Chapter 1

Introduction

1.1 Approach and Aims

This book addresses the procedural position of natural and legal persons whose rights and legally protected interests are affected by the regulatory acts adopted by the European institutions. It is based on a rights-based approach to participation, in that it analyses participation as a procedural right grounded in the impact regulatory acts have on substantive rights and interests. It is a normative endeavour since it aims to redefine the current scope and meaning of participation rights in European Union (EU) administrative law.[1] This is based on a firm understanding of the origins and rationale of participation rights as well as of the participatory mechanisms that pervade EU decision-making. The legal analysis is as such situated in the broader political context of European integration.

This book puts forward and demonstrates two main propositions. First, the current scope of participation rights in EU administrative law is too narrow in the face of new regulatory developments. It follows that, as they stand, European decisional procedures are not faithful to the values of the rule of law that the EU claims as their own and seeks to promote. Secondly, the scope of participation rights should be extended to new situations and new types of procedures, in particular those that generally fall within the

[1] The term 'participation rights' is used here as an equivalent to 'rights of participation' referring to the right of natural and legal persons to be heard in the decisional procedures that concern them, not to the set of rights associated with participation (such as access to information or reason-giving). The term 'participation rights' is preferred to that of 'right to be heard'. The latter will be reserved to refer to the Courts' stance on this procedural right, which will be criticized in this book, and the former to the broader conception that will be defended here. Moreover, the use of the plural ('participation rights' instead of 'participation right') is justified by the differences that will be delineated among different types of participant.

category of rule-making, i.e. procedures that lead to the adoption of general norms, whichever their form, that affect an undetermined number of persons. This extension is required by a paradigm of EU administrative law that is consonant with the constitutional underpinnings of EU law, in particular those that have enhanced the position of the individual in the EU legal system.[2]

Participation rights are too narrow in two different senses. First, they are too narrow when compared with the effects that Union acts produce, directly or indirectly, in the legal sphere of natural and legal persons who are the subjects of the accrued regulatory powers of the EU institutions.[3] Secondly, they are too narrow when compared with the legal values and principles endorsed by the EU legal system.[4] As such, as a first step, the book points out the limits of participation rights in EU administrative law, which have contributed to the neglect of the procedural position of natural and legal persons in regulatory procedures. Moreover, participation rights should be distinguished from the different forms of participation that imbue the EU regulatory structures. In fact, although the use of participation has become more explicit and systematic under the so-called 'new governance' developments, these have not, in general, improved the legal protection of subjective rights and legally protected interests of the persons affected by the Union regulatory action. The specific meaning attributed to the concept of participation in this book is implicit in these assertions: participation refers here to the procedural rights of intervention in decisional procedures grounded in substantive rights or interests that are affected by these same procedures. This concept, the various forms of participation in EU decision-making, and the limits of participation rights are developed in the following four chapters and concretized in the sector studies presented in the last three chapters.

[2] The term 'Union' or the abbreviation EU will be used throughout this work to refer to the law, processes, acts, and institutions of the European Union as a single entity that encompasses the former three pillars. Also the 'Community' designation will be used. The resort to one or other term will depend on the context, namely on the period and segment of law or policy to which each part of the analysis refers. The term 'Community' is preferred when drawing on the developments which occurred before the Maastricht Treaty entered into force. This is particularly the case in Chapter 3.

[3] 'Legal sphere' refers to the entire set of advantageous legal positions (among which rights) and disadvantageous positions (among which duties) that are granted to and impinge upon legal and natural persons.

[4] These are indicated below.

The study goes one step further: it puts forward a different construction for participation rights, which is deemed to surmount these limits without exceeding the legal boundaries within which participation can still be conceived as a procedural right. The rights-based concept of participation defended in the book both enables an extension of participation rights in EU law and provides for the limits of such an extension. This leads us to the second proposition. It is contended that participation rights should exist where the legal spheres of private persons are affected by a regulatory act adopted by the EU administration, independently of the form of the latter and irrespective of their being in an analogous position to that of the addressee of the act. Therefore, among other consequences, the rule according to which no participation rights should be recognized in procedures that lead to the adoption of general acts, should be cast away. The bases of this construction are presented in the next chapter. The conception of participation rights that is developed there guides the analyses undertaken throughout this work.

The aims of the book are revealed by this short introduction. Demonstrating both the current limits and the possibilities of extension of participation rights are its core aims. Two ancillary tasks embody two further objectives. The first consists of the identification of a legal concept of participation that is capable of grounding the proposed extension of participation rights. This means that the proposed construction will stress the legal values in which participation is grounded and will seek to explore the potentialities and limits of participation as a legal concept. Secondly, one should be able to relate the proposed extension to the broader institutional developments that have brought participation to the fore of EU governance. Therefore, the various participation mechanisms that pervade the EU institutional and legal system will be considered in terms of what connects them to, and separates them from, participation rights, as they are understood in this book.

