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Participation and Transparency in Food Law

Coordinatore:

Chiar.mo Prof. Marco Spiga

Tutor:

Chiar.ma Prof.ssa Monica Cocconi

Dottoranda:

Maria Sole Porpora

*To all those who put some of their time,
mind or hearth in this work.*

PARTICIPATION AND TRANSPARENCY IN FOOD LAW

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*“A distance always remains between real equality
and the results of identification.
The will of the people is of course always identical
with the will of the people,
whether a decision comes from the yes or no
of millions of voting papers,
or from a single individual who has the will of the people even without a ballot,
or from the people acclaiming in some way.
Everything depends on how the will of the people is formed.”*

(C. Schmitt, The crisis of Parliamentary Democracy, 1923)

INTRODUCTION

This work revolves around three main, connected topics.

The first one deals with the multiplication of the levels of governance. The study of legal institutions is based on a fundamental premise: the existence of sovereign States wielding their power on people who reside in a given, limited territory¹. However, if no man's an island², neither are the States. International disputes arise because Countries' decisions can have an impact on territories where they have no jurisdiction³; moreover, States are not the only actors exercising power at international level. There is a considerable number of heterogeneous organisms⁴ that issue rules on national legal orders. The phenomenon – acknowledged as the

¹ For a theorization on the Sovereign States, see, for instance, A. Barbera, C. Fusaro, *Corso di diritto pubblico*, Il Mulino, Bologna, 2001, p. 47 ff and M.S. Giannini, *Le relazioni tra gli elementi degli ordinamenti giuridici*, in *Rivista trimestrale di diritto pubblico*, n. 4, 199.

² The expression is a quote from poet John Donne's *Devotions upon emergent occasions and seuerall steps in my sicknes* - Meditation XVII, 1624 suggesting that human beings do not thrive when isolated from others.

³ This process does not only regard regulatory authorities, but, as a consequence, even Courts. For instance, the European Union laws on animal welfare impose some obligations on farmers to prevent abuse and cruel treatment on livestock. However, some investigations have pointed out that when animals are exported abroad, they are subject to unfair treatments while still conscious; therefore, a problem arises for what regards the scope of these rules outside the Union borders. On this matter, the Court of Justice of the European Union (CJEU) has recently pointed out that “in case of a long journey of animals with destination in a third country, the organiser of the journey must submit to the competent authorities of the place of departure a realistic journey log which indicates that the provisions of the EU Regulation on the protection of animals during transport will be complied with”, including in the stages of the journey taking place outside the EU (Case C-424/13 *Zuchtvieh-Export*).

⁴ According to which criteria are used to identify international organizations, their number can vary considerably, nonetheless they are more numerous than States. See S. Cassese, *Il diritto amministrativo globale: una sua introduzione*, in *Riv. trim. dir. pubbl.*, 2005, n. 2, p. 337 and S. Battini, *Organizzazioni internazionali e soggetti privati: verso un diritto amministrativo globale?*, in *Riv. trim. dir. pubbl.*, 2005, n. 2, p. 359 ff.

emergence of a global administrative law- has been deeply studied by scholars⁵, who identify the overlapping of rules and regulators, as well as the lack of their accountability⁶, as the main effects of this transformation.

A pyramidal system, with the State at the top and the minor powers at the bottom, usually allows a clear and stable normative hierarchy. On the contrary, in net-shaped legal orders⁷, like those created by supranational and global regulators, the relationship between the different sources of law is more complicated. In this area, powers are not ordered hierarchically, but competences are shared among several regulators, whose acts and strength vary consistently. Moreover, even private stakeholders contribute in setting standards, obligations and other kind of rules⁸. Therefore, the same sector is usually regulated by a complicated jigsaw of norms -

⁵ See, for instance, S. Cassese, *Lo Spazio giuridico globale*, Roma-Bari, Laterza, 2003; B. Kingsbury, N. Krisch, R.B. Stewart, *The emergence of Global Administrative Law*, in *Law and contemporary problems*, 68, 3-4, 2005, p. 15 ff.; R.B. Stewart, *Il diritto amministrativo globale*, in *Riv. trim. dir. pubbl.*, 2005, n. 3, p. 633 ff and J.-B. Auby, *La globalisation, le droit, l'Etat*, Paris, Montchrestien, 2003.

⁶ See A. Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, Government and Opposition, 2004 discussing the problem of global regulatory networks activity and of their lack of accountability. See also S. Cassese, *L'ordine giuridico globale*, in «*L'impatto delle riforme amministrative*», Quaderni del MIPA, Roma, Formez, 2004, pp. 211-213. For a definition of the concept of accountability, see A. Buchanan and R. O. Keohane, *The Legitimacy Of Global Governance Institutions*, in *Ethics & International Affairs*, 2006, 20, 4, 405-437.

⁷ On global networks, see A. Aviram, *Regulation by Networks*, in *Brigham Young University Law Review*, 2003, p. 1179 and A. M. Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, in *Michigan Journal of International Trade*, 2003, n. 24, p. 1059 ff.

⁸ This body of rules is usually addressed as “self-regulation” or “voluntary standards”, which, when related to the regulation of the food sector, fall under the broad definition of “private food law”. See B. Van der Meulen (ed. by), *Private food law. Governing food chains through contract law, self-regulation, private standards audit and certification schemes*, Wageningen academic publishers, 2011. See also N. Rangone, *Declinazioni e implicazioni dell'autoregolazione: alla ricerca della giusta misura tra autonomia privata e pubblico potere*, in *Rivista di diritto alimentare*, V, 4, 2011, p. 1-13 and A. Benedetti, *Certezze pubbliche e “certezze” private. Poteri pubblici e certificazioni di mercato*, Milano, Giuffrè, 2010.

national, European and global rules, as well as private standards and principles set in domestic and international Courts – which often do not even fit in the usual, well-known classifications⁹.

The confusion increases as it becomes clearer that the “territorial” malfunctioning of the normative hierarchy – which normally implies that one norm cannot waive those with broader impact – twists the power relationship between rules. According to this, “soft law” rules in some cases have a higher strength than normative acts, such as a EU Directive.

In the global sphere, different legal traditions inevitably meet, creating a spurious model, deriving from the fusion and the mutual influence between different legal categories. These categories, which find a natural background in their system of origin, must redesign their role and significance in this new model, in order to preserve the coherence and effectiveness of the whole global polity.

The emergence of global regulation also questions the legitimacy of the new rule-setters and, by consequence, that of the traditional powers. The justification of the power by electoral mandate, indeed, does not exist outside the national and (partially) European borders, because the members of these organizations do not directly represent citizens, but their governments¹⁰. On the other hand, power by elections is frequently deemed insufficient even in those systems where the representative chain has its deeper roots¹¹.

In particular, on one hand the effectiveness of new regulators’ activity is increasing and expanding; on the other hand, this must be related to the weak or inexistent representativeness of those organisms. Frequently, they are set and regulated by an international treaty, whose rules confer broad powers having a not easily definable or controllable scope. In other words, global entities exist because of pacts, signed by people representing Member States, but their action, as well as the rules they set, is outside of the control of those who created them. Due to this

⁹ This leads to the utilization of general, broad terms - such as “soft law” or “governance” - which reunite different acts, rules and other legal initiatives that share a common, substantial feature, regardless of the formal characteristics they have.

¹⁰ The only exception to this rule is the European Parliament, pursuant to the reforms introduced by the Lisbon Treaty in 2007.

¹¹ On the flaws of representative systems in general, see J. S. Mill, *Considerations on Representative Government*, (1861) in J. M. Robson (ed. by), *Collected Works of John Stuart Mill*, Toronto: University of Toronto Press, 1977, 572-73.

displacement of powers¹², the representative chain, which binds citizens and elective institutions together, is interrupted. This is also due to the fact that global institutions act as administrative, not legislative, entities; therefore their representative legitimacy, whether it exists or not, would be indirect.

For the same reason, the proliferation of global administrative powers cause distress to the validity of the electoral mandate as the ground upon which the legitimacy of legal orders rests. As a matter of fact, the growing power of global institutions intensifies the crisis of Parliamentary law in favour of the expansion of the utilization of administrative measures to regulate social phenomena. Primary law loses its power to guide the administrative activity and becomes, as a matter of fact, subject to it. Hence, if a given sector is regulated rather by administrative rules than by legislation, it follows that the democratic value of these rules cannot rest solely on the link between elected people and the constituency. This connection serves usually as a base for the legislative authority and for those powers directly deriving from it. However, if the core regulation is contained in administrative decisions, which somehow replace the guiding role of Parliamentary law, then alternative ways of democratic validation are needed.

According to major scholars¹³, the enhancement of administrative procedural requirements can serve to this purpose. As the delegation chain between citizens and politicians gets shattered, the sovereignty retained by the people justifies the possibility to influence the contents of a rule, thanks to the participation to the process that leads to its adoption.

Therefore, the challenge is about recreating and re-adapting the main features of “political” democracy to those of administrative democracy.

¹² The phenomenon has been described as the “displacement of administrative law”, under which “the regulatory policies and rules applied at the domestic level in the United States and other countries will increasingly have been established through extranational processes not directly subject to domestic administrative law” (R. B. Stewart, *Administrative law in the twenty-first century*, in *NYUL Rev.*, 2003, 78, p. 456).

¹³ See, S. Cassese, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Einaudi, 2009. A. von Bogdandy, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization*, in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns – New Challenges for the International Legal Order*, Wien-New York, Springer, 2003, p. 128 ss. For what regards the food sector, see D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, Milano, Giuffr , 2012.

Whereas elections confer to institutions the power to advocate citizens' opinion, in administrative decision-making the negotiation between values is reflected in the procedural interaction of stakeholders, representing private interests, with the Authority, protecting the general interest. This leads to the problem of determining who can participate or which civil society associations can be considered as enough representative of those positions. Opposed to the needs which "expand" procedural safeguards and slow down the administrative procedure, there are others which, on the contrary, aim at keeping the procedure fast and the administration neutral with respect to the different interests involved¹⁴. In other words, although responsiveness to the democratic principle calls on one side for the expansion of procedural guarantees, on the other side the Authority's intervention must be timely and effective.

In this sense, the principles of efficiency and effectiveness acts as the litmus test to participatory democracy.

When assessing the general system of procedural burdens, two collateral elements must be taken into consideration.

Firstly, the diffusion of these procedural safeguards. Indeed, it is strange to notice that procedural requirements have mostly spread where the legitimation of power is still based on electoral representation. Take as an example the Italian general administrative procedure act of 1990¹⁵ or the US Administrative Procedure act of 1976¹⁶. On the contrary, procedural rules are weaker in those legal orders – such as the European or the global regimes – where the connections between rule-makers and rule-takers are less stable. Therefore, the analysis of participation burdens must be made in the light of their diffusion and of the legal system in which they operate.

This leads to the second issue to be considered, regarding the relation between procedural and representative legitimacy. If, as explained above, the electoral mandate is no more sufficient to justify alone the exercise of power, we can tell the

¹⁴ The tendency of procedural burdens to complicate the process has been referred to as the "ossification of the procedure". See T. O. MC Garity, *Some thoughts on "deossifying" the rulemaking process*, in *Duke LJ*, 1992, 41, 1385; S. Shapiro, *Assessing the benefits and costs of regulatory reforms: What questions need to be asked*, AEI-Brooking Joint Center on Regulation, 2007.

¹⁵ *Legge n. 241 of 7th August 1990, "Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi"*.

¹⁶ Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237, enacted June 11, 1946.

same for procedural instruments¹⁷. For some scholars, they do not substitute, but integrate the mechanisms of political representativeness¹⁸. Therefore, the major challenges are those faced by the legal orders – e.g. the global system – in which both forms of democracy haven't fully developed yet but, on the other side, rules and standards have an impact on stakeholders.

What has been just considered represents one of the evolutions of modern administrative law¹⁹. Still, these issues need further analysis in order to be understood properly.

However, since it is not possible to define all the aspects of the problem here, the analysis will be narrowed to one privileged point of observation, that is food law. In the following chapters, the analysis will show the ability of food law to highlight the complexity of the new challenges undertaken by modern administrative law. Namely, administrative law can help in achieving the restoration of the ancient legal concepts on which all national orders rest – for instance, representation - but that have been undermined by the presence of global law. However, this is not about being conservative by restoring obsolete institutions and concepts; on the contrary, it is an opportunity to see how traditional legal categories gradually evolve into new forms, with no abrupt interruption from the past.

In such perspective, food law²⁰ presents all the features that allow a full investigation of the issues related to the multiplication and the lack of accountability of regulators.

Namely, food law is a complex matter because it crosses many and various interests and values, that can come into conflict. Conflict among values turns into a

¹⁷ On the relationship between participation and representation in the Italian constitutional system, see M. Della Morte, *Rappresentanza vs. partecipazione? L'equilibrio costituzionale e la sua crisi: L'equilibrio costituzionale e la sua crisi*, Milano, Francoangeli, 2013, pp. 31 ff. According to the author, to accept participation implies also the acknowledgment of the role of the Parliament in representative democracies.

¹⁸ See A. Fung, *Varieties of participation in complex governance*, cit., p. 66.

¹⁹ Theories on the emergence of global administrative law – as a separate branch from international or even universal law - have started spreading at the beginning of the XXI Century. For a distinction between global administrative law and other branches, see S. Cassese, *Il diritto amministrativo globale: una sua introduzione*, in *Riv. trim. dir. pubbl.*, 2005, n. 2, p. 335 (footnote n. 7).

²⁰ Namely, since the work is conducted from a global administrative law perspective, the focus will be on administrative food law.

conflict between rules and regulators, each of them protecting a specific interest. Therefore, it is necessary to find a pattern where the debate between the different interests and rules can develop rationally, even within the ramifications of the multilevel regulatory system. As previously explained, the lack of a preset hierarchy, as well as of a constitutional system acting as a reference for shared values and standards, implies that such hierarchy has to be established by the Authority from time to time within the single procedures, depending on the conflict among rules, regulators and the interest involved. This is the main reason why it is necessary to ensure that the rulemaking process respects the democratic principle, above all in its procedural dimension.

Therefore, the aim of such research is to analyze the food law system in order to assess the balance - or the lack of balance - upon which it stands, putting into relation the interests involved and the rulemaking procedures provided for to protect them. The dynamics that develop within food regulation reflect the challenges that modern administrative law is currently facing, that is keeping unity, functionality and consistency of rules and connected values, in a fragmented legal space.

The intersection among the legal orders does not allow to clearly separate the analysis of the national context from the European and global one. At the same time, food governance entails also the simultaneous presence of different Courts; the domestic judiciary, arbitration courts, international courts and adjudicatory commissions affect each other exercising heterogeneous powers. Hence, a strict separation between the analysis of the rules and of the most important case laws would be irrational. As a consequence of that, this work follows a conceptual path. Firstly, it clarifies the function of participation in general and then, in specific, of food governance. To this effect, it is necessary to distinguish among the different territorial levels in order to underline how the governance structure affects the contents of the democratic principle and, therefore, of the corresponding procedural guarantees it has to provide.

The occasional “intrusions” within the analysis of one legal system and the other are made with the purpose of making the reasoning more homogenous and more responding to reality that, as said above, has to face the overlapping of various legal systems. In addition, the chapters contain several references to the more relevant case laws that play a fundamental role in the construction and interpretation of the more significant principles in this field. The second part of the thesis aims at verifying if the food governance needs are actually taken into consideration within

each legal order. Subsequently, the dissertation continues with the analysis of the main consultation regimes adopted by rule-makers in the food sector.

The conclusion will show a certain degree of perplexity with regard to the present food governance, where the development of the idea of participatory democracy and of “constitutional” balance among interests is still in its embryo.

THE ROLE OF PARTICIPATION IN THE FOOD SECTOR

1. Introduction

The purpose of this chapter is to answer to the question: which is the function of participation within good governance?

The debate on the role of procedural safeguards in administrative proceedings has spread in the XX Century, followed by the adoption of Administrative procedure acts in national legal orders²¹. The idea of strong asymmetry in the relationship between State and citizens has confined for long time the principle of procedural fairness inside courtrooms until the emergence of the so-called administrative democracy²². Each change responds to the emerging of needs; therefore, even procedural participation fulfils a precise function within legal orders, regardless of the specific context it relates to. Hence, it is necessary to describe the interests hidden under these procedural guarantees, in the light of the transformations of administrative law.

After this premise, it is necessary to go deeper, with the specific analysis of procedural guarantees within food governance. The presence of various participation regimes, in fact, demonstrates that there is a strict interaction among those safeguards and the legal order in which they are enacted. In particular, the shape of participation influences - and is influenced in turn - by the relevant substantial interests involved in the rulemaking procedure, as well as by the powers retained by the Authority which must provide for procedural participation. The

²¹ For instance, the American administrative procedure act was enacted in 1976, while in other Countries – such as Italy and the Netherlands – similar legislations were adopted in the 1990s (namely, in 1990 in Italy and in 1994 in the Netherlands). For a general overview on administrative procedures in European Countries, see W. Rusch, *Administrative Procedures in EU Member States*, Conference on Public Administration Reform and European Integration, Budva, 26-27 March 2009 available at www.sigmaxweb.org.

²² For this reason, administrative procedural safeguards were deemed to fall under the same category and play the same function of the principle of fairness within a trial. See F. Benvenuti, *Funzione amministrativa, procedimento, processo*, in *Riv. trim. dir. pubbl.*, 1952, 1, 118, p. 127. See also U. Allegretti, *Procedura, procedimento, processo. Un'ottica di democrazia partecipativa*, in *Dir. amm.*, 2007, 4, p. 779-804.

composite and multiform nature of food governance, in fact, implies the coexistence of several bodies in charge with different powers – legislative, executive, regulatory, judicial or quasi-judicial – that are often retained by the same authority.

Such fact leads also to the need of considering participation not only in a traditional sense, that means the right exercised by private subjects in relation to an administrative power, but to widen the boundaries of this concept, in order to include sometimes the prerogative of public authorities, such as the Member Countries of an organization, to be consulted before a regulatory decision is adopted.

Therefore, in order to determine which are – or should be – the goals pursued by procedural participation in the food sector, it is important to make a premise about the object of these rules – food – as well as about Bodies in charge with its protection. At the end of such premise, it will be possible to determine which is the right balance between the general function of participatory democracy and the need to protect the interests connected with the regulation of food sector.

2. Political and administrative democracy

Participation and transparency are two words belonging to administrative law language. For what regards the Italian legal system, they are considered a direct expression of two constitutional principles – fairness and good governance²³ - and they have been implemented in the general administrative procedure Act of 1990. However, they apply to any legal order, since they are acknowledged to be the mirror a wider concept, that is democracy²⁴. The democratic principle, which developed to

²³ Namely, art. 97 of the Italian Constitution uses the terms “*imparzialità*” – literally, impartiality – and “*buon andamento*” – which entails efficiency and effectiveness. According to this interpretation, the Italian administrative Courts have defined participation as a general principle of law (see Cons. St., sez. IV, 25.9.1998, n. 569 and Cons. St., sez. V, 22.5.2001, n. 2823).

²⁴ See, for instance, C. Esposito, *Riforma dell'amministrazione e diritti costituzionali dei cittadini*, in *La Costituzione italiana*, Saggi, Padova, Cedam, 1954 explaining the link between participation, democracy and representation. See also G. Sala, R. Villata, *Procedimento amministrativo (ad vocem)*, in *Dig. disc. pubbl.*, XI, Torino, Giappichelli, 1996.

explain the relationship between the constituency and political class in the republican form of government, has changed its original meaning²⁵ and it has grown in importance within the public administration²⁶.

Back from the radical transformations that took place at the beginning of the last Century, the indirect link between citizens and the administration – thanks to the mediation of politics - has proved to be insufficient, demanding new ways of reconciliation.

In particular, three great events have contributed to this result.

Firstly, the overlapping of the levels of governance has separated the idea of democracy from that of electoral representation. Starting from the XX Century, the number of international and supranational regulators has significantly increased²⁷, as well as their intervention in all sectors²⁸. A new concept of sovereignty has arisen, which coexists and, at the same time, is opposed to States' supremacy.

The most relevant change is the establishment of the former European Community, now European Union. Moreover, other important organizations have been founded, such as the United Nations, the World Trade Organization and the

²⁵ See A. Fung, *Review of "Can Democracy Be Saved?: Participation, Deliberation and Social Movements" by Donatella Della Porta*, in *Contemporary Sociology*, 44, 1, 2015, p. 50 claiming that "Even as the ideal of democracy is nearly universally endorsed, democracy's appropriate institutional forms and social practices seem ever more contested. Whereas representative government with multi-party elections has been largely taken for granted as democracy's canonical institutional form, this is now no longer true.

²⁶ On participation and administrative democracy, see G. Arena, *Modelli organizzativi e democrazia dell'amministrazione*, in A. Pizzorno (ed.), *La democrazia di fronte allo Stato: una discussione sulle difficoltà della politica moderna*, Milano: Feltrinelli, 2010, p. 153 ff and M. Occhiena, *Partecipazione al procedimento amministrativo*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, V, Milano, 2006, 4128 ff.

²⁷ According to S. Cassese, (*The global polity. Global dimensions of democracy and the rule of law*, Sevilla, Global Law Press, 2012, p. 16): "[...] national governments have increasingly been accompanied by other actors, such as multinational corporations, international governmental organizations (IGOs) and non-governmental organizations (NGOs), that challenge the capacity of the State to lead".

²⁸ See again S. Cassese, *The global polity*, *cit*, arguing that "Such global regulatory regimes operate in so many areas that it can now be said that almost every human activity is subject to some form of global regulation".

World Health Organization²⁹. National legal traditions have met in the global arena and have forged new kinds of powers, which take their main features from those of origin, but have also developed their own characteristics. In other words, the new global legal order is not just the result of the union between civil law and common law legal institutions, but it is a new model, with its own peculiarities, that tries to respond to global needs.

The first most typical feature of supranational regulators is that, contrary to States, most of them do not represent citizens directly³⁰. International entities are built on the principle of delegation, which is at the basis of the founding treaties. According to it, individuals – or, in this case, Countries – vest one authority, whose bodies are made of people representing national governments – in a certain set of powers.

Therefore, there are at least two levels ensuring global regulators' insulation from stakeholders, because the delegation chain relies both on the representativeness provided by Countries' electoral systems and on national representatives' power of advocacy in supranational organisms.

However, the global arena does not always follow a single pattern, but it moves to an irregular rhythm. Other from the delegation chain method, less structured governance patterns exist, where the members of the global authority are not political representatives of the Member States; at the same time, some international organisms have not been established by Countries, but by other global entities, which makes the connection with regulated parties even weaker.

Since the electoral mandate is an expression of the will of the people, which exercise their sovereignty through political representatives, the progressive estrangement of rule-setters from rule-takers at global level means that regulators are independent from citizens in the execution and determination of the rules. The second peculiarity of international rule - makers consists in the variety of powers they can exercise. The lack of a constitutional background³¹ and, at the same

²⁹ For further profiles concerning the mission and structure of these organizations, see *infra* par 4.

³⁰ There are some exceptions to this rule. For example, the European Parliament is directly elected by citizens.

³¹ Although the global order does not rest on a formal Constitution, Courts' interpretation of the general principles of international law and of national legal traditions can help in the process of harmonization. See S. Cassese, *La funzione costituzionale dei giudici non statali*:

time, the tendency of every authority to consider itself as isolated from the global legal order makes the delegation of powers bent to the specific needs of each regulated sector. In other words, in the global order, powers are not allocated according to a general theoretical structure.

The absence of a constitutional basis makes the coordination between the powers of the several international authorities, or between these and the prerogatives of States more difficult.

The traditional hierarchy of laws crumbles, and the principle of the separation of powers becomes subject-related. The global space, where authorities exercise both rule-making and executive powers in their jurisdiction, gets fragmented.

International bodies perform their activity mainly by issuing soft laws, standards, voluntary protocols, guidelines, and adjudicatory measures. Therefore, the exercise of the administrative function is at the core of the global order³².

Moreover, since the global governance³³ is structured according to the several fields of expertise, it is necessarily more specific. Nonetheless, as the analysis will show, it has a general impact on States and citizens.

Given the impact of global regulators, their administrative structure and the loosening of the delegation chain³⁴, it can be inferred that the democratic principle shall inform not only the political system, but mostly the administration.

dallo spazio giuridico globale all'ordine giuridico globale, in *Rivista trimestrale di diritto pubblico*, 2007, 3, 609-626.

³² According to S. Battini, Administrative law beyond the State, in VV. AA., Global administrative law: an Italian perspective, RSCAS Policy Papers, 2012, p. 12, “These bodies, ranging from formal international organizations to informal networks of domestic public or private actors, become thus a source of a huge mass of regulatory decisions, which could be best conceptualized, according to the Global administrative law perspective, as administrative regulation”.

³³ The concept of global governance has been firstly defined as “the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal as well informal arrangements that people and institutions have agreed to or perceived to be in their interest” (The Commission on Global Governance, *Our Global Neighbourhood*, Oxford, Oxford University Press, 1995, p. 4).

³⁴ On the weak representativeness of the supranational regulators, see D. Bevilacqua, *Il free trade e l'agorà. Interessi in conflitto, regolazione globale e democrazia partecipativa*, Napoli, Editoriale Scientifica, 2012. The authors suggests that the development of a plural

The second phenomenon to be considered concerns the shape of the relationship between legislative and executive powers. Namely, within national borders, the administration has inherited from the Parliament the task to achieve the objectives of the Welfare State³⁵. This happens not only because the tools available to the former – adjudicatory and rulemaking measures – are simpler with regard to the contents and procedures, but also because the changes on the electoral system and on the form of government tend to stress on the functions of the Government, while leaving to the Parliament the only duty to ratify policies. In front of a heavier burden, however, the law grants the executive with more powers, thus an agency discretion refers to primary law only under a formal profile.

At supranational level, the tendency to structure the governance in fields of competence – with the consequence of creating different orders ruling on health, energy, finance, agriculture, commerce³⁶, etc. – makes the governance more specific; at the same time, the need to respond to specific and urgent demands makes the task of administration wider and heavier.

As a result of that, more attention needs to be given to the way the administrative decision-making occurs³⁷.

and inclusive participation model would put a limit on the lack of accountability of global regulators. See also S. Cassese, *The global polity, Global dimensions of democracy and the rule of law*, Sevilla, Global Law Press, 2012.

³⁵ In the new Welfare State, the Administration cannot just accomplish merely executive tasks provided for by primary law. See B. Sordi, *Diritto amministrativo (Evoluzione dal XIX secolo)*, in *Dig. Disc. Pubbl.*, V, Torino, UTET, 1990, p. 90.

³⁶ This does not deny the existence of connections between the regulated fields. Global regulators engaged in the protection of a single interests, usually must also consider the other values involved. However, since each Organization is autonomous from the others, the consideration of the interests and the interpretation of the principles is not harmonized at global level, but it is still determined by the single Authorities. This prevent from considering the global arena as a single legal order, but rather as a union of several regulatory systems. The enhancement of the dialogue among Courts and regulators is one of the solutions proposed to de-fragment the global arena. See S. Cassese, *La funzione costituzionale dei giudici non statali*, *cit.* and A.-M. Slaughter, *A New World Order*, Princeton, Princeton University Press, 2004, p. 65 ss.

³⁷ For this reason, according to M. P. Chiti, *Partecipazione popolare e pubblica amministrazione*, Pisa, Pacini ed., 1977, p. 272 (who in turn makes reference to G. Isaac, *La procédure administrative non contentieuse*, Paris, 1968, p. 220 ff.), democracy has to be established where, for a too long time, people have forgotten to search for it, where it never

The necessity of new forms of democracy within the public administration arises also from the historical events that have accompanied this change. It is not a case that the idea of the administration as it was in Absolute Monarchies – where the bureaucracy acted like an extension of the king, put in a higher position in respect of citizens³⁸ – has started to vacillate when the States have experienced various failures. The World Wars before, the spreading of corruption and degradation within the political class and, in the end, two long periods of economic depression at the beginning of the XX and XXI centuries, have proved the weakness of governments that, following the democratic transformation of the State, had to face for the first time constituencies' approval. The progressive spreading of a lack of trust towards institutions, has led the citizens to ask for more transparency and for the possibility of actively participating at the formation of public choices³⁹.

All the elements considered so far call for the implementation of the democratic principle inside the public administration, in order to allow the “redistribution of power that enables the have-not citizens... to be deliberatively included in the future”⁴⁰.

Nonetheless, such principle can serve several purposes. First of all, administrative democracy implies the right of subjects to directly participate to the formation of public choices⁴¹. Since in administrative proceedings the intermediation of political parties is not available, the relation between the administration and citizen is direct. The enhancement of procedural safeguards implies, on one side, a better adherence of the administrative action to the problems under consideration; the dialogue between the administration and private citizen increases the amount of information

really existed, and that is in public administration. See also S. Cassese, *La partecipazione dei privati alle decisioni pubbliche – saggio di diritto comparato*, in *Riv. trim. dir. pubbl.*, 2007 and Id, *Gamberetti, tartarughe e procedure. Standards globali per i diritti amministrativi nazionali*, in *Riv. trim. dir. pubbl.*, fasc.3, 2004, pag. 657 who analyzes the new democratization of the administrative agencies through participation.

³⁸ See G. Amato, *Forme di stato e forme di governo*, Bologna, Il Mulino, 2006.

³⁹ It gives account of this evolution U. Allegretti, *Procedura, procedimento, processo. Un'ottica di democrazia partecipativa*, in *Dir. Amm.*, 2007, p. 785.

⁴⁰ S Arnstein, *A ladder of citizen participation*, in *Journal of the American Institute of Planners*, 1969, 35, 4, 216-224.

⁴¹ According to S. Cassese, *Il diritto amministrativo globale, cit.*, p. 354, the lack of democratic legitimacy of supranational regulators can be partially compensated with the enhancement of procedural safeguard in administrative proceedings.

available and allows, on the books, the adoption of rules shared both by regulators and regulated parties⁴². On the other side, the administration needs to be protected from external pressures, so that it is possible to pursue the general interest, even when taking into consideration stakeholders' points of view.

At the same time, other elements must be considered in the analysis of the interaction between democracy and participation: which interests have to be represented in the procedure and to what extent? The democratic principle, in its "pure" and unattainable interpretation, imposes the consideration of all opinions in the public arena. However, just as in electoral systems the representation of the minorities in the legislative Chambers is subject to the crossing of a threshold⁴³, in order to ensure governability, the principle of openness in administrative activity must be balanced with the criteria of effectiveness and efficiency. Slowing down the rule-making process can be a goal itself, for those who adverse the implementation of some policies. Moreover, participation can also help politicians to retain control over the implementation of present and future policies⁴⁴. Namely, via consultations, politicians can make use of lobbies to exercise pressures on the authority, in order to influence policy outcomes without formally intervening in the procedure. Hence, the formal neutrality of decisions is kept, whereas the contents are bent to personal interests and views⁴⁵.

⁴² Some have described this as the "dilution of the power". See M. Nigro, *L'azione dei pubblici poteri. Lineamenti generali*, in Amato, G.-Barbera, A. (eds.) *Manuale di diritto pubblico*, Bologna, 1984, p. 835.

⁴³ The reference is to the fact that candidates become members of Parliament if their political party collects at least a given number of votes from the elections, indicating a sufficient level of representativeness. For instance, in the Italian legal system the current threshold correspond to the 4% of the votes.

⁴⁴ See J. MASHAW, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, in *Journal of Law, Economics and Organization*, 6, 1990; M. D. McCubbins, R. G. Noll, B. R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, in *Virginia Law Review*, 1989, Vol. 75, No. 2., pp. 431-482.

⁴⁵ See C M. Radaelli, *Rationality, power, management and symbols: four images of regulatory impact assessment*, in *Scandinavian Political Studies*, 2010, 33, 164-188. The Author explains the different goals and functions of procedural burdens, focusing in particular on one of these: the Regulatory Impact Assessment (RIA). The RIA is a complex procedure in order to evaluate the likely impacts of a draft policy before it is enacted. It comprises different steps, included the consultation of relevant stakeholders. See also G. D.

This brief overview shows that participation can serve one purpose, as well as its opposite. As it has been remarked, “principles such as equal influence over collective decisions and respect for individual autonomy are too abstract to offer useful guidance regarding the aims and character of citizen participation. It is more fruitful to examine the range of proximate values that mechanisms of participation might advance and the problems they seek to address”⁴⁶. Therefore, in order to assess procedural burdens and their effectiveness, it is necessary to understand how they are performed and how they are connected to the general background.

Various theories and models have spread to the purpose of satisfying such opposite needs about participation, hence deliberative democracy cannot be considered a uniform concept; rather, we can refer to many forms of deliberative democracy and, in general, of interests representation⁴⁷.

In general, participation in decision-making can be referred to individual adjudicatory proceedings or to rulemaking and legislation.

Participation in adjudicatory procedures is broadly accepted in all legal orders, and it has a defensive⁴⁸ and collaborative function⁴⁹. Indeed, it allows private interested parties to issue documents, give and ask for clarifications to the

Majone, *Regulating Europe*, London, Routledge, 1996, stressing on the importance of procedural transparency to make regulations more credible.

⁴⁶ See A. Fung, *Varieties of participation in complex governance*, in *Public administration review*, December 2006, p. 66.

⁴⁷ See P. Bernhagen and R. Rose, *European Interest Intermediation vs. Representation of European Citizens*, speech at the Fifth Pan-European Conference on EU Politics, Porto, Portugal, 23- 26 June 2010 and G. Barone, *I modelli di partecipazione procedimentale*, speech at the Italian-French conference at the Law Faculty “La Sapienza” in Rome, January 28 2006. Both authors claim that participation serves different purposes, therefore it is necessary to distinguish among different models of interest representation.

⁴⁸ See D’Alberti, M., *Lezioni di diritto amministrativo*, Torino, 2012, 41 who points out the analogies between the right to participate and the right to defense.

⁴⁹ On the different functions of participation in the single legal orders see S. Cassese *La partecipazione dei privati alle decisioni pubbliche – saggio di diritto comparato*, in *Riv. trim. dir. pubbl.*, 2007, 13; B. G. Mattarella, *L’evoluzione della disciplina del procedimento amministrativo in Francia*, in *Riv. trim. dir. pubbl.*, 1995, p. 762 and F. Fracchia, *Analisi comparata della partecipazione procedimentale nell’ordinamento inglese e in quello italiano*, in *Dir. e soc.*, 1997, p. 201; R. L. Rabin, *Perspectives on the administrative process*, Boston, Little Brown, 1979 and Stewart, R.B., *The reformation of american administrative law*, in *HLLR*, 1965, 1772.

Authority⁵⁰ and contribute to the formation of the final measure by which they are affected.

On the contrary, legislators do not always grant participation in general decision-making, because normally it does not affect people directly. Primary law and rulemaking administrative measures envisage general provisions, affecting a broad number of indeterminate people. Therefore, if consultations should be carried out, the Authority would firstly have to identify who are the people that are allowed to participate. However, this can be difficult, since in rulemaking procedures the function of participation is mainly to collaborate in shaping the contents of the measure, or to avoid disputes⁵¹, not to protect a specific situation threatened by the intervention of the Authority. At the same time, opening consultations to all those who would potentially be affected by a general provision could excessively slow down the procedure and jeopardize its goals.

Therefore, when legal orders provide for participation in rulemaking procedures, they also put some limits for what regards three aspects: the kind of proceedings people can be involved in, which interests can be represented and, ultimately, how they are expressed during the steps of the procedure.

For what concerns the first aspect, generally the participation of private parties is allowed in administrative rulemaking, while excluded in the formation of primary law.

Indeed, administrative and political democracy should not try to mutually emulate or replace themselves. The level of discretion granted to the authority in political choices is higher than that of administrative rulemaking⁵². Therefore, a distinction between participation in administrative rulemaking and the formation of policies is rational and legal orders generally mirror this difference.

⁵⁰ Namely, for a long time the British administrative laws have provided for the right to be heard in the proceedings for the adoption of a measure negatively affecting private interests.

⁵¹ See G. Napolitano, *La logica del diritto amministrativo*, Bologna, Il Mulino, 2014, p. 220.

⁵² As remarked in G. Pizzanelli, *La partecipazione dei privati alle decisioni pubbliche: politiche ambientali e realizzazione delle grandi opere infrastrutturali*, Milano, Giuffrè, 2010, p. 31, recalling Hans Kelsen's distinction between *legislatio* and *legis executio*.

For instance, although the initial drafts of the Italian procedure act (l. 241/1990) provided for the participation of concerned parties in rulemaking⁵³, based on the French model of the “*enquête publique*”, the Italian legislator had decided to limit its scope to adjudicatory proceedings. Nonetheless, scholars and Courts have later expanded the application of these provisions, to allow the consultation of stakeholders even in administrative rulemaking procedures⁵⁴. However, this has never been extended for what regards Parliamentary law, whereas some little efforts have been carried out in order to allow consultations for the adoption of normative measures by the Government⁵⁵. The only tools citizens have to contribute to the formation of primary law are the referendum and the legislative initiative, provided for by the Constitution. However, these tools cannot be considered as an expression of administrative democracy, since they rather belong to the traditional idea of political democracy, according to which even the “direct” exercise of the supremacy by the people has to be mediated by the intervention of the elected representatives. Therefore, there is no actual participation to the elaboration of policies, because citizens are just allowed to submit proposals or to express their consent on them, but they are not involved in the discussion and modification of their contents.

Still, supranational regulators— such as the European Union —have progressively considered the opportunity to involve citizens in the formation of public choices⁵⁶.

⁵³ On administrative rulemaking in Italy, see G. Della Cananea, *Gli atti amministrativi generali*, Padova, Cedam, 2000. See also B. G. Mattarella, *Participation in rulemaking in Italy*, on www.ijpl.eu, 2011.

⁵⁴ See, for example, Cons. di Stato, sez. IV, 24 October 2000, n. 5720 and Cons. di Stato, sez. VI, 27 December 2006, n. 7972, for what regards regulatory measures of Independent Authorities. On administrative participation in the Italian legal order, see F. Benvenuti, *Funzione amministrativa, procedimento, processo*, in *Riv. trim. di dir. pubbl.* 1952, now in Id., *Scritti giuridici*, Milano, Vita e Pensiero, 2006, pp. 134-135; S. Cassese, *Il privato e il procedimento amministrativo - Un'analisi della legislazione e della giurisprudenza*, in *Archivio giuridico*, n. 1-2, 1970, p. 25 ss; G. Barone, *L'intervento del privato nel procedimento amministrativo*, Milano, Giuffrè, 1969; M.P. Chiti, *Partecipazione popolare e Pubblica amministrazione*, Pisa, Pacini, 1977.

⁵⁵ Within the Italian administrative system there is an important difference between normative activity and administrative rulemaking. The latter provides specific rules for a broad range of addressees (for instance, a local plan or a tender notice), whereas the former is both general and abstract.

⁵⁶ According to the Commission's *White paper on European governance*, 2001 (COM(2001) 428 final): “policies should no longer be decided at the top. The legitimacy of

As we will see on the further chapters, participation in these area can be interpreted and implemented in many ways.

For example, the involvement in the adoption of primary law in the EU is indirect and mediated, thanks to the European citizens' initiative⁵⁷. People are not actually consulted by legislative institutions, still their proposals can be considered by the Parliament and the Council. Here participation has a clear democratic purpose: no direct pressure is put on the legislative bodies, which discuss on the proposal independently and isolated from the promoting committees, still citizens have the possibility to raise their voice. From the citizens' point of view, the benefits of public participation are not maximized in this case, because their involvement in the determination of public choices is filtered by the institutions, whereas the actual participation in political decision-making entails a broad array of powers and faculties for citizens, who drift apart from representative democracy and exercise their sovereignty directly⁵⁸. In other circumstances Treaties grant a deeper intrusion in policy-making, for what regards general, non-legislative acts. As it will be discussed further, the European Union law provides for the duty of the Commission to carry out broad consultations with parties concerned (art. 11 TEU).

At the same time, at regional level some legislators have proved to be willing to open the adoption of legislative and administrative rulemaking measures to the consultation of the citizens⁵⁹.

the EU now lies with the participation of its citizens". Moreover, at global level, participation is seen as an "iterative process involving the continuous re-adjustment of relationships between different stakeholders in a society in order to increase stakeholder control and influence over development initiatives that affect their lives... Ideally this means putting the beneficiaries at the centre of a development process that they will drive and continuously adjust, according to their own learning processes and needs" (FAO, *Participation: our vision*, available at www.fao.org).

⁵⁷ Under Article 227 TFEU and Article 44 of the Charter of Fundamental Rights of the EU.

⁵⁸ According to F. Benvenuti, *Il nuovo cittadino. Tra libertà garantita e libertà attiva*, Venezia, 1994, 103 participation is a new way to get legitimation and citizens' consensus when electoral representation alone can no more fulfill this need; see also V. Crisafulli, *La sovranità popolare nella Costituzione italiana*, in ID., *Stato, popolo, Governo. Illusioni e delusioni costituzionali*, Milano, 1985.

⁵⁹ For example, the Statute of the Italian Region Emilia-Romagna (l. reg. March 31 2005, n. 13) provides at art. 17 that the adoption of normative and administrative rulemaking measures can (subject to the prior approval of the Regional Council) envisage a public enquiry. Oral consultations are open to the members of the Regional Committee,

Moreover, other international actors have periodically opened their processes to stakeholders, especially for what regards the adoption of soft law measures⁶⁰.

The second aspect to be considered regards the kind of interests that can be represented during the process. From this point of view, two main opposite models exist. The first one grants the possibility to individually make comments on the regulatory proposal. For example, the American “notice-and-comment”, which also inspired the Italian Gas and Electricity Authority procedural guidelines⁶¹, allows concerned parties to separately submit remarks, suggestions, analyses to the Authority in charge. Hence, the decision is shared between rule-makers and rule-takers, when the former have the duty to take into account the comments of the latter.

However, the traditional interpretation of the relationship between citizens and the administration suggests that a certain level of insulation of the Authority from the affected parties is needed, in order to attain the general interest. The process of democratization of the administrative procedure, might also allow stakeholders to exercise pressure on the authority, which is a legitimate expectation of rule-takers; however democracy can fast be turned into oligarchy if the procedure is not tuned in a way that can still ensure the neutral balance among different values and the protection of the authority from external bias. Moreover, to excessively open the consultation of stakeholders could cause a stall in decision-making. This could happen by accident, because a particularly significant measure gets the interest of many concerned parties; however, this could also be the result of a pre-meditated, obstructionist objective to undermine the adoption of a certain measure⁶².

associations and groups representing a common interest. See M. Carli, *Lo Statuto dell'Emilia Romagna. Principi e partecipazione*, on www.federalismi.it.

⁶⁰ All these topics will be discussed further in the next chapter.

⁶¹ Art. 5 of the Authority's Resolution n. 61 of May 20 1997. At a later stage the notice and comment have been extended also to consumers and to small and average businesses.

⁶² The use of legal options in order to deliberately compromise activities or decision-making is a common feature of modern democracies. For instance, in September 2015 an Italian senator filed 82 millions of amendments to block the Constitutional reform on the composition of the Senate. In food law, the adoption of safeguard measures by many European States to forbid the cultivation and importation of GMOs in their territories, combined with the failure of the European institutions to give the requested authorization to importers (the so-called “*De facto moratorium*” of the *EC- Biotech* case in the 1990s, *European Communities – Measures Affecting the Approval and Marketing of Biotech*

Therefore, especially among international organizations, more structured and controlled ways of consultation are preferred. In this second model, only the most important stakeholders – and here a question arises: important to whom? – or representative associations – again: representing who? – are invited to participate to the decision-making process. Hence, individuals’ ideas can only be mediated through interested groups. The main purpose of curbing access to consultations is to reduce the duration of the procedure of adoption and to allow only the most significant interests and the highly affected parties to be represented during the decision-making process. The main challenge about participation is indeed to heighten democracy indicators without jeopardizing efficiency and good governance. However, efficiency is not the only desired outcome of this choice. Indeed, to restrict participation by choosing in advance the people to be consulted is also a way for the Authority to filter possible opinions and to pre-determine what interests might be deemed as actually relevant. While considered a tool of open democracy, participation can ultimately lead the rule-maker to only consider the stakeholders that match its own views on the draft measures. Hence, procedural safeguards can serve as a tool of political control over the decision, as well as to give the stakeholders the impression to be involved in rulemaking, but actually diminishing or keeping unchanged their practical influence⁶³.

