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## THE RISK OF THE UNCERTAINTY OF THE RULES AND THE CONSEQUENCES OF THEIR INFRINGEMENT

ABSTRACT. *The essay reproduces the report presented by the author at the IIAS (International Institute of Administrative Sciences) Conference held on 25-29 June 2018 in Tunis.*

*Since then, the topical importance of the legal certainty issue has become increasingly clear in the Italian scientific debate. The writings collected in the volume edited by F. Francario and M. A. Sandulli on “Principle of reasonableness of jurisdictional decisions and right to legal certainty” (Naples, 2018) offer a vivid proof of this. In the last year the problems highlighted in this essay have found further evidence in the Italian case-law as well as in the regulatory national framework. The umpteenth amendment to the Public Procurement Code (together with a draft law announcing the complete reform of the Code), which has, inter alia, provided for the abolition of some of the new controversial Italian National Anti-Corruption Authority regulatory powers, is emblematic. This last choice, although it constitutes a first step to overcome one of the weaknesses represented in the essay, in turn inevitably creates further uncertainties due to its still partial extent.*

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### **1. Introduction**

One of the main risk factors for a country’s economy is, in my opinion, the lack of security about the rules governing the correct exercise of public powers (administrative and judicial), which operators and investors have to deal with.

Whoever invests in a given territory or sector needs to trust in the system he/she has to deal with, without bearing the risk that public authorities might suddenly change

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the given conditions for exercising his/her economic activities or for obtaining (or, if already awarded, for keeping on obtaining) economic benefits. In the same way, if public authorities, after many years, state unpredictably that the same operators do not have the right titles to exercise their activities (because of the delay in the administrative controls or because of the adoption of a narrow interpretation of legislative provisions which are objectively ambiguous), after having attracted them with a fake *openness* and *simplification* of the rules, clearly trick investors.

In the enterprise perspective, always looking for profitable investments, stability on the qualifying titles and criteria to exercise a professional or economic activity or on the conditions that have to be met in order to enjoy the results of economic investment is a fundamental aspect. So, this topic is inevitably closely related to the uncertainty of the rules governing the correct exercise of public powers that very often offer, to those who have to face them, an illusionary *expectation* of impartiality and *predictability*.

In a very complex and unclear context, public administrations are more likely to make mistakes, and by doing so, to unfairly deny operators the necessary qualifications for exercising their activities or for the acquisition of goods and benefits, or, just as badly, to wrongfully choose their contracting parties, to find unfounded breach of rules, or to impose unfair and disproportionate sanctions. In the same way, because of the complexity of the framework, public authorities might also challenge or put into question qualifications and titles obtained years before, depriving operators of the source of income they have invested in and/or of the work they have already started.

If this last harmful issue inescapably brings operators and investors to turn away, it's even more worrying having regard to the titles (the so-called "consent by silence") that are considered implicitly formed due to the inertia kept by the public administrations on the requests (inertia encouraged by the public officials' concern to take responsibility for complex interpretative choices).

But, in this already alarming context, what is even more worrying is the ever-increasing number of activities that the Italian law allows to start on the basis of a start-up activity notification (in the past it was the so-called self-declaration: "*Dichiarazione*" or "*Denuncia di inizio di attività*," today replaced by "*Segnalazione di inizio di attività*"). As already mentioned, this notification risks to be considered unlawful after a long time, when administrations, with proper controls, find out that the (already started) activity

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did not satisfy all the requirements provided by the various and complex rules or because operators made involuntary mistakes or omissions when producing the notification.

Even if in the Italian legislature several rules were adopted, through continuous reforms, aiming at reducing the uncertainty of these titles allowing to struck them down only if strict conditions are met, unfortunately the same rules have been (and continue to be) subjected to conflicting interpretations, giving space to further uncertainties. The rules that should simplify and liberalize the exercise of economic activities turn out to be detrimental to operators, depriving them of an *ex ante* control over the lawfulness of the activity that they are about to start and making them unable to guarantee the validity and stability of their titles when contracting with banks or sponsors.