The construction proposed is deemed to yield results that are more consonant with the rule of law than the current *status quo* on this matter. Rule of law is meant here as the imposition of substantive and procedural limits to the exercise of public power. The rule of law has been heralded as one of the foundations of EU law, to the extent that its institutions and bodies are submitted to legal norms and that judicial review by the EU Courts ensures respect for these norms.[5] Legal developments such as the

[5] This was the sense of the Court's judgment in *Les Verts* (Case 294/83, *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, paragraph 23). On this point, Jean Paul Jacqué (2006) *Droit institutionnel de l'Union Européenne*, 4th edn, Paris: Dalloz, pp. 51–4. As is widely known the principle is now enshrined in Article 2 of the Treaty on the European Union (TEU).

respect for fundamental rights have stressed the protection of the individual as being an inherent dimension of this principle.[6] Nevertheless, concern for the protection of the substantive rights and legally protected interests of the persons affected by the exercise of public powers has arguably not been transposed to the design of regulatory procedures and structures set up in the EU context, beyond the realm now covered by Article 41 of the Charter of Fundamental Rights.[7] Moreover, one may argue that this contrasts with the 'empowerment' of private persons vis-à-vis Member States and the respective administrations, by way of the principles of direct effect and primacy, as well as state liability for breach of EU law.[8] Further, it may also be held that this tends to ignore the case law that establishes the importance of procedural law in protecting fundamental rights.[9] Indeed, by an argument *a maiori ad minus*, procedural law is equally relevant for the protection of subjective rights and legally protected interests that do not have the status of fundamental rights.

It follows from these last arguments that the propositions of the book are also congruous with specific features of the EU legal system. These stem not only from the principles mentioned, but also from four other characteristics. To begin with, the various forms of cooperation between national and European administrations—which tend to blur the distinction between direct and indirect administration—are very likely to boost situations in which the rights and interests of private persons are affected by the combined action of national and EU administrative entities. This may require a perspective on the issue of the legal protection of these persons different from the one inherent in the principle of procedural autonomy. Further, a typology of acts of the Union, grounding the distinction

[6] See, in this regard, Armin von Bogdandy (2006) 'Constitutional principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law*, Oxford and Portland: Hart Publishing, pp. 3–52 at pp. 15–20; Jacqué, *op. cit.*, pp. 51–74; Jürgen Schwarze (2006) *European Administrative Law*, Revised 1st edn, London: Sweet and Maxwell, p. cxvi; on the various elements of the rule of law principle that have been recognized by the EU Courts, Schwarze, *ibid*, p. cxviii, on their more recent developments see, among others, *ibid*, pp. cxix–clxii.

[7] OJ C 303/1, 14.12.2007.

[8] On the impact of these principles on the relationship between persons and their national administrations, see Alberto Massera (2007) 'I principi generali', in Mario P. Chiti and Guido Greco (eds), *Trattato di diritto amministrativo europeo*, Tomo I, 2nd edn, Milano: Giuffrè, pp. 285–414, at pp. 379–89.

[9] E.g. Case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football v Georges Heylens and others* [1987] ECR 4097, paragraph 14, referring to the duty to state reasons as instrumental in the right to effective judicial protection.

between legislative and administrative rule-making on substantive criteria is still found wanting, despite the new rules of the Treaty on the Functioning of the European Union.[10] Moreover, it is doubtful whether the distinction between general and individual acts will ever be able to grasp the reality of the forms of Union action, in particular with regard to the effects of the acts. In addition, the modes of production of EU rules are very much determined by a combination of representative and participatory elements. This is arguably an important systematic element to understand and reflect upon EU decisional procedures, providing a possible 'constitutional basis' for the furtherance of participation rights. While the first feature reinforces the relevance of the topic chosen as an object of analysis, the second, third, and fourth aspects mentioned incline us to question the influence of some of the arguments which have been deployed to delimit the scope and meaning of participation rights in EU administrative law.

This book is based on two premises. First, the forms of procedural participation which have been developed with regard to administrative procedures, both in national legal systems and in EU administrative law, are the most appropriate to test the legal protection of natural and legal persons affected by public regulatory action. From this premise derive two important tools of analysis used in this work: the construction of the concept of participation proposed and the reliance on the theory of legal administrative relationships, both embedded in doctrines of national administrative law.[11] The topic of procedural administrative participation recalls that the issue of authority–liberty, which has been at the core of the development of administrative law in national legal systems, has been largely absent from EU administrative law. This is due to the persistent but erroneous assumption that, with the exception of competition law, the action of the EU institutions drawing on an administrative function bears upon relationships among public authorities, not with the rights and interests of natural and legal persons. Nevertheless, this was arguably the core concern that pushed for the development of procedural entitlements of interested persons in EU administrative law, in particular in the areas of direct administration. Secondly, the exercise of the administrative function that may justify the recognition of participation rights pervades different levels of decision-making. In the EU legal system, the identification of the administrative function is essentially a matter of interpretation of the

[10] Articles 289 to 291 TFEU (OJ C 83/1, 30.03.2010).

