declaration” refers to the articles 30-35 and annexes XIII, XIV and XV. The articles 30-35 and annexes XIII²¹, XIV²² and XV²³ concern violations of the provisions relating to forms of expression and presentation of the nutritional declaration, with the exclusion of the following exceptions:

a) art. 30 “Content”, paragraph 5;

b) art. 33 “Expression by portion or unit of consumption”, paragraphs 2 and 3.

The administrative monetary sanction foreseen ranging from a minimum of € 2.000,00 up to a maximum of € 16.000,00

5.- Mutual recognition

It’s useful a mention of the mutual recognition clause foreseen by the article 25, title IV “Final dispositions” of the aforementioned Legislative Decree, in order to ensure the free circulation of packaged foods in EU, EEA.

Art. 25 provides that:

“Without prejudice to the application of the applicable European Union legislation, the provisions of Title III of this decree do not apply to food products legally manufactured or marketed in another EU Member State or in Turkey or to legal-

⁽¹³⁾ Art. 10 “Additional mandatory particulars for specific types or categories of foods” of EU Reg. No 1169/2011.

⁽¹⁴⁾ Annex III “Foods for which the labelling must include one or more additional particulars” of EU Reg. No 1169/2011.

⁽¹⁵⁾ Article 14 “Distance selling” of EU Reg. No 1169/2011.

⁽¹⁶⁾ See art. 9, par. 1 of EU Reg. No 1169/2011, with exclusion of letter f) TMC (Minimum Term of Durability).

⁽¹⁷⁾ Art. 21 “Labelling of certain substances or products causing allergies or intolerances” of EU Reg. No 1169/2011.

⁽¹⁸⁾ Art. 12 “Violations concerning the minimum conservation term, expiry date and freezing” of Legislative Decree n. 231/2017.

⁽¹⁹⁾ Art. 24 “Minimum durability date “use by” date and date of freezing” of EU Reg. No 1169/2011.

⁽²⁰⁾ Annex X “Date of minimum durability, “use by” date and date of freezing of EU Reg. No 1169/2011.

⁽²¹⁾ Annex XIII “Reference intakes” of EU Reg. No 1169/2011.

⁽²²⁾ Annex XIV “Conversion factors for the calculation of energy” of EU Reg. No 1169/2011.

⁽²³⁾ Annex XV “Expression and presentation of nutritional declaration” of EU Reg. No 1169/2011.

ly manufactured products in a Member State of the European Free Trade Association (EFTA), a contracting party to the Agreement on the European Economic Area (EEA), in accordance with the provisions of the regulation”.

The mutual recognition clause above mentioned allows free importation into Italy, based on the principle expressed by art. 38²⁴ of the Regulation, of packaged, non-prepacked food products and food products for final consumption, even if they do not comply with the national provisions of Title III of the aforementioned decree, but legally manufactured or marketed in another Member State or in Turkey or in a Member State belonging to the EEA.

6.- Procedures for ascertain the infringements and for imposing sanctions

In implementation of the legislative delegation, the AGCM and the local bodies (Regions, Municipalities, etc.), as far as their respective competences are concerned, check for violations and, therefore, could also carry out checks on Food Industry Operators, in obvious contrast, with the single activity of the ICQRF.

With regard to controls aimed at imposing administrative monetary sanctions, the art. 26 of the Legislative Decree n. 231/2017 – “Authorities responsible for imposing sanctions” provides that:

1. The Department of Central Inspectorate for the Protection of Quality and Fraud Repression of Agri-Food Products of the Ministry of Agricultural, Food and Forestry Policies is designated as the competent authority for the imposition of administrative pecuniary sanctions provided for in this decree.

2. Remain fixed the competences of the Antitrust Authority in accordance with Legislative Decree 2 August 2007, n. 145, and of the legislative decree 6 September 2005, n. 206, and those due, pursuant to current legislation, to the bodies respon-

sible for ascertaining the violations.

3. The parties that carry out control activities are required to maintain the confidentiality of information acquired in compliance with current legislation”.

In compliance with the legislative delegation pursuant to art. 5, paragraph 3, letter b) of Law 170/2016, the Department of Central Inspectorate for the Protection of Quality and Fraud Repression of Agri-Food Products (ICQRF) of the Ministry of Agricultural, Food and Forestry Policies (MIPAAF) is designated as the competent authority for the imposition of administrative monetary sanctions provided for by the aforementioned Legislative Decree.

The ICQRF is one of the major European agri-food control bodies. Its own skills at national level are the following:

- i) prevention and repression of fraud in the trade of food products and technical means of production for agriculture;

- ii) supervision of productions of registered quality (PDO, PGI and BIO);

- iii) contrasting the irregular commercialization of agri-food products introduced by Member States or Third Countries and the fraudulent phenomena that generate unfair competition between operators and sanctions for the proper functioning of inter-professional agreements.