In the end, the ways in which stakeholders can be consulted vary from one Authority to the other. Usually, private parties are allowed to send only written opinions on the draft measure. On one hand this enhance the transparency of the procedure, since normally all contributions are published on the website of the authority, which at the end of the consultations makes a general report and replies

Products, adopted 21 November 2006, DSR 2006:III, p. 847) has been defined as “administrative obstructionism” by S. Battini, *Amministrazioni nazionali e controversie globali*, Milano, Giuffrè, 2007, p. 20.

⁶³ This phenomenon is addressed by scholars with the expression “symbolic policy”, when “information is gathered, policy alternatives are defined and cost-benefit analyses are pursued, but they seem more intended to reassure observers of the appropriateness of actions being taken than to influence actions” (J. G. March, J. P. Olsen, *The new institutionalism: organizational factors in political life*, in *American political science review*, 3, 1984, p. 738). On this topic, see also M. J. Edelman, *The symbolic uses of politics*, University of Illinois Press, 1985; S. L. Suárez, *Symbolic Politics and the Regulation of Executive Compensation. A Comparison of the Great Depression and the Great Recession*, in *Politics & Society*, 2014, 73-105.

to the major observations⁶⁴. Moreover, it also makes the procedure more rational and controllable, because it is easier for the stakeholders, the agency and the judiciary to verify the inner logic of the final measure and the steps followed to reach the decision⁶⁵. By consequence, written consultations also protect the authority from lobbies pressure, because their involvement in the process is more indirect and detached. Indeed, participation shall enhance democratic decision-making both from the point of view of the stakeholders and of the Authority, whose commitment to the general interest shall not be threatened by the over-representation of private interests⁶⁶.

On the other hand, individuals' and groups' positions might not only be adequately conveyed via written statements. The exchange of ideas usually entails more direct forms of interaction. Therefore, if we assume that stakeholders' influence still occurs even outside the official stages of procedure⁶⁷, then limiting participation to written consultations might prevent from having an equal representation of the different interests involved *within* the procedure and lead, ultimately, to less transparent and accountable policies. Namely, some interests might be underrepresented and others might be overrepresented, both inside and outside the procedure.

Nonetheless, some authorities provide for more complex methods of consultation, which comprise, for instance, interviews and questionnaires, panels, the right to be heard and the possibility to issue and have access to documents. Normally, the more complex is the participation, the higher are the costs of implementation. Therefore agencies tune participation also according to an

⁶⁴ See G. D. Majone, *Regulating Europe*, London, Routledge, 1996, stressing on the link between procedural transparency and regulatory credibility.

⁶⁵ On the positive effects of public participation in regulatory processes, see OECD, *Recommendation of the Council on regulatory policy and governance*, Paris, 2012.

⁶⁶ See M. De Benedetto, M. Martelli, N. Rangone, *La qualità delle regole*, cit., p. 38. See also J. L. Mashaw, *Structuring a "Dense Complexity": Accountability and the Project of Administrative Law*, in *Issues in Legal Scholarship*, 2005, 1.

⁶⁷ See C. R. Sunstein, *After the Rights Revolution: Reconciling the Regulatory State*, Cambridge, 103, investigating the different levels of pushiness of the interested groups. Namely, powerful lobbies have several indirect means to put pressure on the authority even outside the proceedings and to overarch underrepresented interests.

evaluation of the benefits and costs arising from the implementation of procedural safeguards⁶⁸.

In conclusion, participation is not usually envisaged for what regards primary law, whereas in administrative rulemaking and in the adoption of soft law measures some legal orders provide for stakeholders' right to be heard or to submit comments. This is explained with the need to improve democracy in decision-making. However, when dealing with participation, there is the recurring tendency to highlight its beneficial effects, while leaving aside both the practical outcomes of its implementation as well as the other purposes procedural rules might also serve. In particular, participation might also be a useful instrument in lobbies' hands to bind the authority to individual needs as well as to ossify the adoption of an unwelcome measure. In addition, the shape of procedural safeguards influence the adequacy of interests representation within decision-making. For this reason, in order to understand what could be the benefits and the risks of the enhancement of participation in the adoption of food policies, it is necessary to first outline the relevant interests involved.

3. The interests involved in food governance

In the previous paragraphs participation has been outlined as an institution which is strongly connected with the substantial interests that shall be represented during the rule-making procedure. Procedural safeguards change according to the regulated sector and the related legal scenario. Therefore, the purpose of this paragraph is to illustrate the interests addressed by food policies.

Food governance affects various interests, which sometimes are complementary and other times get in conflict; in addition, they and are protected by Bodies belonging to different legal orders and exercising various powers.

The point of balance among such interests is determined by many factors. Firstly, it depends on how and by whom these values are protected. The problem of the underrepresentation of interests usually regards the influence of minorities in the electoral system, as well as the role of some disadvantage categories within the

⁶⁸ On this topic, see M. De Benedetto, M. Martelli, N. Rangone, *La qualità delle regole*, Bologna, Il Mulino, 2011.

society. However, underrepresentation is also a common concern for policymakers engaged with the protection of sector-based values in multi-level systems. Hence, it is important to investigate the powers retained by the Authorities in charge with their protection as well as the relationships existing among them.

Secondly, the outcome of the mediation among different interests is also affected by procedural safeguards. Namely, participatory initiatives give to the addressees of the policies the possibility to advocate for their rights. The way participation is regulated, the method of involvement of the interests in the procedure, their balance, as well as the level of actual implementation of these safeguards can influence the way the Authority decide.

In order to assess the effectiveness of participatory methods in the food sector, it is necessary to investigate the interests demanding for public authorities' intervention on food-related issues and, at the same time, the entities in charge of their protection.

The second aspect will be discussed in the next paragraph.

For what concerns the first issue, it is necessary to point out that the scope of food law is determined in relation with the objects of its protection, that is food and feed⁶⁹.

Food, similar to the environment⁷⁰, is a complex matter, whose definition within precise limits is hard; hence, in order to explain the meaning of food governance it is better to use general terms that allow to catch all the intersections with the several fields of law. In specific, it is not possible to discuss about food law without considering the regulation of commerce, agriculture, environment protection,

⁶⁹ The explanation of food law as related to its object can be found in L. Costato, *I principi fondanti il diritto alimentare*, in *Dir. Giur. Agr. Alim. E amb.*, 2007, p. 6. See also M. A. Recuerda Girela, *Los principios generales del derecho alimentario europeo*, in *Revista de Derecho de la Unión Europea*, Enero-Junio 2014, p. 167-190.

⁷⁰ The utilization of the expression "environmental protection" is the result of a complex hermeneutical activity by scholars and Courts in order to determine a system of norms protecting and promoting the landscape, regulating polluting activities and ruling local plans, which however do not necessarily exhaust within them. As a matter of fact, the difficulties met by the Italian constitutional legislator first and then by the Courts in fixing the different areas of environmental law well reflects the difficulty in marking straight boundaries of such good. On such matters, see, in general, G. Rossi (ed. by), *Diritto dell'ambiente*, Torino, Giappichelli, 2015.

human health and animal wellbeing or even national cultural and religious traditions.

The list of sectors connected with food governance yet allows to catch the first of its peculiarities: food, being the object of the rules set in this fields, has a double nature, at the crossroads between common goods and private goods.

In economics, scholars distinguish among public, common, private and club goods⁷¹. The distinction is based on two parameters: rivalry and excludability. Rivalry entails that the use by one individual reduces availability to others. Excludability, instead, refers to the possibility of excluding an individual from use of a certain good. According to such definitions, public goods, which are not rival and not excludable, are on the opposite side with respect to private goods; common goods, instead, have non rivalry in common with public goods, while club goods differ from private goods because they are not excludable.

The environment is normally considered as public good, because everybody can use it and this does not exclude others from using it. In consideration of the fact that food originates from the environment, it could be considered non excludable as public goods but, since it is consumable, it is characterized by rivalry. Given this reasoning, food would be a common good, and its availability and accessibility has to be ensured to everyone. In addition, it is a global common good because, as an environment, its presence has no defined geographical location.

If we think about wild berries or alpine mushrooms, everyone can have access to them, however they are inherently rivalrous goods.

Nonetheless, food has experienced a progressive process of privatization, which often makes it equal to any other product sold on the free market⁷². In other words,

⁷¹ See P.A. Samuelson, *The pure theory of public expenditure*, *The review of economics and statistics*, 1954, 387-389 and J. A. Buchanan, *An economic theory of clubs*, *Economica*, 1965, 1-14.

⁷² Such transformation sinks its roots in history, evolving along with the enhancement of agricultural techniques. However, the privatization of food governance happened more recently and, according to some scholars, is due to the increasing importance of capitalistic values in such sector. In other terms, the major companies of the agri-food sector have gained importance not only as private stakeholders, but also as those who also have political interests, which led them to establish the same rules which they are subject to. This fact causes important impacts from the environmental and socio-economical point of view. On such aspects see P. McMichael, *Global Development and The Corporate Food Regime*, in Frederick H. Buttel, Philip McMichael (ed.) *New Directions in the Sociology of Global*

it is not its inherent ability to ensure our survival, but the possibility of taking economic advantage from its production that has progressively generated a distinction between the food that we can find in the environment (as wild fruit) and the one that is produced and cultivated by man, subject to market rules in first place, even before the powers of the public authority.

Wild food, in fact, maintains the features of non-excludability and rivalry, so that everyone can take advantage of it with no exclusion of others from using it, but at the same time, reducing its availability; on the contrary, food produced by human activity is put on the market and gets commercialized.

Such fact does not eliminate the need of any individual to ensure self-subsistence. Then, what is still considered “common” is the need of food. Pursuant to this idea, notwithstanding its economic value⁷³, nowadays food – namely, the access to it - is recognized as a common need and a human right⁷⁴.

Development (Research in Rural Sociology and Development, Volume 11). Emerald Group Publishing Limited, 2005, 265 – 299 and M.C. Jordan, *The privatization of food: corporate control of biotechnology*, *Agronomy Journal*, 2000, 803-806 and J. Clapp, and D.A., Fuchs,(ed), *Corporate power in global agrifood governance*, MIT Press, 2009. The commodification of food explains also the regulation of the sector both by public and private law. Nowadays the tendency is to curb the area of intervention of public powers and to foster self-regulation and private standards. See N. Rangone, *Declinazioni e implicazioni dell'autoregolazione: alla ricerca della giusta misura tra autonomia privata e pubblico potere*, in *Rivista di diritto alimentare*, V, 4, 2011 and B. Van der Meulen, *Private food law cit.* See also A. Benedetti, *Certezza pubblica e certezze private. Poteri pubblici e certificazioni di mercato*, Milano, Giuffrè, 2010; S. Henson, *The role of public and private standards in regulating international food markets*, in *Journal of international agricultural trade and development*, 4, Issue 1, 2008.

⁷³ For some commentators, the relevance of food for the European and international trade system has led to an overturning of values, where trade interests are considered at the same – or higher – level of fundamental rights. For instance, the Court of Justice of the European Union has developed a theory on the limits to fundamental rights. According to it, the protection of such rights ought to be proportionate with regard to the safeguard of the other values of the Union, such as the creation of a single market (*Stander C-29/69, International Handelsgesellschaft C-11/70 and Nold C-4/73*) See A. Forti, *Il doppio valore del diritto alla salute nel diritto alimentare*, in *Rivista di diritto agrario*, 2013, p. 600. In the Italian Legal order, the Constitutional Court has defined the right to health as “financially-conditioned”, meaning that the delivery of services is subject to the availability of public resources and therefore does not represent a unconditioned goal of the Welfare State. Recently, this

Food security policies pursue the aim of ensuring survival to all human beings, by guaranteeing access to food⁷⁵. The objective of food security calls for an intervention, either direct or indirect, on the market because it complies with the Welfare logics of fulfilling people needs, rather than with the idea that “The (food) market knows best”⁷⁶, which have been now partially overcome. This implies that, in this area of regulation, food is considered in the light of human rights protection, rather than as a commodity⁷⁷. Therefore, food security policies show a contrast between two interests: free competition and the protection of human life.

The same is perceivable also with reference to the concept of food safety, because there cannot be safe supplies, and therefore the survival of world population, if

principle has been stressed by Courts in order to justify the diminished provision of services by the State during the economic crisis. The Court has also affirmed that, in case of contrast between fundamental and non-fundamental constitutional values (such as the right to health and that of economic initiative), the former does not automatically prevail on the latter but the Authority has to assess their importance case-by-case. See the judgments of the Italian Constitutional Court n. 455/1990, 247/1992, 218/1994, 304/1994, 416/1995, 267/1998, 309/1999, 248/2011 and n. 85/2013 (“*Iva*”).

⁷⁴ For instance, the right to adequate food is mentioned in the Universal Declaration on Human Rights (art. 25). The concept of “adequacy” involves both food security and food safety features, and even cultural values that need to be taken into consideration when assessing if food is actually available in a given territory.

⁷⁵ Following the economic boom of the 1960s, the emergency of global food insecurity was considered overcome, but the problem has strongly been reconsidered with the coming up of the economic crisis of the years 2000. According to a recent report of the Food and Agriculture Organization (*State of Food Insecurity in the World*, 2015, on www.fao.org) in fact, the number of people which are chronically affected by underfeeding, though it is decreasing, is approximately 800 million.

⁷⁶ Such expression has spread to identify the neoclassical economic theories of the beginning of the XX Century, according to which in a system of perfect competition the market supplies to people what they need, reaching Pareto efficiency. Such idea is based on the assumption that «an *invisible hand stabilizes the market and always swings it towards equilibrium*» (J. L. McCauley, *Dynamics of markets: econophysics and finance*, Cambridge University Press, 2004, p. 67). Pursuant to this theories, only setting a perfectly competitive market it is possible to obtain the best allocation of available resources.

⁷⁷ In C. Rocha, *Food insecurity as market failure: a contribution from economics*, *Journal of Hunger & Environmental Nutrition*, 2007, 1, 4, 5-22 the author claims that an industrialized system that considers food only as a good to be allocated depending on market rules cannot seek for food safety of human beings.

availability of safe food for human health is not guaranteed. Even though food safety rules mainly address economic stakeholders, they do not aim at protecting exclusively economic liberty, but mainly the fundamental right to life⁷⁸. As a consequence of that, even in relation to safety rules, food can still be seen as a common need and as a commodity.

Drawing from these remarks, we can consider food as common global need or, from another perspective, a common global responsibility for policy-makers. Such definition does not prove wrong the qualification of food as private commodity, but it complements it. The two terms operate on different fields that, however, equally contribute to establish the ideological basis of food policies.

The challenge of food policies is to succeed in protecting at the same time economic freedoms – such as free enterprise and free trade – fundamental rights – such as the right to health and life, and to cultural identity – new generation rights – such as the right to environment or to the so called “consumer awareness” – and other interests, such as animal wellbeing.

The correlation among such rights, liberties and interests is, depending on the specific field, of contiguity or conflict. For example, labelling rules aim at protecting the safety of food and the right of consumers to be informed; the extent of such obligations however, has a limit in the safeguard of the freedom of enterprise, which does not bear the imposition of excessive rules⁷⁹. In the same way, the agricultural sector is crucial not only from the economic point of view, but also for environmental issues; for example, on one hand the development of agricultural multifunctionality policies aim at providing environmental benefits from the sustainable cultivation of the land; on the other hand, rural activities are proved to

⁷⁸ See M. A. Recuerda Girela, *Los principios generales del derecho alimentario europeo, cit.*, pointing out that the main feature of food law is the primacy of health protection on trade interests. However, food safety rules can be considered non-tariff barriers to trade and, therefore, need also to comply with the principle of free competition.

⁷⁹ This is explained by the fact that the right of the consumer to be informed is functional to the protection of the free-trade. Indeed, in order to allow consumers to be real actors in the free market, they need to be provided for with the relevant information. On this aspect, see K. Purnhagen, *The Virtue of Cassis de Dijon 25 Years Later—It Is Not Dead, It Just Smells Funny*, in Purnhagen and Rott (eds.), *Varieties of European Economic Law and Regulation*, Dordrecht, Springer, 2014.

have a polluting potential that makes them the main responsible for CO₂ production⁸⁰.

Environmental concerns, economic development, health protection, cultural heritage are the many pieces of the same picture. The complexity of the issues related to the food sector is reflected in the fragmentation of the governance, formed by different regulators belonging to several areas, yet addressing a single object.

In addition, the conflict is not only substantial, but also spatial.

The global dimension of food, in fact, does not eliminate the strong territorial rooting of products, from a geographical, economic and cultural point of view. Geographical indications and traditional specialties' regulations are the proof of the link between the products, the areas and methods of production and the traditional character of foodstuff. However, the geographical dimension of food influences not only the contents of the rules, but – pursuant to the principle of subsidiarity - also the distribution of powers, spread at global, European, national and local level.

Regulators belonging to many legal orders, in charge with the protection of different values, overlap in the global arena. In this context, where “there is no single global and comprehensive legal order”⁸¹, but nonetheless all authorities address the same sector, the challenge is to succeed in reducing governance fragmentation and implement coherent policies. To this purpose, the following paragraphs investigate the powers retained by regulators as well as their mutual interaction in the global arena.

4. The set of powers in the regulation of the food sector

The institutions involved in determining and executing rules for the food sector are spread all over the world and they do not belong to a single sectional legal order.

The network of authorities that operate either at world or regional level and, moreover, at State or local level have been addressed as being part of a “multilevel

⁸⁰ On the debate around multifunctionality, see C. Potter and K. Thomson, *Agricultural multifunctionality, trade liberalisation and Europe's new land debate*, in A. Oskam, G. Meester and H. Silvis (ed. By), *EU policy for agriculture, food and rural areas*, Wageningen academic publishers, 2010, p. 213-222.

⁸¹ S. Cassese, *The global polity, cit.*, p. 22.

governance”⁸². In such network, Bodies that have sector-based powers coexist with others belonging to general and pluralist legal orders. Although not all of these Bodies exercise powers at global level, the impact of their rules crosses their territorial jurisdiction⁸³.

The WTO⁸⁴, the WHO⁸⁵, the CAC⁸⁶, the FAO⁸⁷ and the other Rome-based UN agencies⁸⁸ belong to the global level. They are international organizations - or

⁸² See on this matter D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, Milano, Giuffrè, 2012, who defines the governance of food safety as a sectorial and transnational legal order, since it is dedicated to the regulation of a specific, though complex, matter, comprehending several levels of governance (global, regional, national, local), which often organize themselves by getting together (p. 56-57). The picture of the global arena made of multilevel public powers is presented by Cassese, *Oltre lo Stato*, Bari, Laterza, 2006, p. 8.

⁸³ See S. Battini, *Le due anime del diritto amministrativo globale*, in AA. VV., *Il diritto amministrativo oltre i confini*, Milano, Giuffrè, 2008 analyzing the impact of national measures on other legal orders. See also S. Cassese, *What is Global Administrative Law and why study it?*, in VV. AA., *Global administrative law: an Italian perspective*, RSCAS Policy Papers, 2012, p. 2.

⁸⁴ The mission of WTO is to promote free trade at global level, preventing the States from interposing private interests to the development of such system. Therefore it intervenes in any sector of commerce, and the agri-food sector is an important part of it. In addition, the role of WTO does not only entail policy-making powers, but it implies also quasi-judicial functions, exercised by means of the Dispute Settlement Body (DSB), the authority who decides on disputes in the international trade field. Its action ensures compliance with the rules adopted within the WTO and those recalled by this system, such as food safety rules. On the WTO in general, see G. VENTURINI, *L'organizzazione mondiale del commercio*, Milano, Giuffrè, 2004 and G. Picone, A. Ligustro, *Diritto dell'organizzazione mondiale del commercio*, Padova, Cedam, 2002; for what concerns the DSB see B. Marchetti, *Il sistema di risoluzione delle dispute del WTO: amministrazione, corte o tertium genus?*, *Rivista Trimestrale di Diritto Pubblico*, 4, 2008, p. 933-967.

⁸⁵ The World Health Organization was established in 1948. It enforces binding rules and promotes the adoption of common practices concerning health. For our concerns, health is protected on three areas of regulation: food safety, animal wellbeing and environment preservation. Also, it weaves relations with other contiguous organizations, such as the FAO, as well as with national authorities. On the contrary there are weak points of contact with the WTO system. On such profiles see D. Bevilacqua, *ult. op. cit.*, p. 80 ff.

agencies that somehow depend from them - which play a fundamental role in developing the economic, environmental, health and social features of food policies.

For what concerns the regional level, the most relevant Authority is certainly the European Union which, as we will see in the further paragraphs, has progressively developed great expertise in food regulation. Namely, the EU bodies playing a major role in the elaboration and implementation of food policies are the EFSA (European Food Safety Authority) – for what concerns the risk assessment and the technical-scientific advice – and the Commission, which has executive powers and is entitled with the risk management.

As the European Union, almost all the Countries have entrusted specialized agencies with regulatory powers over the food sector⁸⁹. However, their structure, independence and responsibilities cannot be compared to those of the European Union bodies.

For instance, the main USA food safety regulatory agencies – the Food and Drug Administration⁹⁰, the United States Department of Agriculture and the Food Safety

⁸⁶ The Codex Alimentarius Commission is an agency set up by the WHO and the FAO. It sets non-binding sanitary and phytosanitary standards, which are adopted by States on a voluntary basis. The problem will be deeply analysed in § 4.1.3.

⁸⁷ The Food and Agriculture Organization (FAO) is an agency of the United Nations working in the agri-food sector. It provides for technical and legal assistance to States, in order to promote the harmonization of food laws. Though it has no imperative powers, the key role it has progressively gained helps in improving the strength of its rules. It also collaborates with other organizations, such as the WTO and the Codex Alimentarius Commission. For further remarks on the structure and the role played by FAO see *infra* § 4.1.1 and S. Marchisio, A. Di Blase, *L'Organizzazione delle Nazioni Unite per l'alimentazione e l'agricoltura*, Milano, Francoangeli, 1992.

⁸⁸ Namely, the World Food Programme (WFP) and the IFAD (International Fund for Agricultural Development). They are both agencies of the United Nations, based in Rome. See *infra* § 4.1.2 and 4.1.3.

⁸⁹ For an overview of the food regulatory systems around the world, see B. M.J. van der Meulen, *Development of Food Legislation Around the World* (Ed. By), in C. E. Boisrobert, A. Stjepanovic, O. Sangsuk and H. L. M. Lelieveld (eds.), *Ensuring Global Food Safety Exploring Global Harmonization*, Oxford, Oxford Academic Press, 2010. On European Countries' food safety agencies, see B. Halkier and L. Holm, *Shifting responsibilities for food safety in Europe: An introduction*, in *Appetite*, 2006, 127 ff.

⁹⁰ About FDA's powers see F. H. Degnan, *FDA's creative application of the law: not merely a collection of words*, Washington, Food and Drug Law Institute, 2006. and Lars

and Inspection Service⁹¹ - cannot be compared to the above authorities⁹². According to the federal structure of the US system, in fact, they are more similar to our national authorities than to the European Union agencies. Moreover, whereas at European level the responsibility to regulate food safety is mainly entrusted in two bodies, having separated and well-defined duties, the US food system is more decentralized and agencies' functions are less defined.

Similarly, even if there have been several attempts in such direction⁹³, in Italy there is no Independent Authority regulating food safety issues similar to EFSA. The food sector in general is regulated by bodies belonging to different Authorities. The governance is based on the powers given to the Regions and the State - for what concerns primary legislation- and to Health Authorities⁹⁴, to the Ministry of Agricultural and Forest Policies (the MIPAAF), to the Ministries of Environment⁹⁵ and Health⁹⁶ and to Regional administrative Authorities - for what concerns controls

Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Structures)*, in *Cornell L Rev.*, 2008, 901.

⁹¹ These are just the main agencies governing food safety and food quality issues. In fact, the US system counts no less than 30 federal laws and regulations on these issues, administered by 15 federal agencies – such as federal Centers for Disease Control. Moreover, all States have their own laws, regulations and agencies dedicated to food safety. See *www.usgovinfo.com*.

⁹² For a comparison between the two system, see T. Babuscio, *Alimenti sicuri e diritto - Analisi di problemi giuridici nei sistemi amministrativi delle Autorità per la sicurezza alimentare europee e statunitense*, Milano, Giuffrè, 2005. See also D. Viti, *Il governo della sicurezza alimentare nella globalizzazione dei mercati: il caso Cina*, in *Rivista di diritto alimentare*, 4, 2009, comparing the Food and Drug Administration with the Chinese food safety authority.

⁹³ On the need for the establishment of an Italian food safety authority, see S. Cassese (ed. by), *Per un'Autorità nazionale della sicurezza alimentare*, Il Sole 24 Ore, 2001.

⁹⁴ Such as the Istituto Superiore di Sanità.

⁹⁵ For instance, representatives of the Ministry of Environment take part to the “Comitato tecnico per la nutrizione e la sanità animale”, a food safety advisory commission chaired by the Ministry of Health.

⁹⁶ Namely, to a division of the Ministry of Health, called *Direzione generale dell'igiene e la sicurezza degli alimenti e la nutrizione*, dealing with food safety issues at national level.

and more specific regulatory and executive aspects⁹⁷. The constitutional and legislative reforms have curbed national prerogatives and shifted the main regulatory powers to the Regions⁹⁸.

In conclusion, the structure of the food regulatory systems reflects the features of the object of their policies. According to the autonomy and multi-level dimension of food, policies and authorities are geographically fragmented and sector-based. Each legal order develops a sub-regulatory level of policies specifically addressing food issues from different points of view. Therefore, these special levels enjoy a certain degree of autonomy from other regulatory system. Nonetheless, they are not isolated, since they establish connections with other thematic fields.

In the global system, the intersection between the regulators and the functions they exercise prevent the single legal orders to be sharply separated from the others⁹⁹. Considering the link of the food sector with trade, health, agriculture, environment and consumer protection, the various authorities in charge of representing such interests carry out their duties in constant dialogue¹⁰⁰. The sector-based structure of this system foster the emergence of a regulatory network, where it appear to be no center or vertex, and each institution occupies a fundamental and equivalent role as the others. The frequent utilization of *soft law* rules, relying on voluntary compliance by the States and no judicial authority exercising powers to ensure observance, is a symptom of such parity among rule-makers.

However, the connections among the various microcosms, bodies and legal orders are such that this network is far from being without a center or a top. On the

⁹⁷ Namely, the role of the Regions in the regulation of the agri-food sector has increased following the constitutional reform that has redistributed the competences between the State and the Regions (*legge costituzionale* n. 3 of October 18th 2001). See infra § 4.3.

⁹⁸ See A. Fioritto, *Agricoltura*, in M. P.Chiti and G. Greco (Ed. by), *Trattato di diritto amministrativo europeo*, II, 2007 p. 25-26. See also infra § 4.3 and Ch. II § 4.

⁹⁹ See S. Cassese, *Il diritto amministrativo globale: una sua introduzione*, cit. p. 331 ff arguing that there is no actual separation between the global and the national administrative level.

¹⁰⁰ According to D. Bevilacqua, *La sicurezza alimentare*, cit, p. 88, the stability of such relationship does not imply their effectiveness. Indeed, some systems, such as that of the WHO, still have insufficient connections with others regulators of food governance.

contrary, there are more than one policy-making and policy-executing focuses, from which the other systems, depending from them, unravel¹⁰¹.

The two fundamental centers are the one that refers to the WTO – at global level- and to the European Union, at regional level.

Moreover, such focal points operate within the common network of food governance; hence, there is a connection between them¹⁰². The shape of such connection determines the total arrangement of the food governance, for what concerns the distribution of powers and, more importantly, the balance among the values and the interests involved.

The following paragraphs draw the attention on the powers retained by the main regulators of the food sector, their role and the connections existing among them. The analysis of the governance allow to determine not only the way that such decision- makers affect private subjects, but also the relationship – hierarchic or equal- existing among them. Both such elements contribute in the analysis of the function of participation in food governance, because they highlights the power relationships between regulators, their accountability and, as a consequence, where grass-roots advocacy is more needed.

¹⁰¹ I share the assumption of D. Bevilacqua, *cit.*, p. 51 who, starting from the structure of food safety governance as a multilevel and networked order, describes it as being sectional and fragmented. This system protects several different values, which are not considered as a whole, but each one of them refers to different organizations which, even connected, pursue their own objectives according to a self- referential and sector-oriented logic. However, the lack of an Authority with the power to include and coordinate the various interests does not allow to reach parity among the institutional actors involved in the food safety system. On the contrary, the relations among the policy makers are measured on the basis of the direct or indirect binding capacity of the rules they issue. Specifically, the regimes dedicated to health and agriculture are absorbed by the free trade sector.

¹⁰² The relationship between the global and European administrative orders have been deeply examined by Italian scholars, such as in E. Chiti, B. G. Mattarella, *Global administrative law and EU administrative law. Relationships, legal issues and comparison*, Berlin – Heidelberg, Springer, 2011.

4.1. The global food governance

The globalization of the economy had as a main consequence the progressive delegation to supranational regulators of the power to adopt measures affecting national legal systems. The impact of the global regimes is that “such regulation, however, today affects individual freedom more directly than it is believed according to the dualistic paradigm: domestic authorities, rather than the recipients of decisions adopted at the international level, are often just an enforcement tool of global decisions against private subjects”¹⁰³. What is missing is a single general and unitary body of global laws. Instead, there are several global regimes, affecting single sectors of economy.

In the global arena, the institutions engaged in the determination of the policies and in the adoption of substantial acts for the agri-food law are mainly the WTO and the CAC, as well as some UN agencies, such as the three Rome-based agencies (FAO, WFT and IFAD) and the WHO.

Generally, the WTO system and the WHO regulate food safety issues, whereas the other UN agencies deal more with food security. However, whereas food security and food safety are conceptually separated, their regulation is not so sharply divided among regulator. On the contrary, there is an ongoing interaction between the two system.

These are not the only organs or programmes dealing with food issues at global level. For instance, the United Nations family also envisages the UN Conference on

¹⁰³ S. Battini, *Administrative law beyond the State*, cit., p. 12, referring to The International Civil Aviation Organization (ICAO) standards on emissions from aircraft and aircraft engines. The ICAO standards are not formally binding. However, if a member State adopts a lower standard, its aircrafts are not allowed to travel through other Countries' airspace. On the other hand, higher standards prevent manufacturers to enjoy considerable economic and record keeping benefits. Similar mechanism, as it will be further explored, are applicable to CAC sanitary and phytosanitary standards. Within the European Union, the dualism is developed according to the principles of conferral and subsidiarity, regulating the competences of the Union and the States. For what regards the Union, policies are enforced in the Member States via direct and indirect administrative powers. On this topic, see L. Baroni, *Amministrazione diretta, amministrazione indiretta e cooperazione amministrativa: riflettendo sui modelli di amministrazione nella PAC*, in *Dir. Un. Eur.*, 1, 2011, p. 95 ss.

Trade and Development (UNCTAD), a body responsible for dealing with development issues, particularly international trade. It is governed by 194 Member States which reunite to produce recommendations to policymakers on macro-economic issues. UNCTAD also interacts with other agencies, namely with the WTO, providing for technical assistance in the development of studies and intergovernmental gathering processes. However, this analysis focuses only on the representativeness and on the powers exercised by agencies having a direct competence on food-related subjects, namely in the field of food security and food safety¹⁰⁴. In this way it will be possible to determine how far the activity of such organizations affects the adoption of food policies and, at last, its impact on people.

4.1.1. The Food and Agriculture Organization

According to the “Voluntary guidelines to support the progressive realization of the right to adequate food”, adopted by the 12th session of the FAO Council in 2004, “States should promote democracy, the rule of law, sustainable development and good governance, and promote and protect human rights and fundamental freedoms in order to empower individuals and civil society to make demands on their governments, devise policies that address their specific needs and ensure the accountability and transparency of governments and State decision-making processes in implementing such policies”¹⁰⁵. This recommendation addresses national governments, as they are considered the main policy-makers; however, the global arena has changed in a way that powers have partially shifted on an upper level of governance. Therefore, one might wonder whether, when adopting guidelines on good governance, the FAO itself complies with them.

¹⁰⁴ For another reconstruction of the tasks and functions undertaken by some of these organizations see D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, Milano, Giuffr , 2012 (see in particular Chapt. I). The Author explains how, by cross-references between norms and informal connections among the Authorities and the national legal orders, soft law rules and the support activity undertaken by global organizations get, in fact, binding strength.

¹⁰⁵ FAO Council, *Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security*, Guideline 1.2, 2004, on www.fao.org.

Although formally described as a mere technical agency of the United Nations, the FAO has gained a great role in global food rule-making.

The Organization has been established in order to contribute “towards an expanding world economy” and ensure “humanity's freedom from hunger”¹⁰⁶.

To this purpose, it gives technical advice to Member States in order to help them attaining scientific development, economy stabilization and the harmonization of food law at global and regional level, both during the formulation and in monitoring the implemented policies¹⁰⁷.

FAO's support is applied in several multiannual projects, which led, for instance, to the implementation of the Comprehensive Africa Development programme or of the global technical cooperation project for economic and agrarian policy in Latin America¹⁰⁸. Notably, the attainment of food security for the global population is pursued by promoting partnerships and collaboration between the regulators and the stakeholders, towards the harmonization of rules and practices on food and agriculture¹⁰⁹. However, this does not imply the utilization of command and control measures by the FAO towards Member States; rather, the Organization cooperates and acts together with Countries, NGOs and – sometimes - private stakeholders to achieve voluntary compliance to its rules¹¹⁰.

Therefore, FAO draws upon soft law measures to promote the harmonization of rules¹¹¹. Though formally true, the degree of compliance to its standards,

¹⁰⁶ According to the Preamble of the *Constitution of the Food and Agriculture Organization*, Quebec, 16th October 1945, on www.fao.org.

¹⁰⁷ FAO's support is applied in several multiannual projects

¹⁰⁸ The list of all projects successfully implemented by FAO can be found at www.fao.org/policysupport.

¹⁰⁹ See on FAO's website “how we work”, claiming that FAO plays “a connector role, through identifying and working with different partners with established expertise, and facilitating a dialogue between those who have the knowledge and those who need it. By turning knowledge into action, FAO links the field to national, regional and global initiatives in a mutually reinforcing cycle. By joining forces, we facilitate partnerships for food and nutrition security, agriculture and rural development between governments, development partners, civil society and the private sector”.

¹¹⁰ This aspect is furtherly investigated in the next Chapter.

¹¹¹ Namely, the FAO's powers have been defined “*quasi normative and operational*” in S. Marchisio e A. Di Blase, *The Food and Agriculture Organization*, Geneve-Rome, Martinus Nijhoff Publishers, 1991, p. 22.

recommendations and decisions by States reveals that these rules are more than persuasive for Countries.

This happens for two main reasons; firstly, when States engage in long sessions of elaborate negotiations or project building, they are most willing to comply with them once they are adopted. The support in the implementation of projects, in addition, ensures direct engagement by Countries and therefore, heightens the likely effectiveness of FAO's advice.

Secondly, the binding force of FAO policies is also a consequence of the connections existing between such Organization and other entities, namely the WTO. The collaboration between the two bodies is built on the assumption, which is not always shared, that threats to food security and food safety can be mainly resolved by the elimination of trade barriers among States. Therefore, measures protecting food safety and human, animal or plant life must also comply with the obligation to ensure free competition¹¹². The balance between free trade and the protection of health is provided by an agency established by FAO and the WHO.

Namely, FAO is co-founder of the Codex Alimentarius Commission and contributes providing its scientific expertise to the elaboration of CAC's food safety standards, which are recalled by WTO treaties¹¹³. Namely, the risk analysis for international standard setting is undertaken in three FAO and WHO committees: the Joint Committee on Food Additives (JECFA), the Joint Meetings on Pesticide Residues (JMPR) and the Joint Meetings on Microbiological Risk Assessment (JEMRA)¹¹⁴.

¹¹² The connection between global trade and the protection of human life and health is also stated in the preamble of *FAO's Constitution*, declaring that the Organization was established to promote the common welfare, by "contributing towards an expanding world economy and ensuring humanity's freedom from hunger".

¹¹³ Namely, the WTO Agreement on the application of Sanitary and Phytosanitary Measures (SPS Agreement) states that "to harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations". The Agreement names the FAO/WHO Codex Alimentarius as the relevant standard-setting organization for food and plant health (SPS Agreement Introduction, Article 12.3 and Annex A paragraph 3a). See further par. 4.1.3 and 4.1.5.

¹¹⁴ See B. Van der Meulen, *The Global Arena Of Food Law: Emerging Contours Of A Meta-Framework*, in *Erasmus Law Review*, Volume 3, Issue 4, 2010, p. 220 ff.

Moreover, the FAO carries out its duty to promote harmonized norms among Member States by helping them with the implementation of WTO rules in the food sector. Namely, the Organization has given support to the implementation of the WTO Uruguay Round Agreement on Agriculture and to the negotiations on agriculture under the Doha Round¹¹⁵. Subsequently, its role has also developed in assisting countries with the implementation of current trade agreements and in preparing for trade negotiations through studies, analyses, training and experience sharing.

As anticipated, FAO establishes connections also with other regulators. For instance, the Commission for the Conservation of Southern Bluefin Tuna sets binding quotas for the fishing of tuna and controls illegal fishing on the grounds of FAO's International Plans of Action on responsible fisheries. The Commission is an intergovernmental organization, established in 1993 with the Convention for the Conservation of Southern Bluefin Tuna, whose measures bind its Member States and are enforceable before the International Tribunal for the Law of the Sea¹¹⁶. By means of indirect linkages, FAO's voluntary recommendations become enforceable before a Court.

Ultimately, FAO plays advisory functions both for rule-setters and for rule-takers in the area of trade law.

It follows that the apparent weakness of tools allocated to the FAO is partially counterbalanced by the mutual cross- references existing among its measures or activities and those issued to protect trade.

Still, the Organization is both insulated from the United Nations and citizens.

In particular, although they report directly to the Economic and Social Council of the United Nations, usually specialized agencies act quite independently from the headquarters, for what regards their policies and choices.

¹¹⁵ The Doha Round is the latest round of trade negotiations among the WTO membership, named after the city that hosted the launch WTO's Fourth Ministerial Conference in November 2001. Its aim was to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. Doha negotiations were seriously threatened by the emerging of the global economic crisis and by the subsequent soaring of food prices. Namely, the rise of prices was used both to argue for a speedy resolution of the negotiations, and to argue against any further liberalization.

¹¹⁶ See S. Cassese, *Il diritto amministrativo globale: una sua introduzione*, cit., p. 333.

Secondly, the statutory bodies of the FAO¹¹⁷ are made of delegates of the Member States. The basic texts of the Organization do not specify that they shall be *elected* representatives of the Nations. However, even so, this implies at least a double layer of separation between the FAO and citizens.

Moreover, since the FAO mainly plays advisory functions towards Member States or others global organizations, it is not directly responsible for the final outcome of its activity. Food rules with direct impact on citizens are formally ascribed to Member States or to their executive agencies, but FAO strongly influences their contents, without being accountable for it.

Hence, it is not enough to assess if the FAO – as any other global regulator – is accountable to States; it is even more important to scrutinize the level of democracy and accountability towards citizens, without any intermediation.

In fact, global regimes are not based on representative democracy and, in some way, they were established to create new regulatory systems beyond electoral proxy. As States transfer powers to international organizations, they give away a part of their sovereignty¹¹⁸. This is the inherent effect and the rationale under the creation of international bodies. Namely, the reason behind the establishment of such organizations, provided with their own bodies and structures, is not to merely implement shared policies. On the contrary, global regimes differ from intergovernmental practices¹¹⁹ because the creation of a separate organization

¹¹⁷ Namely, the FAO is governed by the Conference of its member States which meet every two years to review the Organization's work and approve of the 'Program of Work and Budget'. The Director General is chosen by the Conference and serves for a six-year term. The FAO Council, consisting of 49 member states from seven regional groups and assisted by many specialized technical committees, is elected by the Conference and acts as the executive organ. The FAO's course of action is determined in these governing bodies. The technical work and the policy implementation are carried out by the Secretariat, which operates through a number of departments. The FAO is financed by its member States as well as by banks and private entities. See FAO's Constitution on www.fao.org.

¹¹⁸ This assumption is not denied by the fact that international policies might be influenced by the different ability of Member States to dominate regulatory regimes, according to the size of their economic strength. The diminished sovereignty of States is an automatic consequence of the internationalization of policies and equally applies to all Members, while their ability to influence the outcome of policies does not depend from it and varies in time and among States. On this topic, see D.W. Drexner, *All politics is global. Explaining international regulatory regimes*, Princeton University press, 2007.

¹¹⁹ See S. Cassese, *What is Global Administrative Law and why study it?*, *cit.*, p.2.

implies a certain degree of independence from States in the elaboration of policies. Therefore, when rules are adopted by these Organizations towards less-sovereign States and citizens, Organizations must prove to be accountable themselves, in order to abide by the principle of democracy and popular sovereignty.

In conclusion, FAO plays a crucial role in the regulation of the food sector at global level. The Organization's basic texts outlines two main, equal objectives: to eradicate hunger and to promote the free exchange of goods¹²⁰. However, the connections existing with the regulation of free trade and the collaboration with the Member States in the implementation of WTO rules make its action mainly effective in this field. This means that the promotion of other values, such as food sovereignty, the right to adequate food and the protection of human health does not take on the same importance as that of free competition.

Still, the influence of FAO does not correspond to equal means of accountability towards the addressees of the rules it contributes to adopt. Informal connections between the Organization and other national and supranational authorities prevent from precisely assessing the actual contribution of FAO in policymaking and, more importantly, legally imputing rules to its organs. Though not intentionally, the FAO throws the stone and hides the hand in policymaking, making it also impossible to ensure the right of action and to a fair trial against its provisions. This makes procedural accountability even more important, because it is the only tool to both allow a better inclusion of underrepresented interests in the decision-making process¹²¹ and, at the same time, to reduce FAO's insulation from rule-takers¹²².

¹²⁰ See the Preamble of FAO's Constitution, available at www.fao.org.

¹²¹ As argue in S. Cassese, *What is Global Administrative Law and why study it?*, cit., p. 2, "There is no representative democracy and there are no periodic elections at the global level; but deliberative democracy can work as a valid surrogate, granting participation in the decision making processes".

¹²² Moreover, commentators have also hoped for the enhancement of UN agencies accountability and transparency in order to improve the effectiveness of their actions. See T. Zweifel, *International Organizations and Democracy: Accountability, Politics, and Power*, London, Lynne Rienner eds., 2006 and P. Kauppi, J. Leinen, G. Watson, G. Onesta, *The case for global democracy: Advocating a United Nations Parliamentary Assembly*, Berlin, Committee for a Democratic U.N., 2010.

4.1.2. The World Food Programme

Born in 1961 pursuant to a resolution of the UN General Assembly and FAO, the World Food Programme (WFP) is the largest humanitarian agency and it is part of the UN family¹²³. The Programme is governed by the WFP Executive Board, which consists of the representatives of 36 Member States.

The organization is headed by an Executive Director, who is appointed jointly by the UN Secretary General and the Director-General of FAO. Therefore, contrary to other Organizations, the WFP has a lower level of independence from the UN family, and especially from its founder FAO. Hence, its representativeness and the legitimacy of its action mostly derive from its affiliation to the United Nations.

However, its structural dependence does not correspond to a financial support by the UNO: WFP is financed on a voluntary basis and it does not receive any stable subsidy by the United Nations. The main donors are the States – with the United States being the main contributor¹²⁴ - however a little part of its budget comes from donations by businesses¹²⁵, associations and individuals engaged in the fight against food insecurity.

Its main mission is to eradicate poverty and hunger by giving assistance in emergency situations and helping States in building strategic actions in all the fields related to food security and food safety. Therefore, it combines operational activities with indirect regulatory powers. In specific, it collaborates both with governments and international organizations to influence global food policies.

For what regards governments, the WFP has recently engaged in a project to enhance the collaboration with EU institutions for the eradication of hunger and poverty. Nonetheless, almost all projects are set in developing Countries, since WFP's approach is to intervene directly in emergency situations, rather than supporting policy changes on a global scale.

¹²³ All information on the governance of WFP are available on the official website www.wfp.org.