[11] On the methodology of translation, see the section below.

Treaty and primary norms that define the competences of the decisional bodies and, with it, the subject matter of regulation and the goals to be achieved.[12]

1.2 Method and Sources

The book is essentially an interpretation of the principle according to which 'a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known' before the adoption of the act.[13] This is its point of departure and its point of arrival. In fact, as mentioned, the main purpose of this work is to redefine the scope and meaning of participation rights and this principle, in particular its current judicial interpretation, decisively conditions these two elements in current EU administrative law.

The method is one of legal interpretation. The wording of the norms where this principle is enshrined, whether judicial or legislative, is the first step of the legal analysis. This provides its core empirical ground. Nevertheless, the aims of legal analysis stray far beyond the understanding of positive law based on the syntax of norms. In this case, as stated, the study of participation rights intends to assess critically their scope and meaning with a view to proposing a different normative solution to the problem of the procedural protection of substantive rights and legally protected interests in the realm of EU administrative law. Therefore, the scope and meaning of participation rights need to be understood in the light of the rationales of these rights, both as they have been developed in EU law and as they may be interpreted in the light of general principles of law accepted in the EU legal system. Furthermore, this legal interpretation will include a consideration of the historical development of participation rights and mechanisms in the EU legal and political system, as well as of their current features.

The core arguments of the book are thus grounded in a hermeneutics that combines the teleological, historical, and systematic elements of legal interpretation. The rationales of the principle according to which persons

[12] On the difficulties in identifying the administrative function of the EU, see Dominique Ritleng (2009) 'L'identification de la fonction executive dans l'Union', in Jacqueline Dutheil de la Rochère (ed.), *Exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux*, Bruxelles: Bruylant, pp. 27–51.

[13] Case 17/74, *Transocean Marine Paint Association v Commission* [1974] ECR 1063, paragraph 15.

affected in their rights and interests by an act of public authority should be heard before the adoption of the act yields a reference point for elaborating a more comprehensive understanding of participation than the one strictly enshrined in positive law. This understanding is capable of grounding a broader scope of participation rights than the one currently accepted in EU administrative law. Further, the knowledge of the origins of this principle and of the way it has been perceived, interpreted, and applied contributes to characterizing it and to clarifying the reasons for its current scope. In addition, this analysis is situated in the context of the EU legal and political system. This brings to this work elements of the 'normative whole' in which participation rights and mechanisms are embedded as well as the consideration of related norms and practices that may shed new light on the principle under analysis. In particular, the pervasiveness of participatory mechanisms in the EU regulatory structures leads one to question the strict legal-formal conceptions of participation, conveyed by the Courts' jurisprudence.[14] Moreover, this calls into question whether, as imparted by the Commission, there is effectively no room for law in the configuration of some of these mechanisms, and compels one to consider which, if any, the role of law could be. At the very least, the study of non-legal forms of participation allows us to consider other meanings of participation, which are not wholly deprived of legal significance, even if detached from the core concern for the dignity of the person that has underpinned the judicial developments on this matter. Additionally, it calls the interpreter's attention to other dimensions of the relationships that intervene between natural and legal persons concerned by European law and the actions of the EU institutions. Therefore, understanding the meaning of different participation mechanisms in the EU setting is an important systematic element of the analysis undertaken in this book. Participation emerges thus as a feature that is embedded in the institutional-constitutional tradition of European integration and this stresses the inadequacy of the current legal scope of participation rights in view of the constitutive features of the EU polity.

This work relies on three different groups of sources. First, the leading cases of the European Court of Justice and of the Court of First Instance

[14] Jurisprudence is used throughout this work in the sense of a body of case law with authoritative value. Unless otherwise specified, the terms 'Courts' and 'EU Courts' refer here to the Court of Justice (for which the abbreviation ECJ is still used) and to the General Court, which will still be designated Court of First Instance (or CFI) when referring to judgments issued before the Lisbon Treaty entered into force (cf. Article 19(1) TEU).

(now General Court) on participation rights, as well as relevant EU legislative norms. Secondly, the administrative laws of Member States and doctrinal works thereon. Thirdly, political science studies, policy documents, and preparatory acts of EU legislation.

The case law of the EU Courts is the main source to understand the origins and the historical developments of the *audi alteram partem* principle in EU administrative law, as well as the current scope and meaning of participation rights. This analysis provides one of the pillars of the book. The study of the case law is complemented by a cursory resort to the EU legislative norms that enshrine the right to be heard and other procedural rights of participation in sector legislation, in particular in competition law, that have been the object of judicial interpretations. In fact, the current scope and meaning of participation is the result of the interplay between the legislative and judicial developments. The Courts' stance is both conditioned by the legislative options and conditions them also in areas in which these matters have not been the object of a consistent body of case law.