So, even though the Italian Administrative Procedure Act doesn't allow the public administrations to withdraw given authorizations or quash their own decisions when conferring economic benefits, eighteen months after the granting of such benefits, administrations and judges misuse the exception to this general rule (I'm referring to Article 21-*nonies*, paragraph 2-*bis*, of the Italian Law on Administrative Procedure, Law no. 241/1990, as amended by Law no. 124/2015) that allows public administrations to quash their own decisions if delivered on the basis of misrepresentations of the truth or false declarations as established by a final criminal judicial decision. According to their strict interpretation, the time limit to exercise powers provided by Article 21-*nonies* Law 241, cit. does not apply if there is a final conviction only in cases of false declarations, thus excluding the necessity of a conviction for the cases of misrepresentations of the truth or erroneous indication of the circumstances or of the legal status. As already noted, it is unfortunately and just inevitably due to the complexity and uncertainty of the legal and jurisprudential framework.

The issue is even more complicated for the self-declarations of conformity because, despite the explicit reference to the strict conditions of self-annulment (mentioned in Article 19, Law 241, cit.), interpreters always propose new reading keys, which can be both dangerous and helpful for operators. Since the mentioned provision was not amended or repealed by the last reform, some believe that the administrations could exercise an *ex post* control without any temporal limitation, in order to identify any erroneous indications of mandatory conditions to start the activity. So, Article 21, paragraph 1, of the same Law still provides that: "With the declaration or with the

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request referred to in Articles 19 and 20 the interested party must declare that he meets the conditions and the requisites required by law. In the event of false declarations or false certifications, the compliance of the activity and its effects to the law or the amnesty provided for in the articles themselves is not permitted and the declarant is subject to the sanction provided for in Article 483 of the Criminal Code, unless the fact constitutes more serious crime.” Others consider that Art. 21-*nonies* does not extend its scope of application to the exceptions referred to in the aforementioned par. 2-*bis*, because it makes reference only to the conditions for the ‘self-annulment.’

If we really believe (as I do) that the use of simplification tools and of mechanisms of “para-liberalization” of the economic activities (*e.g.*, the self-declaration) are fundamental steps for the development of the country as well as for ensuring compliance with the EU principles of free movement and free establishment set out in the Bolkestein Directive of 2006, this system then cannot expose operators trusting in these instruments to higher risks more than others who obtained explicit authorization or any other explicit administrative act.<sup>1</sup>

As already mentioned, the uncertainty of the regulatory framework is particularly serious when it involves interdictions or prohibitions and the consequences of their violation.

The risk of incurring in heavy administrative sanctions (pecuniary or interdictory) is nowadays even higher (due to the conditions of their application) than the risk of incurring in criminal sanctions. One need only think of the devastating effects of an interdiction to receive the already granted economic advantage or to contract with the public administrations due to (infringements of) rules with unspecific and unclear

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1 On this topic, see, M. A. SANDULLI, *Controlli sull'attività edilizia, sanzioni e poteri di autotutela*, at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); Id., *Poteri di autotutela della pubblica amministrazione e illeciti edilizi*, at [federalismi.it](http://federalismi.it), 2015, 14 and *Autotutela*, in *Treccani. Il Libro dell'anno del diritto*, Istituto dell'Enciclopedia Italiana Roma, 2016; R. CHIEPPA, *La (possibile) rilevanza costituzionale della semplificazione dell'azione amministrativa*, in *Giorn. dir. amm.*, 2009, p. 265; G. CORSO, *Perché la complicazione?*, in *Nuove autonomie*, n. 3-4, 2008, p. 325; F. MERUSI, *La semplificazione: problema legislativo o amministrativo?*, *ivi*, p. 335; P. LAZZARA, *La semplificazione dell'azione amministrativa ed il procedimento tra diritto interno e diritto comunitario*, *ivi*, 475; N. LONGOBARDI, *Attività economiche e semplificazione amministrativa. La Direttiva Bolkestein modello di semplificazione*, available at [www.amministrazioneincammino.it](http://www.amministrazioneincammino.it); A. NATALINI, *Le semplificazioni amministrative*, Il Mulino, Bologna, 2002.