¹²⁴ The United States' financing rate in 2014 was more than five times higher than that of the second best donor, the United Kingdom. The European Union was the third major contributor.

¹²⁵ The main contributors are multinationals working both in the food chain and in other sectors, such as Unilever, Vodafone and DSM. They also support and engage in WFP's projects, proving for the necessary expertise.

In addition, it establishes relevant forms of collaboration with the two other food-related agencies of the United Nations: FAO and IFAD. Namely, as WFP works to achieve its strategic objectives¹²⁶, it participates actively in the Committee on World Food Security (CFS), an intergovernmental body made of UN Member and other Countries to serve as a forum for review and follow up of food security policies¹²⁷. Moreover, the most relevant outcome of their collaboration has been the elaboration of the Global Strategic Framework for Food Security and Nutrition, a set of guidelines and recommendations for global, regional and national decision-makers to combat food insecurity and malnutrition. The Framework addressees are not only the direct beneficiaries of these policy proposals, but also the developed Countries that can help in achieving the reduction of global food insecurity. Moreover, the Global Strategic Framework faces food issues on a multidisciplinary basis, directing the guidelines also to “decision- and policy-makers responsible for policy areas with a direct or indirect impact on food security and nutrition, such as trade, agriculture, health, environment, natural resources and economic or investment policies”¹²⁸. This programme is intended to foster policy debate on these issues and, therefore, is periodically amended by the CFS according to the results of the ongoing dialogue.

The recommendations of the Framework shall not be considered alone, since they recall some important documents providing for principles for the achievement of food security. These are guidelines, voluntary agreements and other documents elaborated and adopted at global level, such as the above-mentioned “Voluntary Guidelines To Support The Progressive Realization Of The Right To Adequate Food In The Context Of National Food Security”.

Therefore, by means of continuous recalls and linkages to other soft law measures, these policy proposals form a coherent and cohesive body of recommendations for policy – makers covering several areas of intervention. Hence, the potential impact of WFP’s activity as policy-facilitator is considerable.

¹²⁶ See WFP Strategic Plan 2014-2017 on www.wfp.org. namely, one of the strategic goals (namely Goal 3) is to strengthen community participation, with a special attention for gender equality, in the elaboration of food programmes and policies. These projects, however, are activated only at the request of governments, therefore these principles are not automatically enforceable but they entail public institutions’ interest in enhancing civil society participation in policy-making.

¹²⁷ For more information about the CSF, see next chapter.

¹²⁸ See CSF, *Global Strategic Framework for Food Security and Nutrition*, on www.fao.org, p. 6.

Nonetheless, its proposals lack a strong link with mandatory rules or with other effective regulatory systems, such as that of the WTO – although this Organization has participated at its elaboration. Therefore, the strength of these measures, contrary to those of, for instance, the Codex Alimentarius Commission, rely only on the voluntary adhesion and implementation by national governments. This calls for a stricter link with the system of global trade and Health protection. The creation of stable bonds between those collateral systems could also counterbalance the low degree of independence of its governance structure from the United Nations, namely from its founding organization FAO. This has also an impact on its representativeness and on its role in the global arena.

Ultimately, the effectiveness of its present and future action with regards to food policies likely depends on the reduction of its isolation from the other relevant regulators as well as the enhancement of its representativeness.

4.1.3. The International Fund for Agricultural Development

The International Fund for Agricultural Development (IFAD), a specialized agency of the United Nations, was established as an international financial institution in 1977, on the basis of what had emerged during the 1974 World Food Conference.

The Fund finances agricultural development projects primarily for food production in developing countries, in order to fight against food insecurity and famine. Namely, IFAD's mandate is improving rural food security and nutrition, and enabling rural women and men to overcome poverty.

As one of the agencies of the United Nations dealing with food issues, IFAD does not only finance agricultural development projects. On the contrary, it also works as an advisory body for governments¹²⁹ and directly engages in projects with other Organizations and Member States.

Namely, in order to enhance its influence, the Fund continually promotes common good practises and approaches and establishes stronger links with other

¹²⁹ In particular, IFAD helps Countries to develop rural and poverty policies intervening in all steps of policy cycle, from when they are conceived and drafted, to their implementation and ex-post evaluation.

global actors¹³⁰. Its major partners can be not only national governments, but also NGOs, companies, foundations, banks and international organizations. These partners both contribute at co-financing IFAD work and engage in projects on agricultural development.

Starting from 2009, IFAD has undergone a process of reform, in order to strengthen its position and raise the quantity and quality of its operations¹³¹. Member States have increased the amount of funding resources to carry out IFAD's activity and, more importantly, other organizational transformations have allowed the Fund to directly supervise its projects by establishing its own Country offices, instead of relying only on the implementation by partners. Ultimately, IFAD's position and influence has been financially and strategically strengthened, although its reach is influenced by its comparably small dimension among the other UN agencies¹³².

In carrying out its mission, the agency has been establishing stable linkages with other Organizations outside and inside the UN family, especially with the FAO and the WFP. These bodies work together to achieve UN objectives on food issues.

In particular, the Fund participates at the elaboration of recommendations and of the UN agenda concerning sustainable development, poverty and famine.

For instance, the IFAD has been involved both in the elaboration of the so-called Millennium Development Goals¹³³ and in the new 2030 UN Agenda on sustainable

¹³⁰ "By scaling up and achieving further efficiencies, IFAD and its partners can reach more beneficiaries" (IFAD, *Reforming IFAD Transforming lives*, June 2014, p. 7, available at www.ifad.org). for instance, IFAD signed two important agreements with the Spanish government and with the OPEC Fund for International Development, in order to deliver new business models and promote innovative financing mechanisms.

¹³¹ See the *Change and Reform Agenda of 2009* and the IFAD's Report "*Reforming IFAD Transforming lives*", cit., both available at www.ifad.org.

¹³² For instance, an evaluation report on IFAD's contribution to reach UK's sustainable development objectives as well as Millennium Development Goals (MDGs) showed that "IFAD makes a clear contribution to delivering MDG1 and generating growth and wealth creation", and that "IFAD's delivery is satisfactory overall, with an ongoing focus on results and continuing improvement", although "its smaller size means that it cannot always play a leading role" (see UK Government, *Multilateral Aid Review: Assessment for International Fund for Agricultural Development (IFAD)*, February 2011, available at www.gov.uk).

¹³³ General Assembly of the United Nations (Fifty-fifth session), *United Nations Millennium Declaration*, A/RES/55/218, September 2000.

development¹³⁴. The former was a plan, developed by the UN and agreed to by all the world's countries and all the world's leading development institutions, entailing a number of goals to eliminate poverty by 2015. Although the objective has been just partially achieved, it has also served as a basis for the elaboration of the new 2030 policy goals o

n sustainable development. The development of these goals aims at influencing Member States' macro - level policies on economic development, agriculture and social issues.

In this context, IFAD plays both as a policy-maker, a discussion facilitator and a stakeholder. According to a Report issued in 2014 on IFAD's reform and activity, "IFAD has also strengthened its engagement in global policymaking and advocacy forums, including its involvement in processes related to the evolving post-2015 development agenda, in order to ensure that the concerns of rural people are heard". Therefore, in global policy negotiations IFAD also acts as a representative of rural societies' interests. Therefore, as all the agencies of the United Nations, IFAD has indirect, yet extended, regulatory powers.

When entrusting policymaking powers to an Agency, the choice about the model of governance is usually between independence and representation, with slight variations in the middle.

In carrying out its mission, the policy of the agency has been that of maintaining independence and transparency from internal and external powers. A specialized office inside the Fund, the Independent Office of Evaluation, is in charge with the overview of the organizational structure, the operational procedures and the policies, in order to give recommendations and to take on strategies to make operations more credible and effective. Every year the Office issues a report that assesses the results and the impact of IFAD operations, with special attention to the reduction of administrative costs. Moreover, IFAD started implementing a regime of full disclosure as of 1 January 2012, which led to the disclosure of more than 700 documents by 2014¹³⁵.

Interestingly, during the years the Fund has progressively engaged in a process of voluntary reform which is in line with the transformations of the administration

¹³⁴ General Assembly of the United Nations (Seventieth session), *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, September 2015.

¹³⁵ Pursuant to IFAD's Policy on the Disclosure of Documents, approved by the Executive Board in 2010. See IFAD's Report "*Reforming IFAD Transforming lives*", *cit.*, p. 13.

occurred in national contexts in the last decades, especially for what regards independent agencies. The stress on good governance, transparency and on the impact evaluation of the activities have been chosen as the methods to address inefficiencies and non-accountability¹³⁶.

However, looking at the governance structure of the Agency, it appears that the composition of bodies is based on representation.

The Governing Council is IFAD's highest decision-making authority. It is formed by governors, alternate governors and other designated advisers from each Member State of the United Nations and of the International Atomic Energy Agency.

The Executive Board supervises the general operations of IFAD and approves its programme of work. Membership on the Executive Board is determined by the Governing Council and is presently distributed according to a scheme that allows the inclusion of OECD¹³⁷ countries, OPEC¹³⁸ Member States and developing countries¹³⁹. Nonetheless, Countries are not equally represented, since the Members from the States retaining economic power at global level are double than those coming from developing countries. Given the engagement of IFAD in poverty and rural development issues, the current governance allows a weak representation of the major addressees of its activity.

Ultimately, the unbalanced representation of Member States, together with the claim for internal and external independence, lead the IFAD to retain autonomy

¹³⁶ The contamination between administrative practices is identified as one of the outcomes of the globalization of law. In the global arena, the exchange of legal traditions and practises between international bodies and national legal orders does not develop only on a top-down path, but it's mutual: national traditions affects the structure and governance of the global Bodies by which they are governed. On this topic, see S.Battini, *La globalizzazione del diritto pubblico*, in *Rivista trimestrale di diritto pubblico*, 2, 2006, par. 3.1. and S. Cassese, *Il diritto amministrativo globale: una sua introduzione*, cit., p. 346.

¹³⁷ Organisation for Economic Co-operation and Development. They are represented by eight member coming from, for example, United States, Russia, United Kingdom and all Western Europe countries.

¹³⁸ Organization of the Petroleum Exporting Countries. They have four seats belonging to, for instance: Iran, Iraq, Libya and Saudi Arabia.

¹³⁹ They are represented by six members divided into three sub lists, representing African countries (such as Egypt, Ethiopia, Morocco and South Africa), Europe, Asia and the Pacific (such as Afghanistan, Bosnia, China and India) and Southern American States (such as Argentina, Mexico and Brazil).

when carrying out its function. Autonomy without any counterbalance, however, may result in bias or, at any rate, to the self-accountability of the policy-maker.

Nonetheless, the several functions carried out by IFAD prevent from giving a single answer to its likely lack of accountability. When financing specific projects, the beneficiaries are already and inherently involved in the process. Similarly, when IFAD directly acts as a partner in national projects for the implementation of policies, it works as an advisory body; therefore, it is on the national authority the duty to make the policy circle more accountable. However, when the Fund participates at the elaboration of recommendations and other policy-making initiatives with other international bodies, it directly performs a regulatory function. In this case, it might be necessary to enhance its accountability towards the direct beneficiaries of these policies or towards the people whose interests the IFAD claims to represent. In order to do so, it might be necessary both to intervene on the governance and on inclusive methods of stakeholders representation within the agency.

4.1.4. Global health governance

On 26th of October 2015 the WHO's agency for research on cancer (IARC) has released a document explaining the results of a study undertaken to evaluate the carcinogenicity of the consumption of red meat and processed meat. After thoroughly reviewing the accumulated scientific literature, a Working Group of 22 experts from 10 different countries has classified processed meats (such as ham or sausages) as carcinogenic to humans, stating that a consumption of 50 grams per day can contribute in causing colorectal cancer. According to the director of IARC, "these results are important in enabling governments and international regulatory agencies to conduct risk assessments, in order to balance the risks and benefits of eating red meat and processed meat and to provide the best possible dietary recommendations"¹⁴⁰.

Ultimately, a limited number of experts, deeming themselves as independent from governments, have carried out an outstanding research with the goal of serving as a risk analysis for national and international policies on public health. Indeed, the

¹⁴⁰ See Press release of 26th of October on *www.iarc.fr*.

close working relationship between IARC and its parent organization, the WHO, allows the research findings of the Agency to be translated into policies for cancer control. This has already happened, for example, for what regards high-impact initiatives on the reduction in tobacco use and on the implementation of vaccination against viruses associated with cancer causation. It is no doubt, therefore, that this Agency plays a significant role in influencing the contents of funding Member States' – but likely other Countries' too - public health policies. Moreover, it can be easily inferred that, if implemented, these choices might have a huge impact on consumers' habits, on food producers and, ultimately, on Countries' income and geopolitical role in the global arena.

Nonetheless, the agency aims at carrying out independent scientific research. For this reason, the Members of IARC Scientific Council are appointed as individual experts and not as representatives of Participating States. However, the Governing Council is composed of the participating representatives of the Member States of WHO. Moreover, the agency is also funded by these Countries: its major contributors are the European Commission, the US National Institutes of Health and some governmental and charitable French organizations¹⁴¹. Therefore, IARC governance is designed to make it accountable to WHO and its funding Members.

As IARC, there are other ancillary agencies helping the WHO to carry out its mission.

In order to understand the role of this and other similar agencies, it is important to underline the connections between them and the WHO, as well as how their governance affects public policies. In fact, working an extension of the UN Health Organization, IARC follows the general governing rules of the UN family.

Currently, there is an intense process of reformation undergoing within the World Health Organization. One of the three pillars of this reorganization deals with the improvement of its role in the global governance, especially in relation to the other international health actors and to private stakeholders¹⁴².

As a matter of fact, the WHO acts as the “directing and coordinating authority on international health work”¹⁴³, in order to achieve “the attainment by all people of the

¹⁴¹ Source: *www.iarc.fr*.

¹⁴² For further information, see the official website of the Organization *www.who.int*, at the section “about WHO – governance reform”.

¹⁴³ Art. 2, chapter II of the *Constitution of the World Health Organization*. It was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (Off. Rec. Wld Hlth Org., 2, 100),

highest possible level of health"¹⁴⁴. Pursuant to this objective, it collaborates with national health authorities and other relevant public¹⁴⁵ and private actors¹⁴⁶ to improve their services in the area of prevention, healing and rehabilitation from disease. This entails also technical and legal assistance to those who require intervention in this fields, as well as the proposal of conventions, agreements, regulations and recommendations. Therefore – with a relevant exception represented by the rulemaking powers provided by articles 21 and 22 of the WHO Constitution - usually WHO does not retain any command-and-control power neither provides for any type of quasi-judicial remedy, since States abide by the Organization's policies only on a voluntary basis.

Moreover, since health issues indirectly cover also other areas of regulation, the WHO put in place significant links with other institutions, such as the FAO¹⁴⁷. The collaboration between these global regulators entails the carrying out of risk analyses for international standards¹⁴⁸ and the creation of networks - where national authorities also participate - having no binding powers but help in creating the basis for future national and international policies¹⁴⁹. Therefore, States are not compelled

and entered into force on 7 April 1948. It has been amended several times since then, lastly in 2006.

¹⁴⁴ Art. 1, Chapter I of the *WHO Constitution*.

¹⁴⁵ In fact, it must “establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organizations as may be deemed appropriate”, art. 2(b) of the *WHO Constitution*.

¹⁴⁶ Namely, the WHO has official relations with some nongovernmental organizations (NGOs), to promote the policies and programmes derived from the decisions of the Organization's governing bodies (see the *Principles governing relations between the World Health Organization and nongovernmental organizations*, resolution WHA 40.25 of the Fortieth World Health Assembly, on *www.who.int*). Therefore, the collaboration between the WHO and NGOs is mainly directed to make the Organization's activity more effective, not to open the decision-making process to private parties.

¹⁴⁷ The collaboration between FAO and WHO is now well established and comprises the joint organization and coordination of periodical international meetings and conferences regarding food issues. In 2002 this led, for example, to the holding of the Pan-European Conference on Food Safety and Quality and the Global Forum of Food Safety Regulators.

¹⁴⁸ For example, the joint FAO/WHO Committees on food safety.

¹⁴⁹ On the networked global order as the new polity see, in general, A Slaughter, *A New World Order*, Princeton Univ. press, 2004. On the analogy between global networks and European Committees, see M. Savino, *I comitati dell'Unione Europea. La collegialità*

to engage in the process, nor to adopt coherent actions; however, the diffusion and openness of these networks nudge Governments to abide by those policies¹⁵⁰.

Therefore, on the books, WHO's activity and powers resemble those retained by the FAO; they mostly act informally, although their position contributes in increasing the compliance with their policies. Nonetheless, their roles differ significantly if considered empirically.

Firstly, FAO's governing bodies have no direct power to issue binding rules towards Member States. Therefore, although compliance is reached in other manners, there is no formal way to force Countries to abide by its recommendations. On the contrary, although the most part of WHO activity is carried out through the adoption of soft law measures, the Organization can exercise also formal influence on national policies. In fact, apart from the role played in global networks, the Organization has also developed the *International Health Regulations (IHR) System*¹⁵¹, envisaging the establishment of national bodies in each Member State, which are subject to the mandatory rules set by the Organization. Moreover, according to art. 21 and 22 of the WHO Constitution, the agency has the authority to adopt regulations whose rules are compulsory for all Member States.

This raises, again, the problem of measuring the level of accountability of its governing bodies and offices. In particular, the governance of WHO is structured on three pillars: the World Health Assembly, the Executive Board and the Secretariat.

The Assembly is the supreme body of the Organization, because it has the duty to determine the general policies, to propose the budget and to appoint the Director – General, the head of the WHO. Its members come from all the Countries of the Organization; they are appointed by national governments and are “persons most

amministrativa negli ordinamenti composti, Milano, Giuffrè, 2005. Moreover, the functioning of networks in food safety regulation is described by D. Bevilacqua, *La sicurezza alimentare*, cit, p. 90 ff.

¹⁵⁰ Nudging is a theory belonging to behavioural economics, according to which indirect suggestions and positive reinforcement can achieve the same compliance objectives as mandatory rules. See R. Thaler. C. Sustein, *Nudge: La spinta gentile*. Milano, Feltrinelli, 2009.

¹⁵¹ The IHR are a body of rules that are binding for all the Member States of the WHO and other Countries. The IHR define the rights and obligations of Countries to report public health events, and establish a number of procedures that WHO must follow in its work to uphold global public health security. Although they entered into force in 2007, due to the recent Ebola outbreak, the revision of IHR are currently under discussion.

qualified by their technical competence in the field of health, preferably representing the national health administration of the Member”¹⁵².

The Board has an advisory function and shall give effect to the decisions and policies of the Health Assembly. Its Members are appointed by the Assembly and are technical experts in the field related to health.

The Secretariat is the technical and administrative body of the Organization and its members are appointed by the Director - General.

Therefore, despite the powers granted to the WHO, its bodies are not directly accountable towards States’ constituencies. The Assembly partially compensates this distance, since its Members *preferably* belong to the national health administration of each Member. However, even when national health administration officials participate to the Assembly, a double layer of insulation from the people persists, since national administrative officials are not directly elected by citizens.

In brief, in the regulation of health matters, WHO exercises both coercive and persuasive action on Member States. However, its governing bodies are not accountable towards final rule-takers.

Therefore, compared to FAO – the other main UN agency dealing with food policies – WHO’s independence from stakeholders might have more disruptive effects.

In addition, since health issues relate to food policies as much as other interests do, it is necessary to investigate also the status of WHO in relation to other regulators.

From this point of view, WHO governance has been considered uncoherent and weak, because of the insufficient links it has established with the other actors involved in the global governance¹⁵³. In particular, WHO mostly interact with other UN agencies, leaving aside the global entities that work outside of the United

¹⁵² Art. 11 of the WHO Constitution.

¹⁵³ I. Kickbusch, *The World Health Organisation: Some Governance Challenges*, Paper produced for the fourth Global Environmental Governance Dialogue “Strengthening the International Environmental Regime, Bellagio Study and Conference Center, 2000, p. 18-21, pointing out that “As more and more UN agencies, bi lateral bodies, NGOs and finally the Bretton Woods institutions took on health, the organization lost power and influence. While there is a plethora of working groups, joint committees, alliances, and negotiations etc. there is no organized, transparent and structured process to bring all players around a table”. See also D. P. Fidler, *Future of the World Health Organization: What Role for International Law*, in *The. Vand. J. Transnat. L.*, 1998, 31, 1079.

Nations. Moreover, as seen above, connections between WHO and FAO take place only in forums and conferences; however there are not stable normative links (such as, for instance, a WHO rule referring to a FAO recommendation or vice versa) between the two that can, on one hand, integrate the voluntary compliance system in which States formally retain their sovereignty but are, in practice, subject to rules set by non-accountable Organizations. On the other hand, stricter linkages between FAO and WHO would also help connecting the protection of human health with other relevant interests in the regulation of the food sector, in order to balance the values bargaining at global level. Since the elaboration of global policies inherently occur in international contexts - where there representative democracy of people is excluded- the appropriate inclusion of interests can be achieved either by citizens directly (grass-root advocacy) or through the indirect representation by specialized Organizations. Therefore, it is important that the Organizations claiming to represent the relevant interests in a given sector be accountable towards the represented stakeholders and participate as equals with the other global actors in the elaboration of policies.

However, whereas the interaction with national governments is considered acceptable, the interrelations between the global health system and that of international trade are not based on role parity. The risk assessments carried out by the FAO/WHO committees on food safety are filtered by the network engaged in the protection of free trade. In addition, the Committee responsible for the implementation of the regulations of the SPS Agreement (the SPS Committee) is a consultative forum of the WTO, although it plays a role in the harmonization of sanitary standards at international level¹⁵⁴. In this context, the WHO acts only as an external organization sharing advisory functions with other international agencies, such as the CAC, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention¹⁵⁵. Moreover, WHO has proved to have an

¹⁵⁴ Namely, it considers relevant topics related to sanitary and phytosanitary protection, and periodically reviews the performance of the SPS Agreement.

¹⁵⁵ See art. 12.2 and 12.3 of the SPS Agreement. See also D. Bevilacqua, *La sicurezza alimentare negli ordinamenti ultrastatali*, cit., p. 89, stressing on the insufficient formal links between the WTO and the WHO to delivered balanced health policies at international level.

inadequate technical expertise to analyse and advocate on trade and health matters, which threatens the organisation's capacity to engage more actively in these issues¹⁵⁶.

This means that, given the great impact of WTO's activity¹⁵⁷, the WHO is not currently able to balance its influence on global governance, which results to be, in the end, strongly trade-oriented.

If global health policies and world trade governance remain two worlds apart, this may lead to a difficulty in determining appropriate, balanced policies in all those sectors – such as food law – in which both interests are involved.

Some may argue that the separation between WTO and WHO policies can prevent the latter from being absorbed by the former. Hence, the WHO would be the appropriate counterbalance to the natural expansion of WTO's prerogatives. However, since all main global food rulers have already set strong links with the system of the world trade governance, WHO independence might result in isolation.

Therefore, the challenge is still to balance trade interests in opposition to the others involved in food policies, but from a different perspective. Indeed, if we assume that a global polity exists¹⁵⁸, the relation between different interests – as well as between the regulators which aim at protecting them – must be shaped in the light of the overall consistency of the global system.

The process of reform undertaken by WHO only partially addresses these issues. The key outcomes indicated by WHO are to improve decision – making, by (a) engaging with Member States ahead of the meetings of the governing bodies, (b) increasing their compliance, (c) acting coherently with UN policies (d) enhance the clarity and the coordination between the levels of governance and (e) involving private stakeholders (NGOs) in the policy - making process¹⁵⁹.

¹⁵⁶ K. Lee, D. Sridhar, M. Patel, *Bridging the divide: global governance of trade and health*, in *Lancet*, 2009, p. 418. See also J. Frenk, S. Moon, *Governance Challenges in Global Health*, in *The New England journal of medicine*, 2013, 368, 936-942, considering the “sectoral challenge” that makes global health actors largely unequipped to ensure that health concerns are adequately taken into account in other policymaking arenas.

¹⁵⁷ The role of the World Trade Organization and the impact of its decision on national legal orders will be taken into consideration in the next paragraph.

¹⁵⁸ It has argued the need for its existence S. Cassese, *The global polity: global dimensions of democracy and the rule of law*, Global Law Press/Editorial Derecho Global, Sevilla, 2012.

¹⁵⁹ This aspect will be more discussed in the next Chapter.

Therefore, the purpose is to strengthen the Organization's power to set rules at global level, but only within the UN circuit, and only with reference to health governance. This means that the reform is not directed at expanding the connection between the WHO and other areas of regulation. On the contrary, it aims at increasing the power it already has on national administrations and non – State actors, engaged with the protection of human health and other UN priorities.

In conclusion, although the improvement of WHO governance is not directed at changing its position towards the other global regulators, it might have a great impact on the internal governance of health issues. Therefore, the reform of NGOs involvement in the rulemaking process would be a key feature in determining whether this renovation is likely to improve WHO accountability or not, in the light of its growing powers.

4.1.5. Regulating food markets: the role of the WTO and CAC

At the heart of food law, there are some non-negotiable values, such as the preservation of human health, that push governments towards different degrees of protective attitudes when establishing safety threshold for foodstuff. However, in this area, terminology takes its toll. Indeed, while *protective* choices might be justifiable under some conditions, *protectionist* measures strike with the process of liberalization of the global markets.

World trade regulatory regimes generally aim at supporting the former, while dismissing the latter.

In the regulation of global food markets, the elimination of technical barriers to trade passes through the harmonisation of national measures for sanitary and phytosanitary protection.

The 1994 WTO SPS Agreement is the most significant effort to reduce trade distortions caused by differences in animal, plant and food safety policies among Countries. Focusing on food safety, the contrast between opposite interests is not the result of a dialogue between different bodies – each one representing the relevant values involved – but it is entrusted to a single authority: the Codex Alimentarius Commission (CAC).

Although formally CAC is not an agency of the World Trade Organization, the standard-setting system is mostly trade-oriented, so that human health is protected to the extent it does not hinder free competition values.

In particular, the Commission has been created in 1962 by FAO and WHO as an independent committee in charge with the adoption of codes and common sanitary and phytosanitary standards – the Food Standard Programme¹⁶⁰.

States comply with CAC's measures on a voluntary basis, since the Commission has no right to take down different behaviours¹⁶¹.

From these two elements, it seems that global food safety standards are adopted under the protection of human health objectives, leaving Countries' sovereignty untouched.

However, CAC's basic texts do not focus exclusively on the protection of health, but they outline two equal objectives: the protection of consumers' health and the promotion of free trade¹⁶². In practice, the two values are not equally considered in

¹⁶⁰ Uniform standards aim at eliminating the so-called non-tariff barriers to free trade, because “cadute le barriere doganali e gli altri ostacoli all'accesso al mercato, invece, le stesse regole, e le decisioni amministrative che le applicano, sono potenzialmente in grado di colpire interessi localizzati in qualsiasi paese” (S. Battini, *La globalizzazione del diritto pubblico*, in *Rivista trimestrale di diritto pubblico*, 2, 2006, pag. 327). On the classification of the non-tariff barriers – among which there are the technical barriers to trade, the sanitary and phytosanitary measures, transport and costs of the infrastructures, telecommunications, private standards and transaction costs – see L. P. Mahé, *Environment and quality standards in the WTO: New protectionism in agricultural trade? A European perspective*, in *European Review of Agricultural Economics*, 2007, 24, pp. 480-503 and MAST (Multi-agency support team), *First Progress Report to the Group of Eminent Persons on Non-tariff Barriers*, Mimeo, Geneva, June 2008. For an overview of such international barriers see A. De Capoa, *Norme tecniche e commercio internazionale. Focus su 20 paesi in tema di etichettatura, certificazione, origine, contraffazione e tutela dei consumatori*, Il Sole 24 Ore, 2010.

¹⁶¹ See art. 2 and 3 of the SPS Agreement, under which “Members have the right to take sanitary and phytosanitary measures... provided that such measures are not inconsistent with the provisions of this Agreement” but they may also “introduce or maintain sanitary and phytosanitary measures which result in a higher level of sanitary and phytosanitary protection”.

¹⁶² Namely, the Commission is responsible for the “implementation of the Joint FAO/WHO Food Standards Programme, the purpose of which is: protecting the health of the

fixing international food safety standards, since the stable linkages existing between the Commission's activity and the WTO system drag food safety regulation under the scope of free trade policies.

The analysis carried out in the previous paragraphs has shown that the system of linkages is a common feature of global law: all international organizations do not accomplish their duties alone, but are part of a broad network, in which non-binding rules become mandatory thanks to mechanisms of mutual dialogue and cooperation.

Nonetheless, although also other global regulators cooperate and establish linkages between their rules, the Commission's standards have a higher degree of persuasion, because of their direct enforceability within the global trade system.

In particular, the standards set by the Commission have become compulsory in practice because they are mentioned in the Agreement on Sanitary and Phytosanitary measures (SPS Agreement) which – along with the Agreement on Technical Barriers to Trade (TBT Agreement)¹⁶³ - is part of the treaties of WTO. Under its provisions, CAC's international standards acts as benchmarks for national SPS policies, hence national complying measures are automatically presumed to be in accordance with the international obligations. The Agreement allows Countries to deviate from them only drawing from a different risk assessment.

Non-compliance with the standards by the Members of WTO - as the European Union and its States - can rise disputes before the quasi-judicial body of the Organization. Namely, Members can be subject to compensation measures after a decision of the Dispute Settlement Body of WTO¹⁶⁴, whose main goal concerns the maintenance of competition in the global markets¹⁶⁵. The same happens with reference to the TBT Agreement¹⁶⁶.

consumers and ensuring fair practices in the food trade" (FAO/WHO, *Procedural Manual of the Codex Alimentarius Commission*, art. 1, available at www.fao.org).

¹⁶³ In particular, the TBT Agreement deals with technical requirements such as those on labelling, certifications and packaging. Article 2.4 of the TBT Agreement does not mention CAC explicitly but refers, generally, to international standards.

¹⁶⁴ Precisely, the Dispute Settlement Body formally acts as an advisory body of the WTO. Therefore, neither the Body, not the Organization have the power to enforce decisions taken after the arbitration procedure. However, if a decision is not respected, States can be authorized by DSB to adopt compensation measures, such as additional import levies.

¹⁶⁵ In fact, the DSB has been established in order to achieve compliance with trade rules established in the WTO Agreement. See art. 3 of the Dispute Settlement Understanding (Annex 2 of the WTO Agreement, available at www.wto.org): "The dispute settlement

Therefore, food safety standards are fixed and disputes are settled at global level from an essentially economic point of view¹⁶⁷. As a result, other interests, such as cultural concerns, public trust, environment and health protection, “take a back seat to trade interest”¹⁶⁸ in policy-making.

This assumption is confirmed by the criteria used to verify Member States’ compliance to the standards provided by CAC. According to articles 3.3 and 5.1 of the SPS Agreement, in fact, stricter national standards of protection are valid only when its necessity is justified by an adequate risk assessment. In other words, only when there is sufficient scientific evidence concerning a threat to health, States can diverge from CAC’s food safety rules.

This might be considered an application of the precautionary principle.

system of the WTO is a central element in providing security and predictability to the multilateral trading system”.

¹⁶⁶ According to art. 2.2 of TBT Agreement, “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products”. Therefore, even in the TBT Agreement there is specific reference to the objective to protect international trade, to a limited number of exceptions and to risk assessment as the ground of justification.

¹⁶⁷ The Organization is frequently accused of elevating “free trade in food and food stuffs over a host of other concerns” (H. S. Shapiro, *The rules that swallowed the exceptions: the WTO SPS Agreement and its relationship to GATT Articles XX and XXI the threat of the EU-GMO dispute*, in *Ariz. J. Int. & Comp. Law*, 199, p. 339).

¹⁶⁸ According to D.L. POST, *The Rise of Regulatory Capitalism: The Global Diffusion of a New Order*, in *The Annals of The American Academy of Political and Social Science*, 2005, «One of the key criticisms of the Codex Alimentarius Commission is that despite its dual mandate to protect public health and to promote fair trade practices, in fact public health protection takes a back seat to trade interest [...]Although initial drafts of standards are often issued from the Codex secretariat, in fact the drafts are usually written by individual countries...The result is that a handful of countries, usually those that can afford to devote staff time to drafting Codex standards in between committee meetings, dominate the framing of the standard».

The principle of precaution has been firstly introduced by German Courts¹⁶⁹ and subsequently adopted by the Court of Justice of the European Union (CJEU) to address food safety disputes¹⁷⁰. Furtherly, the principle has been also applied by national and European Courts and legislators both in relation to food issues¹⁷¹ as well as in other areas of law¹⁷². The function of the precautionary principle is to guide legislator's decisions not on the contents of a rule, but on the decision-making process. Such principle, therefore, guides the Authority's discretion from the procedural and not substantial point of view¹⁷³. Namely, it allows governments and agencies, in case of scientific uncertainty concerning the possible effects of a phenomenon on human health, to adopt restricting measures to prevent the

¹⁶⁹ See A. Trouwborst, *Evolution and status of the precautionary principle in international laws*, The Hague, London, 2002.

¹⁷⁰ Namely, such principle had been introduced to solve environmental and food disputes long before it has been established in the Treaties. See Court of Justice's case *Sandoz BV174/82*, concerning the importation of vitamin added food from Germany and Belgium in the Netherlands. In particular, the Court stated that Member States can, in order to protect human health, impose restrictions to the importation or exportation of products, provided that they comply with the principle of proportionality. See also the judgments of the European Union Court of Justice of 13th November 1990, cause C-331/88, *Fedesa*; 5th December 2000, cause C-477/98, *Eurostock Meat Marketing*; 21st March 2000, C-6/99, *Association Greenpeace France c. Ministère de l'Agriculture et de la Pêche*; 2nd October 2002, cause C-241/01, *National Farmers' Union; associated causes Monsanto SAS et al. c. Ministre de l'Agriculture et de la Pêche*, C-58/10 e C-68/10.

¹⁷¹ In the area of food safety the European Union legislator has made an intensive use of such principle (for example, in the case of the "crazy cow", decision of the Commission no. 96/239/CE of 27th March 1996 to forbid importation of beef from the United Kingdom, then reversed by decision no. 98/256/CE of 16th March 1998). See on the matter M. Sollini, *Il principio di precauzione nella disciplina comunitaria della sicurezza alimentare*, Milano, Giuffrè, 2006.

¹⁷² After the introduction of art. 174 TCE (today 191 TFEU) and of the Communication of the Commission of 2nd February 2000, judgments regarding precautionary principle have multiplied, forming a consolidated guidance on the matter (Court of Justice, sect. II, 15th January 2009, C-383/07; 13th December 2007, C-418/04; 9th September 2003, C-236/01, recently recalled by the Italian Council of State's decision, sect. V, no. 6250 of 27th December 2013).

¹⁷³ F. De Leonardis, *Il principio di precauzione nell'amministrazione di rischio*, Milano, Giuffrè, 2005 and G. Manfredi, *Note sull'attuazione del principio di precauzione in diritto pubblico*, in *Diritto pubblico*, 3, 2004.

assumed risk to occur¹⁷⁴. In such way, the Authority is entitled to take discretionary decisions drawing from the consideration of a multiple set of scientific and non-scientific values, within the limits of proportionality¹⁷⁵ and rationality¹⁷⁶.

¹⁷⁴ Nevertheless politicians can abuse of this principle: taking advantage of the fear arising from a possible event, they can pursue their own objectives hidden behind a precaution approach. On such aspect see C. Sunstein, *Il diritto della paura. Oltre il principio di precauzione*, Bologna, Il Mulino, 2010.

¹⁷⁵ The principle of proportionality has become part of the European Union Constitutional basis, thanks to art. 5 TEU, consolidating the previous case law of the Court of Justice; according to it “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”. See CJEU, 5/7/1977, cause 114/76, *Bela-Mühle*, under which the objectives of the common agricultural policy specified by art. 39 TFEU operate either as basis or as inner limit of the community Institutions activity in such field). Moreover, the proportionality is measured with reference also to the measures adopted by the Member States affecting fundamental freedoms (see the case “*Cassis de Dijon*” Sent. 20/2/1979, cause 120/78, *Rewe-Zentral-AG*, stating that the restriction to free movement of goods has to be justified by reasons of public interest and by an adequate balance between the former and the latter). Therefore, the principle prevents a constitutional value to be considered to be absolutely prevailing in respect of another one, but it requires a real verification, in consideration of the mutual integration of fundamental rights protected by the European and national laws.

¹⁷⁶ Meaning the conformity of a choice to a logic-rational plan, in coherence with the context into which it is inserted. Rationality therefore, has an impact on the agency’s leeway; however, it is applied to all the cases when power execution is not entirely bound and therefore it needs to be justified. Therefore, rationality guides also the legislator (in compliance with the principle of equality ex. Art. 3 It. Const. on which G. Scaccia, *Controllo di ragionevolezza delle leggi e applicazione della Costituzione*, in *Nova juris interpretatio*, Roma, 2007, pp. 286-302) and the Judiciary. Moreover, rationality operates as an implied condition of proportionality because an unfair measure cannot be considered rational. For this reason the Italian Constitutional order tends to overlap such terms (see sentence of the Const. Court 2/1999, mentioned in M. Cartabia, *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana*, Conferenza trilaterale delle Corte costituzionali italiana, portoghese e spagnola, Roma, Palazzo della Consulta, 24-26 ottobre 2013, stating that «l’automatismo della sanzione disciplinare è irragionevole, contrastando con il principio di proporzione, che è alla base della razionalità che informa il principio di eguaglianza»). Finally, it is important to remind that the proportionality and rationality of a measure can be assessed even when it affects fundamental rights. Since it is denied their absolute and prominent value in respect of other constitutionally protected

At global level, the refusal of the WTO adjudicatory body to accept precaution as a general principle of international law¹⁷⁷, as well as its interpretation of articles 3.3 and 5.1 in the light of the WTO laws, suggest that its approach rather abides by a different principle, that is the principle of prevention¹⁷⁸. Namely, stricter national measures are not in conformity with WTO laws when based not on prevention, but more generically on precaution.

The precautionary approach differs from the principle of prevention because of two aspects. The first is that precaution allows the adoption of prudent measures even under conditions of scientific uncertainty concerning the possible effects of a phenomenon (which could be the commercialization of a new product meant for

interests, it is always necessary to actually balance the different values and rights, in order to fulfill the needs implied in the specific case.

¹⁷⁷ As stated in the *EC- Hormones* decision (WTO Appellate Body Report, EC—Measures Concerning Meat and Meat Products, WT/DS26/ AB/R; WT/DS48/AB/R, adopted 13 February 1998, par. 123). See also *Sardines*, WT/DS231/AB/R, 70-72 and *Shrimp/Turtles*, WT/DS58/AB/R. In these decisions, the Appellate Body of the WTO limited national discretion by imposing procedural requirements for the exercise of their powers.

¹⁷⁸ Scholars have broadly discussed on the principle of prevention, and on its similarities and peculiarities with respect to the principle of precaution. See S. Romero Melchor, *Principio de precaucion: principio de confusión?*, in *Gaceta Juridica de la UE 2000*, n. 207, p. 89 ss; L. Marini, *Il principio di precauzione nel diritto internazionale e comunitario. Disciplina del commercio di organismi geneticamente modificati e profili di sicurezza alimentare*, Milano, Giuffrè, 2004, p. 5 who distinguishes among prevention, precaution and compensatory approach; D. Bevilacqua, *cit.*, p. 274 and ss. analysing the application of such principles in food safety governance. Some have expressed their doubts about a real distinction between the two concepts; see A. Barone, *Il diritto del rischio*, Milano, Giuffrè, 2006, who interprets the precautionary principle like a specification of the preventive approach (p. 77) and L. Krämer, *Principi comunitari per la tutela dell'ambiente*, Milano, 2002, 82 ss, stating that the precautionary principle «non sembra contenere, dal punto di vista giuridico, alcun valore aggiunto». Indeed, both principles under discussion deal with risk management and, therefore, they move within the sphere of what is likely or possible to occur. In my opinion, the difference is perceivable on the moment when an Authority can, according to one of the two principles, act in order to face the threatened risk. The principle of precaution, in fact, allows a more anticipated protection, because it is justified by the high level of discretion and uncertainty of the risk management. Hence, the border between legitimacy and illegitimacy of the Authority decision is based mainly on the concept of sufficient availability of elements in favor of precautionary approaches.

cultivation or human consumption), whereas prevention requires certainty. The second aspect, which is a consequence of the first one, regards the possibility of the administration to adopt a measure based on the integration of different interests, not entirely respondent to a strict scientific approach.

Such interests, as already explained, play an important role within the multifaceted sector of food. Therefore, either at administrative (for instance, the release of an authorization) or policy-making level (for instance, when fixing new rules or standards)¹⁷⁹, the relation between science and discretion determines the legitimacy of the extra-scientific evaluations that have been made.

At global level, the technocratic approach strongly limits the consideration, within the process of risk analysis occurring at national level, of factors and interests that are not scientifically measurable¹⁸⁰. Some examples help to clarify the concept.

As part of the WTO, the DSB interprets CAC standards in the light of the GATT (General Agreement on Tariffs and Trade)¹⁸¹ and of the other agreements such as TBT and SPS Agreements. In their provisions, there is extensive reference to the protection of the free trade, with a precisely defined, close number of exceptions to this principle, provided by art. XX GATT. The exceptions relate, for instance, to the protection of human, animal, plant health or life and to public morals. The definition itself of these values as “exceptions” to the protection of free trade already limit

¹⁷⁹ Nonetheless, in the global arena there is no clear distinction between legislative and administrative, normative and executive measures. See S. Cassese, *Il diritto amministrativo globale: una sua introduzione, cit.*, p. 342.

¹⁸⁰ On the marginalization of social values in favour of a technocratic approach in global decision-making see E. Stokes, *Book review: “EU Regulation of GMOs: law and decision-making for a new technology” by Maria Lee*, in *Journal of Environmental Law*, 2010, p. 163. See also J. Scott, *On Kith and Kine (and crustaceans): trade and environment in the EU and WTO*, in J.H.H. Weiler (ed), *The EU, the WTO and the NAFTA: towards a common law of international trade*, Oxford, Oxford University Press, 2000, p. 158.

¹⁸¹ International agreement, signed on 30th October 1947 in Geneva by 23 countries, establishing the basis for a multilateral system of trade relations to favor the liberalization of world trade. Starting from such agreement – whose never accomplished ambition was to create a Trade International Organization – the Countries have stipulated several agreements directed at eliminating custom barriers. The GATT has been updated in 1994, after the negotiations of the Uruguay Round, terminated with the signature of the Marrakech Agreement, which has established the World Trade Organization.

States' possibility to consider interests falling outside the scope of market liberalization.

Moreover, the condition under which these exceptions can be activated, which is the above-mentioned risk assessment based on the available scientific evidence, furtherly limit States' discretion. Namely, drawing from the joint interpretation of articles 3 and 5 of the SPS Agreement, the DSB's doctrine requires national stricter measures to be necessary and non -arbitrary. Namely, the necessity and non-arbitrary test is run establishing as a legitimacy threshold the certainty of risk, which leaves aside the consideration of non-scientific elements, belonging to the step of risk management. As stated in the *Australia – Salmon* case, which in turn refers to the decision of the DSB in the *EC- Hormones* dispute, the “risk” evaluated must be an ascertainable risk; “theoretical uncertainty is “not the kind of risk which, under Article 5.1, is to be assessed”¹⁸². By requiring stricter measures to be based on risk assessment, the SPS Agreement, and its interpretation by the DSB, limits the discretionary power that, in national contexts, is expressed during risk management¹⁸³. As a result, “risk management was absorbed by risk assessment, as this must be detailed and in rational relation between risk and the measure: therefore science absorbs discretion”¹⁸⁴.

¹⁸² See Report of the Appellate Body, *Australia - Measures Affecting Importation of Salmon*, WTO Doc. WT/DS18/AB/R (Oct. 20, 1998), available at www.wto.org and *EC - Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/R/AB/R, WT/DS48/AB/R (16 January 1998). These cases are also cited in support of the thesis expressed in M. D'Alberti, *Poteri pubblici, mercati e globalizzazione*, Bologna, Il Mulino, 2008, p. 131 on the unbalanced relationship between trade and non-economic values in global regulatory system. For a different interpretation of these case-laws, see D. G. Victor, *WTO Efforts to manage differences*, in D. Vogel and R. A. Kagan (Ed. By), *Dynamics of regulatory change*, Berkley and Los Angeles, University of California press, 2004, p. 243 ff.