The resort to sources of national law has a threefold purpose. First, they provide an overview of rules and conceptions that are very likely to have influenced EU law in this matter, and, thus, contribute to a better understanding of participation rights from a *de lege lata* perspective. In fact, the principle according to which affected persons should be heard before the adoption of an act that affects their rights and interests stems from the laws and common constitutional traditions of Member States. These shed light on the origins, scope, and meaning of participation rights. The assumption that the conception of participation rights in EU administrative law was influenced by the national legal orders is confirmed by the Courts' methodology in creating general principles of law. It is worth mentioning that the judgment of the European Court of Justice and the Opinion of Advocate General Warner in *Transocean Marine Paint Association* are conspicuous examples of this methodology.[15] Secondly, the study of national legal rules

[15] Loïc Azoulai (2000) *Les garanties prodédurales en droit communautaire. Recherches sur la procedure et le bon gouvernement*, PhD Thesis, European University Institute: Florence, pp. 110–15, where the case is discussed (also Takis Tridimas (2006) *The General Principles of EU Law*, 2nd edn, Oxford: Oxford University Press, p. 372). See, equally, Adelina Adinolfi (1994) 'I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri', *Rivista italiana di diritto comunitario*, pp. 521–79, at p. 543–4; Xavier Groussot (2000) 'The general principles of Community law in the creation and development of due process principles in competition law proceeding: from Transocean Marine Painting (1974) to Montecatini (1999)', in Ulf Bernitz and Joakim Nergelius (eds), *General Principles of European Community Law*, The Hague: Kluwer Law International, pp. 185–204, at p. 188.

on participation rights provides some valuable normative indications for the construction of legal solutions addressing problems that might arise as a result of the proposed extension of participation rights in EU administrative law. In this sense, rules of national law yield useful normative elements from a *de lege ferenda* perspective.[16]

The relevance of national sources from a *de lege ferenda* perspective unveils an additional, deeper, and more decisive reason to resort to rules and principles of national law when analysing certain aspects of EU law: this provides a second level of analysis, a benchmark to assess critically the current state of EU law, which is the purpose of this book. In our case, this benchmark is grounded in a common understanding of what participation means and which values it conveys in the specific context of the procedural protection of persons and legally protected interests before the exercise of public power. A common understanding of participation, which is acceptable across different legal systems, may be deduced from monographic studies that analyse the features of participation rights in different national contexts, as well as from the few comparative works that cover this subject matter.[17] These allow us to identify the legal and political foundations of participation rights. On this basis, one may sustain that certain concepts or conceptions developed in national legal contexts may circulate from national to EU law, provided that they yield an explanatory basis for the understanding of the legal issues that emerge in the EU legal order, have a sufficient normative capacity to deal therewith, and are consonant with other features of the EU legal and political system.[18] Two important

[16] On the influence of national laws in the construction of EU law, see, *inter alia*, Pierre Pescatore (1980) 'Le recours dans la jurisprudence de la Cour de Justice des Communautés Européennes a des normes déduites de la comparaison des droits des États membres', *Revue Internationale de Droit Comparé*, Vol. 32, n. 2, pp. 337–59, at pp. 354–8. This recalls the functions of general principles in European law and the Courts' methodology in their creation. On this, see Adinolfi, *op. cit.*, pp. 528–33; Yves Galmot (1997) 'L'apport des principes généraux du droit communautaire à la garantie des droits dans l'ordre juridique français', *Cahiers de Droit Européen*, Vol. 33, n. 1–2, pp. 67–79, at p. 78; Tridimas, *op. cit.*, pp. 29–35; Massera, *op. cit.*, p. 291.

[17] Michel Fromont (2006) *Droit administratif des États européens*, Paris: Presses Universitaires de France, pp. 215–22; Schwarze, *op. cit.*, pp. 1243–371; Stefano Battini, Bernardo G. Mattarella, and Aldo Sandulli (2007) 'Il procedimento' in Giulio Napolitano (ed.) *Diritto Amministrativo Comparato*, pp. 107–74. A comparison between the French and the German system is provided by Ewald Eisenberg (2000) *L'audition du citoyen et motivation des décisions administratives individuelles. Étude comparative en France et en Allemagne*, Paris: L'Harmattan. The references to the monographic works or articles on specific national systems are found throughout the book, in particular in Chapter 2.

[18] These considerations on the possibility of translating national concepts to the European setting draw on Neil Walker (2003) 'Postnational constitutionalism and the problem of

aspects of the conceptual framework of the book, presented in Chapter 2, derive from this approach: the concept of participation proposed and the resort to the concept of legal administrative relationship as an important support for the construction of participation rights set forth.