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objectives or which are difficult to interpret (to the extent that they cause contrasts in the case-law). Likewise, think of the upsetting effects deriving from higher pecuniary sanctions imposed by the Competition Authority.

In a more general perspective, the lack of clarity of the regulatory framework and the extreme confusion of the legal formulas used (which no longer correspond to traditional categories and institutions, so that for example we often speak inappropriately of “void” or “revocation” to describe an “annulment” or of “exclusion from a tender” to describe an “expulsion” due to the impossibility of awarding the contract, etc.) do not allow to predict with a sufficient degree of reliability if an operator can actually be admitted to a public selection procedure or will actually be able to obtain the necessary qualifications in order to exercise an economic activity.

At the same time, this unpredictability reflects its effects on the “case-law,” which wrongly plays a “creative” role that is not its own. So, even if the administrative courts try to achieve clear interpretative orientations, unfortunately they offer extremely heterogeneous solutions, also because of the (inevitable) difficulty faced by the same courts to create “their own” principles resolving disputes certainly related to a specific case.

From another point of view, the uncertainty of the legal and judicial framework increases the number of actions before the Courts, since operators are interested in having a positive judgment or a verdict which, regardless of the outcome, makes the parties (the plaintiff or the defendant) non-responsible because of the decisions adopted.

The resources of the judicial system are however limited and the increase in litigation determines uncertainty and, therefore, general dissatisfaction. In fact, in order ‘to do justice,’ not only the dispute has to be resolved, but the parties and the general community must also understand the reasons underlying that decision and, possibly, accept them. Still, it is a result difficult to obtain if the decisions build upon brief and often inadequate reasons as well as on contradictory precedents.

We often read that the rule of law has been in crisis for a quite a long time and it must be considered outdated, but I believe that it is a value we absolutely cannot afford to lose. In the same way, the legislative “service” is crucial to a society, especially nowadays since it is absolutely necessary to restart the economy and to give predictability and certainty to those who, despite the difficulties, are investing time and resources in studies, work and goods.

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## 2. National Factors of Uncertainty

This is the reason why, for years (and I can say, sadly, for several decades),<sup>2</sup> I have reserved great attention, both with my writings and by organizing conferences and meetings,<sup>3</sup> to the legal certainty issue bearing in mind the following fundamental principle: only stable rules can guarantee the stability of the institutional and economic system.

Without legal certainty, as it is constantly stressed also at the European level, there can be no certainty of relationships, be they social, private, or public ones.<sup>4</sup>

I have already mentioned that in Italy this demand has, unfortunately, not yet been met.

This is mainly due to the political crisis and, at the same time, to the lacks and excesses of our legislative system that adopts too many poor quality rules that are even contradictory in several cases.

We are overloaded with reforms, which are repeatedly corrected and revised (with the technique of the delegated decrees for the “correction” of the original ones) and which, in turn, refer to secondary sources of administrative law (regulations) or to

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2 Among others, M. A. SANDULLI, *Brevi riflessioni su alcune recenti tendenze all'incertezza del diritto*, in *Rass. parlamentare*, 2003, p. 128; *La s.c.i.a. e le nuove regole sulle tariffe incentivanti per gli impianti di energia rinnovabile: due esempi di 'non sincerità' legislativa. Spunti per un forum*, in *federalismi.it*, 2011, p. 6; On this topic see also, F. FRANCIOSI, *Il diritto alla sicurezza giuridica: note in tema di certezza giuridica e giusto processo*, in *Garanzie degli interessi protetti e della legalità dell'azione amministrativa*, ES, Napoli, 2019, 3; M. TRIMARCHI, *Stabilità del provvedimento e certezze dei mercati*, in *Dir. amm.*, 2016, 321.