¹⁸³ Similar positions can be found in other disputes, such as in *EC- Biotech (EC - Measures affecting the approval and marketing of biotech products (WT/ DS/291, 292, and 293)*, Reports of the Panel, Geneva, 29 September 2006). For an interpretation comforting the thesis of the strongly technical and trade-oriented DSB's doctrine, see H. S. Shapiro, *The rules that swallowed the exceptions: the WTO SPS Agreement and its relationship to GATT Articles XX and XXI the threat of the EU-GMO dispute*, cit.

¹⁸⁴ R. Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, in *Michigan Law review*, June 2000, p. 2337.

Therefore, although WTO rules envisage the possibility for States to take into consideration non-economic interests, the conditions under which this circumstance would be justified bring national measures back to scientific and technical grounds. In *EC- Seals*¹⁸⁵, the Appellate Body of DSB has for the first time interpreted the provisions of the TBT Agreement establishing that an ethical - oriented measure can be included in provision of art. XX GATT; nonetheless it has carried out a strict scrutiny on the necessity and non - arbitrariness of the measure, which ultimately was deemed to be not legitimate and trade obstructive¹⁸⁶.

Apparently, the utilization of technical criteria ensures higher objectivity in the construction of global policies. As a matter of fact, CAC does not exercise – in theory – a political role, but it is a technical advisory board. Moreover, it has no democratic legitimacy, because its members are nominated, not elected by the global society. Since it misses representativeness, CAC's compliance with strictly scientific standards could prevent it to play a political role¹⁸⁷.

¹⁸⁵ Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22nd May, adopted on 18th June 2014. In this dispute Canada and Norway have questioned the Community ban to the importation and marketing of seal products, based on the disdain of European citizens towards capture and killing methods of these animals. For the first time the global adjudicatory organs have endorsed the prevailing of extra-scientific motivations on the free trade protection; therefore, the measure has passed the necessity test. However, it has failed under the chapeau of art. XX GATT, that requires a rational link between the higher standard and the policy objectives.

¹⁸⁶ For a comment on the decision see G. Shaffer, D. Pabian, *The WTO EC-Seal Product decision: animal welfare, indigenous communities and trade*, *American Journal of International Law*, 2015, Forthcoming. See also A. Herwig, *Symposium on the EU-Seal Products Case · Regulation of Seal Animal Welfare Risk, Public Morals and Inuit Culture under WTO Law: Between Techne, Oikos and Praxis*, in *European journal of risk regulation*, vol. 6, issue 3 2015, 382-387. On the approach of WTO towards cultural interests, see also L. Zurek, *The European Communities dispute: how the WTO fails to consider cultural factors in the Genetically Modified Food debate*, in *Texas International Law Journal*, 2007.

¹⁸⁷ On the problem of legitimacy of the global Institutions, see D. Bevilacqua, *Il free trade e l'agorà*, cit., proposing, as solution to the problem of the democratic deficit suffered by them, to increase the procedural guarantees provided by them. On the matter, see the important remarks of Sabino Cassese, *Oltre lo Stato*, cit. The Author, though acknowledging the problem created by moving decisions from national to global level, and from the

However, the institutional connections with WTO disturb such apparently balanced system. Firstly, the actual binding force of the standards provided by CAC, in fact, strongly limits the possibility of the States – whose legitimacy is mainly based on representativeness – to found their policies on theoretical assumptions. Secondly, the approach of CAC in determining standards is not neutrally apolitical. It is aimed at protecting human health, but as long as this ensures free international trade. The CAC itself, therefore, acts in function of a set of values. The values protected by the global system are those of free trade.

In conclusion, not only the CAC plays a political role, but it also imposes its theoretical orientation on WTO Members and, as a consequence, on private parties. The decision of States to abide by WTO rules might also be a strategy to avoid complications and potential conflicts¹⁸⁸, as well as a way for less developed countries not to be excluded from world commercial exchanges¹⁸⁹. This is witnessed also by the participation of WTO bodies to the elaboration of the recommendations concerning other areas of food law, such as food security. The abidance by WTO rules and principles is seen as a necessary pre-condition for the elaboration of effective policies on global issues.

The progressive diffusion of world trade values in the legal orders is also due to the adoption of these principles by national and supranational Courts. The WTO agreements do not expressly regulate the effectiveness of world trade rules in national legal orders. Due to the lack of agreement on this point, the WTO has left States free to determine if international trade law can be directly invoked by citizens

legislative to the administrative level (p. 63) states that the participatory guarantees are only a partial solution to the democratic deficit; therefore they cannot replace the political accountability; in addition, procedural safeguards have to be accomplished in ways that do not cause adverse effects, such as the capture of the regulator (see Id, *La partecipazione dei privati alle decisioni pubbliche – saggio di diritto comparato*, in *Rivista Trimestrale di Diritto Pubblico*, 2007). See also S. Battini, *Le due anime del diritto amministrativo globale*, in AA. VV., *Il diritto amministrativo oltre i confini*, Milano, Giuffrè, 2008, who analyses global law - either as rules imposed to the national regulators or as restrictions imposed to the global regulators – and the enhancement of the democratic function performed by procedural guarantees at this level.

¹⁸⁸ See M. D. Masson – Matthee, *The Codex Alimentarius Commission and its standards*, the Hague, 2007 and I. Sien, *Beefing up the Hormones dispute: problems in compliance and viable compromise alternatives*, in *Georgetown law journal*, 2007, 95, 565 ff.

¹⁸⁹ See D. G. Victor, *WTO efforts to manage differences*, cit. p. 238.

before Courts. In mostly all cases, States – and even the European Union¹⁹⁰ - have denied this possibility in their acts of ratification. However, a mere act of ratification is not considered enough to regulate the relationship between international and domestic law, since it must be compatible with the principles governing each legal order¹⁹¹.

According to the case-law of the CJEU, international treaties – such as those of the WTO – are one of the sources of law of the EU. Therefore, both European institutions and the Member States must abide by their provisions. However, private parties generally do not have the right to challenge the violation of international rules – such as those of the WTO system – before a Court¹⁹². In fact, the obligations deriving from international duties - such as contained in the WTO agreements - has no direct relevance in trials within the European Union, unless they give specific right to citizens or are recalled expressly by the acts of the EU¹⁹³.

¹⁹⁰ See *Council Decision 94/800/EC* of 22 December 1994 concerning “*the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)*”.

¹⁹¹ The issue of the effectiveness of WTO law within the EU have been faced by many scholars. See, for example, A. Tancredi, *EC Practice in the WTO Law: How Wide Is the "Scope for Manœuvre"?*, in *EJIL*, 2004, pp. 933-961; J. H. J. Bourgeois, *The European Court of Justice and the WTO: Problems and Challenges*, in J. Weiler (edited by), *The EU, the WTO and the NAFTA*, cit., pp. 71-123

¹⁹² See *International Fruit Company and others v. Produktschap voor Groenten en Fruit*, c. 21 - 24/72. In this case, the Dutch court asked whether the ECJ had the jurisdiction to rule on the validity of EEC Treaty under international law, in particular under the General Agreement on Tariffs and Trade (GATT). The CJEU argued that it is obliged to examine the validity of regulations which may be in contradiction with the rules of international law. However, two conditions must be verified. First of all, the Community must be bound by that provision, Secondly, that provision of international law must also be capable of conferring rights directly on citizens of the Community. Under the Court’s view, the GATT does not meet these requirements. The opinion has not changed even when WTO agreements have replaced the GATT. See, on this point, CJEU, 23rd November 1999, C-149/96, *Portugal v. Council*.

¹⁹³ See CJEU 22nd June 1989, 70/87, *Federation de l'industrie de l'huilerie de la CEE (FEDIOL) v. Commission*; CJEU, 7th May 1991, C-69/89, *Nakajima All Precision Co. Ltd v. Council*. See again CJEU, C-149/96 – *Portugal v Council*, par. 42-46. As per the Court of Justice main case laws, WTO treaties and its protocols do not justify any legal remedy against their violation by European law or national laws before any European court. See also CJEU,

Yet, global food safety rules frequently fall in the two exceptions outlined by the Court of Justice¹⁹⁴. Moreover, they act indirectly, since national rules must be interpreted according to international law¹⁹⁵.

In conclusion, WTO rules – namely the standards set by the CAC – revolve around the principle of free trade and have a great impact on domestic and European legal orders, affecting States choices and citizens' rights¹⁹⁶. Still, the Codex Alimentarius Commission cannot be considered as representing neither the former nor the latter. Theories on alternative forms of accountability¹⁹⁷ require that global

Dior C-300/98 e C-392/98, on the applicability of TRIPs treaty. For a comment, see G. Zonnekeyn, *EC liability for non-implementation of WTO dispute settlement decisions are the dice cast?*, in *J. Int. Econ. Law*, 2004, 7, 483–490.

¹⁹⁴ European acts frequently recall international treaties in their provisions. For instance, according to the XVI Recital of Directive 412/2015 on the cultivation of GMOs, the rules imposed at European level must be in conformity with art. 216(2) TFEU, according to which the Union respects international obligations.

¹⁹⁵ CJEU, *C-92/71 – Interfood*, par. 6.

¹⁹⁶ Among commentators, a minority has argued that global trade rules' impact on States is just hypothetical, or at least less remarkable as expected; indeed, in many cases governments have decided not to comply with WTO rules, especially when public concerns about the threat on social and cultural values were involved. One example is EU non-compliance with the *Hormones* ruling, on which see D. Wüger, *The never-ending story: the implementation phase in the dispute between the EC and the United States on Hormone-treated beef*, *Law and Policy in International business*, 2002, p. 777. See also C. Downes, *The impact of WTO SPS Law on EU food regulations*, Springer, 2014. In reviewing the existing literature on the matter, the Author argues that “[...] whether expressed in coercitive, strategic or normative terms, expectations largely converge: WTO members will comply with international rules. [...] yet the food-related disputes that have arisen under the SPS Agreement directly challenge this regulative assumption”. Nonetheless, non-compliance implies the adoption of compensation measures, having consequences on international trade relations and on States economic status. Therefore, even in case of non-compliance, trade law exercises an impact on Countries. according to D. G. Victor, *WTO Efforts to manage differences*, cit., p. 242 “formal disputes are important not only because they often address important trade barriers themselves but also because they create interpretation of the law, focus expectations on how WTO system will handle possible future disputes, and deter other violations”.

¹⁹⁷ See *supra* *Introduction*.

regulators engage in transparent and accountable decision – making processes¹⁹⁸. What still needs to be investigated is the extent to which CAC should be accountable, and the methods to achieve this result.

4.2. The European Union’s competence in food law: what’s in a name?

The image of three pillars supporting the pediment of a temple belongs to the classical iconography of European law because, until the Lisbon Treaty came into force¹⁹⁹, it has been used to describe the jurisdiction of the European Union in economy, foreign policy and penal law.

Now that such image has been overcome in favor of a better uniformity and simplification of the European action, it can be recovered to show what are the legal conditions that have allowed the development of the food policies.

Namely, EU food legislation covers many aspects, such as the safety, quality and security²⁰⁰ of foodstuff, information to consumers, animal welfare, sustainability, subsidies and other economic policies addressing agricultural activities. The main principles are contained in Reg. 178/2002, which is known as the General Food Law (GFL) and established the European Food Safety Authority. For this reason, this

¹⁹⁸ “Surely, if a national government gave its worst – off citizens no effective influence in its policies and laws but still ordered them to obey, we would call that government illegitimate” (T. Zweifel, *cit.*, p. 2).

¹⁹⁹ The Lisbon Treaty has overcome the distinction between Pillars, conferring to the European Union the powers retained by the former European Community.

²⁰⁰ Since food security policies are mostly directed at helping foreign Countries achieving sustainable development, they do not affect European citizens directly. Namely, European Union has adopted the EU2020 initiative and the European Consensus on Development, the general framework for food security initiatives, on the basis of art. 210 of the Lisbon Treaty. Therefore, food security initiatives fall under the Union and the States’ policies on development cooperation; hence, they are mainly addressed at helping non-EU countries in achieving global food security and sustainable development goals. See the Communication from the Commission to the Council And the European Parliament “*An EU policy framework to assist developing countries in addressing food security challenges*”, SEC(2010)379.

paragraph investigates the Union's power to regulate the food sector mainly from the point of view of safety policies, although other areas are taken into consideration.

At European level, food laws²⁰¹ usually rests on articles 43, 114 and 168 of the Treaty on the Functioning of the European Union (TFEU), concerning the common agricultural policy²⁰², the Single Market and human health protection²⁰³. Nonetheless, there is no specific provision in the Treaties that expressly delegate to the European Union institutions the power of issuing rules concerning food.

Food law scholars have to face a major paradox: the proliferation of European food rules²⁰⁴ without a specific legal basis. Namely, European food law does not operate as a “metaframework”, providing for national legal orders with rules to

²⁰¹ On the existence and the autonomy of food law, namely of public food law, L. Perfetti, *Principi della disciplina pubblicistica dell'alimentazione. Premesse ad un diritto amministrativo dell'alimentazione*, in *Riv. Dir. Agr.*, 1, 2014, 3-20. On the principles governing EU food law, see B. Van der Meulen, *The Structure of European Food Law*, Laws, 2013.

²⁰² Historically, after World War II, the agricultural policy of the European Economic Area focused on increasing the agricultural productivity and an assurance of availability of supplies at reasonable prices. Therefore, nutrition, agricultural and food security policies formed a single body of rules. Consumers' health protection, rules harmonization and safety aspects became part of European food law only in the second part of the XX Century. See M. Holle, *Nutrition Policy in the European Union*, Wageningen Working Papers, 2014, 3.

²⁰³ The consideration of further interests such as, for example, environment protection or animal health, occurs only if deemed necessary in the specific case (art. 5, Reg. 178/2002). However, there are fields, such as that of GMOs, where the impact on the environment is expressly considered; in compliance with art. 6 of the Regulation on GM feed and food n. 1829/2003/CE, the risk assessment needs to be done in order to determine the potential harmful effects that the cultivation of such plants could imply on the surrounding environment.

²⁰⁴ Food is one of the most regulated sector within the EU.

address consumers' behavior²⁰⁵, but directly regulates the food sector with binding rules²⁰⁶.

There is no doubt that people's dietary habits as well as the methods of production of some traditional products refuse standardization, since they belong to the cultural heritage of a territory that, even because of economic reasons, needs to be taken into consideration. The increase of competitiveness of the European producers on the international market, in fact, depends in first place on maintaining a high quality level of the products they can offer; this frequently implies to draw upon production processes that belong to the local tradition²⁰⁷. The choice of devolving food policies at national level, therefore, meets both economic and cultural requirements, although respecting the idea of a European Union United in diversity²⁰⁸.

At the same time, however, Europe main goals to set a single European market and to overthrow the obstacles to free competition at international level, require the adoption of a small number of clear and common rules among States. For instance, the general regulation on quality schemes for agricultural products and foodstuffs²⁰⁹ rests on art. 43 (2) and art. 118. According to the latter, "In the context of the establishment and functioning of the internal market the European Parliament and the Council [...] shall establish measures for the creation of European intellectual

²⁰⁵ On the contrary, according to B. Van der Meulen, *The Global Arena Of Food Law: Emerging Contours Of A Meta-Framework*, cit., p. 240, the international food law is a meta-framework, since "it does not in itself regulate stakeholders dealings with food, but rather sets requirements that such regulation must meet at national level".

²⁰⁶ On the competences of the European Union for what regards food safety, see M. Savino, *Autorità e libertà nell'Unione Europea: la sicurezza alimentare* in *Riv. trim. dir. pubbl.*, fasc.2, 2007, p. 413.

²⁰⁷ For instance, recently Italian producers have expressed their concerns about the European Commission official letter inviting the government to cancel the ban on the utilization of powdered milk for the production of cheese (news published on the official website of the Ministry of Agriculture www.mipaaf.gov). In the Commission's view, the ban is a restriction on the free movement of goods, however Italy has never allowed this method of production in order to preserve the quality of its regional products.

²⁰⁸ "United in Diversity is the official motto of the European Union, coming from the Latin expression "*Unita in Diversitate*", officially adopted by the European Parliament in 2000.

²⁰⁹ Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 "*On quality schemes for agricultural products and foodstuffs*".

property rights to provide *uniform protection* of intellectual property rights throughout the Union and for the setting up of *centralised* Union-wide authorisation, coordination and supervision arrangements” (emphasis added).

Following this reasoning, free trade imperatives justify diversified measures inside the national territories, but only as long as they are strictly necessary. Such rule, which can be considered a reversed interpretation of the principle of proportionality²¹⁰, justifies the concurrent competence of the European Union on the matter and it is applicable in any field ruled by free competition²¹¹, including the food sector²¹².

As a consequence of that, even if there is no explicit jurisdiction in that field, the Union is indirectly vested with the power of issuing binding and non – binding food rules due the great economic importance of such sector²¹³. Besides, until the changes

²¹⁰ Such expression means that the interpretation that is given to the principle of proportionality is that deduced with an *a contrario argumentum*, from the definition introduced by the Maastricht Treaty at art. 3 B, third paragraph, which states that: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”.

²¹¹ Namely, the legal basis is art. 4, par. 2, letter *a* TFEU, according to which the Union has concurrent competence for what regards the internal market.

²¹² In particular, the principle of subsidiarity, which regulates the division of competences between the Union and the States, is interpreted in the light of the principle of proportionality. As a consequence of that, the principle of subsidiarity regulates also the choice of legislator between binding and non- binding acts. See on this interpretation S. Cassese, *L'aquila e le mosche. Principio di sussidiarietà e diritti amministrativi nell'area europea*, in *Foro it.*, 1995, V, 373 and M. P. Chiti, *Principio di sussidiarietà, pubblica amministrazione e diritto amministrativo*, in *Dir pubbl.*, 1996, 789; in ID., *Mutazioni del diritto pubblico nello spazio giuridico europeo*, Bologna, 2003, 153.

²¹³ This assumption is confirmed by the so-called theory of implicit powers, formulated by the Court of Justice (see decision “AETS”, *Commission v. Council*, 22/70, judgement released on the 31st March 1971) according to which, even when there is no specific mandate, the Union can be considered competent in a specific matter when such is necessary to exercise a jurisdiction or to reach an objective that is expressly provided by the Treaties. Such theory is a softer interpretation of the principle of conferral (art. 5 first sentence and art. 7, paragraph 1, TEU) according to which the Union is entitled to act only within the limits of the jurisdiction expressly provided by the Treaties.

that followed the BSE crisis, food law existed only in the light of the development of the internal market²¹⁴.

Therefore, the legal basis of the European Union jurisdiction in food matters is first of all art. 114 TFEU²¹⁵, which entrust the institutions with the powers to adopt “measures for the approximation of the provisions laid down by law, regulations or administrative action in Member States which have as their object the establishment and functioning of the internal market²¹⁶”.

The competence of the European institutions is particularly strengthened when its action concerns health, safety and environment or consumer protection; in such fields, in fact, the Commission’s legislative proposals have to achieve a “high level of protection” (3rd paragraph). As a consequence of that, in such matters the measures are particularly stringent²¹⁷, considering also the fact that the Member States can maintain divergent national provisions only pursuant to some precisely given grounds, and as long as they are not based on arbitrary evaluations or constitute an

²¹⁴ See B. M.J. van der Meulen, *Development of Food Legislation Around the World* (Ed. By), in C. E. Boisrobert, A. Stjepanovic, O. Sangsuk and H. L. M. Lelieveld (eds.), *Ensuring Global Food Safety Exploring Global Harmonization*, Oxford, Oxford Academic Press, 2010. In the part related to European law, the Author outlines the passage from a market-oriented legislation to a more comprehensive approach on food safety.

²¹⁵ For example, art. 114 TFEU is used as the legal basis of Regulation 1333/2008 (and following amendments) on additives, and of Regulations no. 1829 and 1831/2003 (and following amendments) on the traceability and labelling of GMOs.

²¹⁶ The utilization of art. 114 (former art. 95 TEC) instead of art. 115 (former art. 94 TEC) is explained by the fact that the latter allowed the action of the Union only through Directives and only with regard to matters that “directly affect the establishment or functioning of the internal Market” Art. 114 allows more flexibility, since it refers in general to measures which “have as their object the establishment and functioning of the internal market”. Therefore it has encouraged a broader utilization of this basis by the Union, which is free in choosing the most suitable regulatory tool to reach the expected objectives. On such aspects see G. Gaja, *Il processo di armonizzazione e la sua incidenza sull'ordinamento italiano*, in *L'ordinamento italiano dopo 50 anni di integrazione europea*. Atti del convegno di studi, Alghero, 5-6 ottobre 2001, Torino, Giappichelli, 2004.

²¹⁷ For an overview of the EU intervention on public health matters related to food consumption, see A. Alemanno and A. Garde, *The Emergence of an EU Lifestyle Policy. The Case of Alcohol, Tobacco and Unhealthy Diets*, in *Common Market Law Review*, issue 6, 2013, 1-36.

unfair obstacle to free trade²¹⁸. The burden of proof on Member States is particularly heavy because the non-arbitrariness of the national precautionary measures²¹⁹ has to be grounded on sufficiently convincing scientific evidence. Such requirements are hardly met by Member States wanting to diverge from the common policy²²⁰.

²¹⁸ In particular, according to art. 36 TFEU, the reasons that justify divergence of the national legislation in respect of the European law regard public morality, public order, public safety, human and animal health protection, protection of the national art, historical or archeological property, industrial or commercial property protection. On the other side, the landmark case *Cassis de Dijon*, introduced the principle of mutual recognition, stating that differences on legal requirements among States must not prevent from fulfilling free trade objectives if these rules grant the same level of protection. Namely, goods which are lawfully produced in one Member State cannot be banned from sale on the territory of another Member State, even if they are produced to technical or quality specifications different from those applied to its own products. On the different concepts that have been developed after the *Cassis de Dijon* case, see K. Purnhagen, *The Virtue of Cassis de Dijon 25 Years Later—It Is Not Dead, It Just Smells Funny*, cit..

²¹⁹ Concerning the principle of precaution in the EU food law, see A. Alemanno, *Le principe de précaution en droit communautaire: stratégie de gestion des risques ou risque d'atteinte au marché intérieur?*, in *Rev. du Droit de l'Union Européenne*, 4, 2001. See also D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, Milano, Giuffrè, 2012 where the author compares the different interpretation of the principle of precaution at European and global level. On such aspect see also F. Bruno, *Il principio di precauzione tra diritto dell'Unione Europea e WTO*, in *Dir. e giur. agr. amb.*, 2000, 10, 569-577. On the principle of precaution in general, see F. De Leonardis, *Il principio di precauzione nell'amministrazione di rischio*, Milano, Giuffrè, 2005.

²²⁰ For example, the European Food Safety Authority has recently expressed its concerns on the decision of France to stop cultivation of a type of genetically modified maize, previously authorized by the European Union. In particular, the French measure was based on the emergency clause of art. 34 of Regulation EC 1829/2003, providing that the States can adopt precautionary measures in case it is “evident that products authorised by or in accordance with this Regulation are likely to constitute a serious risk to human health, animal health or the environment”. Such clause reintroduces the logic of the general principle stated in art. 36 TFEU, expressing again the principle of precaution. In such context, therefore, EFSA has verified the lack of sufficient scientific evidences, in terms of risks for human or animal health, or for the environment, to justify an emergency measure like the one taken by France. On the principle of precaution applied in the field of Genetically Modified Organisms, see E. Brosset, *L'Autorité européenne de sécurité des aliments et la dissémination d'OGM* in F. Couzinet, *La création de l'Autorité européenne de sécurité des*

Even though art. 114 does not expressly mention food issues among those that deserve a higher protection within the Union law, they have been included in the scope of the rule, because they concern both human and animal health protection, as well as consumer protection²²¹, which are covered by the scope of that norm.

Such circumstance allows the introduction of the other two “pillars” supporting upon the European competence in food law. They are the above-mentioned art. 43²²² and 168 TFEU.

As per the first pillar, the Commission retains the power to present proposals²²³, whereas the Council and the Parliament might issue acts in accordance with the procedure of co-decision, for what concerns the formulation and implementation of the common agricultural policy²²⁴. Within the agricultural sector, in fact, the Union exercises a concurrent competence with the Member States, as provided by art. 4, par. 2 letter *d* of TFEU.

Namely, art. 43 is inserted in Title III (Agriculture and Fisheries), which mainly aim at establishing a common organization of the agricultural markets²²⁵, in order to avoid price fluctuations and the lack of regulatory uniformity, caused by the presence of specific organizations for each product in the past²²⁶.

aliments : enjeux et perspectives, IREDE, Presses de l'Université de Toulouse, 2005, pp. 101-149.

²²¹ See G. Vitellino, *EU food law and consumer protection: is private enforcement a viable option?*, in *Dir. Un. Eur.*, 4, 2013, 817 ff, dealing with food safety and food quality law in the light of consumers' protection.

²²² See the Directive of the Council n. 2002/99 which regulates the production, transformation, distribution and introduction of products having animal origin meant for human consumption, and also the Regulation of the European Parliament no. 470/2009 about residual veterinary medicines in food.

²²³ About Commission's powers with reference to the Common Agricultural Policy, see L. Costato, *Poteri delegati e poteri di esecuzione della Commissione U.E.: dalla PAC al TFEU*, in *Rivista di diritto alimentare*, 1, 2010.

²²⁴ On the “administrative models” created for the implementation of the CAP, see L. Baroni, *Amministrazione diretta, amministrazione indiretta e cooperazione amministrativa*, *cit.* The transition from agricultural law to food law in the EU, and the progressive fusion of the two, is explained in V. R. Fuentes (ed. by), *From agricultural to food law. The new scenario*, Wageningen Academic Publ., 2014.

²²⁵ See also art. 40 TFEU.

²²⁶ The common market organizations (CMO) establish a common regulatory system to all Member States for the production and trade of agricultural products, replacing the previous

The market stabilization, in particular, is one of the four objectives pursued by CAP and listed in art. 39 of TFEU, together with the increase of agricultural productivity, the technical progress, the improvement of the standard of living for the agricultural community and, in the end, food security. However, among them there is no direct reference to other important fields of food law, like food safety.

Nevertheless, pursuant to art. 38, par. 1 “The internal market shall extend to agriculture, fisheries and *trade in agricultural products*” (emphasis added). Therefore, we can infer that the function of the CAP is to enhance in the food sector the more general objectives of the Union, that is the creation of the single market²²⁷. Consequently, a systematic and comprehensive intervention is needed, to integrate the specific goals of CAP with the more general objectives of the Treaty. As a confirmation, it is specified that “the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products” (art. 38, par. 2).

It follows that CAP includes also those measures that, even if they are not directly connected with price stabilization or supplies availability, contribute to the promotion of free trade.

In conclusion, food rules – especially those related to food safety - aim at ensuring uniformity in the regulation of food production, in order to avoid differences among national legislations that could become, in fact, an obstacle to free trade²²⁸. Thus the general approach followed by the European Union is similar to

national organizations. Starting from 2007, the system has been simplified, by common provisions for all agricultural sectors. The objective, in particular, has been to determine a change from several CMOs – for each type of product or group of products – to only one CMO. Such innovation has been determined, in particular, by the Council Regulation no. 1234, recently replaced by Regulation no. 1308/2013.

²²⁷ Pursuant to this, according to the new Directive (EU) 2015/412, States have the possibility to exclude the cultivation of authorized GMOs from their territories for reasons exceeding those evaluated during the risk assessment. However, the European Parliament has recently set aside the proposal of the Commission to provide for the same exception for the circulation (that is trading and utilization) of GMOs²²⁷. The main reason behind this decision is that opt-out measures would not be compatible with the single market, since they could constitute an internal barrier to trade. See the EU Parliament’s vote and press release of the 28th of October 2015, on www.europarl.europa.eu.

²²⁸ Such connection is put in evidence by the same European Union, as per the first Whereas of Reg. 178/2002, claiming that “The free movement of safe and wholesome food is

that adopted at global level, although some relevant differences exist²²⁹. As seen above, disputes arising from non-compliance with the global food safety standards established by the Codex Alimentarius Commission are solved by the Dispute Settlement Body of the WTO. Therefore, similar to the EU, global food safety standards – that bind both the European Union and the Member States, are directed at maintaining free competition in the world trade.

However, trade protection is not the only theoretical basis for food law. European food regulations try to find a balance between economic objectives and the protection of other values. This is frequently reached according to the principle of subsidiarity: while the European rules create a common framework under the promotion of the single market, the protection of other values falls under Member States' autonomy²³⁰.

Moreover, the reference to food security among the objectives of the CAP, has progressively allowed to combine the attention towards quantity and quality in food safety governance. Namely, the European actions aimed at achieving the availability of supplies have progressively shifted the attention also on other aspects, such as the quality of food. That has happened mainly thanks to the direct purchase of products by the former European Community, under the condition that the same had to meet

an essential aspect of the internal market and contributes significantly to the health and well-being of citizens, and to their social and economic interests". Another important element is the constant reference in the Regulation to the need of safeguarding consumers' and operators' trust. Such concept, which has a strong economic origin, confirms the submission of the common agricultural policy and food safety rules to the main objective of following the competition dynamics and creating a single European market.

²²⁹ Drawing from the conclusions reached in the last paragraph, the main difference regards the relation between discretion and science-based decisions.

²³⁰ This follows the failure of the 2004 proposal to establish a Constitution for Europe. The abandoned Treaty proposal included the formal recognition of the European anthem, flag and other features that implied a new political role for the Union, beyond economic integration. Namely, the process of European integration had suggested the need to strengthen EU jurisdiction against Member States' sovereignty in some matters. The failure of the project and the subsequent entry into force of the Lisbon Treaty enhanced the Union's powers, but also confirmed its main duty to stabilize the single market, while funding on the principle of subsidiarity the regulation of those matters in which national differences are still perceivable. On the features of the abandoned proposal for a European Constitution, see E. Spaventa, *From Gebhard to Carpenter: Towards a (non-) economic European constitution*, in *Common Market Law Review*, 2004, 743-773.

minimum quality standards, which the market has afterwards adopted as their own quality thresholds²³¹.

Nevertheless, although the enhancement of the safety level of food stuff is one of the key-objectives under the Common Agriculture Policy²³², the sanitary and phytosanitary measures are considered an expression of the public health protection policies by the European primary legislation.

In that field, according to the TFEU and in consideration of the above mentioned objectives of reach unity in diversity, States use the open method of coordination (art. 2, par. 5²³³ and art. 6 letter a²³⁴). The method allows States to harmonize to their law orders, still avoiding the adoption by the Union of binding acts, through the so-called community method²³⁵. According to the open method of coordination, on the contrary, a direct dialogue is established among the national administrations to the adopt mandatory rules.

Nonetheless, art. 168, par. 4 provides concurrent competence for what concerns “measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health”. According to it, the European Parliament and the Council, after consulting the Economic and Social Committee and the Committee of the Regions, act in accordance with the ordinary legislative procedure of co-decision.

Consequently, though food safety rules are based either on art. 43 or art. 114 TFEU, they should be considered mainly as part of public health protection measures.

²³¹ For this interpretation, see S. Harris, A. Swinbank, G. Wilkinson, *The food and farm policies of the European Community*, New York, John Wiley&Sons, 1983.

²³² See European Commission, *The EU's common agricultural policy (CAP): for our food, for our countryside, for our environment*, available at www.europa.eu/agriculture.

²³³ Stating that “In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas”. On the open method, of coordination see S. Del Gatto, *Il metodo aperto di coordinamento. Amministrazioni nazionali e amministrazione europea*, Napoli, Jovene Editore, 2012.

²³⁴ Stating that “The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health”.

²³⁵ It explains the reasons of the transition from the community method to the open method of coordination S. Del Gatto, *Il metodo aperto di coordinamento*, cit, p. 8 ff.

Indeed, starting from the Green Paper of 1997 about “ General Principles of food law in the European Union”²³⁶ - converged in the general food law Reg. EC n. 178/2002²³⁷, the main objective of food safety policies is the protection of human health²³⁸.

In confirmation of this, the food safety European system is based on the sharp distinction of the risk assessment, committed to the European Foods Safety Authority – from those of consequent risk management, that are held by the Commission. Such separation should ensure, according to the legislator, the impartiality²³⁹ and the scientific quality of decisions concerning food safety²⁴⁰, to the purpose of better protecting the consumers’ health.

²³⁶ Commission *Green Paper* COM/97/0176 final.

²³⁷ In particular, according to art. 7, the principle of precaution is connected to the purpose of ensuring “the high level of health protection chosen in the Community”.

²³⁸ Pursuant to the first two premises of the GFL “The free movement of safe and wholesome food is an essential aspect of the internal market and contributes significantly to the health and well-being of citizens, and to their social and economic interests. A high level of protection of human life and health should be assured in the pursuit of Community policies”.

²³⁹ However, impartiality does not mean that decisions are not theoretically or politically oriented. The discretion of the EU legislator, indeed, makes policy making at EU level much politicized. On the relation between the need for scientific-based decisions and discretion at European and global level, see A. Szajkowska and B. M.J. van der Meulen, *Science Based Governance? EU Food Regulation Submitted to Risk Analysis*, in M. Fenwick et al. (eds.), *Networked Governance, Transnational Business and the Law*, Springer-Verlag Berlin Heidelberg, 2014.

²⁴⁰ Actually, scholars have broadly pointed out the lack of procedural transparency and the risks of weak impartiality EFSA Committees members. On the matter see S. Gabbi, *L'autorità europea per la sicurezza alimentare. Genesi, aspetti problematici e prospettive di riforma*, Milano, Giuffrè, 2007 and D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, cit. According to the latter, in addition, the decision to empower EFSA with just advisory tasks and not direct regulatory powers is in line with the impossibility to grant discretion to any organ but the Union Institutions (so-called “Meroni principle”, stated by the Court of Justice in the 1958 judgement *Meroni v. High Authority*, 9/56 and 10/56).

To that regard, even if the European food law contains constant references to consumers' protection²⁴¹, it is hard to find art. 169 TFEU – which rules on that matter - as the explicit legal basis for food regulatory actions²⁴².

Such exemption, however, does not invalidate the substantial protection offered to consumers with regard to food safety even if, pursuant to art. 169 TFEU, no specific judicial remedies are provided in case of violation of such rule.

In conclusion, even if there is no explicit acknowledgement of the European competence on food matters in the Treaties, that has not prevented the establishment of a large regulatory system, based on free trade protection, on the creation of a common agriculture policy and, above all, on the protection of public health.

After a careful study, these provisions are not simply a body of regulations regarding the same object, but they are an actual system, with rules, powers and institutions²⁴³ forming an autonomous structure that limits States' sovereignty. Pursuant to this idea, the 11th “Whereas” of Reg. 178/2002 states that “in order to take a sufficiently comprehensive and integrated approach to food safety, there should be a broad definition of food law covering a wide range of provisions with a direct or indirect effect on the safety of food and feed [...]”. By means of this clarification, the Union adopts a wide meaning of “food legislation”, aimed at justifying the extension of its jurisdiction with regard to food and feed safety²⁴⁴.

²⁴¹ As per art. 5 of Regulation 178/ 2002 “Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade [...]”.

²⁴² According to it, “In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers”.

²⁴³ That has become clear, in particular, after the establishment of the European Food Safety Authority, by Reg. EC 178/2002. This authority, in fact, does not only provide for the scientific basis needed to issue the European legislation concerning food safety; its establishment has also caused the creation of an institutional network of European and national authorities that cooperate to reach the objectives related to food safety. This has evidenced the existence of a structure having its own governance, since it does not involve only the adoption of rules or the issuing of opinions. Such structure has the features of the sectional legal order, according to D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, cit.

²⁴⁴ Such purpose is reaffirmed in the XII, XII and XIV Whereas, which introduce the so-called “from the farm to the table“ approach, stating that “In order to ensure the safety of

This does not imply the exclusion of the national institutions from the actors committed in food safety regulation. The Member States play an important role in their own territories; however, their function is changing because, due to the influence of European law, they act more as policy-executer than as policy-makers²⁴⁵.

Given the impact of European food law on a broad array of people – from producers to consumers – it is vital to understand to what extent they are involved in the decision-making process. Most of the European regulators, in fact, are totally insulated from the final addressees of food policies.

Among European Institutions, only the Parliament represents citizens, while the others have at the best an indirect connection with constituencies. This means that there is a poor level of grass-root representation in food policies.

The comitology procedure should have rebalanced the lack of accountability of European institutions by giving Member States the possibility to be consulted before the Commission adopted implementing measures. However, the lack of agreement between national representatives within the Committees has prevented comitology to carry out its function²⁴⁶.

For what regards EFSA, the general tendency is to preserve its independence, in order to safeguard the neutrality of its advisory role. However, in the last years accountability and transparency have been considered not only in accordance, but even an occasion to enhance the neutrality of this advisory body²⁴⁷.

food, it is necessary to consider all aspects of the food production chain as a continuum from and including primary production and the production of animal feed up to and including sale or supply of food to the consumer because each element may have a potential impact on food safety”.

²⁴⁵ See L. Baroni, *Amministrazione diretta, amministrazione indiretta e cooperazione amministrativa*, cit. p. 98, stressing on the broad discretion retained by EU Institutions – and largely confirmed by several decisions of the Court of Justice - in the implementation of the common agricultural policy.

²⁴⁶ On the flaws of comitology procedures, see M. Savino, *La comitologia dopo Lisbona: alla ricerca dell'equilibrio perduto*, in *Giornale di diritto amministrativo*, 10/2011, 1041 - 1048 and Id, *I comitati dell'Unione europea. La collegialità amministrativa negli ordinamenti compositi*, Milano, 2005, 105 ss.

²⁴⁷ According to this orientation, the Authority has started to open its processes to the scientific community and to the other contribution from civil society. See further in the next chapter.

Although the arrangement of powers and the degree of accountability of Institutions at European level might have a justification in general, in the regulation of food this might become increasingly unacceptable, since the body of rules is growing, but it still lacks of an explicit basis in the Treaties.

The absence of a clear constitutional basis, as well as the low level of accountability of rule-makers, can be a threat to the rule of law in the food governance. Therefore, it is much needed a careful attention towards procedural safeguards to re-balance the current power arrangement.

4.3. The governance of food in the Italian legal order: fragmentation or subsidiarity?

The first part of the Italian Constitution²⁴⁸ provides for the fundamental principles upon which all the other constitutional and non-constitutional rules rest. It includes, for instance, the equality principle, the freedom of belief, the subjection of the Italian Republic to international and European law, the protection of the landscape, the right to work, the principle of autonomy and decentralization. However, since it came into force in 1948, it does not give explicit protection to the so-called third generation of rights²⁴⁹, such as the right to a healthy environment. Nonetheless, Courts and scholars have interpreted art. 9 – protection of the landscape – and art. 32 – right to health – as implying the safeguard of the environment. It wasn't until later in 2001²⁵⁰ that the word “environment” was firstly included in the Italian fundamental Charter. Still, it wasn't mentioned among the

²⁴⁸ Namely, articles from 1 to 12, which embody the fundamental principles.

²⁴⁹ The division of human rights into three generations was firstly outlined in K. Vasak, *Human Rights: a thirty-year struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights*, in *UNESCO Courier*, United Nations Educational, Scientific, and Cultural Organization, Paris, November 1977. According to the Czech jurist, human rights can be divided into three categories: first generation or political rights, second generation or social rights and third generation rights, which include a broad spectrum of liberties, dealing with cultural heritage, the protection of the natural resources, intergenerational equity and the protection of minorities.

²⁵⁰ As per l. cost. n. 3/2001, which amended the V part of the Constitution, introducing major changes in the division of powers between the State and the Regions.

general principles, but under the part regulating the competences of the State and the Regions.

Similarly, in the first part of the Constitution there are no provisions explicitly mentioning the right to food or consumers' protection; however, according to art. 117, the State and the Regions have shared competence for what regards food matters²⁵¹. In addition, as seen above, food law is a complex matter, inherently connected with other aspects such as agriculture, safety, trade, health protection and – most importantly – the implementation of international law. In these areas, Regions and State do not always have shared powers, but sometimes the Constitution exclusively entrust either the former or the latter with the regulation of these matters. Namely, on one hand the State has exclusive jurisdiction for what regards the relation with the European Union, the public order, the international precautionary measures and the protection of the environment²⁵². On the other hand, Regions alone can rule on agriculture and, at the same time, they share powers for what concerns the protection of health.

The overlapping of powers in the food governance has also led to misinterpretations by the two legislators on the limits of each jurisdiction²⁵³. Hence, the Italian Constitution somehow envisages the right to food, however it is not easy to determine which are the authorities in charge with its protection and to what

²⁵¹ Namely, it is used the word “*alimentazione*”, which relates to the nutrition of people.

²⁵² In specific, whereas the protection of the environment is exclusively vested in the State, the Regions shall enhance the cultural and environmental heritage. Finally, they also have full legislative powers in all the matters that are not expressly included in the list provided by art. 117 of the Constitution. The distinction between “protection” and “enhancement” has led to frequent misinterpretations by both State and Regions, ultimately settled by several decisions of the Italian Constitutional Court. On this topic see, in general, G. Rossi (ed.), *Diritto dell'ambiente*, Torino, Giappichelli, 2014 (in particular, chapters I and II).

²⁵³ See, for instance, C. Cost., n. 13th January 2004, n. 12 on the regional powers over the viticultural sector. See also C. Cost. n. 162 of June 1st 2004. In this case, the State claimed that its exclusive jurisdiction on public order and health matters contrasted with the decision of some Regions to ban the utilization of the health book for food producers. According to this claim, the health book satisfied reasons of general public concern about the protection of health, therefore it was not on the Regions to decide on its abolishment. However, given the enforcement of general principles by EU law and the introduction of the HACCP system, the utilization of the health book by food producers has been considered unnecessary by the Court, hence no more satisfying imperative needs of public health protection.

extent, especially because legislative jurisdiction matches administrative powers in each matter²⁵⁴ but, in case of shared competence, the national rules provide for the general principles whereas Regions regulate the matter in detail.

Nonetheless, the subjection of national law to EU rules has partially weakened the legislative powers of the State, especially for what concerns the provision of the general principles. Moreover, the new division of powers between State and Regions have entrusted the latter with more policy-making power over the food and agricultural sector.

Therefore, national food law is mainly directed at implementing European rules, although the States still retain some discretion in the choice of the means through which achieving the results required by the common provisions. Moreover, national rules cover also the matters where the competence of the European Union has not been exercised yet, as well as for all the cases when States are left with a certain amount of leeway in derogating to European law²⁵⁵.

Similarly, national administrative authorities exercise their function according to the primary interest they shall protect.

In food matters, the main administrative bodies involved at national level are the Ministry of Agriculture and Forestry (MIPAAF) and the Ministry of Health, whereas, despite previous attempts, no Italian independent authority on food safety has been set yet.

The MIPAAF has the power to adopt and implement national and European measures on the agricultural, fisheries, forestry and food policies, especially for what regards the protection against food frauds and food safety issues. Moreover, it represents Italy in the European Commission and Parliament, namely during the negotiation of the common agricultural policy²⁵⁶.

The MIPAAF shares food safety regulatory powers with the Ministry of Health²⁵⁷ especially in food safety matters²⁵⁸, for all those aspects that do not fall under the

²⁵⁴ Namely, according to art. 117, Regions and State exercise administrative functions in the same areas where they retain legislative powers.

²⁵⁵ For instance, legislative powers are exercised with regard to the protection of geographical indications and the “Made in Italy”, the adoption of emergency measures under European law, as well as the enhancement of small and medium food enterprises’ trade.

²⁵⁶ See *www.mipaaf.gov*.

²⁵⁷ See *www.salute.gov*.

²⁵⁸ However, it exercises also broader functions, such as the promotion and implementation of educational projects on nutrition.

Regional jurisdiction. The Ministry of Health is also the national reference unit of the World Health Organization.

Formally, the rulemaking activity of these Ministries is carried out thanks to the adoption of general measures called *Decreti Ministeriali* (DM). These are usually discretionary normative measures – though formally administrative – adopted by one or more Ministers pursuant to the law.