The choice of national legal orders from which legal sources were selected was determined by the linguistic capacities and limitations of the author and is, therefore, confined to England, France, Italy, Spain, and Portugal. It should be noted that, although this work includes references to the German legal system, the author's knowledge in this regard is only based on translated works.[19] From a *de lege ferenda* perspective, the sources of the Italian legal system have been particularly influential in this work. Italian studies on participation in administrative procedures are abundant and the debates on this topic are prolific, not least due to the discussions that preceded the entering into force of the general law on administrative procedure, but also given the relevance attributed to the legal subjective positions of individuals in the Italian system of judicial review.[20]

The third type of source mentioned—political science studies, policy documents, and preparatory acts of EU legislation—is required to analyse participation as a feature of the EU institutional form and of its regulatory structures. This strand of participation (strictly, non-legal dimensions of participation), when approached by lawyers, tends to be considered independently of the problem of procedural protection of persons affected by the exercise of public powers (due process rights in administrative procedures). Nevertheless, as pointed out above, this is an important systematic element of the interpretation of participation rights undertaken in this work. It is in this respect that the interdisciplinary nature of the topic of this book becomes more pressing. Political science studies—mostly articles, published both in journals and in working paper series, such as the EUROGOV, as well as monographic studies included in collective works—have helped the author to navigate the functioning and other related problems of some of the participatory structures in place at the EU level, thereby acquiring knowledge of

translation' in Joseph H.H. Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State*, Cambridge: Cambridge University Press, pp. 27–54, at pp. 35–38.

[19] In particular, Galetta's translation of the German *Verwaltungsverfahrensgesetz* was a valuable source in understanding the basic standpoint of the German legal system in this matter (Diana-Urania Galetta (2002) *La legge tedesca sul procedimento amministrativo (Verwaltungsverfahrensgesetz). Traduzione con testo a fronte e commento introduttivo*, Milano: Giuffrè).

[20] For a flavour, see Massimo Occhiena (2002) *Situazioni giuridiche soggettive e procedimento amministrativo*, Milano: Giuffrè, Chapters 2 and 3.

facts of potential legal relevance, or at least, facts that may be valued from a legal standpoint. Admittedly, the author's lack of deeper knowledge of this discipline has limited the use of its sources in this work. Additionally, the consultation of websites in which participatory practices can be followed was relevant from this perspective (for example, the website of the Committee of European Securities Regulators was particularly useful for the study undertaken in Chapter 6). The Commission's COM documents were also a source for understanding the rationales and features of certain participatory practices. Furthermore, these documents were equally important to comprehend the legal strand of participation: given the Commission's prerogatives to initiate legislation, its general stance is likely to transpire into legislative provisions.

Finally, the conception and extension of participation rights propounded are tested in the sector analyses. The choice of sectors was meant to cover the different dimensions of participation in the European legal and political setting and to shed light on the differences and continuities between the two strands of participation mentioned. In addition, they also cover different modes of EU administration: implementation by national administrations, notwithstanding the strong European shaping of national decisions (securities markets regulation under the Lamfalussy process); implementation both by national and European entities, permeated by composite administrative procedures which in fact lead to an integrated administration (food law);[21] a form of direct administration, in which the administrative decisions are primarily within the competence of the European Commission (state aid). It will be demonstrated that the specific division of executive powers which is intrinsic to the EU administration does not need to—and indeed should not—contend with the granting or otherwise of participation rights to the persons affected by administrative regulatory acts.

The approach is different in each case, since the respective objects of analysis are also different. The study on the sector of state aid elaborates the interpretation of Article 108(2) TFEU. In essence, it focuses on the study of the Courts' case law regarding this Article, but it also relates it to regulatory developments which have occurred in this field beyond the framework of the Treaty. It brings together different cases, on the assumption that this is

[21] The term integrated administration refers here to the inter-linkages between national and EU administration, which are reflected in and embodied by the decisional procedures that combine their respective contributions in the regulatory decisions adopted in the realm of EU administrative law.

an essential task to build up a doctrinal approach to the subject matter under analysis.[22] The object of the chapter dedicated to food law is the examination of selected procedures that are deemed to be representative of the decisional powers of the EU institutions in this field and that are likely to impact on the private legal sphere. It draws on the analysis of the respective directives and regulations, and situates this in the development of this EU policy. The analysis of the regulatory structure set up in the area of financial services is the one that most deviates from a strict method of legal interpretation, given its object. It examines a regulatory process that results in the enactment of legal norms but is essentially informed by considerations that stray beyond the strict legal realm. It is also not a sector analysis proper, but a study of one regulatory process. Its sources are mostly the several policy documents that delineate this process and the related participatory procedures, as well as those which display their functioning and evaluation.