3 Reference is made here to all the conferences organized by our *Associazione dei professori di diritto amministrativo* (AIPDA), under my Presidency, and, in particular, the annual Conference of 2014 on *L'incertezza delle regole*, ES, Napoli, 2015; of 2015 on *Le Fonti del diritto amministrativo*, and of 2016 on *Antidoti alla cattiva amministrazione: una sfida per le riforme*. The presentations are available on the website of the Association: [www.diritto-amministrativo.org](http://www.diritto-amministrativo.org) and the several meetings organized on the topic, such as: *Le misure di prevenzione della cattiva amministrazione: le garanzie procedurali* (Scuola Universitaria Superiore of Pisa, 19 February 2016); *La riforma della Pubblica Amministrazione e i decreti di attuazione della Legge 124/2015 (Legge Madia)* (University of Milan, 26 February 2016); *Principi e regole dell'azione amministrativa: il principio di buona amministrazione e la riforma Madia* (Administrative Court of First Instance of the Lazio Region, 1 February 2016, Rome); *Cattiva amministrazione e responsabilità amministrativa* (University of Bergamo, 7 June 2016).

4 M. A. SANDULLI-F. APERIO BELLA, *Certezza delle regole e rapporto tra le Corti: il caso dei c.d. costi di sicurezza aziendali*, in S. TOSCHEI, *L'attività nomofilattica del Consiglio di Stato*, Roma, 2017; M. A. SANDULLI, *Profili soggettivi e oggettivi della giustizia amministrativa: il confronto*, at *federalismi.it*, 2017, 3; Id., *Principi e regole dell'azione amministrativa: riflessioni sul rapporto tra diritto scritto e realtà giurisprudenziale*, in *federalismi.it*, 2017, p. 23; L. TORCHIA, *Lontano dal giuridismo: incertezza, insicurezza, fiducia*, in *Giorn. dir. amm.*, 2017, p. 171 et seq.

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acts of regulation/interpretation which are difficult to classify (here I make reference to the “Guidelines” of the Italian National Anti-Corruption Authority). Lastly, the case-law gradually and sometimes deliberately refers to them not only for the interpretation, but also for the “creation” of rules that the proper sources are unable to provide.

The Council of State, exercising its advisory role on the legislative reforms, tried, but sadly without great success, to point out critical issues and asked for an amendment to the provisions considered unclear, unconstitutional or contrary to EU law.

As highlighted in the introduction, ambiguous and contradictory provisions are an evident risk especially in administrative law: if a public power directly affects one’s rights, it has to be bound by a clear and certain regulatory framework (i.e., the principle of legal certainty and the rule of law), or rather by legal rules of a substantive and procedural nature aimed at ensuring the impartiality of public action and the best balance between the different public and private interests at stake, allowing an effective and adequate control over their compliance.<sup>5</sup>

The rush to adopt quick reforms, being fully aware of their shortcomings and of the fact that they will be amended and corrected along the way, is a phenomenon which should be fought and discouraged.<sup>6</sup>

The problem is so evident that we are increasingly invited to acknowledge – and to accept – the inadequacy of the legislature and the (consequent) need to renounce the rules issued by the representative bodies in favor of flexible rules adopted by economic powers and independent Authorities.<sup>7</sup>

However, it is clear that legislative procedures offer more guarantees. Hence, their replacement with, for example, the so-called soft-law rules increases the risk of

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5 M. A. SANDULLI, *Il codice dell’azione amministrativa: il valore dei suoi principi e l’evoluzione delle sue regole*, in M. A. SANDULLI, *Codice dell’azione amministrativa*, Milano, 2017, 3-4, hereis field we assistprocedure.

6 M. A. SANDULLI, *Semplificazione, certezza del diritto e braccia legate*, in *giustamm.it*, 2005; Id., *La s.c.i.a., le nuove regole sulle tariffe incentivanti per gli impianti di energia rinnovabile: due esempi di “non sincerità” legislativa. Spunti per un forum*, in *federalismi.it*; Id., *Introduction to the AIPDA annual Conference 2014 on “L’incertezza delle regole”*, Naples, 3-4 October 2014, in *Annuario AIPDA*, 2014, Napoli, ES, 2015.