Therefore, national legislative and administrative rulemaking powers are granted to institutions that are bound by electoral mandate to the constituency. For what regards primary law, the Parliament is directly elected by citizens, who also are granted with the right of legislative initiative. Therefore - despite the latest reforms of the electoral system have strongly unbalanced the proportionality between votes and representation in the legislative Chambers²⁵⁹ -the lack of direct participation of people to the formation of the primary law seems counterbalanced by the representativeness of the empowered institutions.

At administrative level, rulemaking powers are retained by members of the Government, which is responsible towards the Parliament and it is bound by law in the exercise of its duties.

In some cases the Government can exercise temporary legislative functions, via the adoption of Decrees. These measures are formally administrative, but they substantially envisage normative rules, which are justified by necessity and urgency.

In the last decades, the Government has largely drawn upon these temporary measures, even outside the scope of their inherent function²⁶⁰.

In addition, the Parliament can also delegate the implementation of legislative provisions to the Government, providing for a set of common principles that ought to be observed by the Executive.

However, the evolution of the relationship between the Executive and the Legislative power, fostered by the changes in the electoral system²⁶¹, have

²⁵⁹ Namely, the current electoral legislation provides for a proportional system, but with a large majority premium(*legge* n. 270 del 21st December 2005). In 2013, the Constitutional Court has declared the unconstitutionality of this system. See further explanations in this paragraph.

²⁶⁰ See B. Cimino, S. Morettini, C. Tancredi Palma, *La delegazione legislativa*, in L. Duilio (ed.), *Politica della legislazione, oltre la crisi*, Il Mulino, Bologna, 2013, p. 109 ff. and S. Ceccanti, *Decreti legge e decreti legislativi in Italia*, in *Forum di Quaderni costituzionali*, 2014, n. 4, p. 1-8. Both authors explore the causes and consequences of the inappropriate utilization of legislative measures by the Government over the years.

undermined the primacy of Parliament in the determination of the contents of the law. Hence, the balance between the prerogative of the Government to set the general policy and the duty of the Parliament to amend it, according also to the prospective of the minorities, has been altered. Within this context, political parties as well as the Government itself have experienced a reduction of their representativeness²⁶²; the Members of Parliament and the governing bodies of the main parties are almost entirely appointed, not elected by the constituency or registered supporters. Moreover, the global and national economic crisis has lately intensified the disaffection among citizens with their representatives, ultimately leading to instability and to the direct appointment of two Governments by the Head of the State, without elections, in less than three years²⁶³.

For this reasons, some have referred to these recent events as to the crisis of representative democracy, which appears to affect also other legal orders²⁶⁴. Given

²⁶¹ Namely, for a long time the voting system has granted the prevailing Party with an extremely large majority in Parliament, deemed as unconstitutional in 2014 (*C. Cost. n. 1/2014*) because it breached the principle of representativeness and of the equality of the vote (Art. 67 and 48 of the Italian Constitution). On this topic, see P. Pinna, *La crisi di legittimazione del governo rappresentativo. Riflessioni sulla sentenza della Corte costituzionale n. 1 del 2014*, in *Osservatorio Costituzionale*, March 2014 and S. Sergio, *Per un nuovo sistema elettorale: la legge della Corte, la legge del Parlamento, la legge dei partiti*, in *Federalismi.it*, 2015, n. 1, p. 1-13.. Currently a new reform of the electoral system is under discussion. See A. Saitta, *La forma di governo in Italia tra revisione costituzionale e nuova legge elettorale*, in *Rivista AIC*, 2015, n. 2, p. 1-6.

²⁶² See S. Ceccanti, *Sistema elettorale: una trasformazione di energia o una macchina fotografica?*, in *Quad. Cost.*, 1, 2011, 116 ff and, more in general, D. Bougnoux, *La crise de la représentation*, Paris, Éditions La Découverte, 2006.

²⁶³ Namely, Prime Minister Mario Monti was appointed by President Giorgio Napolitano on November 2011. After one year and a half, Enrico Letta was elected and he remained in charge until the beginning of 2014 when, after receiving a vote of no confidence by his own Party, he resigned in favour of current Prime Minister Matteo Renzi, appointed by the Head of the State in February of the same year.

²⁶⁴ Nonetheless, the lack of representativeness is a problem that dates back in the History of democratic Nations because, as argued by some scholars, there has never been a period in the evolution of representative democracy when someone somewhere has not declared democracy to be in crisis. See P. Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity*, Princeton, Princeton University Press, 2011. See previously VV. AA., *The Crisis of Representative Democracy*, Papers presented at the International Symposium

the weakened position of the Parliament, many substantial policy- setting powers are vested by the Executive, lacking of sufficient representativeness itself.

For what regards Regions, the constitutional reform of 2001 has implemented the principle of subsidiarity by entrusting them with more powers and autonomy²⁶⁵. Namely, Regions are granted with exclusive and concurrent legislative powers in some matters, according to art. 117 of the Italian Constitution, and self-regulate the main institutional features of their governments by Statute, included their electoral system²⁶⁶. All Regions have opted for voting systems that provide for the direct election of the President of the Committee (“*Presidente della Giunta*”, who is at the head of the Regional Committee, exercising executive functions). Therefore – pursuant also to the concept of subsidiarity - the formal political representativeness of the Regions is usually higher than that of national institutions.

However, representativeness does not coincide with the possibility for citizens to express their position with the vote. The absence of a directly elective government is a sign of a low level of representativeness, however its presence does not automatically indicate that decision-makers are responsive to public opinion. This happens mainly for three reasons.

First of all, according to art. 67 of the Italian Constitution, elected politicians shall exercise their mandate with discretion²⁶⁷. This means that they do not follow external directives – such as that of the Party they belong to or the positions expressed during the election campaign – blindly, but they must act according to their actual orientation on a matter. This principle embodies the idea of democracy

on the Crisis of Representative Democracy and Possible Alternatives, Geneva, 15-17 November 1985.

²⁶⁵ Regions have progressively obtained more independence thanks to the transition to a more “federalized” division of powers between State and lower levels of governance. In particular, the *legge costituzionale n. 1/1999* have entrusted Regions with statutory autonomy and with the power to regulate their electoral system.

²⁶⁶ The Regional voting systems have to abide by some principles set by law. Pursuant to this, the *Legge 2 luglio 2004, n. 165 (Disposizioni di attuazione dell'articolo 122, primo comma, della Costituzione)* sets some principles like the representation of the minorities without any harm for the stability of the elected majority and the principle of free mandate of the Regional Council’s members.

²⁶⁷ On this topic see S. Curreri *Democrazia e rappresentanza politica Dal divieto di mandato al mandato di partito*, Firenze, Firenze University Press, 2004.

and of freedom of conscience; however, it also threatens the representativeness of elected bodies as well as their accountability towards the citizens²⁶⁸.

Secondly, even if elected officers always acted pursuant to the political area they belong, once they are vested with a public function they are in charge with the fulfilment of the general interest. Hence, after the elections, a change occurs within the relationship between citizens and politicians, since the latter must act in behalf of the people entirely, not a part of it. This variance has an impact on the actual representativeness of the politicians, which justify the integration of participatory tools in the traditional delegation chain.

Thirdly, even where representative democracy fulfils its function, the constituency does not cease to exercise its sovereignty by giving mandate to elected people to fulfil the general interest. On the contrary, delegation shall be conferred within a certain set of legislative as well as contingent limits. Namely, delegated powers are exercised within the scope of the laws. In addition, especially considering the crisis of the primary law, public policies shall constantly seek public consensus, not only through the informal dynamics of political debate, but also within procedures where the compliance with the rule of law can be assessed and controlled. Pursuant to this, most modern democracies integrate passive forms of representativeness – for example, the expression of the vote – with active participatory or deliberative democracy²⁶⁹.

²⁶⁸ Several empirical studies have also evidenced a high rate of politicians' migration from one party to the other during the mandate, questioning the level of their representativeness. See S. Curreri, *cit.*

²⁶⁹ On the different approach of deliberative and participatory democracy, see G. Arena, *Valore e condizioni della democrazia deliberativa e partecipativa*, in U. Allegretti (ed.), *Democrazia partecipativa*, Firenze, Firenze University Press, 2010, p. 85-88. In particular, although these two expressions are frequently addressed as synonyms, they attain two different, complementary objectives. Namely, in participatory democracy the constituency contributes to the formation of the final decision in formally supporting a given political choice. For instance, the referendum and the legislative initiative of the citizens are an expression of participatory democracy. They both set a connection between the constituency and the Authority, by giving the possibility to each part to express the appreciation on a certain proposal. However, there is no dialogue between these two parts. On the contrary, deliberative democracy entails a proactive participation of the citizens. In this models, the general interest is pursued by the direct involvement of citizens in decision-making. The first most famous example of deliberative democracy is that of participatory budgeting occurred

The problem of representation does not only occur at legislative level. Namely, the crisis of delegation and the decline of the rule of law has a considerable impact on the administration.

Many parts welcome new forms of procedural representation, beyond electoral consensus, to balance out the crisis of the traditional institutions of the Rule of Law²⁷⁰. This approach, based on the adoption of shared decisions at all levels, integrates with the last European recommendations on good governance, as well as with the national process of institutional re-democratization.

However, the quasi-federal framework of the Italian constitutional system justifies a differentiated approach towards good governance, depending on the functions exercised by national and regional institutions. Namely, although the national authorities play a key-role, especially in the process of bargaining of European choices, the elaboration and implementation of food policies, as well as the allocation of resources, take place at regional level. This means that the attention on the level of democratization and interests representation must be drawn at this stage. However, Regions' autonomy has encouraged the development of different policies among territories for what regards participation to legislative and administrative activity²⁷¹. Therefore, the level of actual representativeness of institutions varies according to the Statutory choices of each Region. In this field, policy choices are greatly influenced by the traditional belief of the self-sufficiency of political representation. However, this approach can also prevent participation from

in Porto Alegre in 1989. See D. Della Porta, *Can democracy be saved?: participation, deliberation and social movements*, John Wiley & Sons, 2013.

²⁷⁰ See, for instance, S. Cassese, *La partecipazione dei privati alle decisioni pubbliche – saggio di diritto comparato*, in *Rivista Trimestrale Diritto Pubblico*, 2007, p. 25 M. Ramajoli, *Procedimento regolatorio e partecipazione*, paper delivered at the conference “La regolazione dei servizi di interesse economico generale”, Firenze, 6th November 2009, available at www.giustamm.it; see also M. Cocconi, *La partecipazione all'attività amministrativa generale*, Padova, Cedam, 2010. The Italian administrative Courts have upheld the link between the lack of accountability and the enhancement of procedural safeguards with regard to the activity of Independent Authorities; see for instance Cons. di Stato, VI, case n. 7972/2006, n. 2007/2006 and n. 2201/2006 and the Opinion of February 6th 2006 n. 35585.

²⁷¹ Namely, whereas pursuant to the law participation is generally provided in adjudicatory procedures, there are still some uncertainties with reference to rulemaking and normative measures. See: next Chapter, § 4.2.

being stakeholders' Trojan horse in democratic processes. Ultimately, the role of participation in the national and regional framework is to smooth a food regulatory system smothered by the need to protect the different interests involved and the necessity to amend the flaws of a legal order that has rapidly fallen from subsidiarity to fragmentation.

5. The role of participation in food governance

Within the European Union and its Member States, regulatory policies pertaining foodstuff are often defined and decisions are taken under the influx of acts adopted in international fora. At the same time, legislators and administrative authorities exercise their residual discretion under the legal authority provided by the electoral mandate; nonetheless, the critical situation of political representativeness, citizens' lack of trust in Institutions, as well as the crisis of primary law cast some doubts over the solidity and self-sufficiency of this system²⁷². This work integrates with the theories identifying procedural standards of participation as one of the means to address these issues affecting democracy. This assumption also takes into consideration the possible negative outcomes of opening rulemaking procedures to stakeholders. Stakeholders consultations does not always inherently equal citizens' approval. At the same time, public empowerment might not always be desirable,

²⁷² See J. Mendes, *Rule of law and participation: A normative analysis of internationalized rulemaking as composite procedures*, in *International Journal of Constitutional Law*, 2014, 12,2, 372 analysing the impact of informal ways of reception of international rules in national contexts on the substantial contents of procedural safeguards. Namely, the author explains that when the EU law is the result from the reception of international rules, procedural standards – namely participation- are weaker. Therefore, “reception depletes the capacity of procedural standards to structure discretion and thereby constrain the exercise of public authority in areas of regulation where courts hardly enter. It potentially leads to situations of unrestrained authority... The depletion of procedural standards therefore emerges as a problem of the rule of law, as it limits the law’s ability to structure the exercise of discretion and constrain public authority”.

especially in those contexts in which this can curb procedural efficiency or simply might not be a viable option²⁷³.

Therefore, the analysis suggests a neutral approach when dealing with procedural safeguards, which strongly depend on how they are arranged by law and actually carried out in the specific proceedings. This is even more true with respect to food law. In this field, regulation is influenced both from the issues that affect decision-making in general, and from the specific features of the food sector itself.

For what regards the first aspect, the main challenge in the elaboration of public policies is to attain the general interest without excessively affecting private positions. This has been also described with the four- words expression: equity, efficiency, security and liberty²⁷⁴. Regulators identify theoretical objectives and try to attain substantial outcomes while coping with personal, collective and general interests. The role of procedural safeguards is to embed that debate in rational, verifiable steps.

In addition, food governance is characterized by the presence of several interests, stakeholders and regulators.

Namely, the presence of multiple values involved in the determination and implementation of policies triggers the conflict among principles and threaten the appropriate representation of interested parties within the procedure. Policy-making inherently deals with the conflict among interests. However, the friction between opposites usually takes place inside a single regulated sector. However, in some areas, such as environmental law, the levels of conflict tend to overlap. Food governance, although it has its own features, is the result of the interaction between several regulatory systems. Therefore, policies arise both from the internal negotiations occurring within each regulated sector, as well as from the collision between one area of law and the others. Moreover, the multiplication of the regulatory systems involved in the creation of food law also increases the number of stakeholders affected by policies and decisions, making the balance between efficiency and transparency, neutrality and accountability even more difficult.

Moreover, the global dimension of food, both considered in its social and commercial implications, contributes in complicating the global regulatory arena;

²⁷³ Accordingly, see A. Fung, *Varieties of public participation in complex governance*, cit, p. 67.

²⁷⁴ D. Stone, *Policy paradox: The art of political decision-making*, Norton, New York, 2002.

namely, the global food polity entails a growing network of authorities, vested with different powers, in different fields, at all levels of governance.

Usually, the global regulators are specialized agencies, acting in one single field of expertise, keeping a certain degree of insulation from the other global regulators, the Member States and – since their governing bodies are not elected but appointed – the citizens. In addition, they retain a broad array of powers, nonetheless the result of their action formally belongs to soft law. Regional regulators – such as those of the EU – exercise their specific competences in the light of a general constitutional background; depending on their role, they can be either deemed as independent, or they can be vested with their powers because they directly or indirectly represent the constituency. Depending upon this, they exercise legislative, advisory or executive functions. In the end, national authorities are vested with powers by electoral mandate, although recent changes have evidenced the inadequacy of representative mechanisms to entirely justify the legitimacy of their choices and actions.

Therefore, regulators of the food sector address participation in different ways, according to their competence, the binding effectiveness of their rules and the level of insulation they want to keep both from the other Organizations of the global network, the States and the citizens.

In conclusion, procedural safeguards weigh as a great cost on decision-making. Therefore, they should be implemented as far as they provide for certain benefits on the elaboration and implementation of policies. In food governance, procedural burdens might address various issues. Firstly, participation could counterbalance the lack of accountability of rule - makers and policy-executers. This would also enhance the transparency, effectiveness and legitimacy of their policies, especially for those regulators who are largely insulated from citizens. Secondly, procedural safeguards would allow the creation of a new procedural-oriented constitution for the global polity²⁷⁵. As it has been argued by some commentators²⁷⁶, since the global polity is a system without a Constitution – meaning that global regulators do not share common fundamental principles – the elaboration of policies might rest on different grounds. In particular, differences among legal orders currently prevent from the imposition of substantial principles; yet, procedural burdens foster the dialogue between regulators, and between them and the stakeholders. Hence,

²⁷⁵ See D. Bevilacqua, *Il free trade e l'agorà. Interessi in conflitto, regolazione globale e democrazia partecipativa*, Napoli, Editoriale Scientifica, 2012, p. 21-22.

²⁷⁶ See S. Cassese, *Il diritto amministrativo globale: una sua introduzione, cit.*, p. 353.

participation might trigger the negotiation between values which ultimately lead to the creation of a new, shared, set of principles. By consequence, the distance between rule-makers and rule-takers and the fragmentation of governance, is reduced.

Ultimately, the analysis of the global food governance shows that theories on participation cannot be disconnected from the examination of the institutional connections among rule-makers and from the investigation of the structure of the single Authorities. When assessing the benefits and risks of participation within global food governance, the impression is that there is not only a single answer to the problem. On the contrary, the fragmentation of the global polity prevent from considering this issue as a part of a single conundrum.

This means that enhancing participation in the same way might not be appropriate to solve accountability issues of all food regulators. Accountability, indeed, is related to other issues affecting the global regulatory system. Firstly, the responsibility of authorities towards interested parties postulates the choice on the method of interest representation in the procedure.

Secondly, the decision to enhance procedural standards is linked to the dualism between administrative and electoral democracy. Namely, procedural safeguards are not the only method to reach a higher level of legitimacy in food policies. Hence, the assessment of participatory regimes should be carried out along with a careful analysis of the relationship between representative democracy and administrative procedural safeguards.

Thirdly, a certain degree of independence from rule-takers might also be functional to the neutrality of advisory bodies and technical agencies, as well as to the stability of the institutional background in which they operate.

Ultimately, this analysis rests on the conviction that is not enough to just say that participation enhances the quality of decision-making, but it is more important to understand how it does so and to which extent.

To this purpose, the next chapters investigate the way regulators involve private stakeholders in the adoption of rulemaking and executive measures in the food sector. The analysis will inherently be performed in the light of the institutional aspects outlined above, as well as considering the risks procedural safeguards might bring when actually carried out in the authorities considered.

CONFRONTING THE PATTERNS OF PARTICIPATION IN FOOD GOVERNANCE

1. Introduction

The analysis in the previous chapters has focused on the features of the main regulatory bodies involved in the food sector, taking into consideration their powers, the impact of their policies and the connections existing among them. Although they are all committed in the regulation of foodstuffs, these regulators belong to different legal orders, they protect different interests and enjoy a different level of representative legitimacy. Drawing from global administrative law theories, which link the lack of accountability of institutions with the enhancement of procedural safeguards, the purpose of this chapter is to take a step forward by trying to answer to the question: What is the current implementation of participatory safeguards in food governance?

The structural and constitutional differences existing among the regulatory bodies prevent to address this issue with a single approach; on the contrary, the analysis of each context must be put in relation with the role played and the powers exercised by each institution.

In particular, according to the conclusions reached in the first part of this work, procedural requirements in the global arena should balance between the lack of electoral representativeness, the low accountability of regulators and on the other side the extended territorial impact of the policies, the inexistence of a global society and the fragmentation of the quasi-judicial dispute settlement systems. At the same time, the global arena is characterised by fragmentation due to the unbalanced protection of interests in rulemaking procedures and in Courts. However, the next paragraphs will show that participation should be tweaked in order to avoid the substitution of the electoral accountability with indirect and ineffective means of representativeness, such as that of NGOs. Given the need to compensate the lack of electoral legitimacy with procedural representativeness, the fear is that the participatory systems put in place by global regulators shift on few civil society organizations – which can also suffer from a *deficit* of democracy or representativeness – the power to protect citizens' interests.

At European level, the main problem is represented by the increasingly coercitive power of the Union's institutions and organs, while the democratic system is still in search of a legal basis to justify enhanced forms of representativeness and the civil society direct involvement in decision-making. At the same time, Member States' claim for discretion and for being identified as the main focal points to represent citizens' opinion, need to be taken into consideration.

For what concerns the Italian legal order, procedural safeguards dilemmas hinge upon the fragmentation of governance and to the quasi-federal structure in the division of powers. Not only the crisis of primary law and of electoral representativeness, but also the proliferation of powers and competences among several institutions and bodies create a chaotic picture that cast several concerns on the actual accountability of rule-makers. In this situation, the main obstacle to the diffusion of participatory tools is the long-lasting scepticism of institutions towards the development of new forms of accountability. Sovereign States are the result of the evolution of the Absolutism, in which the king exercised absolute powers over individuals, and the bureaucracy was an extension of its coercitive role²⁷⁷. The unbalanced relationship between State and citizens was justified by the exercise of powers to protect the people. Procedural safeguards partially contrast this model, since they call for a new balance, by involving interested parties in the exercise of the authority. Therefore, although extensive research has been made on participation, and Courts have supported the enhancement of procedural safeguards²⁷⁸, the development of these tools beyond adjudicatory proceedings or, in other cases, the level of their implementation, is still mostly subject to the Authority discretion.

The following analysis tries to find a rationale, an order in the jigsaw of powers that characterizes the regulation of the food sector.

2. Models of global accountability: the WTO and UN system

As explained above, the institutions engaged in global policy-making for the agri-food sector are mainly the UN Rome-based agencies, the World Health Organization and the Codex Alimentarius Commission. They establish mutual connections and

²⁷⁷ G. Amato, *Forme di stato e forme di governo*, cit., p. 33.

²⁷⁸ See *footnote 23*.

collaborate together in addressing food safety, food security and other agricultural issues; however, the way they interact with stakeholders and civil society in general varies among them, influencing the final outcome of global food policies.

Namely, global regulators engage in participatory initiatives in two ways: as interests representatives themselves – for instance, when they are involved in policy-making initiatives by other Organizations - and as policy-makers or policy-facilitators. It is not easy to distinguish between these roles, because they frequently exercise the two functions jointly. The following paragraph will both consider joint experiences of participatory mechanisms, as well as the methods of participation carried out by each global regulator.

2.1. Participation in joint global platforms

Food global regulators acted both as interest representatives and as policy-facilitators during the elaboration of the Millennium Development Goals and of the post-2015 Agenda on sustainable development²⁷⁹.

As previously anticipated, the FAO had set, together with other agencies of the United Nations, a number of goals to be reached by 2015 in a document called “Millennium Development Goals”. These goals related, for instance, to the promotion of environmental sustainability, the reduction of child mortality, as well as the development of a “Global Partnership for Development”²⁸⁰.

In 2015 these goals have undergone a deep review, which ultimately led to the construction and adoption of the new Agenda on Sustainable Development, including poor rural people being recognized as key actors and partners in the elaboration and implementation of food policies at all levels as one of the main objectives to be reached by 2030²⁸¹.

²⁷⁹ See *supra*: Ch. I, § 4.1.3.

²⁸⁰ See Goal 8 “Develop a global partnership for development” of General Assembly of the United Nations (Fifty-fifth session), *United Nations Millennium Declaration*, A/RES/55/218, September 2000.

²⁸¹ See Goal 16 “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels” of General Assembly of the United Nations (Seventieth session), *Transforming our world: the 2030 Agenda for Sustainable Development*, *cit.*, p. 25.

The negotiating process started with the outcome document of the United Nations Conference on Sustainable Development²⁸² setting out a mandate for its agencies to establish an open working group to develop a set of sustainable development goals for consideration and appropriate action by the General Assembly at its sixty-eighth session. Also the Economic and Social Council played a major role in the preparation, implementation and follow up of a post-2015 development agenda.

As a result, the agencies released a report enlisting the general objectives to be achieved by Member States by 2030. According to the document, three goals underline the need to “develop effective, accountable and transparent institutions at all levels”, “ensure responsive, inclusive, participatory and representative decision-making at all levels” and to “broaden and strengthen the participation of developing countries in the institutions of global governance”²⁸³.

These agencies claimed for accountability in policy-making, but can they be considered accountable themselves when setting these policy drivers? Should it be accepted that global calls for the enhancement of participation would be formulated by non-accountable institutions?

As a matter of fact, whether acting as interest representatives or policy facilitators, global organizations should give evidence of the legitimacy of their role.

The procedure for the elaboration of the 2030 Agenda has envisaged extensive participation of stakeholders.

Apart from the UN agencies, also representatives of governments, civil society, philanthropic organizations, academia and private sector were engaged in this

²⁸² General Assembly of the United Nations (Sixty-sixth session), *The future we want*, A/RES/66/288, July 2012. In specific, as per statement no. 249 “In order to provide technical support to the process and to the work of the working group, we request the Secretary-General to ensure all necessary input and support to this work from the United Nations system, including through establishing an inter-agency technical support team and expert panels, as needed, drawing on all relevant expert advice. Reports on the progress of work will be made regularly to the General Assembly”.

²⁸³ Objective 16.6, 16.7 and 16.8 of the report. See Open Working Group of the General Assembly on Sustainable Development Goals, *Proposal for Sustainable Development Goals A/68/970*, available at undocs.org.

discussion, which examined the broader implications for development cooperation of the post-2015 development agenda²⁸⁴.

Namely, for what regards private stakeholders participation, these processes were complemented by a set of eleven global thematic consultations. Moreover, meetings and conferences, on-line discussions, and larger public debates have occurred in all countries. In addition, a global survey and 11 thematic dialogues on different themes have been carried out across the world with the result that, considered as a whole, these consultations have collected the contributions and perspective of over than one million people²⁸⁵. The results of this process have eventually been included in several reports submitted to the UN in order to contribute to the elaboration of the final strategy²⁸⁶.

The absence of a prearranged participatory model and the fluidity of global linkages and platforms allow consultations to take place in different forms and at different levels in single contexts. This has happened also in other parallel contexts.

For instance, in 2009 the reform document of the Committee on World Food Security (CFS) was successfully adopted in October 2009²⁸⁷. As previously explained, CSF is an intergovernmental platform of the United Nations system for the follow-up of policies concerning world food security. It mainly coordinates its activity with FAO. The CSF organizational structure includes members, participants and observers. Namely, its Members are representatives of FAO, IFAD and WFP, as well as of the other Countries of the United Nations. Participants belong both to UN

²⁸⁴ The UN General Assembly document “The future we want” expressly addresses Major Groups role in pursuing sustainable societies for future generations. Furthermore, other stakeholders, such as local communities, volunteer groups and foundations, migrants and families as well as older persons and persons with disabilities, were also invited to participate in UN processes, related to sustainable development. See the official website of the 2030 Agenda www.sustainabledevelopment.un.org.

²⁸⁵ Data available at www.sustainabledevelopment.un.org.

²⁸⁶ For instance, Retreat of the President of ECOSOC, *The 2016 high-level political forum on sustainable development (meeting under the auspices of ECOSOC)*, Tarrytown, 21 – 22 November 2015, and the *Summary of the Stakeholder Preparatory Forum for the Post-2015 Development Agenda Negotiations*, both available at www.sustainabledevelopment.un.org.

²⁸⁷ FAO, Committee on World Food Security, *Reform of the Committee on World Food Security*, Rome, 14-15 and 17 October 2009, on www.fao.org.

agencies and to the private sector and they are represented in the executive bodies of the CSF- the Bureau and the Advisory Group.

According to the reform of 2009, States have recognized the right of civil society organizations to “autonomously establish a global mechanism for food security and nutrition which will function as a facilitating body for CSO/NGOs consultation and participation in the CFS” (par. 16).

As a result, The Civil Society Mechanism (CSM) was established, in order to allow civil society organizations, active in agriculture and food regulatory issues, to participate in global, regional and national multi-stakeholder food security governance structures and processes.

Namely, CSM participates in formulating proposals within the CSF which has, among its members, four representatives of the CSM.

This way, it should be ensured a stable and active consultation of interested parties - in specific, environmental associations, NGO, committees for minorities protection, and other non-commercial actors- – to CFS tasks. The purpose is to give voice to poorly represented subjects²⁸⁸, in order to balance the pressure that is normally exercised on the regulators by the main agro-food stakeholders²⁸⁹.

Nevertheless, beyond formal provisions, it is necessary to understand how these grass-root advocacy mechanisms are structured, in order to ensure an effective and equal representation of interests.

The CSM organization aims at creating an inclusive platform, open to any civil society organization, in order to represent a wide range of interests and to reach-when possible - a joint position before policy-makers. Its structure is based on decentralization of governance, with groups and focal points acting at national,

²⁸⁸ Such as the landless, agricultural workers, indigenous peoples, peasants, fisherfolk, pastoralists, women, youth, and the urban poor. See M. Wolpold-Bosien, *Working together towards a human rights framework for food security and nutrition— How far have we come?*, in *Right to food and nutrition watch*, 2012, p. 13-18.

²⁸⁹ See A. Liese, *Explaining Varying Degrees of Openness in the Food and Agriculture Organization of the United Nations*, in C. Jönsson, and J. Tallberg, *Transnational Actors in Global Governance. Patterns, Explanations and Implications*, New York, Palgrave MacMillan, 2010, 88 – 109. Global regulators cooperate with businesses to achieve their goals and have access to more funds. However, for instance, the institutional link between FAO and the main industries has weakened in time, up to the cancellation in 1978 of the Industry Cooperative Programme, established in 1966 to allow representatives of multinational companies to steadily cooperate in developing food policies within the Agency.

regional and global level. Moreover, a Coordination Committee has been established to facilitate the action of working groups.

In 2013 the Coordination Committee commissioned an evaluation of the performance and functioning of the CSM, asking for proposals on how to strengthen the scope of participation of underrepresented stakeholders in the CSM and how to improve both the influence on the CFS agenda and the functioning of the CSM. According to the report²⁹⁰, CSM has enabled civil society to make some major inroads in engagement with the CFS. However, there are still some concerns about the unclear methods of appointment of CSM body members, the lack of leadership within its working groups, as well as the weak political alliances between the CSM members of the CSF Advisory Group and the other governments and institutions.

These issues prevent from reaching a broader acceptance of CSM's proposal within the CSF and lowers CSM accountability and outreach. Another important limitation in this regard is that time and, above all, financial resources of civil society organizations are insufficient to really take full advantage of the participation opportunities offered by the reformed CFS. While, in principle, social groups representing those most affected by hunger and malnutrition now have more political space than ever within the global governance structures on food and nutrition, in practice most are not in a position to really use it.

Nonetheless, CSM's activity is deemed to be ultimately effective. The impact of CSM action on food and nutrition global policies is evident in many initiatives carried out by FAO.

For instance, FAO's "Guidelines on Responsible Governance of tenure of Land, Fisheries and Forests in the Context of National Food Security" of 2012 have been endorsed by CSF, after an extensive process of consultations with stakeholders, namely small-scale producers' associations and NGOs, reunited in an *ad-hoc* task-force (the International Facilitation Group)²⁹¹. Several of their proposals obtained the support of governments and found their way into the guidelines²⁹².

²⁹⁰ P. Mulvany and C. Schiavoni, *Final Report "Evaluation of the Civil Society Mechanism for relations with the CFS"*, August 2014, available at www.csm4cfs.org.

²⁹¹ The International facilitation group was established before CSM was set up and later became one of its Working Group.

²⁹² CFS, 38th (Special) Session, *Voluntary Guidelines on the Responsible Governance of tenure of Land, Fisheries and Forests in the Context of National Food Security (CFS 2012/38/2)*, Rome, 11 May 2012.

Similar participatory methodologies have been used for the elaboration of the Global Strategic Framework for Food Security and Nutrition²⁹³.

The direct inclusion of private stakeholders, especially those representing weak positions, in the governing bodies of intergovernmental platforms has some consequences. Private actors cease to be considered just as policy-recipients and become, at all effects, policy-makers. It follows that the procedural safeguards usually encompassed in participation, such as the duty of the Authority to give evidence of the consultations carried out or the right to challenge the lack of adequate consultations and procedural unfairness in general, do not apply with respect to them. Participation, which entails the involvement of individuals in *others'* activity, is substituted by direct assumption of responsibility.

It might be argued that the principle of procedural fairness does not apply to policymaking and that the breach of procedural rules can be challenged only with regards to administrative, not normative proceedings. Therefore, even if CSF would envisage only the “external” participation of civil society, procedural safeguards would not apply either. However, the division between normative and administrative measures, policymaking and executive measures is progressively blurring, especially in international contexts²⁹⁴. Policy-makers are increasingly requested to consult stakeholders and to give evidence of participatory processes. Moreover, CSM representatives are members of the CSF Advisory group, which is considered an executive body²⁹⁵; therefore procedural safeguards would be applicable.

It follows that, by including stakeholders in governing bodies, the problem of the adequate representation and participation shifts from the regulatory body onto the representatives of civil society within the same body. Having CSF provided for direct advocacy, the problem whether civil society is adequately represented in it relies on

²⁹³ A set of guidelines and recommendations for global, regional and national decision-makers to combat food insecurity and malnutrition. See *supra* Ch. I, §4.1.2.

²⁹⁴ “In domestic legal orders, there is a clear-cut dichotomy between legal and non-legal prescriptions, because there is a higher authority that establishes the dividing line between what is and what is not law. This picture, however, changes as we move into the global arena. There, we are confronted by a world that is highly formalized, but not in strictly legal terms” (S. Cassese, *What is Global Administrative Law and why study it?*, in VV. AA., *Global administrative law: an Italian perspective*, RSCAS Policy Papers, 2012, p. 4).

²⁹⁵ www.fao.org/csf.

CSM' own accountability and, ultimately, on its ability to gain political influence within the Advisory Group.

This means that, if with participatory mechanisms the policy-makers have to give account of the consultations with an indefinite increasing number of stakeholders, direct involvement narrows negotiations to the power relationship existing between the representatives of civil society and the other members of the governing bodies.

Ultimately, the level of accountability and interests representation become, as a matter of fact, less visible and verifiable.

Therefore, along with direct representation mechanisms, it is important that CSF still implements methods of accountability and transparency. As a matter of fact, during the elaboration of the Global Strategic Framework, the UN Special Rapporteur on the right to food affirmed that “the CFS cannot meet its ambition [...] without monitoring and accountability mechanisms, including accountability of CFS Member States to discharge their human rights obligations in the context of achieving food and nutrition security”²⁹⁶.

Therefore, participation and transparency should be ensured not only as direct representation in the Advisory Committee, but also while implementing and monitoring procedures of the CSF as a whole.

This would provide for a better consideration of interests involved and, above all, the enhancement of the accountability of the several regulators jointly represented in these global platforms.

2.2. Making FAO accountable: liquid strategies of civil society participation

Global organizations conduct their policy—making activity also individually.

In accomplishing its mission, FAO has always established some connections with civil society representatives and NGOs. Although it used to collaborate mainly with multinationals, after the cancellation of the Industry Collaboration Programme in 1978, FAO has tried to increase its accountability and responsiveness towards civil

²⁹⁶ O. De Schutter, *Mandate of the Special Rapporteur on the Right to Food: Submission to the Consultation on the First Draft of the Global Strategic Framework for Food Security and Nutrition of the Committee on World Food Security*, 8 May 2012, p. 4.

society and underrepresented stakeholders. For instance, in 1999 FAO has adopted the Policy and Strategy for Cooperation with Non-Governmental and Civil Society Organizations²⁹⁷, while in 2014 the Organization has improved its collaboration with the International Planning Committee on Food Sovereignty (IPC). The IPC is an independent global platform that gathers small producers, civil society associations and farmers trade unions, with the purpose to put food sovereignty at the top of international regulators' agenda²⁹⁸.

Namely, IPC works as a participation facilitator for civil society organizations in global bargaining and forums. In the last decades, it played a fundamental role in enhancing the effective participation of underrepresented stakeholders in the two editions of the World Food Summit (1996 and 2002) and in the International Conference on Agrarian Reform and Rural Development (2006).

It also helps private associations to be involved in the elaboration of each International Organization's strategies; for instance, in 2012 IPC has coordinated the consultation of stakeholders in the "New FAO strategy for partnerships with civil society organizations", adopted in 2013²⁹⁹.

In addition, the IPC itself promotes the creation of multilateral platforms and participates at global conferences: it has engaged in the negotiations for the renewal of CFS and also worked on the proposal for the creation of the CSM.

IPC's working groups also participate in setting up FAO's agenda and policies. For example, the working group for the fishersfolk worked on the drafting of FAO Guidelines on small-scale fisheries.

In conclusion, IPC works as a participation facilitator for other organizations in global forums and before single regulators; in addition it participates in first place in global bargaining and in FAO's strategy building.

Since the CFS began to work independently, the IPC decided to redefine its own workspace outside the CFS, primarily in the FAO, but also in other UN agencies and in the single territories, reorganizing the roles and responsibilities of Member organizations at regional level. Its structure resembles that of global regulators: it is composed of a General Meeting, representing all members and in charge with the

²⁹⁷ FAO, *Policy and Strategy for Cooperation with Non-Governmental and Civil Society Organizations*, 1999, available at www.fao.org.

²⁹⁸ For further details on the structure and historical origin of IPC, see www.foodsovereignty.org.

²⁹⁹ FAO, *New FAO strategy for partnerships with civil society organizations*, 2013, available at www.fao.org

elaboration of the working plan; a Facilitating Committee, which is accountable to the Committee and oversees the work of the IPC; a Secretariat, with executive functions. Representation in these bodies is granted on a regional basis and according to the 19 member organizations of the IPC.

In 2014, through an institutional exchange of letters, FAO has acknowledged the importance of the role carried out by IPC and created the basis for cooperation in establishing future policies, mainly ensuring the participation of such organization to the commissions and conferences periodically called by the food security agency of the United Nations. Therefore, while still keeping its Member States-based structure, FAO has acknowledged IPC as an external key-actor in gathering civil society participation in its activity.

The collaboration between the two organizations followed the strategy adopted by FAO in 2013 to enhance grass- root advocacy in its activity. According to it, FAO establishes formal agreements with non – state actors having a legal status³⁰⁰ and working in the areas related to its mandate. The involvement of these actors relates, among other functions, to the support for the signature and implementation of global conventions, guidelines and other normative documents by Member States. Moreover, FAO shall grant civil society organizations' participation to policy dialogue in global conferences. In order to do so, FAO offices shall implement this strategy on a decentralized level, establishing forms of collaboration and communication with local civil society organizations.

However, according to the methods described in the Strategy, civil society organizations' participation should mainly take place at the initial stage of proposal or at the final stage of implementation of the projects, not in that of the discussion in governing bodies' meetings, since they only attend to them as observers³⁰¹.

Moreover, whereas FAO acknowledges that it is important to engage in relations with organizations having “the broadest possible representation vis-à-vis their constituency and region” and that their views are brought to “policy, normative and technical discussions convened by FAO, and subject to a decision by Member States, to Technical Committees”³⁰² and governing bodies, it is not clear how this actually occurs. In particular, from what can be inferred in the documents and agreements

³⁰⁰ Organizations that do not have a legal status shall seek the assistance of a civil society organization with juridical standing, in order to engage with formal collaborations with FAO.

³⁰¹ *New FAO strategy, cit*, p. 26 and 29.

³⁰² *New FAO strategy, cit*, p. 26.

available³⁰³, it seems that the methods of civil society involvement in FAO's activity vary case-by-case, from a simple exchange of letters to more formal relations. The choice between the different methods depends on the level of connections both the civil organizations and FAO want to establish; in addition, the contents of participatory safeguards is uncertain. Moreover, the way FAO gives account of the consultations occurred is still unclear and, therefore, unlikely to be verified³⁰⁴.

In conclusion, although the participation of civil society to FAO policy-making activity is not completely missing, it is based on a model that differs from the core contents of procedural safeguards. In first place, it is not open to any party having a vested interest and wanting to actively contribute to the determination of the global policies; on the contrary, it relies on processes mediated by selected associations having a liquid structure³⁰⁵ and a partial and sectorial representativeness³⁰⁶. These bodies act in behalf of civil society, though no extensive mandate and no periodical check on its actual representativeness is put in place. Paradoxically, if in national legal orders citizens' legislative initiative is possible if evidence is given of promoters' representativeness – for instance, by the collection of an established number of

³⁰³ See *www.fao.org*.

³⁰⁴ See M. Rocha de Sousa, *A Global Governance Approach to FAO: Proximity, Legitimacy & Accountability- Averting the global food crisis*, in *Crise global e efeitos na agricultura e desenvolvimento rural*, ESADR, 2013. The Author assessed FAO's accountability, drawing on several indicators, such as participation, reason-giving, independence and transparency. Although, compared to other global regulators, the final ranking of FAO is average, it still does not provide for satisfactory levels of well-established procedural safeguards.

³⁰⁵ See Z. Bauman, *Modernità liquida*, Roma-Bari, Laterza, 2000.

³⁰⁶ The degree of representativeness of elite stakeholders affects the effectiveness of procedural safeguards and, therefore, the democratic value of policies. See A. Fung, *Varieties of participation in complex governance*, *cit*, stating that “The principal reason for enhancing citizen participation in any area of contemporary governance is that the authorized set of decision makers... is somehow deficient... Whether the direct participation of citizens in governance can remedy one or other of these deficiencies depends in large measure on who participates: are they appropriately representative of the relevant population or the general public?”. See also S. Nespore, *Organizzazioni non governative internazionali e mondo globale: la difficile ricerca di una legittimazione*, in *Riv. giur. ambiente*, fasc.6, 2012, pag. 703 investigating the representativeness and legitimacy of non-governmental organizations at global level.

supporters' signatures— the legitimacy of these organizations to participate to policy-making is based only on the claim of their ability to act in behalf of society.

Moreover, associations and NGOs participation at FAO's activity happens with no general criteria of selection, but according to single agreements between the UN Agency and each platform, leaving space to external pressures exercised on the Organization. In other terms, even though the opening to the civil society is somehow present, it is fragmented, heterogeneous, badly organized and suitable to represent only a certain part of the civil society – even if it is the part usually poorly represented within the Institutions.

That can depend, on one hand, from the fact that such procedures have only recently become a stable part of the FAO agenda, therefore their development is still prudent and unripe; on the other hand, there is no doubt that a less institutionalized and open participation might increase the risk of slowing down the activities carried out by the Organization. In addition, limits to participation are justified also by keeping the regulator sufficiently insulated from the regulated subjects³⁰⁷. This fact does not eliminate the need to enhance such procedures, to partially compensate the lack of accountability suffered by FAO; at the same time, it also highlights the need to properly balance participation, accountability and transparency both in the Organization and in civil society associations.

Therefore, although FAO has considerably enhanced participatory mechanisms to involve civil society representatives in its activity, some further reforms should take place to precisely determine the contents of participation and, ultimately, to create a stable platform, with predetermined rules, where civil society organizations could freely join after given evidence of their actual representativeness. This should not replace, but happen along with more formal relations and collaboration on single projects and strategies put in place by the Organization and some associations, such as the IPC.

³⁰⁷ See FAO, *Strategy for Partnership with Civil Society Organizations*, Rome, 2013, available on www.fao.org, illustrating the general policy of the Agency concerning the promotion and enlargement of participation with civil society.

2.3. The WFP: participation and discretion

According to the WFP Strategic Plan 2014–2017, “No single organization can address today’s complex food and nutrition security challenges. Partnership is more important than ever. The challenge now is to better define the role and value added of actors within the wider field, strategically select partnerships, strengthen mutual accountability and ensure collaboration delivers results”³⁰⁸.

Drawing from this, WFP has launched a Corporate Partnership Strategy (2014–2017), in order to enhance operational and knowledge collaboration with other United Nations agencies, international and non-governmental organizations, civil society and the private sector. Namely, according to the Strategy, WFP partnering approach differentiates between several forms of collaboration, in order to improve collective approaches without losing autonomy and efficiency because of transaction costs and longer consensus building procedures³⁰⁹.

Pursuant to this, WFP engages in three different kinds of partnerships: bilateral agreements, memoranda of understandings with multi-stakeholders platforms and informal networked collaborations. Usually, partnerships with civil society do not take place with the general public, but with NGOs at global, regional and national level. The type of collaboration is quasi-contractual, aimed at implementing single strategies during specific emergencies, although consultations with all NGOs take place annually at Chief Executive Office level. Moreover, WFP put in place a strategy to collaborate with the private sector and the academia, ensuring itself access to their resources and knowledge, in order to build sound policy-making³¹⁰.

Under the strategies put in place by WFP, civil society advocacy and involvement in policy-making is not direct, but mediated by NGOs and other institutions, such as businesses and universities. Their participation seems mostly aimed at providing WFP with more information and financial support to carry out its activity. Therefore, in WFP’s Strategy there is an inherent distinction between mere consultation and participation. Civil society representatives are consulted in order to reach evidence-based policymaking, whereas they actively participate only at policy and strategy implementation. In this sense, their role is just instrumental to WFP’s

³⁰⁸ All the cited official documents can be found at *www.wfp.org*.