1.3 Existing Literature and the Contribution of this Book

The use of a method of legal interpretation combined with the scope and purposes of this book define its province in relation to other EU legal studies on participation. It is submitted that, given the very ambiguity of the term participation, delimiting the purview of this work in relation to previous studies undertaken on this subject matter is useful to clarify the approach adopted here. The existing studies may be grouped within two main bodies of literature: roughly, one combines a legal-political approach to the topic, while the other adopts essentially a strictly legal standpoint of analysis. It is worth considering these two perspectives in turn.

In the first strand, participation has been analysed from the perspective of its potentials and limitations as a source of legitimacy of EU decision-making, capable of countering, at different levels, the EU's democratic shortcomings. As a result of this approach, these studies stand at the intersection between law and political science, combining also legal and political theory in different degrees and variances. The origins of this strand can be traced back to the first academic debates on the EU democratic deficit which shifted the discussions on this topic from the institutional

[22] In this sense, Schwarze, *op. cit.*, p. 9.

realm to the role of 'non-institutional' actors in EU governance; in particular, to those studies which have argued for the introduction of deliberative democratic processes in the EU modes of governance.[23] A different variant of this approach, perhaps more inspired by a republican model of democracy, suggested the creation of notice and comment rules resembling those envisaged in the US Administrative Procedure Act of 1946.[24] Also in this case the underlying idea seems to have been that pluralist participation, filtered by such rules, would foster democracy within the EU. In a similar direction, another perspective of analysis has focused on the question of participation through the lens of citizenship.[25]

This strand of literature was nourished by the focus given to participation in the Commission's White Paper on Governance and by the subsequent inclusion of the principle of participatory democracy in the Constitutional Treaty signed in Rome in 2004, reiterated after Lisbon in the Treaty of the European Union.[26] It also branched in different directions. In particular,

[23] See, for example, Deirdre M. Curtin (1996) '"Civil society" and the European Union: opening spaces for deliberative democracy?', *Collected Courses of the Academy of European Law*, Vol. VII, Book 1, The Hague: Kluwer Law International, pp. 185–280. For an illustration of a more theoretically oriented approach, Joshua Cohen and Charles Sabel (1997) 'Directly-deliberative polyarchy', *European Law Journal*, , Vol. 3, n. 4, pp. 313–42.

[24] Paul Craig (1997) 'Democracy and rulemaking within the EC: an empirical and normative assessment', *European Law Journal*, Vol. 3, n. 2, pp. 105–30. Similar concerns with the legitimacy of EU administrative decision-making led to the debates on the possible codification of EU administrative procedures, in which such notice and comment rules could be enshrined (e.g. Carol Harlow (1996) 'Codification of EC administrative procedures? Fitting the foot to the shoe or the shoe to the foot', *European Law Journal*, Vol. 2, n. 1, pp. 3–25; Martin Shapiro (1996) 'Codification of administrative Llw: the US and the Union', *European Law Journal*, Vol. 2, n. 1, pp. 26–47). These ideas were taken up and debated in the specific context of the comitology procedures: Francesca Bignami (1999) 'The democratic deficit in European Community rulemaking: a call for notice and comment in comitology', *Harvard International Law Journal*, Vol. 40, n. 2, pp. 453–515 (defending the existence of a dubious 'right of civil society participation' as a third generation of participation rights; see Bignami (2005) 'Creating European rights: national values and supranational interests', *Columbia Journal of European Law*, Vol. 11, n. 2, pp. 241–353 at pp. 315–36); Stijn Smismans (2004) *Law, Legitimacy, and European Governance. Functional Participation in Social Regulation*, Oxford: Oxford University Press, pp. 448–56. Ellen Vos (1999) 'EU committees: the evolution of unforeseen institutional actors in European product regulation' in Christian Joerges and Ellen Vos (eds), *EU Committees: Social Regulation, Law and Politics*, Oxford: Hart Publishing, pp. 19–47, at p. 46.

[25] Carol Harlow (1999) 'Citizen access to political power in the European Union', EUI Working Paper RSC No. 99/2; Stijn Smismans (2007) 'New governance—the solution for active citizenship, or the end of citizenship?', *Columbia Journal of European Law*, Vol. 13, n. 3, pp. 595–622.

[26] Article 11 TEU (OJ C 83/13, 30.03.2010).

these constitutional and 'para-constitutional' developments fuelled the studies on the role of civil society participation in democratizing the EU governance structures. This is a burgeoning literature the threads of which are difficult to grasp in this short account. Most academic studies on the White Paper published after its adoption tended to be critical of the Commission's conceptions regarding participation which were reflected in the White Paper.[27] More recent studies tend to focus on the assessment of the democratic potential of the Commission's participatory practices,[28] as well as on the 'participatory promises' announced as accompanying the so-called new modes of governance.[29] Other works also draw on the legitimacy debate and on ways of going about the EU's claimed 'legitimacy problem', even if they have a different focus from the broader political role of civil society in democratizing governance.[30] On the other hand, the EU constitutional developments motivated some legal scholars to attempt a different legal outlook concerning these matters.[31]

[27] A limited sample is provided in Chapter 3, Sub-section 3.3.2, where the analyses of Kenneth Armstrong, Paul Magnette, Olivier De Schutter, and Stijn Smismans are cited.