- iv) At European and world level, the ICQRF is an ex officio authority and a coordinating authority on wine, defending quality Made in Italy in all European countries, fighting counterfeiting outside the EU borders also with cooperation agreements.

- v) Finally, the ICQRF carries out checks on the WEB for the protection of Italian quality productions by making agreements with the main global e-commerce players.

Analysis of art. 26 of Legislative Decree 231/2017 shows the presence of multiple Authorities with competences regarding monitoring and imposing sanctions: the ICQRF, the AGCM and the local

⁽²⁴⁾ Art. 38 “National measures” of EU Reg. No 1169/2011.

bodies, and the delegation law makes no specification about the criteria for sharing competence when checking for violations.

The interpretative difficulties are often tightened by the will of the delegating legislator to maintain the role of pre-eminence of the Italian Anti-trust Authority (AGCM) as the subject that exercise broad powers: a checking, monitoring and where necessary, inhibiting and sanctioning body, to safeguard the consumer against infringements committed by Food Sector Operators.

Actually, the function of the AGCM is to be the responsible body for safeguarding the loyalty of information supplied to consumers, especially with reference to violations of art. 3 of Legislative Decree No 231/2017 "Violation of fair information practices pursuant to art. 7 of EU Reg. No 1169/2011".

Finally, art. 27 of the Legislative Decree n. 231/2017 governs the procedures for imposing sanctions foreseeing that:

1. for the assessment of violations and the imposition of administrative sanctions provided for by this decree are applicable, the provisions contained in Chapter I, Sections I and II of the Law of 24 November 1981, n. 689.

2. The provisions of article 1, paragraphs 3 and 4 of the decree-law of 24 June 2014, n. 91, converted, with modifications, by the law 11 August 2014, n. 116 apply to the violations envisaged by the present decree.

3. When the violation is committed by companies with micro-company parameters, as per recommendation 2003/361/CE of 6 May 6, 2003, the administrative sanction is reduced to a third.

4. The sanctioning provisions of this decree do not apply to supplies to non-profit organizations, for the subsequent free transfer to poor people, of foods that present labelling irregularities not attributable to information on the expiry date or relating to substances or products that can cause allergies or intolerances.

5. The sanctioning provisions of this decree do not apply to the placing on the market of a food that is accompanied by an adequate written correction of the information that does not comply

with the provisions of this decree".

Examination of art. 27 reveals the following:

- the difficult practical application of Law 689/1981, considering the legal reserve in favour of the local bodies responsible for checking for violations;

- a measure is introduced to reduce the edictal sanction by up to one third in the event that the responsible party has the parameters of a micro-company. According to the Commission Recommendation of 6 May 2003 on the definition of micro, small and medium-sized enterprises and in particular to art. 2 of the Annex to the Recommendation "*The category of micro, small and medium-sized enterprise (SMEs) is made up of companies that employ less than 250 people and whose annual turnover does not exceed 43 million Euro*";

- The non-sanctionable nature of products supplied to non-profit organisation that distribute free food to the needy people is established, without prejudice to violations related to the expiration date and allergens.

7.- Summary Brainstorming

Based on the considerations above, in Italy we have different competent bodies responsible for checking for violations and imposing sanctions, with a negative impact for the controlled subjects (i.e. food industries) as well as a lack of coordination between the competent public bodies, especially the competence, foreseen by the aforementioned Legislative Decree of the Municipalities to ascertain the infringements of EU Reg. No 1169/2011.

I hope that the authority and the well-known professional experience of ICQRF could avoid this discrepancy.

ABSTRACT

The principal aim of the article is to show the con-

trast between the National Law (Legislative Decree No 231 of 15 December 2017) on sanction rules for the infringements to the disposals of (EU) Regulation No 1169/2011, on the provision of food information to consumers, and the compliance of National Law to disposals of the same (EU) Regulation No 1169/2011.

The article examines, in particular, the contradictions concerning matter of controls, assessment and imposition of administrative monetary sanctions coming from the European Delegation Law n. 170/2016 – art. 5, paragraph 3, letter b), by virtue of which the Delegate Decree No 231/2017, other Delegated Decrees and Ministerial Decrees have been issued.

Scopo principale dell'articolo è quello di evidenziare contrasti e conformità tra la disciplina nazionale sulle norme sanzionatorie per le violazioni alle disposizioni del Regolamento (UE) n. 1169/2011 (Decreto Legislativo n. 231 del 15 dicembre 2017), e le disposizioni di tale Regolamento.

L'articolo esamina, in particolare, le contraddizioni in materia di controlli, valutazione e irrogazione delle sanzioni amministrative pecuniarie derivanti dalla Legge di Delegazione Europea n. 170/2016 - art. 5, comma 3, lettera b), in virtù del quale sono stati emanati il Decreto Legislativo n. 231/2017, altri Decreti Legislativi e Decreti Ministeriali.