7 M. A. SANDULLI, “*Principi e regole dell’azione amministrativa: riflessioni sul rapporto tra diritto scritto e realtà giurisprudenziale*”, *supra*, note 5.

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uncertainty<sup>8</sup> (as it is repeatedly indicated in the reports and interventions presented at the 2015 AIPDA (Italian Association of Administrative Law Professors) annual Conference and in *Le Fonti del diritto amministrativo*).

It is clear that this is even more problematic if we consider its impact on sanctions. The gradual increase of the administrative sanctions requires even greater attention to the adoption of those rules whose infringement can be sanctioned by the competent authority.

The rule of law principle applied to sanctions, without distinction between the criminal and the administrative ones, and the application of the principle *nullum crimen, nulla poena sine a* (prior, clear and certain) *lege*, that European law (ECHR and EU) wants to extend also to the latter, precludes sanctions based on a technical rule or on a precedent, as well as on interpretative “guidelines” (that are sometimes also adopted afterwards).

Before I mentioned the ANAC guidelines. Our legislature, with the new 2016 Italian Public procurement Code, designed a system based on rules which are sometimes difficult to understand and apply, interpreted by “flexible” tools with a very much unclear nature.<sup>9</sup>

This an utterly serious problem, which contradicts the slogan that flexible rules

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8 Exempted from prior legitimacy checks, the ‘light’ regulations are more easily exposed to the risk of annulment, causing therefore new disputes and instability. Not to mention the risks related to their probable continuous review and the consequent problems in identifying the rules applicable to the procedures in progress, linked, *inter alia*, to the innovative or interpretative nature that the various parties will try to give to the new rules according to the respective interests and to the uncertainties due to the fact that their application can be subject to justified derogation. On the topic, *amplius*, M. A. SANDULLI, *Poteri dei giudici e poteri delle parti nei processi sull’attività amministrativa. Dall’unificazione al codice*, in *federalismi.it*, 2015, p. 18.

9 G. A. GIUFFRÈ, *Le ‘nuove’ dimensioni del regolamento. Il caso delle Linee guida ANAC*, at *federalismi.it*, 2017, p. 2; C. DEODATO, *Le linee guida dell’ANAC: una nuova fonte del diritto?*, at *Giustamm.it*, 2016, 4; F. CINTIOLI, *Il sindacato del giudice amministrativo sulle linee guida, sui pareri del c.d. precontenzioso e sulle raccomandazioni di Anac*, in *Dir. Proc. Amm.*, 2017, 2, p. 381 *et seq.*; G. MORBIDELLI, *Linee guida ANAC: comandi o consigli?*, in *Dir. Amm.*, 2016, 3, p. 273 *et seq.*; I. A. NICOTRA (edited by), *L’Autorità Nazionale Anticorruzione. Tra prevenzione e attività regolatoria*, Torino, Giappichelli, 2016. The extreme uncertainty on the rules comes also from the pending list of references for preliminary rulings referred to the European Court of Justice by the Italian Administrative Courts (four are linked to the new Contract Code: one is related to the 2006 Code and two concern public contracts’ review procedures) whose judgments could dramatically change the rules operators have already started to be familiar with.

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support the economic upturn: the reckless launch of and the participation in new tendering procedures are certainly not encouraged by such an unclear framework.<sup>10</sup>

The result is, as mentioned, that citizens or undertakings in this context are forced to seek rulings from the Courts, the same rulings that the legislator did not know how or did not want to adopt *ex ante*, with all the uncertainties deriving from an *ex post* measure adopted for a specific case.

The problems deriving from a contradictory, ambiguous and often incomplete regulatory framework are often tackled by strengthening the role of judicial interpretation.<sup>11</sup> This solution however, as already mentioned, inevitably creates further uncertainties and contradictions, because inherently linked to the fact that the rule regards a specific case that, without the proper limits, is at risk of arbitrariness or at least lacks “predictability.”

First of all, we find judicial interpretations which, although connected to the same subject and to the same rules, are very different and often contradictory. Hence, the system is destabilized, the administration and the operators cannot find the “security” they would need.