[28] See Beate Kohler-Koch and Barbara Finke (2007) 'The institutional shaping of EU-society relations: a contribution to democracy via participation?', *Journal of Civil Society*, Vol. 3, n. 3, pp. 205–21, and the sector studies included in this special issue; B. Kohler-Koch, D. De Bievre, and W. Maloney (eds) (2008) *Opening EU Governance to Civil Society—Gains and Challenges*, Connex Report Series, no. 5 (<http://www.connex-network.org/series>). Sandra Kröger (2008) 'Nothing but consultation: the place of organised civil society in EU policy-making across policies', European Governance Papers (EUROGOV) no. C-08-03, <http://www.connex-network.org/eurogov/pdf/egp-connex-C-08-03.pdf>.

[29] Stijn Smismans (2008) 'New modes of governance and the participatory myth', *West European Politics*, Vol. 31, n. 5, pp. 874–95 (first published as a EUROGOV Working Paper).

[30] See, for example, Smismans' monograph on functional participation in social regulation (Stijn Smismans (2004) *Law, Legitimacy, and European Governance*, *cit.*, Chapter 1). Smismans focuses on 'the role of law in structuring interest group participation' always with an eye to assessing whether institutionalized forms of participation might be an additional source of EU legitimacy (*op. cit.*, p. 42).

[31] Some analyses included in legal commentaries to the Constitutional Treaty are illustrative of this standpoint (e.g. Eric Meisse (2005) 'La démocratie administrative dans le Traité établissant une Constitution pour l'Europe', in Vlad Constantinesco, Yves Gautier, and Valérie Michel (eds), *Le Traité établissant une Constitution pour l'Europe. Analyses et commentaires*, Strasbourg: Presses Universitaires de Strasbourg, pp. 397–417). From an administrative law perspective, see Carol Harlow (2006) 'Civil society organisations and participatory administration: a challenge to EU administrative law?', in Stijn Smismans (ed.), *Civil Society and Legitimate European Governance*, Cheltenham, Northampton: Edward Elgar, pp. 115–40). Harlow notes that 'as yet there has been no real response from administrative law to the problems of participatory administration and new governance', although, according to her, the measures that the Commission has been experimenting have the potential to cause a transformation of EU administrative law (p. 135).

The second strand of literature has older and deeper roots in EU legal studies. It studies participation rights from the strict perspective of 'hard law', as they have been developed by the Courts and enshrined in EU legislation. With the exception of studies undertaken in certain fields—such as some environmental law studies, which tend to display approaches that come close to the ones described above—these are, in the main, positive-legal analyses of participation rights which essentially examine the norms in force, explicating the Courts' stance on these matters. In this body of literature, two main approaches may be identified. Many studies focus on the procedural rights in force in specific fields of law, chiefly the rights of the defence in competition law, which is generally considered the archetype of the administrative activity of the Commission and a privileged field of analysis of the right to be heard.[32] Others have a broader approach which covers the different fields where the Courts' case law has developed—staff disciplinary procedures, state aid, anti-dumping, customs, and financial assistance through structural funds.[33] In this second group, some focus on re-constructing the main developments of the Courts' case law, with a view to identifying general principles, rules, and tendencies embodied

[32] The archetypal character of competition procedures is expressly mentioned by Maria C. Baruffi (2001) *La tutela dei singoli nei procedimenti amministrativi comunitari*, Milano: Giuffrè, p. 65. In this sense also Damien Chalmers, Christos Hadjiemmanuil, Giorgio Monti, and Adam Tomkins (2006) *European Union Public Law: Texts and Materials*, Cambridge: Cambridge University Press, p. 441. This approach is taken in the following works: Léon Goffin (1980) 'La jurisprudence de la Cour de Justice sur les droits de la défense', *Cahiers de Droit Européen*, pp. 127–44; Valentine Korah (1980) 'The rights of the defence in administrative proceedings under Community Law', *Current Legal Problems*, Vol. 33, pp. 73–97; P.J. Kuyper and T.P.J.N. van Rijn (1982) 'Procedural guarantees and investigatory methods in European law, with special reference to competition', *Yearbook of European Law*, Vol. 2, pp. 1–55; Asteris Pliakos (1987) *Les droits de la defense et le droit communautaire de la concurrence*, Bruxelles: Bruylant; R.H. Lauwaars (1994) 'Rights of the defence in competition cases', in Deidre Curtin and Ton Heukels (eds), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Vol. II, Dordrecht: Martinus Nijhoff Publishers, pp. 497–509; Julian M. Joshua (1991) 'The right to be heard in EEC competition procedures', *Fordham International Law Journal*, Vol. 15, n. 1, pp. 16–91; Georges Karydis (1997) 'Le contrôle des concentrations entre entreprises en vertu du règlement 4064/89 et la protection des intérêts légitimes des tiers', *Cahiers de Droit Européen*, n. 1–2, pp. 81–139, in particular pp. 85–93.