³⁰⁹ See *WFP Corporate Partnership Strategy (2014–2017)*, p. 9.

³¹⁰ See *WFP Corporate Partnership Strategy (2014–2017)*, p. 18.

activity. The only moment when shared policy-making takes place is at the annual meeting with NGOs at Chief Executive office level.

If we exclude this reunion – which occurs too infrequently to be considered a stable and effective method of stakeholders’ involvement - participation in WFP is not fully institutionalized but mainly occasional, and grass-root advocacy rests on non-governmental and other institutions’ representativeness.

Previous to the current Strategy, other documents had focused specifically on these aspects, such as “WFP Working with NGOs: A Framework for Partnership”³¹¹, “Private-Sector Partnerships and Fundraising Strategy 2013–2017”³¹² and “Participatory Approaches 2000”³¹³.

Pursuant to the latter, WFP acknowledges that “the inclusion of civil society through participatory approaches is a prerequisite for poor people to contribute their knowledge, skills and resources to processes that influence their lives” but that “there are various factors that impede the adoption of participatory approaches at both the national and local levels”³¹⁴. Therefore, the level of participation varies according to the situation, and it is implemented through information sharing, consultation, collaboration with shared control over decision-making and empowerment with the transfer of control over decisions and resources. Therefore, depending on the specific situation, policy-takers and projects beneficiaries are involved either at the early stage of programme design or during its implementation.

Although documents mostly refer to the last phase of implementation or emergency management, WFP has integrated elements of participation in all phases of the programme cycle: needs assessments, targeting, activity identification and implementation, and monitoring. What the participatory strategy lacks, however, is an overall policy encompassing all the different situations and addressing them according to general pre-determined rules.

Drawing from the Strategies put in place, WFP still has a case-by-case approach to participation. The documents show how participatory activities have been carried out in the past and how they should be managed in the future. However, there are no pre-determined rules guiding its governing bodies and operational structures’ approach to people’s involvement. In other words, the WFP strategy provide for

³¹¹ WFP/EB.A/2001/4-B

³¹² WFP/EB.A/2013/5-B

³¹³ WFP/EB.3/2000/3-D

³¹⁴ WFP, *Participatory approaches*, available at www.wfp.org, 2000, p. 3.

general recommendations, but the final choice on the adequate level of civil society involvement in programme drafting and implementation is ultimately delivered on officers' discretion. Moreover, since policy-makers and officers within the WFP are not provided with any punctual guidance on how and when implementing participatory methods, its implementation cannot even be verified both by governing bodies and stakeholders.

In conclusion, although WFP participatory approaches seems to be widely spread and well-rooted, they are not systematic, but largely discretionary.

2.4. IFAD and the Farmers Forum's potential

Similar to WFP, also the other minor Rome-based agency of the United Nations conducts participatory initiatives mainly with NGOs.

However, although organizations usually relate with NGOs as representing civil society interests and replacing them in negotiations, the system implemented by IFAD aims at ensuring that the addressees of the policies build the capacity to advocate and protect their interests vis-à-vis governments, the market or others actors in society³¹⁵. Therefore, the collaboration between IFAD and NGOs aims at eliminating levels of insulation between rule-setters and rule-takers, by directly empowering the people with the protection of their own interests. However, this goal refer to local governments and other organizations, not to IFAD itself. It derives that, although IFAD promotes people direct advocacy before political structures, it is not able to act accordingly, for what regards its own policies.

Namely, grass-root advocacy is still carried out thanks to the mediation of non-governmental bodies, which in turn should put in place participatory procedures in the conception, design and implementation of their programme and policies.

In 2005 IFAD established the Farmers' Forum³¹⁶, a bottom-up process of consultation, working at national and regional level and including small farmers' and rural producers' organizations and governments, focused on rural development

³¹⁵ IFAD, *Strategy: Deepening IFAD's engagement with the private sector*, 2012, available at www.ifad.org. Namely, for the purpose of this strategy, IFAD supports private actors in the engagement of public-private partnerships.

³¹⁶ IFAD, *Towards a farmers' forum at IFAD's Governing Council*, Rome, 15 February 2005, available at www.ifad.org.

and poverty reduction. The Forum meets every two years and aims at bringing together small farmers representatives³¹⁷ and governments for the implementation of projects and IFAD's objectives in general.

Namely, consultations are carried out in two forms. The first entails the exchange of information between farmers' associations, IFAD and agricultural ministries or government representatives on their own respective objectives, strategies and operations, as a first step to explore potential areas of collaboration in specific projects. This dialogue aims at laying the foundations for a more developed collaboration on specific projects and policies³¹⁸. The second regards Regional consultations, which follows the same pattern, but on a larger scale, since it involves governments and organizations based on several countries and belonging to the same area of the world³¹⁹.

Therefore, IFAD collaboration with private stakeholders, namely small-scale farmers, is project-based. General objectives are not shared with several actors, however their specification in programmes and in more detailed policies takes place at national and regional level thanks to the establishment of the Farmers' Forum. Moreover, the involvement of governments' representatives in the Forum allows underrepresented interests to emerge and to directly affect national policies.

However, this system still needs to overcome some obstacles.

First of all, the Forum does not allow the representation of all interests. The platform currently includes farmers and fisherfolks networks; therefore, it should be extended to include other kinds of producers (such as pastoralists or agriculture workers, for instance). Moreover, large-scale producers are excluded from this dialogue, under the assumption that, since they have different interests, they require different kinds of policies³²⁰. However, the isolation of different stakeholders prevent governments and organizations to engage in an inclusive dialogue and to carry out an actual debate between the different positions. Negotiations take place at

³¹⁷ According to the Farmers' Forum founding document (p. 6), the prerequisite to join the Farmers forum is to be "a legitimate and accountable representative of a membership based farmers' or rural producers' organization, legally recognized in the country. The organizations should have a majority membership of smallholder family farmers and/or other resource poor rural producers (pastoralists, artisanal fishermen, self-employed rural workers, landless wage labourers)".

³¹⁸ IFAD, *Towards a farmers' forum at IFAD's Governing Council*, cit. p. 5.

³¹⁹ IFAD, *Towards a farmers' forum at IFAD's Governing Council*, cit. p. 6.

³²⁰ The Farmers Forum, *The next 10 years: a proposal*, 2015, p. 1.

different stage and in different moments, making the policy-making process fragmented, especially for what regards the control over the power-relations between parties. Avoiding the direct debate between strong and weak interests representatives prevent the simultaneous balance of powers to take place, hence exposes the Authority – in this case, IFAD and national governments – to bias and subjugation.

Moreover, the evaluation of the Forum's work in the past years have highlighted a insufficient participation of key- governmental actors and policy-makers to the Forum's activities³²¹.

In conclusion, the creation of a Farmers' Forum has the potentiality to enhance the involvement of underrepresented interests in policy-making. However, stronger linkages with policy-makers and other stakeholders should be put in place to create an inclusive platform for effective policy negotiation, not only at Country and Regional level, but also with regards' to IFAD's activity.

2.5. The WHO: Oligarchic protection of public health at global level

The analysis of the participatory platforms established by food security agencies has proved the existence of several methods to attain democratic legitimacy in the global arena.

The need to compensate the lack of accountability is even greater when referred not to a technical agency – although the analysis showed that this definition should be closely tested in practice- but to global subjects that expressively retain regulatory powers, such as WHO and WTO.

These organisms act on different sectors– health and trade – which, however, interact in the global food governance³²². The analysis of their activity shows that the territorial and substantial effectiveness of their powers is not the same; indeed, even if they both act at global level, they do not exercise the same binding powers on Member States. The activities of WHO, in fact, are mostly persuasive and, although

³²¹ The Farmers Forum, *The next 10 years, cit.*, p. 2.

³²² For instance, FAO/WHO joint committees carry out impact assessments for the Codex Alimentarius Commission, whose standards are recalled in the WTO treaties.

some measures are mandatory for Member States, they cover just a part of WHO activity³²³.

On the contrary, WTO rules – and those recalled by WTO treaties, such as CAC's standards - are able to substantially bind Member States, by ensuring their compliance via a quasi-judicial mechanism.

Moreover, the relationship between the global system of trade and that of health is unbalanced, since global health studies, such as the risk assessments carried out by the joint FAO/WHO Committees for the CAC rules, are shaped and evaluated according to the need to protect free competition³²⁴.

Nonetheless, WHO seems to have a stronger legitimation than CAC, since the latter is an independent body, whereas the former functions as a multilateral Member States - driven organization. However, as previously illustrated, the emergence of global governance has overturned the foundations of representative democracy and of States' sovereignty, which can be no more considered the only reliable basis to evaluate multilateral organizations' legitimacy.

WHO is a relevant example of this change. The previous analyses have clearly pointed out that, despite its national sovereignty-based structure, there is a strong deficit of democracy in global health governance³²⁵. A recent stakeholders perception study³²⁶ has highlighted that, whereas most people value the important work of WHO, they also have concerns regarding the independence of the Organization and

³²³ See *supra* Ch. I, § 4.1.4.

³²⁴ As pointed out in K. Lee, D. Sridhar, M. Patel, *Bridging the divide: global governance of trade and health*, cit., p. 417, "trade governance is formalised and demanding, whereas global health governance has little structure, a greater diversity of contributors and perspectives, and weaker legal obligations. WHO has limited access to the WTO meetings at which trade issues that could directly affect health are discussed". The lack of a substantive impact of a public-health perspective on free policies remains a barrier to coordinated action between the WTO and WHO.

³²⁵ See K. Lee, M. Koivusalo, E. Ollila, R. Labonté, T. Schrecker, C. Schuftan, D. Woodward, *Globalization, Global Governance and the Social Determinants of Health: A review of the linkages and agenda for action*, Globalization Knowledge Network: Research Papers, *www.who.int*, June 2007. The Author illustrates the democratic value of WHO policies and structure. One key element is the lack of transparency and equal accountability of the Organization. Strategies are politicized and in the hand of the main State and external donors.

³²⁶ WHO, *WHO global perception survey*, 2012, on *www.who.int*.

the influence of vested interests. WHO finds itself in the awkward position of being neither democratically accountable to States, nor autonomous, but curbed within a oligarchic system run by its financial supporters. The purpose of this paragraph is to investigate the existence and the suitability of other forms of accountability, such as grass-root advocacy systems.

The relation between WHO and civil society has been defined as controversial³²⁷.

The reference to the establishment of structural collaborations with private actors has been repeated in official documents and reports over the years³²⁸, and ended in the 1987 “Principles governing relations with non-governmental organizations” and in the “Guidelines on working with the private sector to achieve health outcomes” of 2000³²⁹. Later, the interaction between civil society organizations and WHO was halted at the beginning of the XXI Century and started again with the ongoing process of reform regarding WHO’s engagement with non-State actors³³⁰.

This draft scheme aim at providing for a more rigorous and comprehensive operational framework for WHO engagement with civil society. However, the analysis shows a blurred policy of collaboration with non-State entities.

Similar to the other Organizations, WHO engages in the dialogue with civil society mainly through non-governmental organizations, although other private entities (such as members of the academia and businesses) are considered³³¹.

³²⁷ R. Van de Pas, L.G. Van Schaik, *Democratizing the World Health Organization*, in *Public health*, 128(2), 197.

³²⁸ See art. 2,18 and 71 of the WHO Constitution. Moreover, at the beginning of the XXI century some studies have been carried out on the involvement of civil society in the formulation and implementation of public health programmes and policies as well. See WHO reports of 2002 “*WHO and Civil Society: Linking for Better Health*” and “*Understanding Civil Society Issues for WHO*”.

³²⁹ Report by the Secretariat, EB107/20, 30 November 2000.

³³⁰ Namely, governing bodies and offices are discussing a new framework for the collaboration with non-State actors. See WHO Health Assembly, decision WHA67(14), May 2014.

³³¹ In the documents of the ongoing WHO reform, governing bodies have considered the idea of harmonizing rules provided for NGOs with those addressing relations with other non-state actors (such as businesses). However the proposal has been rejected in order to maintain stricter rules for the private sector. See “Draft WHO Policy And Operational Procedure On Engagement With Private Sector Entities”, annex to the *Framework of engagement with non-State actors*, EB136/5, 15 December 2014, p. 27.

On one hand, grass – root advocacy seems to be well known within the Organization. For instance, the proposals for the WHO governance reforms followed a series of questions to solicit opinions of stakeholders on WHO management of its work with the wide range of non-State actors that currently have a significant role in global health. A public web-based consultation has also been held to the same purpose. The Report on WHO governance reform generally discusses the opinions received and enlists a series of principles for the engagement with non-State actors. Therefore, the drafting of the proposals gave account of the two different consultative initiatives - both targeted and public – put in place. In addition, the procedure ended with a list of four principles to be applied to all interactions with non-State actors, “irrespective of the nature of the non-State actor in question, and regardless of context”. These principles include governmental representation, scientific approach, transparency and neutrality³³².

On the other hand, it is not clear under which legal basis and principles the WHO has carried out these consultations, neither which actors have been involved. Moreover, despite those premises, the Report shows that WHO reform of the relationships with civil society is still strictly based on intergovernmental representativeness, on the non-accountable power of policy and decision-making of the Organization’s governing bodies and on a case-by-case approach towards participation. Pursuant to this, “no non-State actor can expect to have the decision-making privileges of engagement with the Organization on the same basis as Member States”³³³. Moreover, the general principles of engagement with non-State actors deal more with the Organization’s substantial attitude in decision-making, rather than giving a common procedural structure for participatory initiatives, which remain broadly differentiated. Namely, the Organizations engages in two kinds of relations with non-state actors: formal and informal, depending on the existence of an agreement and on the intensity of the collaboration; the majority of WHO’s relations are informal, without a specific agreement, and focus not on general policy-making but on specific activities.

³³² WHO governance reform, cit., p. 4.

³³³ *WHO governance reform*, Report by the Secretariat, EB133/16 133rd session 17 May 2013, P. 4.

In particular, relations can take the form of consultations, directed either at acquiring relevant information or at influencing non-state actors' activity³³⁴; hence, consultations are not aimed at involving these bodies in the final policy-making decision, which remain the prerogative of Member States. Secondly, stakeholders can collaborate with the Organization for the implementation and monitoring of programmes. More binding forms of interaction are represented by contracts and financial support.

In the end, WHO framework also envisages non-state actors engagement in WHO governance³³⁵. However, the level of their engagement is, at its best, merely formal and ineffective. Namely, NGOs, international business associations and philanthropic foundations in “official relations”³³⁶ are able to participate in WHO's governing bodies meetings. Recently the Executive Board requested the Director-General to revise accreditation procedures for nongovernmental organizations, namely to de-couple participation in meetings of WHO's governing bodies from a period of working relations³³⁷. However, participants attend to sessions without the right of vote, and are only entitled to make a prior statement to clear their positions on the matters under discussion³³⁸.

In addition, governing bodies can also hold electronic or in person hearings where the participants can present their evidence, views and positions and be questioned about them, albeit they do not enter into a debate³³⁹.

In conclusion, WHO engagement with civil society is partial – since it is mainly directed at NGOs – and not enough satisfactory at the stage of policy-making, since it focuses mainly on the implementation of programmes and projects. Policy statements clearly divide decision-making – vested in Member States - from the

³³⁴ See *WHO governance reform*, cit., p. 5: “the Secretariat seeks the opinion of others, seeks to influence their activities, or solicits information from non-State actors. Consultation is thus part of the process of policy development, but is distinct from final policy decisions which remain the prerogative of Member States”.

³³⁵ See *WHO governance reform*, cit., p. 5.

³³⁶ Formal relations are established according to some criteria and a procedure explained in the *Principles Governing Relations with Nongovernmental Organizations*, on www.who.int.

³³⁷ See *WHO governance reform*, cit., p. 7.

³³⁸ More information on the functioning of the official relations can be found in the WHO Secretariat, *Framework of engagement with non-State actors*, cit., p. 20-22.

³³⁹ See WHO Secretariat, *Framework of engagement with non-State actors*, cit. p. 13.

execution of policies – which involves a great number of stakeholders, in order to enhance the extensiveness of WHO activity.

Nonetheless, the Framework requires non-state actors to underpin transparent interactions and to make public all the details on their structure, organizational goals and sources of funding³⁴⁰. Moreover, before engaging in any relation, the WHO conducts due diligence, which entails “a review of the information provided by the non-State actor, a search for information about the entity concerned from other sources, and an analysis of all the information obtained”, in order to categorize the non – State actors and identify their level of independence and likely impact on the WHO ability to achieve its objectives³⁴¹.

Following a pattern well-known at global level, the Organization is able to influence private organizations’ structure and governance through the implementation of internal rules and strategies; still, by focusing on transparency and accountability obligations for private organizations, its process of reform does not effectively intervene to fill the gap of accountability suffered by the UN Organization itself.

Moreover, although transparency rules for private actors put a feeble light on the line that connects WHO and NGOs, they do not solve the lack of clear mechanisms for the accountability of non-State actors towards the people. The mechanism demanding that non-State actors operating in the global arena be accountable for the global effects of their actions are relatively vague, at their best³⁴².

Ultimately, civil society is largely unrepresented or directly excluded from participation to WHO activity which, in any case, mainly regard executive action rather than policy – building procedures.

³⁴⁰ These data are included in the “WHO register of non-State actors”, covering relations at global, regional and country level.

³⁴¹ See WHO Secretariat, *Framework of engagement with non-State actors*, cit., p. 16.

³⁴² According to the WHO Secretariat, *Framework of engagement with non-State actors*, cit., p. 4, any engagement with non-State actors must “be conducted on the basis of transparency, openness, inclusiveness, accountability, integrity and mutual respect”; however, no agreement has been reached yet on provisions specifying accountability requirements.

2.6. WTO and CAC: how to make the Market accountable

At the heart of food law there is the attempt to reconcile free trade objectives with the protection of other values, human life and public health in first place. The balance is usually pursued relying on scientific approaches towards regulation. For instance, under the TBT Agreement, national technical regulations must not constitute an obstacle to free trade; however, necessary restrictions can be adopted to protect “human health or safety, animal or plant life or health, or the environment”, relying on “available scientific and technical information, related processing technology or intended end-uses of products” (art. 2). Similarly, according to the Preamble of its Constitution, FAO has the purpose of “raising levels of nutrition and standards of living of the peoples...bettering the condition of rural populations, and thus contributing toward an expanding world economy”.

At global level, the emphasis on science-based choices is great, because, in absence of a system of direct election of the international organizations’ members, it should act as a neutral method to settle the political bargain on the contents of a rule between equally sovereign States.

International treaties have sealed the link between global free trade goals and scientific risk assessment, the latter being ancillary to the former. As a result, science serves as a justification to an economic policy choice. However, since scientific outcomes – especially in this field – are uncertain and subject to interpretation by experts, the reliance on science does not automatically provide for neutrality. On the contrary, it helps in reinforcing the outcome of political bargaining on the contents of technical rules – which are not by chance known as possible “barriers to trade”.

Consequently, as explained in the previous chapter, food governance has proved to be an unbalanced network of regulators attracted by the binding force of WTO rules. Contrary to other global legal orders, WTO system covers the entire lifecycle of the regulatory activity: from rule-setting to quasi-judicial³⁴³ enforcement. At the same time, pursuant to the “liquid” structure of global entities, the WTO system does not abide by the principles of representativeness and separation of powers, therefore legitimation issues are at the core of WTO bodies.

³⁴³ The Dispute Settlement Body is considered an adjudicatory body, rather than judicial, because it has no direct power to inflict enforcing measures. However, the practical outcome of its activity is similar to that of national judiciaries, because it can authorize one Country to adopt retaliation measures against another State.

As previously explained, the Codex Alimentarius Commission was established as per a joint resolution of WHO and FAO, however its food safety standards are enforceable by the Dispute Settlement Body of WTO, which makes CAC one of the herald of the free trade system. Therefore, it is necessary to investigate the legitimacy of the Codex Alimentarius Commission's activity, namely the democracy and neutrality of its decisions, in absence of a mechanism for direct representation. At this purpose, procedural safeguards could enhance the transparency and accountability of procedures, namely by opening decision-making to stakeholders.

The link between legitimation and procedural rights is acknowledged by CAC itself, which also proves the existence of an accountability gap. In particular, CAC official documents provide for the possibility of private and public entities to participate at the elaboration of the standards. Namely, the participation of governmental and non-State organizations is considered critical to sound decision-making and to make the rule-maker accountable³⁴⁴. However, strategies in the past have mostly regarded the enhancement of developing countries' inclusion in decision-making³⁴⁵, rather than the involvement of private organizations or individuals.

³⁴⁴ See Codex Alimentarius Commission, *Strategic Plan 2008-2013*, point 17 and 19, claiming that "full participation by all Codex Members and other interested parties in the work of the CAC is now more important than ever. The participation of all members and relevant intergovernmental and international non-governmental organizations is critical to sound decision-making and ensuring that Codex standards and related texts take account of the full range of interests and viewpoints" and that it is necessary to "encourage the participation of consumers and public interest groups in its processes at the international level and encourage governments to take action at the national level".

³⁴⁵ For instance, The Codex Trust Fund was established in 2003 to help developing countries and countries in transition to increase their participation in the work of the Commission. Currently, FAO and WHO are launching a successor initiative to the Codex Trust Fund (CTF2) in January 2016, which will shift the focus from widening participation in Codex, to focusing on building strong, solid and sustainable national capacity to engage in Codex. See Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, 38th Session, *Fao/Who Project And Fund for Enhanced Participation In Codex: Codex trust fund Successor initiative*, Geneva, Switzerland, 6-11 July 2015. Document available at www.who.int.

CTF2 will shift the focus from widening participation in Codex, to focusing on building strong, solid and sustainable national capacity to engage in Codex.

Nonetheless, the focus on the better involvement of developing countries in decision-making shows that, beyond formal statements, CAC actual leadership strongly depends on the economic and political standing of its Members, since the positive outcome of standards setting process is still based on voting³⁴⁶. Moreover, previous attempts to improve accountability by re-balancing top-down advocacy seemed not to take into account the global-spread crisis of States' political representativeness³⁴⁷.

With the adoption of the new strategic plan 2014-2019, the focus is still on developed countries involvement in the Codex³⁴⁸ and on consensus building. Furthermore, Member States involvement regards the contribution to the risk assessment, thanks to the generation of data and the provision of useful information, whereas the risk management step is not affected. Therefore, the strategy aims at reinforcing the scientific basis for trade-oriented policies, rather than including different point of views in the elaboration of standards.

The reference to consumers and public groups participation is vague and does not imply any structured process of bottom-up involvement. Non-governmental organizations, and "other stakeholders" are only informed of how the Commission intends to fulfil its mandate during the period 2014–2019³⁴⁹. A more intense cooperation is established only with other private regulators, such as non-governmental standard-setting organizations, to reinforce mutual strategies and avoid regulatory overlaps with these bodies³⁵⁰.

From what can be observed, no system of actual grass-root advocacy is put in place with non-state actors. CAC grants NGOs (but only to those fitting in some listed requirements) the only status of Observers³⁵¹.

³⁴⁶ See Rule X of the Joint FAO/WHO Food standard Programme, *Rules of Procedure of the Codex Alimentarius Commission*, 2015: "The Commission shall make every effort to reach agreement on the adoption or amendment of standards by consensus. Decisions to adopt or amend standards may be taken by voting only if such efforts to reach consensus have failed".

³⁴⁷ See *supra* the Introduction.

³⁴⁸ See Objective 3.1 of the Codex Alimentarius Commission *Strategic plan 2014-2019*.

³⁴⁹ See Codex Alimentarius Commission *Strategic plan 2014-2019*, p. 3.

³⁵⁰ Objective 1.3 of the *Strategic plan 2014-2019, cit.*, p. 9.

³⁵¹ See Rule IX, par. 5 and 6 of the Procedural Manual of the Codex Alimentarius Commission, available at www.fao.org.

An Organization in Observer Status is entitled to attend the sessions of the Commission and the subsidiary bodies, without any right to vote. They can issue documents explaining their views on the matter under discussion and *might* be invited by the Chairperson to actively participate. Therefore, participation is mainly silent; real involvement in policy negotiation is eventual and subject to the discretion of one person. Similarly, NGOs may be invited by the Directors-General to participate in meetings or seminars on subjects organized under the Joint FAO/WHO Food Standards Programme, or to send written statements.

The system put in place highlights the difference between consultation and participation. Most of the time stakeholders are only consulted on the issues at stake and, even when participatory safeguards are discretionally granted to them, their function is still that of providing the Authority with more information.

This does not mean that stakeholders' intervention does not exercise any influence on the decision-maker; however, the procedure is not systematically activated, nor predetermined criteria of activation exist; accordingly, the Authority shall not even justify its decision or give evidence of having considered stakeholders' views. In brief, although CAC internal rules provide for a certain degree of bottom-up advocacy, the systems lacks all the features that make participatory safeguards effective.

On the other hand, NGOs shall comply with a number of requirements and obligations to provide CAC a better knowledge both on the issues it addresses and the changes in the structure or governance of the non-state organizations with whom it collaborates. Moreover, NGOs must collaborate with the Codex Alimentarius Commission to achieve its objectives and implement its activity. Therefore, while carrying out its mission autonomously, CAC sets stringent requirements of publicity and transparency onto non-state actors, in order to strengthen its reputation and leadership in the global arena. In other words, while influencing civil society organizations' policies and governance, CAC is not influenced by them in return.

In conclusion, CAC's accountability is jeopardized by the unresolved governance issues related to the unbalanced representation of States within its governing bodies. Although grass-root advocacy is presented by the Commission itself as a parallel counterbalance and rules provide for standards of transparency and methods of stakeholders' participation to rule-making activity, their function seems not to be directed at enhancing administrative democracy. Rather, procedural safeguards aim at strengthening CAC's leadership and the effectiveness of its rules, by seeking for a

better knowledge, informing stakeholders on the contents of the decisions, involving governmental and non –state actors in their implementation and by retaining indirect control over the governance of these bodies.

3. Participation within the European Union

At European level, the law specifically provides citizens with the right to directly or indirectly participate to food rule-making (art. 9 reg. 178/2002).

Such approach reflects the European Union’s declared intention to increase the level of democracy within those institutions suffering from an important accountability deficit, in order to get them closer to the European citizens³⁵²; secondly, it acknowledges the importance of consultations as a tool to adopt more informed and better accepted rules³⁵³.

To that purpose, the White Paper on the European governance of 25th July 2001³⁵⁴ has established five main fundamental principles on which decision-making should rest: openness, participation, responsibility, effectiveness and coherence³⁵⁵.

³⁵² There was awareness of such problem with special regard to the European Parliament, before the changes set by the Lisbon Treaty. See C. Pinelli, *Il deficit democratico europeo e le risposte del Trattato di Lisbona*, in *Rass. parl.*, 2008, fasc. 4., p. 925 ss.; J. Mendes, *Participation and the role of law after Lisbon: a legal view on article 11 TEU*, in *Com. mar. law rev.*, 2011, p. 1849 ss; P. Piroddi, *Il Parlamento europeo nel Trattato di Lisbona tra democrazia rappresentativa e democrazia partecipativa*, in *Riv. it. dir. pubbl. com.*, 2011, fasc. 3-4, p. 801 ss.

³⁵³ “The quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely to create more confidence in the end result and in the Institutions which deliver policies” (*European governance: a White Paper*, COM(2001)428 final, Bruxelles, 25 July 2001).

³⁵⁴ European Commission, *European Governance*, cit. According to it, the Commission adopted procedures aiming at opening decision-making to the consultation of interested parties.

³⁵⁵ The debate on public participation has led to the so-called Barca Report (*Un’Agenda per la riforma della politica di coesione*, report prepared in April 2009 by Fabrizio Barca, upon request of Danuta Hubner, the European Officer for the regional policy) and then to Regulation (UE) of the Parliament and Council no. 1303/2013, setting rules in favour of

The emphasis on participation and transparency was firstly introduced in Declaration no. 23 on the future of Europe³⁵⁶, and then reaffirmed in the Treaty of Lisbon: according to art. 11 (2) and (3) TEU, the Union ensures the maintenance of an open, transparent and constant dialogue between the European Institutions and the civil society associations, and it expressly provides for the duty of the Commission to proceed with large consultations of the interested parties in performing its tasks.

Therefore, participation is one of the key objectives of the European Union.

In addition, it integrates with the principle of representative democracy, as stated in art. 10 TEU, under which “every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen”³⁵⁷.

But do participatory initiatives actually comply with the democratic principle at European level?

In adjudicatory procedures - such as individual authorizations³⁵⁸ - participation is directed at attaining well-informed decision-making, by involving the interested party in the first step of the procedure. Since adjudicatory procedures in the food sector usually address risk – such as the cultivation of a genetically modified

partnership and participatory local development. A further enhancement has been represented by the innovations introduced by the Lisbon Treaty, namely art. 10 and 11 TEU (see *infra*).

³⁵⁶ *Declaration no. 23 on the Future of the Union*, attached to the Treaty of Nice, acknowledging the need to improve and constantly guarantee the democratic legitimacy and the transparency of the Union and its Institutions, as well as to get them closer to the citizens of the Member States.

³⁵⁷ As it will be further discussed, art. 10 TUE links political representation, democracy and participation, stating that “1. The functioning of the Union shall be founded on representative democracy. 2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens. 3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen. 4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union”.

³⁵⁸ See, for instance, the procedures of authorization for novel foods (Regulation n. 258/1997) and for GMOs (Directive n. 18/2001 and Regulation n. 1829/2003).

organisms - the involvement of the private parties allow the authority to gather information, to act according to the principle of proportionality and to facilitate acceptance and compliance with the decision.

The promotion of participation outside adjudicatory procedures varies according to the type of measure or the act to be adopted.

Usually, advertising campaigns to raise constituencies awareness close to the elections as well as other activities to increase their knowledge about the European Institutions and their work have been identified as tools to enhance participation³⁵⁹.

However, in this case, the enhancement of participation plays a political function, since it is rather aimed at generating a sense of belonging to Europe and increasing the visibility of policy-making, than at allowing citizens' intervention in policy-making. Moreover, relying on promoting campaigns rather than on specific legal obligations has a further risk. Given the legal obligation under the Treaties to ensure citizens' participation, there is not and there can be no clear method to verify its real compliance and, therefore, no risk arises for the Authority from the violation of such obligation³⁶⁰.

Nonetheless, improving people's understanding of EU institutions might contribute to the enhancement of the exercise of two participatory rights: the possibility to issue petitions³⁶¹ and the right to citizens' initiative³⁶².

³⁵⁹ For instance, Council Regulation (EU) No 390/2014 of 14 April 2014 establishing the 'Europe for Citizens' programme for the period 2014-2020, is aimed at funding projects that can improve conditions for civic and democratic participation at EU level. See all the initiatives at www.eacea.ec.europa.eu.

³⁶⁰ Therefore, some authors have criticized the formulation of art. 11, because, even if included among the rules regarding the democratic principles, it has a programmatic and not mandatory meaning, since it is not followed by executive rules that can strengthen its effectiveness. See J. Mendes, *cit.*

³⁶¹ Under Article 227 of the Treaty on the Functioning of the European Union and Article 44 of the Charter of Fundamental Rights of the EU.

³⁶² Under Article 11(4) TEU, 24(1) TFEU and Regulation of the European Parliament and of the Council no. 211/2011. On the implications of the European citizens' initiative and on the structural problems inhibiting CSOs in mobilising broad sections of the public in EU policy-making, see J. De Clerck-Sachsse, *Civil Society and Democracy in the EU: The Paradox of the European Citizens' Initiative*, in *Perspectives on European Politics and Society*, Vol. 13, Issue 3, 2012, 299-311.

All these tools are placed at the initial step of the legislative decision-making procedure; hence, on one hand the initiative is granted to citizens, but it is just eventual – since it relies on people’s choice or Commission’s approval³⁶³ - and on the other hand the stages of the discussion and of the actual decision-making are reserved only to the EU institutions.

Although the Parliament and Council sessions are public – but not those of the Commission – citizens are not allowed to formally intervene and influence the contents of decisions and primary acts³⁶⁴. There are obvious reasons of procedural expenditure under this choice. Moreover, that can be partially understandable for what concerns the Parliament, since it is democratically elected and directly represents European citizens.

Nevertheless, some have argued³⁶⁵ that the constitutional changes that made the European Parliament directly eligible by citizens does not eliminate the fact that the European Union is not based on the sovereignty of the people and, therefore, its Institutions have to find legitimacy also in other ways.

In other words, the principle of democracy does not only end in representativeness, but it has a wider scope of application. Parliament is the only

³⁶³ Under art. 10 of Regulation no. 211/2011, within three months after having received the request of initiative, the Commission sets out in a communication its legal and political conclusions on the citizens’ initiative, the action it intends to take, if any, and its reasons for taking or not taking that action.

³⁶⁴ According to art. 145 (3) of the Rules of Procedure of the European Parliament, “Members of the public admitted to the galleries shall remain seated and keep silent. Any person expressing approval or disapproval shall immediately be ejected by the ushers”. According to J. Mendes, *cit*, p. 1849 “ [...] there are no legal mechanisms to ensure voice to citizens or persons affected in the decision-making of the EU institutions and bodies. [...] this status quo may change as a result of the Lisbon Treaty, especially, but not only, due to Article 11 TEU. Yet two years from the entry into force of the Treaty, the political and legal meaning of this provision and the consequences thereof remain uncertain. So far, the debate has focused essentially on the European citizens’ initiative, which constitutes the only true innovation this Treaty article stipulates.”

³⁶⁵ See D. Ferri, *Participation in EU Governance: A “Multi-Level” Perspective and a “Multifold” Approach*, in C. Fraenkel-Haerberle, S. Kropp, F. Palermo e K. Sommerman, *Citizen Participation in Multi-level Democracies*, Nijhoff, Brill, 2015, 378. and related bibliography – stating “the overall idea of solving the “input legitimacy” problem by giving more powers to the European Parliament «rests on a fallacious analogy with the institutions of parliamentary democracy at national level»”.

Institution that is directly elected by subjects, while the others do not represent the citizens, but the States³⁶⁶.

In addition, as per art. 11 TEU³⁶⁷, the principles of transparency, participation and openness are included among the “Provisions relating to democratic principles”; hence, the implementation of democracy within the Union should not only be conveyed via representative tools, but necessarily also by the enhancement of participation.

As a matter of fact, art. 11 (3) TEU expressively connects participation only to the activity of the Commission. Currently, it is the only Institution that has provided for models of deliberative democracy³⁶⁸, aimed mainly to make more effective and reasonable the decisions of such body³⁶⁹.

Namely, Commission’s efforts to enhance participation have focused on “Your voice in Europe”, an online platform where citizens can have access to a variety of consultations on the matters falling under the competence of the European Union’s institutions.

Nonetheless, the scope of procedural principles could be extended also to other EU authorities. In particular, according to art. 15 (1) TFEU all the organs and the organizations of the Union are compelled to act transparently to guarantee the participation of the civil society. Therefore, if art. 15(1) TFEU is read together with art. 11 (2) TUE – which refers to the enhancement of dialogue between civil society and all the UE Institutions in general – it could also justify a broader application of participatory requirements.

In conclusion, the joint interpretation of the provisions about openness and democracy that can be found in the Treaties has two main consequences: on one hand it extends the function of participation, by making it not only a tool of decisional efficiency, but also an application of the principle of democracy; on the other hand it makes the principle of participation applicable not only for the Commission, but for other bodies of the European Union.

³⁶⁶ See art. 10 (2) TEU.

³⁶⁷ On the contents of art. 11 TUE see *supra* in this paragraph.

³⁶⁸ See also art. 2 of Protocol II of the TFEU, stating “Before proposing legislative acts, the Commission shall consult widely”.

³⁶⁹ Concerning the method adopted by the Commission to ensure participation to decision-making and its function, see C. Quittkat and B. Finke, *The EU Commission Consultation Regime*, in Kohler-Koch, De Bievre and Moloney, *Opening EU-Governance to Civil Society – Gains and Challenges*, CONNEX Report Series 2008, N. 5, 183-222.

There are some implications deriving from these interpretation, that need to be explained. The first of these implications is that the existing participatory procedures of the Commission have to be read again in accordance with the democratic principle. Current participatory tools have been deemed – by scholars and the Commission itself³⁷⁰ - unclear and quite inadequate with respect to the objective of ensuring effective forms of open decision-making processes towards the civil society³⁷¹. Rather, participatory procedures are more directed at enhancing citizens' trust and at providing useful information to the Authority. The distinction in legal provisions between consultation and participation itself clearly marks the will of the Authority to give the possibility to citizens to “express their views” which, nonetheless, does not explain how these views can have an impact on policymaking³⁷². In the institutions' view, public and stakeholder consultation is

³⁷⁰ See C. Quittkat, *The European Commission's Online Consultations: A Success Story?*, *Journal of Common Market Studies*, May, 2011, 653-74; B. Kohler-Koch, *The Organization of Interests and Democracy in the European Union*, in B. Kohler-Koch and B. Rittberger, *Debating the Democratic Legitimacy of the European Union*, Rowan & Littlefield, 2007; Commission Staff Working Document, *Impact Assessment Board Report for 2010*, SEC(2011)126 final, Brussels, 24th January 2011, p. 14; Commission Communication, *Smart Regulation in the European Union*, COM(2010)543 final, Brussels, 8th October 2010, p. 10-11. For instance, the low participation to the questionnaires promoted by the Commission is highlighted at the page “Your voice in Europe”, on www.ec.europa.eu.

³⁷¹ This judgment does not take into consideration comitology procedures. Comitology is a process where the Committees of the EU assist in the adoption and implementation of EU laws in each matter. Committees are formed by national officers, who advise the Commission about the contents of the secondary measures approved by the Union every year. Such tool, in fact, is a way to guarantee the representation of national interests within the procedures of a non- representative organ. Therefore they also follow participatory rationales. However, comitology does not directly involve the participation of citizens, since it is mediated by the States. Moreover, comitology has turned out, in several fields, (for instance in GMOs law), to be inadequate to fulfill its own purposes; hence, it is not considered a good example of participation and representation of interests anyway. About comitology and its destiny after the Union constitutional reforms in 2007, see M. Savino, *La comitologia dopo Lisbona: alla ricerca dell'equilibrio perduto*, in *Giornale di diritto amministrativo*, 10/2011, pp. 1041-1048.

³⁷² According to D. Ferri, *European Citizens... Mind the Gap! Some Reflections on Participatory Democracy in the EU*, in *Perspectives on Federalism*, Vol. 5, issue 3, 2013 p. 80, “while EU institutions have opened up to citizens and CSOs, the multi-centred and

integral to well-informed decision-making and to improving the quality of law making. However, despite the rhetoric of connecting the EU to its citizens, participation at Commission decision-making level cannot be deemed a direct expression of the democratic principle³⁷³.

The second implication is that the possible extension of the obligation provided for by art. 11 TEU to the other organs of the Union is in contrast with the theory claiming that, since the legislative and general acts do not directly affect private subjects, procedural safeguards are not applicable in this case. Under this rationale, the principle of good administration mainly focuses on adjudicatory measures. Namely, “every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken” (art. 44 Charter of Fundamental Rights of the European Union). The extension of procedural requirements out of adjudicatory measures interrupts the direct link between the interests at stake and the procedure itself, potentially allowing every individual to be involved in decision-making. Hence, the limits to participation are justified by the need to involve only directly interested parties in the procedure.

However, this does not automatically mean that procedural distinctions between adjudicatory and other measures cannot be smoothed, with regards to the European Union³⁷⁴. The Union law, in fact, has blurred the distinction between administrative

heterogeneous forms of participation in EU governance are still insufficient and somewhat questionable in terms of openness and transparency... Informal horizontal participation has been reduced to CSOs’ participation, but the brief discussion of consultations and civil dialogue has underlined these channels’ deficiencies. There is still a significant gap between what these informal participatory channels (should) pursue (i.e. open up the decision-making process to EU citizens and make them actors of EU governance) and what is actually achieved in terms of openness and transparency, and ultimately also in terms of “input legitimacy”.

³⁷³ See J. Mendes, *Participation and the role of law after Lisbon*, cit., p. 6.

³⁷⁴ The debate on the duty to give reasons for legislative acts has spread also in Italy for what regards regional and national legislation. See for example, R. Bin, *Atti normativi e norme programmatiche*, Milano, Giuffrè, 1988; A. Iannuzzi, “Motivazione”, in S. Cassese (ed. by), *Dizionario di diritto pubblico*, IV, Milano, Giuffrè, 2006, pp. 3752 ss; C. Deodato, *La motivazione della legge. Brevi considerazioni sui contenuti della motivazione degli atti normativi del Governo e sulla previsione della sua obbligatorietà*, on www.federalismi.it,

measures and legislative acts, requiring that all legal acts state the reasons on which they are based (art. 296 TFEU). Therefore, in the European context, the traditional assumption that primary law – contrary to administrative decisions - does not provide reasons for its enactment, falls.

Similarly art. 11 TEU, by providing for the right of the interested people to participate to decision- making procedures, seems to imply a further desegregation of the traditional categories,. This is supported also by the fact that, according to art. 298 TFEU, “in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an *open*, efficient and independent European administration.” (emphasis added). The concept of openness, together with what established by articles 11 and 15 TUE, could found the duty of the EU Institutions to ensure consultations of the civil society on the legislative proposals under discussion, as much as Treaties require the right to give reasons for all European acts.

Nonetheless, no forms of participation, in the sense just explained, have accompanied the legislative procedures of the Parliament and Council.

Therefore, even in Europe the participation is not substantially granted to citizens in the adoption of rules, because it is totally missing or – like in proceedings before the Commission – it is not adequately performed.

Nonetheless, the new EU agenda seems to validate the claims that have been just expressed, which could open new paths for deliberative democracy. The Better Regulation Package of 2015 suggests the extension of smart regulation techniques – which have usually addressed only the Commission - to the legislative bodies.

Accordingly, the Communication delivering the package states that “stakeholders will be able to express their views over the *entire* lifecycle of a policy” (emphasis added)³⁷⁵. For this reason, it argues that consultations should be carried out not only with reference to legislative acts, delegated and implementation acts, but also to other non-legislative measures such as roadmaps and inception impact assessments.

luglio 2014; P. Guidelli, *La motivazione della legge. il caso della legge regionale toscana 22 ottobre 2008*, n. 55, on www.Consiglio.regione.toscana.it.; A. Romano Tassone, *Sulla c.d. “funzione democratica” della motivazione degli atti dei pubblici poteri*, in A. Ruggieri (ed. by), *La motivazione delle decisioni della Corte costituzionale*, Torino, Giappichelli, 1994, pp. 34 ss.

³⁷⁵ European Commission, COM(2015) 215 final, Communication from the commission to the European Parliament, the council, the European economic and social Committee and the Committee of the Regions “*Better regulation for better results - An EU agenda*”, P. 5.

Pursuant to this, the Commission shall provide an explanation and a justification to the European Parliament and to the Council for each proposal, which should include also the results of the stakeholders' consultation and of the impact assessments conducted. Although the reference to "consultations" instead of "participation" suggests that no steps have been taken towards the improvement of the quality of participation³⁷⁶, at least the reference to a broader array of acts suggests that European law routemap is headed to the diffusion, rather than to the restriction of the scope of procedural requirements.

For the same reason, the evolution of European law might also suggest a future expansion of procedural burdens also for other "organs" of the European Union, such as the European Food Safety Authority.

Namely, a new interpretation of art. 9 GFL, stating that "There shall be open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law", shall be in line with the above-mentioned provisions of the Treaties.

Under art. 3 GFL the consultation of stakeholders is expressively recalled only with reference to the risk management, therefore principle of openness has been referred mainly to the activity of the Commission. However, this requirement could also be applied – for instance – to the phase of risk assessment carried out by EFSA.

Besides, the enhancement of participation might not necessarily threaten EFSA's independence. Some theories argue that formal methods of insulation do not automatically make authorities more independent but, on the contrary, they can favour bias in decision-making³⁷⁷; accordingly, opening EFSA's procedures to stakeholders' participation, if counterbalanced with effective means to enhance transparency, might not necessarily threaten its independence, but enhance the democratic coefficient and the quality of its activity³⁷⁸.