It is increasingly common that the Courts not only interpret, but also end up replacing the legislator, by directly creating “new laws” and/or by even rewriting the rules in those cases (though rare) in which the legislator expressed a seemingly clear *voluntas legis*.<sup>12</sup>

As noted on several occasions, examples of ‘creative’ jurisprudence are unfortunately frequently found in the field of public contracts,<sup>13</sup> as well as in those

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10 The problem of uncertainty of the regulatory framework on the subject of public contracts already characterised the old Code, as the author had pointed out in M. A. SANDULLI, *L'eterna incertezza della disciplina dei contratti pubblici: quale diritto per le stazioni appaltanti e quali prospettive per la competitività del Paese?*, at *federalismi.it*, 2008, p. 5; Id., *Contratti pubblici e (in)certezza del diritto fra ordinamento interno e novità comunitarie*, in *federalismi.it*, 2008, p. 7.

11 On the topic, see the already cited works at note 3.

12 On this issue see, M. A. SANDULLI, *Poteri dei giudici e poteri delle parti nei processi sull'attività amministrativa. Dall'unificazione al codice, supra*, note 9.

13 On this issue, see the case-law of the administrative Courts, stating: “Professional offenses taken into consideration in the list provided by Art. 80 paragraph 5 letter c) Legislative Decree 50/2016, for the purpose of ex-

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decisions of the competent administration ordering the annulment of the measures issued before the entry into force of Law no. 124 of 2015 (the so-called “Madia Law”). From 28 August 2015, the 18-month period – set by Art. 21-*nonies* of Law no. 241 of 1990 – starts, within which stability of the legal position has to be achieved.<sup>14</sup>

The issue becomes even more complicated if we consider that in this ‘creative’ context, from the perspective of the so-called “administration of results”, the Courts grant public administrations a dangerous “freedom” to act, on the assumption that the breach of rules aimed at protecting citizens and the general public interest is not to be considered so serious as to undermine the lawfulness of the final act.

Indeed, in a democratic constitutional framework that guarantees fundamental rights, it is possible and coherent to refer to an administration of results, if the aim is to achieve a clear framework of rules allowing a logic and not strictly formalistic interpretation. But it must not allow the administration to act beyond the rules which can easily lead to the exercise of “super-powers.”<sup>15</sup>

Evidently, a State based on the rule of law and on a Constitution that draws on the separation of powers and on the primacy of the rules adopted by institutions representing the people, cannot allow the Courts to play a fundamental regulatory role.<sup>16</sup>

Even though the Courts have surely been playing an important role in developing fundamental principles coherent with the constitutional framework and in

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cluding an economic operator from a tender, are purely exemplary and such as to entail exclusion based on presumption. However, the exclusion can also take place in all cases where the contracting authority is able to demonstrate with solid reasons that the economic operator has been guilty of serious professional offences, such as to make his integrity and reliability doubtful, even in case of a termination for non-compliance contested by the party by the judicially excluded.” C.g.a. 30 April 2018, n. 252; Cons. St., section V, 2 March 2018, n. 1299.

14 M. A. SANDULLI, *Principi e regole dell'azione amministrativa: riflessioni sul rapporto tra diritto scritto e realtà giurisprudenziale*, *supra*, note 5.

15 M. A. SANDULLI, *Semplificazione amministrativa e amministrazione di risultati*, in M. IMMORDINO - A. POLICE, *Principio di legalità e amministrazione di risultati*, Torino, 2004, 230; Id., Introduction to the conference on *Codificazione, semplificazione e qualità delle regole*, University of Roma Tre, 17-18 March 2005, at [www.giustamm.it](http://www.giustamm.it), 2005, p. 3.

16 M. A. SANDULLI, *Il ruolo del giudice amministrativo e i limiti al potere giurisprudenziale di interpretazione*, Presentation at the annual AIPDA Conference, Trento, 5-6 October 2012, in *Annuario AIPDA 2012*, Naples, ES, 2013; Id., *Effettività delle norme giuridiche nell'interpretazione giurisprudenziale e tutela del cittadino*. Presentation at the Conference on *L'attività nomofilattica delle Magistrature Superiori*, Rome, 21 June 2012, Palazzo Spada.

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compliance with the EU rules,<sup>17</sup> it is necessary to stress that the direct implementation by the Courts of the constitutional principles (general and indeterminate), inevitably leads to the uncertainty of the rules of social life and to the unpredictability of the consequences (positive and negative) of one's behavior.<sup>18</sup>

As already highlighted on previous occasions,<sup>19</sup> it is necessary to clearly distinguish the two roles of the legislator and of the judge. The first must set the rules for implementing constitutional principles; the latter must apply them by giving a correct, broad and constructive interpretation. However, the second one must never be confused with the creation of a "new law," which, although more technically correct and in general more reasonable, remains unrelated to the democratic principle and therefore unsuitable to guarantee security and social peace.

The judge must apply (and interpret) the law, but must not "construct" it. The risk of entrusting to the discretion of "few experts" a regulatory and innovative power that the Constitution reserves, in a general and abstract way, to the organs representing the "sovereign people" is too high to be accepted.<sup>20</sup>

If the lawmaker abdicates his own role, the judicial power is likely to result in the arbitrariness of individual judicial bodies, whose *regula iuris* is not subject to a control of constitutional legitimacy, reserved in our legal system to the sources of legislative status. Moreover, the case-law is not as public as the law, hence, economic and non-

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17 M. A. SANDULLI, *Il ruolo del giudice: le magistrature supreme, at federalismi.it*, 2007, p. 16.

18 On the role of the judge as one who 'makes order' in relation to the rules and does not 'create' them, see, A. PAJINO, *Nomofilachia e giustizia amministrativa*, in *Rass. For.*, 2014; G. SEVERINI, *La sicurezza giuridica e le nuove implicazioni della nomofilachia*, at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it), 2018; F. PATRONI GRIFFI, *Valore del precedente e nomofilachia*, at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it), 2017; Id., *La giustizia amministrativa tra presente e futuro*, *ivi*, 2019. On the limits of the judge to interpret the rules, see, M. A. SANDULLI, *Il ruolo del giudice amministrativo e i limiti al potere giurisprudenziale di interpretazione*, *supra*, note 17; Id., *Effettività delle norme giuridiche nell'interpretazione giurisprudenziale e tutela del cittadino*, *supra*, note 17.

19 M. A. SANDULLI, *Principi e regole dell'azione amministrativa*, *supra*, note 5.

20 A. TRAVI, *Eccesso di potere giurisdizionale e diniego di giurisdizione dei giudici speciali al vaglio delle Sezioni Unite della Cassazione* (Presentation at the seminar organized by the *Struttura di formazione decentrata della Corte di cassazione*, Rome, 21 September 2017), at [giustamm.it](http://giustamm.it), 2017, p. 11; F. FRANCIARIO, *Il sindacato della Cassazione sul rifiuto di giurisdizione*, in *Libro dell'anno del diritto*, Roma, Treccani, 2017; M. A. SANDULLI, *A proposito del sindacato della Corte di cassazione sulle decisioni dei giudici amministrativi*, at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it), 2017.

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economic operators cannot be considered liable if they are not aware of the most recent developments.<sup>21</sup>

Unfortunately, it is sufficient to have a brief look at the latest case-law reports or at the website of the administrative institution to perceive the extreme confusion that reigns over the procedural rules, affecting the right of defense, already significantly affected by the high costs, the strict time limits and the complexity of the drafting, notification and filing of the documents (in paper or electronic form). Since the adoption eight years ago of the Code of Administrative Process (Legislative Decree no. 104 of 2010), the Council of State in plenary session has adopted 50 decisions (out of a total of 137) on matters related to the procedure. Nineteen of which were adopted in the last three years and three just in 2018 (three other decisions are to be published).

### **3. Towards Possible Solutions?**

The above-mentioned and discussed issues confirm the validity of the concerns expressed at the beginning.