³⁷⁶ A. Alemanno, *How Much Better is Better Regulation? Assessing the Impact of the Better Regulation Package on the European Union – A Research Agenda*, in *European Journal of Risk Regulation*, Volume 6 (2015), Issue 3, p. 349.

³⁷⁷ L. Ennsner-Jedenastik, *The Politicization of Regulatory Agencies: Between Partisan Influence and Formal Independence*, in *Journal of Public Administration Research and Theory*, 2015.

³⁷⁸ See D. Bevilacqua, *Democratizzare la tecnica? La partecipazione alle decisioni degli esperti*, speech at the Conference "La formazione procedimentale della conoscenza ufficiale: il caso dell'Agenzia Europea per la Sicurezza Alimentare", held in Parma, 24th November 2015, providing for a model of EFSA's accountability and participation of stakeholders.

This is confirmed by the large variety of initiatives the Food Safety Authority has put in place to enhance the transparency of its activity³⁷⁹. Although EFSA's stakeholders involvement in decision-making mainly comprises multilateral collaborations with experts³⁸⁰, other initiatives have regarded consultations with both the scientific community and the general public.

Namely, the Authority periodically publishes on its website a call for public consultation or a call for data on its scientific assessments and other institutional activities. The consultation process always ends with the publication of the contributions received and with a report on the submitted comments. Although virtually all stakeholders can submit comments, those related to policy or risk management aspects are not considered, since they are outside the scope of EFSA's mission. Therefore, since public consultations within EFSA concern only risk assessment aspects, stakeholders likely belong to the scientific community, although it is not excluded the possibility of other interested parties having a different background – such as civil society associations – to contribute to the assessment thanks to their internal scientific expertise.

EFSA has also established a “Stakeholders Consultative Platform”³⁸¹, a forum to engage with stakeholders active in the area of food and feed. The Platform meets three times per year in plenary meetings to foster dialogue, exchange of views and information between the Authority and the interested parties. Namely, the Platform mandate is to “offer advice to the EFSA's Executive Director with regard to general issues regarding the work of EFSA and, in particular, the impact of its work on stakeholders”³⁸². To this purpose, it submits comments on EFSA's work program and annual management plan and on the EFSA's stakeholders annual work plan, it provides EFSA with feedback on the effectiveness of its policies in responding to

Namely the author suggests that the procedure should be open only to scientific experts, in order to both preserve the neutrality of its role and the separation between risk assessment and risk management.

³⁷⁹ See S. Gabbi et al. (ed.), *Foundations of EU food law and policy: ten years of the European Food Safety Authority*, Ashgate Publishing, 2014, p. 179 ss.

³⁸⁰ Namely, scientific colloquia, technical hearings and bilateral meetings.

³⁸¹ Established by the Management Board in 2005 (EFSA Management Board, *Stakeholder Consultative Committee. Terms of Reference*, MB 10.03.2005 – 5, amended in the Management Board meeting in September 2006).

³⁸² EFSA mb 17 06 10 item 4 doc 3 – *Stakeholder Consultative Platform: new terms of reference*, available at www.efsa.europa.eu.

stakeholders' concerns, advises the Authority on risk assessment methodologies, including the organization and the topics for consultation, provides information and cooperation at the technical level and sets up objectives to be achieved by the Platform during its mandate. The Platform has also been involved in the drafting of EFSA's recommendations for transparency in risk assessment³⁸³.

Unlike consultations, the platform is not open to everybody, but it has a finite number of people attending the meetings. Namely, the twenty-four associations and NGOs that have agreed with the Terms of reference³⁸⁴ and currently make up the Platform represent consumers, farmers, primary processors and the food industry or are involved in public health, plant health, animal health and welfare and environmental protection³⁸⁵. Both the terms of reference and the membership of the Platform are not fixed, but they are reviewed by EFSA's Management board every three years.

In order to be a member of the Platform, organizations must not only provide with expertise within EFSA's remit, but they shall also meet some requirements that prove their representativeness and the stability of their activity. Namely, according to the Terms of Reference, organizations shall be distributed in the majority of the EU Member States, represent at least 60 % of the EU population and they must have been established since at least 5 years.

In addition, EFSA developed a third strategy to enhance transparency. Since 2012, pursuant to Article 28(9)(f) of GFL, the Authority can decide to invite observers to open plenary meetings of its Scientific Committee and Scientific Panels. Therefore, the procedure is activated by EFSA on a voluntary basis. Attendees must register to the procedure and must submit in advance details regarding the organisation they represent, their activities that relate to EFSA's remit and their specific interest in attending the open plenary meetings as observers. At the time of registration interested individuals may also submit their questions for the scientific panel. During the meeting, observers cannot take part in the discussion or in drafting, as well as in the deliberations of the scientific output or try to influence, in any case, the outcome of the discussion.

³⁸³ EFSA Management Board, *Guidance of the Scientific Committee on Transparency in the Scientific Aspects of Risk Assessments carried out by EFSA*, mb item9doc7a, 18 June 2009, available at www.efsa.europa.eu.

³⁸⁴ EFSA mb 17 06 10 item 4 doc 3 – *Stakeholder Consultative Platform: new terms of reference*, available at www.efsa.europa.eu.

³⁸⁵ See EFSA's website www.efsa.europa.eu.

Ultimately, following a strong debate on the lack of accountability of its activity³⁸⁶, EFSA has taken some steps towards the enhancement of openness and transparency. Namely, unlike many other authorities active in the food sector, it is remarkable that EFSA must give account of the consultations occurred. Moreover, the characteristic of EFSA's participatory initiatives is that they are strictly confined to scientific contributions. However, this is justified by the distinction, under the EU food law, between risk assessment and risk management³⁸⁷. Hence, although some scholars have called for the enhancement of procedural safeguards within EFSA's procedures³⁸⁸, they have limited their scope to the involvement of scientific experts³⁸⁹.

Nonetheless, it is not the exclusion of non-scientific matters from the discussion what prevents from the implementation of open procedures within EFSA's activity. Rather, the choice of the Authority whether holding a plenary meeting where stakeholders can participate suggests a certain level of precaution in EFSA's

³⁸⁶ See Scientific Committee, *Transparency In Risk Assessment Carried Out By Efsa: Guidance Document On Procedural Aspects*, Prepared by a working group consisting of members of the Scientific Committee and various EFSA Departments, Request No EFSA-Q-2005-050, 11 April 2006. The document pointed out the need to improve participation, transparency and independence in EFSA's proceedings.

³⁸⁷ Although this distinction is somewhat blurred, especially in those cases where scientific uncertainty heightens the Authority's discretion and can favour the inclusion of other values, given that under art. 22 GFL EFSA's mission is to "contribute to a high level of protection of human life and health, and in this respect take account of animal health and welfare, plant health and the environment, in the context of the operation of the internal market". The description of EFSA's activity in relation to the protection of the single market has cast some doubts on the level of neutrality of its risk assessments. See D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, cit., p. 156.

³⁸⁸ See, for instance, D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, cit., p. 161 and D. Demortain, *European Agencies. The European Medicines Agency (EMA) and the European Food Safety Authority (EFSA), Food and Pharmaceutical Agencies in Europe. Between Bureaucracy and Democracy. Cross-national Perspectives. A Commented Bibliography*, Grenoble, CNRS-Maison des Sciences de l'Homme-Alpes, 2007, 15-100. See also S. Gabbi et al. (ed by), *Foundations of EU food law and policy*, cit., p. 181, giving account of a "highly controversial debate" around the enhancement of stakeholder's involvement in scientific decision-making.

³⁸⁹ See D. Bevilacqua, *Democratizzare la tecnica? La partecipazione alle decisioni degli esperti*, cit., p. 20.

approach towards these new strategies. Given also the fact that EFSA's policy on openness and transparency is entirely self-regulated by the Authority itself – which could be another element of concern on the neutrality of these policies – its governing bodies should shape future policies in the light of the principle of democracy, as stated by the Treaties.

Despite EFSA's participatory initiatives are remarkable, efforts have focused more on the enhancement of transparency, rather than specifically on participation³⁹⁰. Hence, some further steps could be taken to enhance the degree of participation in EFSA's decision-making. Namely, the heightened level of discretion retained by the Authority in the practical implementation of these policies shall be reduced and regulated in accordance with the democratic principle which entails, at least, a narrower leeway on when allowing stakeholders to participate.

Moreover, for what regards the requirements that shall be met to enter the Platform, the criterion of the stability of the organization do not necessarily imply its representativeness and prevents civil society groups gathered around a specific topic to enter the procedure.

In conclusion, although recent initiatives suggest a renovated commitment of the Union to better regulation, the answer of European law to the lack of accountability of Institutions still suffer from the unresolved conflict between openness and political control over the output of policies. Sometimes this results in opaque choices, that confuse participation with consultation, transparency with stakeholders' involvement. Nonetheless, Treaties clearly establish a strong connection between procedural safeguards and the principle of democracy, which should give guidance to Institutions and other organs of the Union in addressing the accountability gap.

³⁹⁰ As a matter of fact, since participation implies stakeholders playing an active role in policy-making, the decision to give interested parties the Observer status is part of the initiatives to enhance transparency and openness, rather than participation.

4. Stakeholders participation in decision-making in Italy

Legislative and administrative rulemaking in Italy is justified by political representativeness. The legitimacy of the delegation chain revolves around three pillars: the voting system, the separation of powers and the rule of law.

This system has experienced a deep crisis, urging for new forms of legitimacy³⁹¹, such as the introduction of controlled methods of direct exercise of the sovereignty by the people. Procedural participation, both at normative and executive level, can satisfy these requirements. However, its inclusion in decision-making processes shall not occur without taking into consideration the relationship between procedural burdens and political representation. Especially in national legal orders, where governance is more structured and hierarchic than at global level, the incursion of citizens in policymaking might jeopardize the basic principles on which good governance rests and prevent the Authority to pursue the general interest. Those principles are, for instance, the correspondence between the right to be heard in proceedings affecting private positions and to a fair trial³⁹². Namely, the right to a fair hearing entails the possibility of having effective access to a Court, which occurs when individuals are directly affected by public choices.

For this reason, procedural guarantees in the Italian legal system have been granted in administrative adjudicatory procedures. On the contrary, they were not considered applicable for what regards normative measures and administrative rulemaking, as per the general administrative procedure act of 1990 (art. 13, *legge* n.241/1990).

However, as previously anticipated, the growing importance of administrative measures in policy setting has led Courts to include administrative rulemaking under the scope of those procedural provisions. The principle has been affirmed mostly in relation to the activity of Independent Authorities, in order to balance both the lack of accountability and of information suffered by them³⁹³. However, it is also

³⁹¹ See supra Ch. 1 § 4.3.

³⁹² Art. 24 of the Italian Constitution and art. 6 of the European Convention of Human Rights and art. 10 of the Universal Declaration of Human Rights.

³⁹³ On the role of procedural requirements for Independent Agencies' rulemaking, see for instance M. Clarich, *Le autorità indipendenti tra regole, discrezionalità e controllo giudiziario*, in *Foro amm. Tar*, 2002, p. 3858 ff. and Id, *Garanzia del contraddittorio nel*

applicable to rulemaking in general, as a consequence of the crisis of primary law. In this sense, participation in rulemaking is not just a declination of the right to defence in administrative proceedings³⁹⁴; on the contrary, it is directly based on the principle of transparency, which can be inferred from articles 1, 3 and 97 of the Italian Constitution. In other words, the sovereignty of the people (art. 1), the duty to participate to the economic, political and social life of the Nation (art. 3), as well as and the principle of good governance (art. 97) allow to consider administrative participation as a direct expression of the Constitutional State. The major consequence of this argument is that, even without a specific provision, participation shall be carried out in administrative rulemaking at any level³⁹⁵.

Nonetheless, normative measures and legislative acts are usually excluded from the scope of procedural requirements. Nonetheless, the slackening of the delegation chain has also led some authorities to question this postulate. For instance, the new legislative act on the protection of biodiversity³⁹⁶ has been drafted involving in the very first steps of the procedure some representatives of civil society associations, such as Slow Food³⁹⁷.

New approaches stress on better regulation and democracy to enhance the real accountability of elected institutions, although the involvement of single stakeholders and interested groups in general decision-making could represent a significant threat to efficiency. The real outcome mostly depend on the interaction

procedimento, in *Dir. Amm.*, 2004, p. 59 ff. See also S. Cassese, *Dalle regole del gioco al gioco con le regole*, in *Mercato concorrenza e regole*, 2002, n. 2, 265 ff.

³⁹⁴ Since the right to participate originally derived its features from adversary trial procedures, it mainly had a defensive function. However, it further allowed the collaboration between the stakeholders and the Authority in the adoption of the final decision. On this evolution, both in the Italian and foreign legal systems, see B. G. Mattarella, *L'evoluzione della disciplina del procedimento amministrativo in Francia*, in *Riv. trim. dir. pubbl.*, 1995, p. 762; F. Fracchia, *Analisi comparata della partecipazione procedimentale nell'ordinamento inglese e in quello italiano*, in *Dir. e soc.*, 1997, p. 201; G. Corso, *Motivazione dell'atto amministrativo, (ad vocem)*, in *Enc. del dir.*, V, Milano, Giuffrè, 2001, p. 778.

³⁹⁵ On this topic see M. Cocconi, *La partecipazione all'attività amministrativa generale*, cit. p. 221 and Id., *L'obbligo di motivazione degli atti amministrativi generali*, *Riv. Trim. Dir. Pubbl.*, 2009, 707-740.

³⁹⁶ "Disposizioni per la tutela e la valorizzazione della biodiversità di interesse agricolo e alimentare", definitively approved by the Assembly on November 19th 2015.

³⁹⁷ News reported on www.slowfood.it.

between the procedural provisions, the features of the regulated sector and the powers of the rulemaking Authority. therefore, since participation can be performed in different ways, the contents of procedural safeguards shall fit with the purpose to regulate a specific sector according to the constitutional principles outlined above.

In particular, the regulation of the food sector requires the simultaneous representation of several interests, both individual and collective. This means that, on one hand, the regulation of the sector should be based on the joint collaboration between the several Authorities active in the protection of those interests and, on the other hand, that access to the rulemaking procedure shall be ideally granted both to representative associations as well as to single stakeholders, if directly affected by the proposed rule.

The following paragraphs outline the enforcement of procedural burdens both at national and Regional level in Italy. The choice to distinguish between the two regulatory levels is due both to the significant differences that can be perceived in the development of participation as well as to the contrasting degree of accountability of regional and national institutions.

4.1. Participation at national level

Pursuant to the separation of powers, in the Italian legal system the legislative power is vested in the elected Parliament, whereas the Government is appointed by the Head of the State – following the consultations with the political parties - and it leads the Executive branch. According to the rule of law, the Government and the executive agencies rest their powers and must act pursuant to primary law. Therefore, the delegation chain and the supremacy of the people are effective depending on the actual representativeness of the institutions.

For a long time the electoral system has been the pivotal hinge of democracy, and Parliament's centrality in rule-setting the litmus test of this system. However, the Government and the agencies have engaged not only in the execution, but also in the issuing of rules.

Namely, the Government can issue two kind of normative measures, both having the force of law: the *Decreto legislativo* and the *Decreto-legge*. The former is adopted pursuant to a Parliamentary act that authorizes the Government to regulate

a specific matter according to certain principles. The latter is adopted under conditions of urgency and necessity, and eventually enacted by the Parliament within sixty days.

Although the principle of the separation of powers is curtailed by the utilization of these measures, the endurance of the democratic system is ensured by the preliminary or retrospective control of the Parliament over the Government.

However, the balance of powers has been threatened by three main factors. Firstly, the enactment of a new electoral system³⁹⁸ has affected the relationship between the Legislative and the Executive, as well as the representativeness of the political bodies towards the constituency. Secondly, Government has frequently drawn upon normative measures outside the scope of the law, replacing the role of primary legislation in the regulation of social relations between people³⁹⁹.

Thirdly, the crisis of parliamentary law has led not only the Government, but the whole Executive branch to engage in new rule-setting functions. Therefore, rules are issued not only by institutions that have a – indirect – connection with the constituency, but also by officials that can be completely insulated from voters⁴⁰⁰.

Thus the crisis of parliamentary law jeopardized the conception of identity between the State and the people. In democracy, representativeness allows citizens to identify law with the general will, even if they do not agree and they have not contributed in the formation of the rules⁴⁰¹. When the concept of identity starts to fail, citizens might not be willing to accept rules without being able to determine the contents in first place. Procedural participation is perceived as a way to rebalance democracy and to re-establish the sovereignty of the people.

Therefore, for what regards normative measures, there is an ongoing debate on whether the Government should also comply with procedural requirements. The majority opinion excludes normative measures from the scope of the procedural provisions drawing from the theories that stress on the substantially legislative

³⁹⁸ See *supra* § 4.3.

³⁹⁹ See S. Ceccanti, *Decreti legge e decreti legislativi in Italia*, cit.

⁴⁰⁰ On the extension of the normative activity of the administration, see E. Cheli, *Ampliamento dei poteri normativi dell'esecutivo nei principali ordinamenti occidentali*, in *Riv. trim. dir. pubbl.*, 1959, p. 462 ss.

⁴⁰¹ "A citizen never really gives his consent to a specific content but rather *in abstracto* to the result that evolves out of the general will, and he votes only so that the votes out of which one can know this general will can be calculated"(C. Schmitt, *The crisis of parliamentary democracy*, 1926, translated by E. Kennedy, MIT Press, 1988, p. 26).

function of these measures, as well as on the political representativeness of the Government⁴⁰². However, the changes affecting the electoral system in recent history have undermined both the representativeness of the Government as well as its accountability towards the Parliament. Hence, procedural safeguards would allow people to collaborate with the authority in the creation of general policies and increase its accountability and ability to meet the constituency's approval. Besides, the possibility to extend participation to normative acts is not unknown to legislators, but it has been supported in some sectors such as environmental law, under the Aarhus Convention⁴⁰³.

Increased transparency and legitimacy of policies have also been the goals of some national initiatives on good governance, which have provided for the duty of the Government to improve participation⁴⁰⁴ as well as to carry out an impact assessment of every draft rule⁴⁰⁵.

According to this approach, the rationality and effectiveness of policies encompass the consultation of interested parties for almost all the normative initiatives of the Government. Indeed, there are some exceptions provided for by law. Namely, according to the *Decreto della Presidenza del Consiglio dei Ministri* (dpcm) n. 170 of September 11th 2008, all Government's measures – with the

⁴⁰² M.S. Giannini, *Provvedimenti amministrativi generali e regolamenti*, in *Foro it.*, 1953, p. 26. See also A.M. Sandulli, *Sugli atti amministrativi generali a contenuto non normativo*, in *Il Foro Italiano*, 1954, 217-218 pointing out that the difference between normative acts and administrative rulemaking relies on the fact that only the former are abstract, whereas the latter regulate concrete situations. See also M. Cocconi, *La partecipazione all'attività amministrativa generale*, *cit.*, p. 45.

⁴⁰³ See art. 8 of the Aarhus Convention (United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on 25 June 1998 in Aarhus) under which participation of the public must be granted in relation with any executive and normative act that might have an impact on citizens, including primary law ("the preparation of executive regulation and/or generally applicable legally binding normative instruments"). On this topic, see T. Scovazzi, *La partecipazione del pubblico alle decisioni sui progetti che incidono sull'ambiente*, in *Riv. giur. amb.*, 1989, p. 485.

⁴⁰⁴ Pursuant to the *legge* n. 229 of 29 July 2003 on simplification, the Government has implemented a system of on line consultation for every normative proposal.

⁴⁰⁵ The duty to assess the impact of regulatory proposals has been provided by *legge* n. 246 of 28 November 2005, which also requires the preliminary consultation of the interested parties.

exception of constitutional draft acts, the measures regarding internal or external security and draft acts that ratify international treaties without proving additional expenses or the creation of new offices (art. 2 and 8) – must be accompanied by an Impact Assessment, which entails the consultation of interested parties⁴⁰⁶. However, the administration has some leeway, since it can always decide, under justification, not to subject the draft rule to public consultation. Moreover, the administration can be exempted from carrying out the Impact Analysis when circumstances of urgency and necessity occur, as well as for all rules of major impact.

Ultimately, the law provides for such broad exceptions to the rule that Government's normative action is rarely subject to the consultation of the stakeholders. In addition, even when it is carried out, it obtains poor interest by individuals, who usually belong to the same Authority in charge with the implementation of the consultations and of the Impact Assessment⁴⁰⁷. This is an inherent reflection of either the low ability or will of the Executive branch to involve citizens in normative decision-making.

Alternatively, the obligation to carry out consultations can also be a consequence of the duty to comply not with general rules, but with specific obligations under European or national law⁴⁰⁸. Two examples are provided.

Firstly, pursuant to art. 26 and 29 of Reg. 1169/2011 on labelling of products, the Member States that want to adopt measures requiring additional mandatory particulars for specific types or categories of foods shall give evidence that this is justified under the necessity of providing the consumers with the appropriate information on the origin of products. Pursuant to this, the Government issued *Decreto-legge* n. 91/2014, providing for the duty of the Ministry of Agriculture to

⁴⁰⁶ Pursuant to the law, the preliminary inquiry for the drafting of the Impact Assessment follows the principles of proportionality, flexibility, transparency and of broad consultation of those who are directly or indirectly affected by the proposed regulation.

⁴⁰⁷ For example, the proposal for the amendment of the DPCM n. 170/2008 has been subject to public consultations for a long time and registered only 26 comments, mostly coming from civil servants.

⁴⁰⁸ Pursuant to the *decreto legislativo* of 30 March 2001, n. 165 and to the general obligation to enhance transparency within the administration, in 2014 the Ministry of Agriculture has carried out online consultations for the amendment of the Code of Good Administrative Behaviour. In addition, in the same year citizens have also been invited to evaluate the quality of information and data provided on the official website of the Department. more information are available at www.politicheagricole.it.

carry out consultations among the consumers to verify whether the indication of the place of provenance of some products might affect their preferences. In compliance with this requirement, a questionnaire was made available to any consumer or food chain operator on the website of the Ministry of Agriculture; the results ought to be analysed in a final report and constitute the basis for the final policy. The Department can also implement other consultations with relevant “focus groups”. According to the statements introducing the call, the consultation meets the European directives on participation and it is directed at enhancing the efficiency, transparency and publicity of decision-making and the control by the citizens over the activity of the administration.

Secondly, pursuant to *Decreto Ministeriale* n. 5528 of 27 May 2015, a Registry of Stakeholders has been put in place to support the adoption of normative measures by the Ministry of Agriculture, related to agricultural and food issues. The subscription to the Registry is either provided for by office’s authority or it is subordinated to the approval by the Ministry, following a specific application of the interested party.

In the end, participation also occurs occasionally, when specific circumstances require to get the opinion of the relevant stakeholders on a certain matter. For example, following some tragic events involving wild boars, an extraordinary consultation has been carried out by the Ministries of Environment and Agriculture with the main representatives of the agricultural industry and “other stakeholders” on the adoption of new measures for the compensation of the damages caused by wildlife⁴⁰⁹. In this case, only invited stakeholders were able to participate to the meeting and no final report was issued.

In conclusion, participation on normative and rulemaking acts at national level is either inexistent or occasional. It occurs according to feeble rules of procedure, or pursuant to the contingent needs and will of the single Authorities. This also prevents from an adequate prevision on the appropriateness of the level of policy defragmentation and on the adequacy of the methods of interests representation to take place. The effectiveness of procedural safeguards in rulemaking procedures must be tested almost case-by – case, which casts itself a negative judgement on the level of implementation of participatory tools at national level.

⁴⁰⁹ News on the website of the Ministry of the Environment www.minambiente.it.

4.2. The consultations of stakeholders in Italian Regions

The Italian Constitution, expressively acknowledges only two mandatory features of participatory democracy: the referendum (art. 75) and the citizens' legislative initiative (art. 71). On the contrary, unlike newer Constitutions of other Countries⁴¹⁰, there are no provisions envisaging the right to procedural participation.

However, as the formal exclusion of administrative rulemaking from the scope of procedural guarantees under the national legislation has not prevented Authorities to progressively implement them, in the same way some Regional Statutes envisage the duty to give reasons and to ensure different levels of public consultation for normative and rulemaking activity⁴¹¹. These provisions⁴¹² have firstly raised some doubts about their legitimacy, which have been dismissed by the Italian Constitutional Court⁴¹³.

In particular, all Regions provide for a specific part of their Statutes dedicated to participation in general. According to most of these provisions, participation is acknowledged to foster democracy and it implies, as a prerequisite, the promotion of citizens' freedom of association, as well as the enhancement of information and transparency within the administration.

However, the way participation is conceived in each territory varies considerably, since only few Regional provisions go beyond the mere implementation of the constitutional obligations regarding the referendum and the legislative initiative.

Therefore, since the aim is to investigate the level of implementation of procedural safeguards at regional level, the cases considered regard the Regions

⁴¹⁰ For instance, the Spanish (art. 105) and Portuguese (art. 267 and 268) Constitutions.

⁴¹¹ For what regards administrative rulemaking, pursuant to art. 29 of the *legge n. 241/1990*, procedural safeguards are included in the minimum standard level of rights ("livelli essenziali delle prestazioni") provided for by the national legislator, which can be improved at Regional level. Pursuant to this, Regions can provide for higher levels of procedural safeguards in rulemaking activity and adjudicatory procedures. See, accordingly, A. Romano Tassone, *Legge n. 241 del 1990 e competenze regionali: osservazioni sulla posizione di A. Celotto-M.A. Sandulli*, available at www.federalismi.it, 2006, p. 5.

⁴¹² See the Statutes of Piemonte (Art. 2,12,72 and 86), Calabria (art. 4), Toscana (art. 3, 19, 39, 45, 72-78), Umbria (art. 20, 21, 61), Emilia-Romagna (Art. 4, 7, 14 - 19), Marche (art. 34), Lombardia (art. 2, 8, 9, 36).

⁴¹³ See It. Const.Court, 6th December 2004, n. 379.

where participatory tools in legislative and administrative activity are more advanced.

The choice to focus also on legislative activity derives from the fact that Regions are the main responsible for the implementation of the European food law in the Italian legal order; in fact, they act both as policy-makers and as policy-recipients. Therefore, since the aim of this work is to assess participatory safeguards in policy-making, regional legislation cannot be excluded from the analysis. Moreover, as policy-recipients, regional authorities somehow exercise “executive” functions even through their legislative powers, which can also justify the shifting of procedural requirements from the administrative to the legislative level.

Nonetheless, the inclusion of advanced participatory methods in rulemaking is not accepted in all Regions, and large variations exist from one system to the other.

In particular, the main differences regard the kind of activity – legislative or administrative – is covered by participation, the stakeholders entitled with the right to participate and, in the end, the way participation is carried out. Ultimately, there is a strong tendency in identifying participation with the traditional features of citizens’ involvement in decision-making, namely the referendum, the right to issue petition and people’s legislative initiative.

In other words, most of the Regions choose to imitate the national legislator for what regards its insulation from citizens’ influence⁴¹⁴. In the great part of local territories, the enhancement of participatory democracy is mostly pursued through the traditional instruments of the referendum, the petition and the legislative initiative by citizens.

Nonetheless, some Statutes have gone further, providing for new forms of deliberative democracy in decision-making in general⁴¹⁵: currently four Regions have

⁴¹⁴ Especially the five regions having a special political autonomy from the national government (Sardegna, Trentino- Alto Adige, Sicilia, Friuli Venezia – Giulia and Valle d’Aosta). According to their Statutes, the only tools for citizens’ participation are the referendum and the legislative initiative. The only exception is the Statute of Sicily, pursuant to which draft legislative acts are written by the regional assembly, with the participation of professionals’ associations and regional officials (see art. 12 of the regional Statute).

⁴¹⁵ In some territories, the law provide for procedural safeguards only in sector-based rulemaking, such as healthcare, tourism and local plans. See A. Valastro, *Gli strumenti e le procedure di partecipazione nella fase di attuazione degli statuti regionali*, in *Le Regioni*, 2009, 95 ss.

fully regulated the right of citizens and residents⁴¹⁶ to be consulted in decision-making (Piemonte, Emilia-Romagna⁴¹⁷, Umbria⁴¹⁸ and Toscana⁴¹⁹) while others are currently drafting new procedural rules on the matter (Abruzzo and Campania). In the following paragraphs, after focusing on these relevant experiences, some conclusions will be drawn on the status of implementation of participatory guarantees at regional level in Italy.

4.2.1. Piemonte

According to the Statute of Piemonte, the participation of citizens to the legislative and administrative activity is vital to democracy and to safeguard the equality and freedom of all citizens (art. 2)⁴²⁰.

Therefore, the political institutions and the administration shall ensure the participation and consultation of citizens in policy-making and in the exercise of the legislative and administrative function in general⁴²¹.

Pursuant to this provision, art. 58 expressly lays down the right to participate to the administrative proceedings, without specifying whether it relates to rulemaking or adjudicatory measures. However, pursuant to the Regional

⁴¹⁶ Usually, the involvement in decision-making is granted to associations, local governments and to other entities such as Universities and Chambers of Commerce.

⁴¹⁷ l. reg. 27 May 2008, n. 8 and a l. 9 February 2010, n. 3. See M. Ciancaglini, *Tra democrazia partecipativa e concertazione. La legge regionale 3/2010 dell'Emilia-Romagna*, in *Le istituzioni del federalismo*, 2011, 215 ff.

⁴¹⁸ L. Reg. n. 14 del 16 febbraio 2010. See G. Sgueo, *La democrazia partecipativa nelle Regioni. La legge n. 14 del 2010 della Regione Umbria*, in *Quaderni regionali*, 2011, 559 ff.

⁴¹⁹ L. reg. n. 46 of 2 August 2013 on which see V. De Santis, *La nuova legge della Regione Toscana in materia di dibattito pubblico regionale e promozione della partecipazione*, in *Osservatorio costituzionale*, n. 0, 2013.

⁴²⁰ Similar expressions can be found in the Statutes of other Regions, such as Emilia-Romagna (art. 7) and Calabria (As per Art. 2, letter *m*, which includes among the general objectives of the Region the participation of citizens and of Local Autonomies to the formation of legislative and administrative measures).

⁴²¹ Art. 2 and 3 of the Statute.

administrative procedure act of 2014⁴²² the duty to give reasons and to carry out consultations is not applicable for the adoption of general rulemaking and normative measures.

For what regards legislation, as per art. 72 of the Statute, the features of participation are the legislative initiative, the referendum, the petition and the point of order. Other forms of participation, such as public consultation, might be regulated by law.

In fact, pursuant to art. 86 of the Statute, the Region can decide to refer a legislative proposal to the consultation of stakeholders, who are invited to submit written comments online. Consultation might take place after the Commission in charge has discussed the proposal and only if it deems it necessary. Only interested groups – usually trade unions, consumers associations and other relevant organizations representing collective interests – that have been expressively invited by the legislative Commission can submit online comments to the proposal.

At the end of 2015, there were two draft proposals regarding agriculture and one about food regulatory issues. Only one of them has reached the step of the procedure where consultations eventually take place. The legislative Commission has invited thirty -one representative associations to submit comments, but only four of them have acted accordingly.

In the two previous legislatures (2005-2010 and 2010-2014) many draft acts have undergone consultations. However, the final reports of the proposals did not give record of them and the references to the contribution of stakeholders were just occasional. The analysis of the comments is available only to the members of the Commission, and it is not published on the website. Therefore the justification of the final measure is not explicitly linked to the results of participation.

In conclusion, contrary to the classic approach towards participation, the consultation of stakeholders occurs in relation to legislative acts, whereas it is excluded from the adoption of general administrative measures.

Although regional legislation is inherently less abstract than national law, the exclusion of administrative rulemaking from the scope of the procedural requirements might prevent the Authority to assess the real impact of policies on residents. It can be argued that, since participation is applicable in legislation – making and in adjudicatory proceedings, procedural requirements embed the whole

⁴²² Art. 21 of the *Legge regionale* n. 14 of 14 October 2014, “*Norme sul procedimento amministrativo e disposizioni in materia di semplificazione*”.

policy-setting procedure, from abstract provisions to implementing measures. Therefore citizens can double-check and hold sway over the contents of the rules. However, since participation in legislative rulemaking is not open to all stakeholders, it might – and it does – happen that one may be affected by an adjudicatory measure based on an act that he did not contribute in determining. Certainly, associations admitted to the procedure should represent the collective interests involved. However, since they do not apply to participate, but they are directly chosen by the authority and they do not act by a specific mandate in behalf of the people they claim to represent, their actual level of representativeness is ultimately uncertain. Moreover, participation does not even occur systematically, but is subordinated to consideration by the Authority in charge.

What emerges from the analysis of the procedural rules on participation is that the regional legislator considers participation as a way to increase the amount of relevant information available to the institutions. Under the law of Piemonte, the democratic function of procedural requirements is weak, whereas its collaborative meaning is more evident. This is confirmed both by the fact that consultations occur occasionally and that the outcomes of participation are not included in a public report, but they are just available to the authority in charge which, however, does not show how consultations have affected the rulemaking process. In other words, there is no actual dialogue between the authority and the stakeholders.

4.2.2. Emilia – Romagna

As per the Statute of Emilia-Romagna, participatory democracy shall be at the basis of – in general terms - the “choices” of the regional and local institutions⁴²³. Pursuant to this principle, the Statute ensures both the availability of adequate information and the representation of interests by associations and organizations within the normative procedure⁴²⁴. Furtherly, it gives the possibility to issue opinions on the matters covered by the jurisdiction of the Regions, as well as to

⁴²³ Art. 7 *a*) of the Statute.

⁴²⁴ Art. 7 *b*) of the Statute.

intervene in the formation of any measure affecting private, common or general interests⁴²⁵.

More specifically, the Statute expressly grant the participation in the formation of normative measures and administrative rulemaking, providing also for both new and classic methods of people involvement in the legislative process⁴²⁶.

However, the real scope of the law seems quite uncertain at first glance. On one hand, in order to ensure the greatest participation in rulemaking, procedural rights are awarded not only to citizens, but to all the residents of the Region⁴²⁷. On the other hand, people cannot participate individually, but only through associations, committees or even groups of people carrying a non-individual interest. Namely, as per art. 15 par. 3, only associations and organizations representing general and collective interests have access to public consultations. Thanks to the exclusion of individual interests from the scope of the rule, individuals seems only allowed to participate in adjudicatory procedures, when a regional measure directly affects them, while they are excluded from general rulemaking procedures⁴²⁸. These provisions clearly show the attempt of the regional legislator to find a balance between opposite needs: on one side, the necessity to implement deliberative democracy and, on the other side, to abide by an appropriate level of insulation between the policy-makers and the citizens.

The exclusion of individual interests from the scope of participation in rulemaking is counterbalanced by the wide outreach of the provisions regarding the involvement of civil society organizations. Namely, contrary to other regional Statutes, participation seems to be open not only to long-established organizations or associations, but also to *ad-hoc* groups of people⁴²⁹. This allows the authority to open consultations virtually to everybody, and residents to feel more represented within the procedure. In addition, if interested parties can also be embodied by contingent groups, formed to represent a position on a specific matter, and not only by long-standing and pre-determined associations, the extent of participation can vary and be adapted according to public response on a matter. This heightens the

⁴²⁵ Art. 15 of the Statute.

⁴²⁶ Art. 16, 18 and 19 of the Statute.

⁴²⁷ Art. 14 of the Statute.

⁴²⁸ Art. 15, par. 3.

⁴²⁹ Under art. 17 of the Statute all the associations, committees and groups of citizens can participate to the public inquiry.

flexibility of procedural burdens both for the authority and for the citizens, helping in the enhancement of administrative efficiency.

However, the outreach of this provisions is remarkably limited by the associations' obligation to subscribe to a Registry, in order to be involved in decision-making. This list identifies which associations shall be consulted by each competent legislative commission. The registry is updated twice a year, hence there is no actual possibility for citizens to form groups of interest on a specific matter.

When they subscribe, associations also agree with the terms of participation indicated in the Protocol on participation⁴³⁰, which regulates the methods of consultation inside the legislative commissions. According to it, four methods of participation can be activated: public hearings, depositions, meetings and online consultations. The choice of the method, the duration of the consultations and the step of the procedure in which they are inserted are not pre-determined by law but decided by the legislative commission in charge, according to the specific necessity. This provision follows that of art. 15 of the Statute, under which the authority has the possibility (but not the obligation) to carry out consultations both for normative and rulemaking activity. Hence, the authority retains a good margin of appreciation on how to carry consultations, which makes the procedure less controllable by stakeholders.

In particular, public hearings may occur at the initial steps of the procedure for the adoption of primary law, regulations, legislative proposals, plans and the major administrative acts. Stakeholders can both issue documents and reports as well as be heard by the authority, which must reply to the observations for no more than thirty minutes⁴³¹.

Moreover, legislative commissions can invite the representatives of associations and other bodies to issue documents and provide for information during the elaboration of legislative drafts, regulatory proposals, administrative acts as well as on other relevant matters⁴³².

⁴³⁰ Adopted with the *Delibera* n.145 of 28 November 2007.

⁴³¹ Art. 43 of the internal code of practice of the legislative body (decision n. 143 of 28 November 2007).

⁴³² Art. 44 of the legislative body's internal code of practice.

People representing the affected interests can also be consulted, according to the methods decided by the competent commission, during the preliminary impact assessment of draft acts⁴³³.

Ultimately, although this approach gives the impression of enhancing democracy, the actual impact of these rules seems to be narrower than its apparent outreach, since participation is activated mostly on a voluntary basis by the authority, which also decides on the methods of implementation.

Still, it is remarkable that, contrary to other Statutes, it is expressly envisaged the duty to give reasons in the final measure, in relation to the consultations occurred. These provisions have raised some doubts of constitutional legitimacy, which have been dismissed by the Italian Constitutional Court⁴³⁴. Namely, the Italian Government has claimed that the duty to give reasons in relation to the public consultations would paralyze the legislative and administrative activity of the Region, in breach of the principle of good governance provided for by art. 97 of the Constitution. The same remarks have been made in relation with the participatory safeguards envisaged by art. 17 and 19 of the Statute. The Court has dismissed these claims, interpreting the duty to carry out consultations as in line with the principle of efficiency and democracy. The Court's reasoning mainly focused on participation and on the duty to give reasons in relation to administrative activity, defining it a common method already adopted in several democracies⁴³⁵. For what concerns participation in legislative drafting (art. 19 of the Statute), the Court denies that the enhancement of procedural transparency would jeopardize the electoral relation between institutions and voters. Therefore, this judgement could become a strong argument for those endorsing a general duty to give reasons to all legislative acts. Moreover, the Court justified the legitimacy of this provision with the fact that the possibility for the regional Assembly to autonomously regulate participation allows to balance between the need to consult stakeholders and the enhancement of the efficiency of regional institutions. The legislative body establishes the rules on the methods of consultation, whereas the single legislative commissions self-regulate the methods of information and integration of the consultation outcomes within the

⁴³³ Art. 49, section 4 of the legislative body's internal code of practice.

⁴³⁴ Corte Cost., 6 December 2004, n. 379.

⁴³⁵ See part. 5 of the holding.

procedure. Participation is mainly conceived as written, although hearings and meeting with the interested parties can be eventually arranged⁴³⁶.

Although the core of procedural principles is provided in articles 17 and 19, the premises to the Regional procedure act (*legge regionale* n. 3/2010) do not mention neither of them as the legal basis of the regulation of the right of citizens to participate in policy-making procedure⁴³⁷. In addition, the premises do not even contain any reference to art. 7 of the Statute, which acknowledges the duty of the institutions to protect consumers' freedom of association, as well as their right to information, transparency and control over the services and products. Notably, although the Statute generally provides for the right of citizens' associations to participate, with regards to consumers' associations there is only a specific reference to their right to assembly, but not to be consulted. In other words, the Statute does not envisage any specific remedy or right regarding consumers' participation, nor does the regional procedure Act.

Moreover, the terminology chosen by the legislator in the regional procedure act is sometimes contradictory and unclear. Whereas one of its objectives is to increase the democratic level of both the regional Legislative and Executive branch⁴³⁸, procedural participation refers to local or regional plans, as well as to other administrative measures⁴³⁹. The authority in charge with the elaboration and adoption of these measures is mainly the Regional government (*Giunta*), although the legislative assembly (*Consiglio regionale*) plays a significant role in the formal approval of them. Therefore, they carry out administrative, not legislative functions, in the adoption of plans. In fact, as per art. 28 of the regional Statute, the legislative assembly is in charge with the legislative function, but it also performs other different tasks, such as the formulation of proposals or the approval of plans.

Therefore, the right to participate to the activity of the legislative body does not mean that stakeholders are consulted for the adoption of legislative acts. Rather,

⁴³⁶ See art. 19, par. 4 of the Statute.

⁴³⁷ On the contrary, the Act is based on art. 2, 4, 7, 15, which refers to the principle of equity and that of participation in the elaboration of plans, policies and administrative measures.

⁴³⁸ See art. 2, par. 1 a).

⁴³⁹ Namely, the activity covered by the law relates to the "*scelte contenute in un atto regionale o locale di pianificazione strategica, generale o settoriale, o di atti progettuali e di attuazione in ogni campo di competenza regionale, sia diretta che concorrente*" (art. 3, par. 1 of l. reg. 3/2010).

participation is provided for the adoption of administrative rulemaking. Namely, the right to be consulted is retained by all individuals, associations and businesses affected - whether individually or jointly – by any regional plan or executive measure or when the Region is required to express an opinion on national public works⁴⁴⁰.

Participation does not occur automatically, but it can be activated by the Authority in charge with the final decision or even by the interested parties whose request is endorsed by one representative of the same Authority.

Since the Act came into force, the participation of stakeholders has occurred in 178 procedures, of which 53 have been subsidized by the regional Legislative Council⁴⁴¹. Subsidies for participation projects are given according to some criteria enlisted in articles 12 and 13 of the regional procedure act. In order to foster the initiative of citizens and their broad involvement in the process, subsidies are preferably awarded for the projects promoted by stakeholders⁴⁴².

Pursuant to the law, consultations can occur in many ways, however, they shall generally consist in an organized discussion between institutions and stakeholders for the adequate representation of interests, needs and for the achievement of a final agreement. The Authority in charge is not obliged to abide by the outcome of the consultations, but it shall provide for a report on the results of participation and justify the final decision in the light of the consultations occurred. In other words, the Authority must not defer the final decision to the opinions of stakeholders, but gives evidence that they have been considered during the decision-making process.

The new provisions on participation have highly affected the decision-making processes carried out in this territory. Since Regions wield the power to issue rules on agriculture, the enhancement of participation has deeply influenced regional food policies⁴⁴³.

For instance, under the obligations contained in EU Regulations n. 1303 and 1305 of 2013, the Region has adopted the Rural Development Plan 2014-2020. Formally, the plan is enforced via a decision of the regional government (*Giunta*), which is

⁴⁴⁰ This is confirmed in art. 11 of the l. reg. 3/2010, which refers to projects, normative measures and administrative procedures.

⁴⁴¹ News taken from *www.regioni.it*.

⁴⁴² Art. 4 of the regional procedure Act.

⁴⁴³ According to the studies that has been carried out, participation mostly occurs in the fields of territory management, local development and environment protection. The available data can be found on *www.regioni.it*.

submitted for the approval of the legislative body (*Consiglio Regionale*)⁴⁴⁴. Since this measure falls under the scope of the regional procedure act, it has been adopted after extended consultations with the stakeholders. Namely, 1200 interested parties⁴⁴⁵ from seven different fields of expertise have been consulted for the identification of the main policy areas of intervention. The participation has been implemented mainly through meetings between the stakeholders and the institutions in charge. Following these consultations, a report has been submitted for comments to other relevant committees. Subsequently, the Authority in charge has taken into consideration stakeholders' contribution during the elaboration of both the draft Plan and the Environmental Impact Assessment. In the end, the first final version of the plan has been adopted and submitted to the European Commission for preliminary evaluations and comments and then formally adopted in 2015.

For what regards the interests represented in the process, there are no available information concerning the list of stakeholders that have been involved in policy-making. However, from what can be inferred by official documents, interested parties belonged to competent authorities, local institutions, food producers and environmental associations, whereas there is no specific reference to the representation of consumers.