Operators and investors are evidently discouraged by the new limits on the guarantees of the fundamental values that are imposed in the name of the needs of the economy. It should be sufficient to recall the recent “spread subsidies” provisions which, by failing to comply with the legislative and contractual commitments undertaken with international economic operators, drastically reduce the subsidies that the State had legally and contractually recognized to producers of renewable energy with the purpose of attracting and encouraging them to invest in our Country. As a consequence, operators and investors are reluctant to trust a system which is ambiguous, uncertain, which affects the explicit, implicit or “self-certified” titles necessary to start activities and to invest resources, and which offers less and less judicial guarantees. Therefore, they inevitably move away from Italy, looking for different outlets for their entrepreneurial investments and their financial resources.<sup>22</sup>

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21 M. A. SANDULLI, *Principio di legalità e effettività della tutela: spunti di riflessione alla luce del magistero scientifico di Aldo M. Sandulli*, in *Diritto e società*, 2015, 4, p. 649.

22 The trust of the investors, necessary to promote growth in the Country, needs a system which is predictable, trustworthy and provides effective protection. On this issue, see, M. A. SANDULLI, *Poteri dei giudici e poteri delle*

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In conclusion, the general public interest in the stability of the rules and the trust of citizens and economic operators in the loyalty of the institutions, on which legal certainty and in more general terms legal *security* draw, are nowadays of the utmost importance. The trust of those who, at different levels, internal and international, central and local (political, professional, bureaucratic, etc.) work for the Public Administration and manage public services is indeed a necessary element of democracy and an essential condition for carrying out any kind of activity or intervention. The sacrifice of the values of security and democracy is however all the more serious if we consider that the values of correctness and reasonableness when regulating legal relations (in whose name some part of the case-law justifies a “creative” interpretation of the law, beyond the text and the *rationale* behind it) are nowadays repeatedly and declaredly sacrificed to the primary needs of the economy, in the name of the need to promote growth in the country.

It is neither sensible nor fair that, on the one hand, the legislator (generally endorsed by the Constitutional Court) imposes new limits on the protection of fundamental rights (health, environment, justice, good administration) in the name of the needs of the economy; and, on the other hand, that judges allow public authorities to extend *ad libitum* the scope and time limits of public controls, prohibitions and sanctions. In this way they deny the very few guarantees that, because of the serious insecurity created in the economic sector by the uncertainty of the regulatory framework and the inefficiencies of the Administration, the legislator sometimes tries to offer citizens and operators who are increasingly held responsible for the assessments and evaluations that public authorities should carry out and for which they pay very high taxes.

Contrary to what some recent case-law seems to suggest, it is therefore necessary to foster a coherent system, based on the rule of law and on constitutional values.

To this purpose, it must be borne in mind, on the one hand, that legal certainty is strictly linked to the effectiveness of the rules, which requires an adequate protection (either administrative and judicial). This is consistent with a principle provided by Di-

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*parti nei processi sull'attività amministrativa, supra*, note 9; G. NAPOLITANO, *Diritto amministrativo e processo economico*, in *Dir. amm.*, 2014, p. 695 *et seq.* and M. DI BENEDETTO, *Diritto amministrativo e crescita economica*, in *Il diritto dell'economia*, 2014, p. 189 *et seq.*; S. ROSE ACKERMAN, *Economics of Administrative Law*, Cheltenham, Edward Elgar, 2007.

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rective 2007/66/CE stating that, in order to guarantee effective compliance, acts and behaviors in breach of the rules must not produce their effects. On the other hand, in order to promote trust in the system between investors, it is also necessary to foster a more efficient and healthier administration<sup>23</sup> whereas it is clear that by limiting *ex ante* controls and by raising obstacles to the access to judicial protection, corruption and maladministration are bound to increase despite the numerous adopted provisions aimed at fighting them (which are however *ex post* remedies and not *ex ante* measures).

Evidently, these considerations are linked to values that are or should be a common heritage and which are independent from any ideological and political beliefs, and so, under this perspective, they are presented at this international conference.

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23 M. A. SANDULLI, *Poteri dei giudici e poteri delle parti nei processi sull'attività amministrativa*, *supra*, note 9.

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