In conclusion, what emerges from the analysis of the legislation of Emilia – Romagna is that institutions usually carry out extended participation with stakeholders for what regards normative and rulemaking measures.

At the same time, according to the legislative provisions and the available data, consultations are not currently carried out for what regards regional legislative acts.

Moreover, there are two other elements that curb the involvement of citizens in policy-making. Firstly, participation is not granted to individuals but only to groups representing collective or general interests. Secondly, it does not occur systematically, but only when deemed necessary by the Authority in charge.

However, some other features provide for a balance to the narrowing of participation. Firstly, participatory methods change according to the authority in

⁴⁴⁴ Nor the decision of the regional government neither the approval of the legislative body are considered legislative measures.

⁴⁴⁵ In particular, the authorities have involved the representatives of agricultural and environmental associations, public institutions and other interested parties. Source: official website of the Regional department of agriculture www.agricoltura.regione.emilia-romagna.it.

charge but it is specifically provided that they may consist not only in passive participation – such as questionnaires – but also in the issuing of proposals, in consultations by citizens' initiative and in public hearings with stakeholders.

Secondly, the duty to give evidence of the consultations in the justification of the final measure limits the discretion of the authority and increases the rationality of the decision-making process. According to some interpretations, the inclusion of the results of the consultations in the justification of the rule can be sought as a way for lobbies and politicians to retain indirect control over the contents of the measure and to curb the authority's leeway⁴⁴⁶. Notwithstanding this risk, requiring for participation without the obligation to give evidence of its outcome would ultimately threaten the rationality of the procedure and make it less verifiable.

Therefore, the regional legislator has chosen to provide for the duty to carry out and give evidence of the consultations and, on the other side, to reaffirm the freedom of the Authority to distance itself from the opinions expressed within the procedure.

Considering the fact that normative plans hardly undergo judicial review, the choice of the regional legislator is in line with the concept behind participatory democracy. Such procedural requirements provide for the obligation to consider citizens' opinion, not to defer to them the decision. The choice of the appropriate level of citizens' involvement in the process relates to the balance between direct and representative democracy⁴⁴⁷. Participatory democracy does not imply that the insufficient level of representativeness of institutions can be amended by uncontrollably opening decision-making to stakeholders. Rather, there must be some limits that make participation compatible with electoral representation.

In addition, when direct democracy methods are inserted in a system based on political representation, they become representative tools themselves. The number of stakeholders allowed to participate vary from one model to the other – still it always covers just a part of those actually affected by the rule; hence, when they directly express their opinion they are themselves representing civil society as a whole. Therefore, this raises the question whether those allowed to exercise

⁴⁴⁶ See C. M. Radaelli, *Rationality, power, management and symbols*, cit., 165.

⁴⁴⁷ According to D. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, in *Yale Law Journal*, 115, 2006, p. 1530 “procedural requirements cannot completely compensate for the lack of electoral legitimacy on the international scale. But refined procedural requirements represent an important step toward more legitimate and effective global governance”.

democracy directly are actually representative themselves of those who are not allowed to intervene in the process. The answer is, most of the time, negative. At its best, associations and organizations “representing” civil society actually act in behalf of a small part of it. In other cases, it is not easily understandable the extent to which their formal representativeness coincide to their real ability to speak for the category to which they belong. Therefore, it is clear that, although representative democracy alone is no more sufficient nowadays, institutions still are those in charge with the protection of the general interest while all the array of collective interests, when considered together, do not equal the general interest. Subsequently, the correct balance between representative and participatory democracy rests on the obligation of the authority to give account of the consultations, while still remaining in charge with the pursuit of the general interest.

4.2.3. Umbria

The relationship between politics and society is at the heart of the regional policies of Umbria. Since the beginning of the 1970s, the regional institutions have promoted new forms of governance, based on information and consultation of citizens in legislative and administrative rulemaking⁴⁴⁸. Nonetheless, there were no statutory provisions enabling the performance of structured and stable forms of consultation⁴⁴⁹. Therefore, despite the efforts, participation has always had a little impact on policies. Under the constitutional reform of 2001 Regions were entrusted with greater powers and autonomy; this has drawn the attention back on the way rules are enacted and, by consequence, also on participatory tools. Although the subsequent initiatives⁴⁵⁰ aimed at enhancing participatory democracy and the

⁴⁴⁸ See F. De Toffol, A.Valastro, *Dizionario di democrazia partecipativa*, Centro Studi Giuridici e Politici della Regione Umbria, 2012, p. 17.

⁴⁴⁹ Namely, the regulation of participatory democracy was provided by other legislative acts, namely the *legge regionale* n. 7/1997 (“Norme sulla partecipazione all’esercizio delle funzioni di competenza del Consiglio regionale e sul referendum consultivo”) and the *legge regionale* n. 22/1997 (“Norme sul referendum abrogativo e sul referendum consultivo in materia di circoscrizioni comunali”), both abrogated in 2010.

⁴⁵⁰ See the “Patto per lo sviluppo dell’Umbria. Sostenibilità ambientale, innovazione del sistema, promozione delle imprese e dei lavori, equità e sicurezza sociale” of June 27th 2002

effectiveness of policies, they did not meet the target. Procedural safeguards addressed only a narrow part of civil society and at the final stage of policymaking, leading ultimately to inequalities and to administrative inefficiency. Therefore, the next models⁴⁵¹ tried to address these problems, focusing participation only on some topics (such as sustainable development, social cohesion, administrative simplification and agri-food issues), yet keeping the management of consultation via collective bargaining talks.

According to these methods of consultations, the executive body has adopted the regional Rural Development Plan 2014-2020. Namely, the Plan has been sent for approval to the European Commission after a session of open consultations with the agri-food businesses. In addition, a system of telematics consultations also allowed individuals to issue comments and opinions on the ongoing debates. From what can be inferred by the information available, local representatives, trade unions, businesses, associations and private stakeholders have been involved during the process that led to the adoption of the Plan. However, the institutions have focused more on the communication of the results achieved than on the direct involvement of citizenship in the elaboration of the policies.

Nonetheless, the Statute of Umbria envisages the right to participate to the legislative, governmental and administrative activity of the Region, providing for the citizens' legislative initiative, the referendum, the right to issue petitions and the duty to carry out open consultations⁴⁵².

Pursuant to these provisions, the participation to legislative and administrative activity is currently regulated by the *legge regionale* n. 14/2010⁴⁵³. Namely, the V part of the Act focuses on consultation, defined as a "method to immediately and directly collect citizens' opinion" (art. 62). In order to allow participation, the Authority provide for the information on normative planning and on the facts and

and the regulation of referendum, pursuant to the *legge regionale* n. 16/2004 ("Disciplina del referendum sulle leggi di approvazione o di modificazione dello Statuto regionale").

⁴⁵¹ Namely, participation to the rulemaking activity is regulated by *legge regionale* n. 14/2010 on which see *infra*.

⁴⁵² Art. 20 of the Statute.

⁴⁵³ *Legge Regionale* 16 febbraio 2010, n. 14 "Disciplina degli istituti di partecipazione alle funzioni delle istituzioni regionali (Iniziativa legislativa e referendaria, diritto di petizione e consultazione)". See G. Sgueo, *La democrazia partecipativa nelle Regioni. La legge n. 14 del 2010 della Regione Umbria*, in *Quaderni regionali*, 2011, 559 ss. and V. De Santis, *La partecipazione democratica nell'ordinamento delle Regioni*, Torino, Giappichelli, 2013.

rules on which legislative drafts are based. For what regards the scope of application, participation applies to all administrative and normative procedures. Contrary to the Statute of Emilia – Romagna – which refers to normative *measures* –the choice of this legislator has been that of enlarging the scope of intervention to every activity carried out by regional institutions. However, the specific methods of consultation envisaged counterbalance the expansion of the scope of intervention. Namely, according to the law, participation does not always occur, but only under request of the legislative body which, in case of urgency, can decide to streamline the procedure of consultation.

Moreover, consultations can be carried out through public meetings (such as conferences), hearings with trade and consumers associations, trade unions and local authorities, as well as through requests for written advises and questionnaires. The authority in charge is free to choose among these tools. This means that, for instance, the goal of enhancing participation can be considered to be achieved even without actually consulting the people, but only via the organization of conferences on specific topics. What is more, pursuant to art. 66, the results of consultations are considered political and, therefore, rulemaking measures cannot be justified under the outcome of participation. The results of the consultations are only communicated to stakeholders, via the publication on the official website of the Authority.

In conclusion, although Umbria Region has engaged in participatory proceedings for a long time, their implementation cannot be considered completely successful.

Although the statutory law stresses on open participation of all citizens to the legislative and administrative rulemaking, the actual involvement of the public in decision-making is curbed by the low effectiveness of participatory methods – more directed at communicating, rather than sharing decisions – by the high leeway of the authority in deciding whether to carry out consultations and, at the end, by the exclusion of the results of consultations from the justification of the final measure.

4.2.4. Toscana

Together with Emilia-Romagna, Toscana is considered one of the most *avant-garde* Italian Regions for what concerns legislative innovations.

Debates among scholars and Courts' orientations frequently influence the choices of both the administration and the legislative assembly.

For what regards civil society participation, Italian scholars generally exclude its relevance in normative rulemaking. Since normative rules belong to the sources of law, they are political measures, hence the discretion of rule-makers is justified by their representativeness⁴⁵⁴. However, following also the general obligation of European institutions to give reasons for legislative acts⁴⁵⁵, some commentators have begun to re-think about the exclusion of normative measures from the scope of procedural safeguards. In particular, although the obligation to justify some rulemaking measures have always existed, this entailed only the necessity to explain the normative premises, the procedure carried out for their adoption and, in some cases, the factual circumstances calling for new rules⁴⁵⁶. In other words, the duty to justify the measure and to give reasons belong to two different ideas about rule-making, since the second one inherently entails the punctual reference to facts and to the impact on rule-takers. The attention of good governance policies on the need to give evidence of the facts considered and to enhance consultations confirm the distinction between justifications and reasons⁴⁵⁷.

In the light of this debate, the Statute of Toscana envisages the participation of residents and citizens to the political choices of the Region. Since there is no pre-determined form of public participation, the involvement of residents in decision-making takes place in different ways.

⁴⁵⁴ See S. Cassese (ed. by), *Trattato di diritto amministrativo*, Milano, Giuffr , 2003, p. 1560.

⁴⁵⁵ See B.G. Mattarella, *Motivazione (dir. com.)*, in S. Cassese (ed. by), *Dizionario di diritto pubblico*, Milano, 2006, p. 3751. See also M. Cocconi, *La partecipazione all' attivit  amministrativa generale*, cit., p.205 and R. Manfellotti, *Giustizia della funzione normativa e sindacato diffuso di legittimit *, Napoli, Jovene, 2008, p. 118 arguing that the duty of European institutions to give reasons for the adoption of legislative acts and the process of European integration justify the application of that requirement also to national legal orders. See, accordingly, the decision of the Italian Constitutional Court n. 104, of March 17th 2006.

⁴⁵⁶ See U. Rescigno, *L'atto normativo*, Bologna, Zanichelli, 1998, p. 138.

⁴⁵⁷ See U. Rescigno, *La qualit  della regolazione e il principio di legalit *, in *Rivista di diritto costituzionale*, 2000, p. 157 and G. Della Cananea, *Gli atti amministrativi generali*, Padova, Cedam, 2000 p. 277, explaining that Courts have always required for a justification of rulemaking measures, in terms of rationality and consistency, but not to give reasons for it.

Namely, according to the Statute, the legislative body (*Consiglio Regionale*) shall promote the participation of citizens to its activity⁴⁵⁸.

In addition, pursuant to art. 72, participation shall be regulated by law and it may occur in the forms of voluntary initiatives and proposals, participation to formal consultations and contribution in assessing the effects of regional policies. In order to promote participation, adequate forms of information to the citizens about the most relevant policies must be provided⁴⁵⁹. The executive body (*Giunta Regionale*) can also decide to carry out formal consultations with the representatives of the institutions and of civil society.

Lastly, for what regards normative activity, the forms of participation to the measures establishing annual and multi-year objectives are regulated by law⁴⁶⁰.

These provisions seem to pursue ambitious goals. However, beyond general statements, they mostly delegate to the enactment of further legislation the regulation of participation.

The only exception is represented by the rules regulating the classic features of direct democracy, the referendum and the legislative initiative of the citizens. Although they are considered the primary tools of direct democracy, they actually allow public engagement only in one limited step of decision-making – whether at the beginning or at the end of it – and not in the actual discussion of proposals. Ultimately, the legitimacy of final decisions still rests on the political representation of the public will.

Lately in 2013 the legislative assembly has enacted a body of rules concerning participation in policymaking procedures (*legge regionale* 2nd August 2013, n. 46), establishing also the regional Authority for the protection and promotion of participation⁴⁶¹. The Authority is a collegial independent body in charge with the management of the participatory processes.

Apparently in line to what also provided by the legislation of Emilia-Romagna, decisions on all public works, projects and initiatives having a relevant impact on

⁴⁵⁸ Art. 11 and 19 of the Statute.

⁴⁵⁹ Art. 73 of the Statute.

⁴⁶⁰ Art. 46 of the Statute.

⁴⁶¹ *Autorità regionale per la garanzia e la promozione della partecipazione*, according to art. 3 and 4 of *legge* n. 46/2013. Interestingly, even when these initiatives do not have a major impact on citizens (equal to 10.000 and 50.000 euros of value), the public inquiry can take place under request of the citizens or of the institutions.

Tuscan residents shall be adopted after the implementation of a public inquiry⁴⁶². The debate takes place in the preliminary step of the procedure, when all options are still feasible. In order to extend public participation mechanisms, even citizens, local Authorities, Universities, businesses and other entities can call for the support of the Region to other forms of debate. At the end of the procedure, the authority in charge has to take in consideration and give evidence of the participatory initiative.

Although these rules broaden the normal scope of participation and the number of the entities having the possibility to promote it, they cover only a narrow part of the Region administrative activity. Therefore, although the provisions of the Tuscan act seem similar to those of Emilia-Romagna, the scope of this act is limited to the implementation of public works, not to the adoption of policies or legislative acts.

At the same time, the Act on the quality of legislation (*legge regionale* of the 22nd of October 2008, n. 55) provides for a number of principles guiding the public Authority in the enactment of the law, such as transparency and participation⁴⁶³. Although there are no specific provisions regulating the right of citizens to participate to normative activity, it is required to carry out an Impact Assessment of every legislative proposal, which entails also the consultation of citizens⁴⁶⁴. Some of the impact assessment concerned also the regulation of agricultural and food sectors⁴⁶⁵.

What the two Regions have in common is the provision of the duty to give reasons. Namely, according to art. 39 of the regional Statute, all acts and regulation must be provided for with a justification.

⁴⁶² Called “*dibattito pubblico regionale*”, art. 7 of *legge* n. 46/2013.

⁴⁶³ Art. 2, *legge* n. 55/2008.

⁴⁶⁴ The implementation of impact assessment methodologies has been spread among Regions after the constitutional reform of 2001 (l. n. 3/2001) and two other legislative initiatives (art. 2 of *legge* n. 246/2005 and *legge* n. 180/2011) aimed at providing for a normative framework for the introduction at national and regional level of new forms of better regulation and administrative simplification. Whereas these forms of policy evaluation have reached a good level of implementation, the regulation of the step of the analysis dedicated to consultation has been less uniform (See www.osservatorioair.it, in the section dedicate to Italian Regions).

⁴⁶⁵ See, for instance, the Draft regulation on the supply of food and beverages “*Disciplina dell'esercizio dell'attività di somministrazione di alimenti e bevande*” or the Impact assessment on the traceability of fisheries “*Proposta regolativa su tracciabilità e qualificazione del prodotto ittico da acquacoltura*” carried out in 2003.

Some commentators⁴⁶⁶ have stressed on the broader impact of the rule provided for by the Tuscan Statute, compared to that of Emilia-Romagna. In particular, whereas the latter envisages the duty to give reasons only when the public inquiry takes place, the former imposes this obligation with reference to every normative activity. However, the general scope of Tuscan laws on participation is narrower than that of Emilia-Romagna and, accordingly, there is no duty to give evidence of the consultations within the justification of the rule⁴⁶⁷; hence, the actual impact of the Tuscan provision is more limited than that of Emilia – Romagna, which better develops the contents of deliberative democracy.

4.2.5. Abruzzo

The Statute of the Abruzzo, similar to others, conceives participation only with regards to the involvement of relevant groups or associations – not individuals – to the policy-making process. With this regard, the Statute provide for some tools to enhance participation.

Namely, all voters can be involved in legislative proposals and can exercise the right to vote in a referendum⁴⁶⁸. Moreover, the Region promotes the participation of citizens, residents and organizations to the implementation of regional objectives. Under the protection of the freedom of association, the Region also grants bodies representing general or collective interests with the right to express opinions and proposals on the matters that fall under the jurisdiction of the Region. At this purpose it is established by law the Regional Registry of Participation, as well as the possibility to access online consultations for those that have subscribed to the Registry. In addition, other methods of consultations can be provided for by law.

Similar to other Regions, the Statute envisages the possibility of the legislative commissions to ask for opinions to local governments, trade unions and other

⁴⁶⁶ See S. Boccalatte, *La nuova legge Toscana sulla qualità della normazione: osservazioni a prima lettura sulle disposizioni in materia di motivazione della legge*, on *federalismi.it*, 2/2009.

⁴⁶⁷ Nor it is envisaged by art. 9 of the *legge* n. 55/2008, regulating the duty to give reasons for Acts and regulations.

⁴⁶⁸ art. 12 of the regional statute.

relevant associations. Moreover, for matters of particular concern, the regional government can meet in sessions open to the public.

On November the 19th 2015, the regional legislative assembly has issued the first draft of the Citizens' Participation to Decision-making Act. The purpose of this Act is to allow citizens to participate to the drafting of normative initiatives and planning measures of the Executive body. The draft was also presented to the public via an online platform on which interested parties could submit comments and suggestions.

The draft act provides for some elements in common with other regional experiences: the establishment of an Authority for the protection of participatory rights ("*Autorità garante della partecipazione*", art. 3), which are granted both to public organs and private groups (Art. 2); online consultations and the possibility for governing bodies to promote a public inquiry (art. 3); a Registry for the subscription of interested parties (art. 4). However, the Draft does not specify in which cases and procedures these participatory methods will apply. Pursuant to the current proposal, detailed rules will be further issued by law and via implementing acts.

Therefore, apart from some general statements and principles, its future enactment will not be able to have a relevant impact on stakeholders' participatory rights. Any further consideration will necessarily be made in the light of the implementing measures delegated to the newly established Authority for the protection of participatory rights. Ironically, the proposal to extend participation to normative acts is undergoing a process of consultation but the actual impact of these provision is exclusively delegated to the implementing measures of an Authority whose activity does not fall under the procedural provisions of the same act.

4.2.6. Campania

According to art. 1 and 11 of the regional Statute, the Region grants the participation of all citizens, both individually and in groups, to the determination and implementation of the policies. Namely, it envisages the consultation of functional autonomies (Art. 19) – like Universities and Chambers of Commerce – and regulates the legislative initiative of citizens, the submission of petitions and the referendum (art. 11-16).

In line with other Regions, the Statute of Campania does not provide for specific rules on participation, but refers to the future enactment of legislative provisions to regulate this matter. Pursuant to this, the regional Assembly has recently adopted the *legge regionale* n. 11 of 14th October 2015 on the quality of rules.

Under its provisions, consultations shall be carried out during the regulatory impact assessment procedure, for the consideration of both public and private interests in the drafting of new legislative rules (art. 4-6). Consultations can also happen via online procedures. Moreover, the regional government shall promote any useful consultation with the representatives of trade unions and businesses' associations (art. 21).

Notwithstanding the importance of these rules for the enhancement of participatory initiatives in normative decision-making, two elements suggest the need for future enhancement of participation in this Region.

Firstly, although the aim of the *legge regionale* n. 11/2015 is to regulate impact assessment methods, its provisions are largely vague, and need the adoption of implementing measures both at legislative and executive level. Therefore, the involvement of citizens is far from being a specific provision affecting decision-makers activity and rule-takers positions, but it is rather stated as a programmatic principle. This is also confirmed by the delegation to the Regional Government (*Giunta regionale*) of the power to specifically regulate impact assessment methodologies, including the consultations with the stakeholders (art. 6).

Secondly, the utilization of “consultation” instead of “participation” clearly highlights the choice of the legislator to limit the function of procedural safeguards. In particular, when assessing the impact of draft rules on stakeholders, consultations provide useful information and help the Authority to have a better overview on the issues at stake. In this sense, consultations are functional to the objective of the analysis as much as statistics or scientific models. On the contrary, participation should *also* play this role, but from a different, wider perspective: its inherent function is to rebalance the relationship between the Authority and citizens, in order to adopt more inclusive rules. In other words, whereas the function of consultations is mainly that of providing the authority with more information on the situation, participation aims at sharing decision-making with stakeholders, without depriving the Authority to take the final formal decision.

Therefore, if under the Statute of the Region citizens should be involved in the determination of the policies, it cannot be affirmed that the new *legge* n.11/2015 properly meets this objective.

4.3. Some thoughts on the implementation of procedural safeguards in Italy: does simplification imply fragmentation and delegation?

As in all sectors, even regulatory approaches are influenced by trends. The current focus of European and national policies is on smart – or better -regulation. Better regulation entails the enhancement of simplification, transparency and the cost-benefit assessment of policies at all levels of governance. Similarly to what happens in fashion industry, when consumers' behaviour abides by a standard which is acknowledged as being right – the implementation of better regulation strategies in Italy seem more directed to fulfil both constituencies and supranational regulators' expectations than the result of a shared commitment in streamlining rules and bringing policies closer to the citizens.

Apart from some relevant exceptions – such as the regional experiences of Emilia-Romagna or Toscana – bureaucrats seem to have embraced this *nouvelle vague* with prudence and suspicion. The difficulty to find a balance between openness and efficiency, as well as the perception that these policies are mostly directed at undermining the Authority's leeway, has led the national and the regional legislators to either leave the situation unchanged⁴⁶⁹ or to address the lack of administrative and political democracy by substantially reproducing within the new methods the old mechanisms based on delegation and on the unbalanced relation with citizens.

For this reasons, if provided, participation to decision-making mostly happens via passive forms of consultation, which are hardly ever open to all citizens and mostly rely on private associations' representativeness. In other cases, civil society associations can participate to decision-making but without the right to vote⁴⁷⁰.

⁴⁶⁹ For instance, the Statutes of the five regions having a special constitutional autonomy (Sardegna, Sicilia, Trentino Alto-Adige, Friuli Venezia-Giulia and Valle d'Aosta) do not provide for any form of citizens' participation apart from those envisaged by the Italian Constitution. The same happens for other Regions, such as Calabria and Liguria.

⁴⁷⁰ According to art. 16 of the Statute of Veneto, the law can provide for the participation – without the right to vote – for local and functional authorities (Such as Universities and Chambers of Commerce) to the formation of legislative proposals. Similarly, as per art. 16 of the Statute of Lazio, the law can regulate the participation of these entities – without the

Therefore, although participatory methods – according to the premises made in the Introduction of this work - shall enhance democracy within the administration, their implementation in this context relies again on representativeness. Notably, electoral representation is substituted by civil society organizations' advocacy.

Moreover, the legislator usually tweak consultation methods to fill the information gap of the authority's expertise and to assess the impact of policies⁴⁷¹, rather than to share the decision-making process with the stakeholders. For the same reason, participation does not occur systematically, but rules leave broad space to public organs to decide when and how to conduct consultations. Moreover, in many Regions participation is not provided by Statutes or its regulation follows a long delegation chain from primary law to administrative measures of implementation, which are currently lacking in the greatest part of the territories.

For example, the Statutes of Calabria, Marche and Molise contain vague expressions that delegate to further acts of implementation the provision of specific methods of citizens' participation, which nonetheless are still missing⁴⁷².

For what regards Lazio, citizens might be consulted thanks to the establishment of sector-based advisory bodies, for what regards issues concerning family issues, disabled people, gender parity and labour, and others can be established by law (art. 75).

In conclusion, representativeness seems to be still at the core of democratic governance, whether it originates from public or private mechanisms of advocacy. Indeed, the individual representation of interests within the procedure is considered the main threat to efficiency. If direct representation is, as a matter of fact, unrealistic, there should be some criteria granting that only private groups with an appropriate level of representativeness can have access to the procedure. However, these parameters should not focus on formal aspects or on private associations' general reputation – which can be frequently misleading. On the contrary they

right to vote on the related proposals - to the *Consiglio delle autonomie locali* – an advisory body representing local authorities.

⁴⁷¹ According to art. 23 of the Statute of Veneto, the law shall provide for the methods to assess the impact of rules before their issuing. Similarly, as per the Statute of Lombardia (Art. 8) the executive and legislative bodies shall provide for open consultations on normative and rulemaking measures, especially with regards to those having economic consequences.

⁴⁷² See art. 4 and 5 of the Statute of Calabria; art. 39 of the Statute of Marche, and articles 30 and 49 of the Statute of Molise.

should allow access both to ad-hoc groups and stable organizations, whereas the provision of a Registry of participation streamlines the step of associations' requirements evaluation, it should also be possible for ad-hoc committees to participate to a single procedure, without the need to have a formal legal structure or a stable organization. Notably, on one side the Registry should contain the list of organizations that permanently engage in the protection of some relevant interests and whose representativeness is periodically verified on the basis of the geographical and qualitative impact of its activity, as well as with regards to the internal accountability system put in place; on the other side, participation should not only be granted to associations enlisted in the Registry, but also to other groups, under their ability to give evidence of their power of representation within a specific context and for the discussion of a specific rule.

At the same time, the possibility for the Authority to discretionally open the procedure to consultations⁴⁷³ should be replaced by predetermined criteria establishing both the objective scope of procedural rules and the methods to carry out consultations.

Furtherly, a distinction must be made for what regards administrative and legislative activity.

For what regards the former, Courts' doctrine and scholars theories have extensively justified the extension of procedural safeguards to rulemaking procedures, which should not be ignored by the regional legislator⁴⁷⁴. Therefore, participation should be precisely regulated by law in line with the principles invoked in case-laws, namely the consideration of stakeholders' point of view in the early stage of the procedure, the duty to give reasons and to file a report on the results of the consultations⁴⁷⁵.

⁴⁷³ See for instance, the Statutes of Veneto (art. 44).

⁴⁷⁴ According to the Statute of Basilicata, the Region shall promote the participation of individuals and groups to the administrative rulemaking activity (art. 47). Similarly, the Statute of Molise states the duty to consult the stakeholders and to give reasons before the adoption of administrative measures (Art. 51).

⁴⁷⁵ Nonetheless, according to the Statute of Lazio, participation is explicitly ensured only with regards to adjudicatory measures (art. 51).

For what regards legislative activity, participation should not be excluded by the legislator, however it should occur differently. Namely, the degree of representativeness of regional institutions is higher, compared to the national level; still, the opportunity to open the decision-making process to private parties is not absent, and relies on the need of the political class to test civil society's support when a legislative proposal earns the attention of the public. Compared to informal debates, participatory methods go further, since they do not just aim at reaching the constituency's approval, but the active contribution on a given matter. As explained above, sometimes the issues at stake are better addressed orally, rather than with written statements submitted by the interested parties. At the same time, extensive methods of participation could seriously slow down the legislative rule-making procedure and be exploited by lobbies - or the political class itself - to bend public opinion to hidden bias. Therefore, it is important that the extension of procedural safeguards to legislative rule-making be carried out via controllable and streamlined methods. Namely, informal methods of consultation, such as meeting and open events could take place, but acting as preliminary phases to raise people awareness on a certain topic and build up public opinion; at the same time, formal participation should occur via written contributions, which leave less space to bias and are more controllable and verifiable than oral discussions. Moreover, participation shall take place when all options are still available. The governing bodies should be requested to include in the final report of a draft rule also a comment on the opinions received⁴⁷⁶. This way, the legislative process would be more informed and controllable, yet simple, the policy-makers accountable for their choices and stakeholders equally represented and considered.

⁴⁷⁶ The duty to give account in general of the comments received helps in making the authority more accountable and the participation meaningful. According to this approach, the Statute of Basilicata provides for the possibility of all associations and organizations to issue deeds and comments on every legislative proposal. These observations ought to be examined by the institution in charge, which submits a report and can, under request, hear the interested parties before the final decision (art. 41).

CONCLUSION

Citizens are still largely confined to the national domain for the full exercise of their powers. Nonetheless, the development of global governance networks have expanded Countries' international obligations and strengthened the impact of supranational hard and soft laws on civil society. As borders lose their ability to embed the territorial effectiveness of rules⁴⁷⁷ and the delegation chain between constituencies and regulators in international platforms becomes looser, the problem to assess global networks accountability gets more urgent.

Within national borders, the level of accountability and democracy is mainly measured via three indicators: the electoral link between voters and politicians, the enforceability of rights in Courts and the separation of powers. At global level, Organizations have tried to emulate political representation by allowing national governments' members to sit in their Boards; moreover, some regulators – such as the WTO - have put in place systems for the enforceability of rules. nonetheless, if we should assess the level of democracy according to the principle of the separation of powers, almost all global networks would not meet this standard, since the liquid structure of global governance blurs the distinction among powers, measures and competences. For instance, global orders mainly act via administrative tools, which nonetheless bind national primary law. In the end, the absence of a global government prevent the analysis from being conducted using the same criteria that usually fit in national contexts.

Hence, on one hand, accountability cannot be measured only via elections or Courts' activity; on the other hand, global rulemaking is mainly administrative⁴⁷⁸. Therefore, the exercise of citizens' rights beyond national borders must take place within administrative procedures for the adoption of general measures.

Some thoughts have also been made on the opportunity to extend procedural safeguards to other kind of rules, such as primary law or official opinions issued by

⁴⁷⁷ On the impact of national measures at international level, see S. Battini, *L'impatto della globalizzazione sulla pubblica amministrazione e sul diritto amministrativo: quattro percorsi*, in *Giornale di diritto amministrativo*, 2006, n. 3, p. 339 ff.

⁴⁷⁸ See S. Battini, *Amministrazioni nazionali e controversie globali*, Milano, Giuffrè, 2007, p. 10, claiming that national measures must abide by global standards and “speak the language of administrative law”.

technical agencies. The diffusion of better regulation policies have highlighted the importance to assess the impact of public choices, regardless of whether they take place at legislative or administrative level.

Hence, the purpose of this work was to determine whether the heightened impact of global policies has been followed by an equal improvement of citizens' rights to advocate for their rights during the decision-making process. Given that the crisis of representation affects not only global systems, but it has originated from the national contexts and lately characterized the creation of other supranational regulators, such as the European Union, the analysis took in consideration also the lower levels of governance. From a national and regional perspective, although the electoral representativeness and the judicial system are stronger, the issue regarding the level of accountability and of citizens' procedural rights before the administration is still present.

The regulation of the food sector is a privileged point of observation of these phenomena, since it is fragmented, it originates from authorities belonging to different geographical levels and it is mainly formed of rules which are the result of the search for balance between opposite values and interests.

In particular, apart from fragmentation, there are some features describing the current status of the regulation and governance of the food sector.

First of all, there is no clear definition of participation, but regulators tweak its meaning according to their objectives. Namely, participation, in the sense adopted in this work, relates with those procedural safeguards aiming at giving stakeholders the possibility not only to express their views, but to actively affect decision-making. This idea embraces also the involvement of citizens in the actual phase of discussion of the options available and the duty of the authority to give account of the comments received.

However, participation is often considered equal to two other tools of citizens involvement in decision-making which, nonetheless, play a different function. The first group of tools relate to the exercise of direct democracy by the people via the referendum, the legislative initiative and the possibility to submit petitions to the authority. Especially in subnational contexts, where the principle of subsidiarity is interpreted as there could be a trade-off between the proximity of the regulator to the citizens and the enhancement of inclusive participation⁴⁷⁹, direct democracy

⁴⁷⁹ In particular, according to the principle of subsidiarity, decisions should be taken as closely as possible to the citizen. The principle respond to the idea that actions taken at local

tools are deemed to be sufficient to provide grass-root advocacy. However, these methods, despite their name, reflect the idea that even the “direct” exercise of the supremacy by the people has to be mediated by the intervention of the elected representatives. There is no actual participation to the elaboration of policies, since citizens are just allowed to submit proposals or to express their consent on them, but they are not involved in the discussion and modification of their contents.

The second tool is the consultation of the interested parties. Namely, it differs from participation because of two elements. Firstly, the function of consultations is mainly that of providing the authority with more information on the situation or making policies more acceptable, rather than sharing decision-making with stakeholders. Therefore, the involvement of people via consultations is rather an application of the principle of reasonableness, than that of democracy. Consequently, the second aspect that makes participation different from mere consultations is that the scope of the latter can be, according to the situation to be addressed and the methods used to collect information, broader than the former. Especially for what regards consultations embedded in regulatory impact assessments, the group of people considered by the Authority can include both direct and indirect beneficiaries, as well as some categories of people that, on the contrary, cannot be involved in participatory initiatives (for example: children).

The confusion between participation and other “shared democracy” tools allow the legislator to give the impression of meeting citizens’ demand to be involved in decision-making, without actually providing for the right means to achieve it. Political scientists define these as symbolic policies⁴⁸⁰. This does not mean that no impact occurs, but that consequences are independent from the initial purpose of policy-makers: «information is gathered, policy alternatives are defined and cost-benefit analyses are pursued, but they seem more intended to reassure observers of

level better respond to citizens’ needs. For this reason, the level of representativeness of local governments is usually considered to be high, compared to other policy-makers. Therefore, this may also suggest that higher responsiveness justifies a lower level of citizens’ direct involvement in policy-making.

⁴⁸⁰ M. J. Edelman, *The symbolic uses of politics*, Champaign, University of Illinois Press, 1985; S. L. Suárez, *Symbolic Politics and the Regulation of Executive Compensation A Comparison of the Great Depression and the Great Recession*, in *Politics & Society*, 2014, 73-105.

the appropriateness of actions being taken than to influence actions»⁴⁸¹. In the food sector, consultations and direct democracy institutions substitute participation when grass-root advocacy is not considered a viable option because the system is still strongly relying on political representativeness, such as in most of the Italian Regions, at European legislative bodies' level or in the case of WHO and WTO.

The second characteristic of participatory initiatives in food governance is that frequently they do not occur on a regular basis, but according to the discretion of the Authority. In global organizations, the collaborations with civil society organizations are normally based on single agreements; alternatively, when rules provide for the duty to consult people in general, they leave the Authority free to decide when participation should occur in the single cases. Similar rationales are present at European level, especially with regard to the European Food Safety Authority. At national level, the Italian law precisely regulates the duty to implement participation within the adjudicatory procedures, which has been extended to administrative rule-making by Courts. However, the regulation of procedural burdens can vary sensibly from one Authority to the other.

The absence of pre-determined rules guiding agencies' and institutions' approach towards people involvement inevitably leads to less transparency and clarity of the procedures; moreover, it makes the level of implementation of procedural safeguards unlikely to be questioned and prevents participatory rights to become enforceable either in Courts or via administrative re-examination.

The third characteristic regards the way interests are represented in food governance. Namely, the analysis of the different legal contexts has shown a tendency to solve the problem of the lack of political accountability by replacing it with systems of grass-root collective representation. Civil society organizations, especially NGOs, are entrusted with the power to advocate stakeholders' opinion in policy-making processes, since usually people are only allowed to participate in groups and not as individuals. The number of NGOs has dramatically increased in the last decades⁴⁸², creating a huge network of bodies operating both at national and international level to influence States' policies on sensitive topics. However, this

⁴⁸¹ J. G. March, J. P. Olsen, *The new institutionalism: organizational factors in political life*, in *American political science review*, 78 (03), 1983, p. 738.

⁴⁸² According to S. Nespore, *Organizzazioni Non Governative internazionali e mondo globale: la difficile ricerca di una legittimazione*, in *Riv. giur. ambiente*, 6, 2012, p. 703 from the 1960s the number of NGOs has increased by a 90% rate, reaching the number of 56.000 organizations by 2012.

rouses the same problem raised against top-down advocacy: the gap between representation and representativeness. Some doubts have been risen about the ability of NGOs to form a “ghost Parliament” flanking governmental organizations during policy-making⁴⁸³. Although NGOs together might give voice to a wide range of opinions, they do not represent civil society. Their claim for representation rests on the values they contend to protect. However, they have received no mandate to do so and there is no system to verify the effectiveness of their claims. If NGOs’ activism is to take its place within democratic society, it presumably should be accountable for its actions.

Notwithstanding these remarks, associational democracy has a merit. It highlights the impossibility to put in place direct democracy systems in wide contexts - like the global arena - without threatening the efficiency of the decision-making process.

If individual or associational representation alone do not adequately address the problem of grass-root advocacy in food governance, there seems to be no solution to the crisis of electoral representation and of Parliamentary law.

Nonetheless, the overview of participatory experiences in food governance suggests that the interaction between more than one system of representation can help in addressing the lack of accountability of regulators. On one hand, whereas there is no doubt that governments should be – and are actually considered - the main depositaries of voters’ opinion, electoral democracy has proven to be insufficient or, as in the global system, not a viable option. Therefore, it is necessary to reinforce the current system of top-down representation, while putting in place parallel solutions of accountability⁴⁸⁴. Namely, the experiences that have been analyzed in this work suggest that the joint implementation of different kinds of citizens’ involvement in policy-making could better address both the lack of

⁴⁸³ G. Johns, *NGO way to go. Political Accountability of Non-government Organizations in a Democratic Society*, in *IPA backgrounder*, Nov. 2000, vol. 12, p. 13.

⁴⁸⁴ A new model of deliberative democracy – called “Global Reflexive Interactive Democracy” - has been recently theorised in D. Bevilacqua, *Il free trade e l’agorà*, cit. The author suggests the creation of a network of non-governmental organizations to represent citizens in global policy-making. For a critique, see the book’s review by S. Battini, *Recensione a “D. Bevilacqua, Il free trade e l’agorà. Interessi in conflitto, regolazione globale e democrazia partecipativa*, Napoli, Editoriale Scientifica, 2012”, in *Riv. Trim. D. Pubbl.*, 1, 2014, 209-212.

accountability of regulators and the weaknesses of individual or associational democracy.

Namely, informal consultations – meetings, surveys, conferences - such as those put in place in regional and global experiences, could act as a preliminary phase of citizens' involvement, in order to raise people awareness on a certain topic, build up public opinion and allow the authority to collect some useful information on the impact of the proposed rule; at this stage, people can be involved both individually as well as in groups.

At the same time, access to formal methods of participation – including the right to issue comments and proposals, the duty of the authority to give account of the analysis of the external contributions via general statements and the right to have access to documents – should be allowed only to interested groups, and not to individuals. Associations and organizations should be able to prove their representativeness as well as the existence of an appropriate level of internal democratic governance. Civil society groups could have a stable organization – such as NGOs or corporate associations – however, it should also be possible for ad-hoc committees to participate to a single procedure, without the need to have a formal legal structure or a stable organization. In other words, the legal structure of these groups - within certain limits of feasibility - should not prevent them to participate to a rulemaking procedure, if they meet the requirements of internal democracy, fairness and representativeness.

The other problem to be addressed is the weak balance between interests. Even in this case, coercitive enforceability tools can be combined with deliberative democracy experiences in order to allow the equal representation of interests in food policy-making and to reduce the fragmentation of governance.

Namely, in order to enhance the consistency of food governance, all the relevant interests should be represented in the decision-making procedures carried out by regulators. This is particularly urgent at global level, since the absence of a general legal order prevent the regulators to abide by the same principles⁴⁸⁵, rules and to fully coordinate their activity⁴⁸⁶. Nonetheless, even the European and national

⁴⁸⁵ Nonetheless, Courts help in reducing the fragmentation by acting as the “guardian of the principles” States must abide by both at national and global level. See S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Roma, Donzelli, 2009.

⁴⁸⁶ See D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, cit., p. 10, calling for the adoption of some core principles by food safety regulators to reduce the fragmentation of governance.

regulatory systems suffer from an unbalanced representation of the interests at stake in decision-making, especially because competences are spread among several authorities. A full involvement of the interests at stake can be achieved in two ways.

Firstly, although food regulatory authorities usually pursue one or a few main goals, they should shape their policies taking into consideration also the other relevant values, by allowing private parties and public authorities representing opposite positions to have access to the procedure. Secondly, the process of “regulatory defragmentation” should mainly be addressed by strengthening connections among regulators, both horizontally – among the authorities protecting different values at the same level - and vertically – from global to local institutions. Some collaborations already exist, although joint initiatives would grant equality and regulatory balance more than the mere intervention of one organ in the activity of the other regulators.

However, stronger connections might result in increased policy displacement if weaker regulators – such as FAO – are not entrusted with powers letting them enhance their status vis-à-vis the other institutions. This is particularly significant at global level, whereas European and national legal orders do not experience the same lack of powers, since they are integrated in a system (partially) based on electoral representation and on the enforceability of rights and rules by law. In the EU and Italian contexts, the unbalanced relations among regulators usually rest on different grounds, such as the institutional or territorial hierarchy of powers or on the specific binding force of their acts in a certain procedure⁴⁸⁷. As a matter of fact, strengthening global regulators role does not necessarily imply moving from soft law to hard law powers. Rather, as the CAC relies on WTO dispute settlement system to make its rules enforceable, similar solutions could also be applied to the other global regulators’ rulemaking activity, especially for what regards WHO and FAO. A heightened binding power should, as explained above, also be reflected in a heightened political accountability of the governing bodies of such Organizations, as well as in the transparency of their activity.

In conclusion, the lack of representativeness and accountability of regulators, as well as the fragmentation of governance in the food sector shall be addressed both directly and indirectly. Direct methods entail the reinforcement of top-down

⁴⁸⁷ For example, although Ministers retain the power to issue binding acts, a ministerial office could be allowed to participate in a rulemaking procedure of another Body by issuing only non-binding advices.

advocacy and of the political representativeness of regulators. Indirect methods include participatory initiatives granting the effectiveness of grass-root advocacy. These solutions necessarily need to adapt to the institutional framework in which regulators act.

At global level, regulators should put in place stronger connections, via joint regulatory initiatives capable of binding Member States and of ensuring their compliance. At the same time, grass-root advocacy should occur via regulated participation of both individuals – through informal, wide-range initiatives – and accountable groups.

At European level, since after the Lisbon Treaty it is unlikely that other constitutional changes would soon reform the current institutional scenario, as well as the powers retained by the organs or the system of political representativeness, the focus should not be on the desired institutional changes, but on participation. Namely, pursuant to the Treaties, participatory initiatives should be informed to the principles of democracy and openness rather than constitute just a political device to increase citizens' sense of belonging to the Union or, alternatively, to provide the authority with more information. The Better Regulation Package of 2015, while taking some steps forward, still lacks this democratic perspective.

At national level, the lack of political accountability is currently addressed thanks to the reforms that will transform the electoral system and the role of the Senate⁴⁸⁸. Moreover, further initiatives should be made to open the policy-making process via the efficient implementation of regulatory impact assessments, which are now compulsory only for the Government and the Independent Authorities. Although in the laws there is little attention on consultations, future expected reforms⁴⁸⁹ could tweak this institution to enhance the openness of the procedures. At the same time, regional experiences witness the existence of many degrees of implementation of procedural safeguards, albeit a positive trend is perceivable. Drawing from the previous analysis, major issues can be avoided by limiting the authority's discretion on the choice of the methods of citizens' involvement and on the cases when participation can occur. Moreover, it is vital that rule-makers give account of the comments received and that stakeholders' representativeness be verifiable.

⁴⁸⁸ See *supra* Ch. I §4.3.

⁴⁸⁹ On the current process of amendment of regulatory impact assessment methods in Italy, see M. Porpora, *The impact of better regulation on the American and Italian administration*, in *Il Diritto dell'economia*, 2, 2015, 453-480.

Ultimately, the analysis of the governance of the food sector clearly shows that political representation and participation, although they have been conceived to address different failures of the democratic archetype, both deal with the problem of ensuring the effectiveness of the principle on which democratic choices rest: the sovereignty of the people. Therefore, they should not be presented as strict alternatives to the policy-makers, but they must act together to ensure citizens' entitlement to a proper balance between the liquidity of global governance and the desirable solidity of legal certainties.

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