[33] See Ole Due (1987) 'Le respect des droits de la défense dans le droit administratif communautaire', *Cahiers de Droit Européen*, Vol. 23, n. 4–5, pp. 383–96 (with an emphasis on competition law and state aid procedures); Schwarze, *op. cit.*, pp. 1320–71; Baruffi, *op. cit.*, Chapters II and III (excluding staff cases and customs procedures); Tridimas, *op. cit.*, pp. 394–406; Paul Craig (2006), *EU Administrative Law*, Oxford: Oxford University Press, pp. 314–30, 360–73; Massera, *op. cit.*, pp. 345–78.

therein and providing an outlook for possible future developments.[34] Some insert the legal analysis in the broader institutional and political context that has been the purview of the first strand of literature mentioned above, thereby yielding a more comprehensive view on the normative choices that built up the current legal regime of participation.[35] Others, drawing on the mutual influence between national administrative laws of the Member States and EU administrative law, analyse the topic of participation rights from the viewpoint of comparative law, inquiring how far they have been enshrined in these different sites as a result of this interplay.[36] Naturally, as is implicit in some of the above considerations, these different approaches are in part determined by the different periods in which they were produced. For example, the adoption of the Charter of Fundamental Rights, given its Article 41 on the right to a good administration, have encouraged analyses of participation which tends to take away from the developments which have occurred in the specific bodies of substantive law, even if the analyses are perforce still very much embedded in the latter.[37]

As stated in the previous section, the book endorses the view that, in relation to this subject matter and in the current state of development of EU administrative law, the strict procedural and substantive legal realm cannot be isolated from the broader political, institutional, and constitutional developments that have shaped the EU as it now stands.[38] The first strand of literature described, which tends to focus on the political significance of

[34] See Meinhard Hilf, Gritta Ciesla, and Eckhard Pache (1991) 'Rights vis-à-vis the administration at the Community level', in Antonio Cassese, Andrew Clapham, and Joseph Weiler (eds), *Human Rights and the European Community: Methods of Protection*, Baden-Baden: Nomos, pp. 455–91; Koen Lenaerts and Jan Vanhamme (1997) 'Procedural rights of private parties in the Community administrative process', *Common Market Law Review*, Vol. 34, n. 3, pp. 531–69. Hanns Peter Nehl (1999) *Principles of Administrative Procedure in EC Law*, Oxford: Hart Publishing, pp. 71–91. This approach underlines Craig's analysis (*op. cit.*, pp. 314–30) and, partially, Tridimas's (*op. cit.*, pp. 378–94). See also Azoulai, *op. cit.*, particularly Part I and Chapter 2 of Part II, and Barbier de la Serre (2006) 'Procedural justice in the European Community case-law concerning the rights of the defence: essentialist and instrumental trends', *European Public Law*, Vol. 12, n. 2, pp. 225–50.

[35] Azoulai, *op. cit.*, Part II, through his analysis of procedures of social regulation (see in particular, Chapter 2 of Part II). Craig, *op. cit.*, *loc. cit.*

[36] Schwarze, *op. cit.*, *loc. ult. cit.*

[37] For example, Alberto Zito (2002) 'Il diritto ad una buona amministrazione nella Carta dei Diritti Fondamentali dell'Unione Europea e nell'ordinamento interno', *Rivista Italiana di Diritto Pubblico Comunitario*, Vol. 12, n. 2–3, pp. 425–44; Denys Simon (2006) 'Le principe de « bonne administration » ou la « bonne gouvernance » concrète', in *Le droit de l'Union Européenne en principes. Liber amicorum en l'honneur de Jean Raux*, Éditions Apogée, pp. 155–76.

[38] In this sense, it shares the approaches of Azoulai and Craig.

participation, is therefore useful to the extent that it reflects and builds on these developments. The perspective of analysis is, nonetheless, a quite different one. Participation rights are not seen in this work as the legal (or political) solution to the problem of the democratic legitimacy of EU decision-making. They are studied, both from an empirical (*de lege lata*) and normative (*de lege ferenda*) perspective, with a view to building up a doctrinal contribution to the problem of the legal protection of natural and legal persons when affected in their rights and interests by the regulatory action of the EU institutions and bodies.

The issue of legitimacy crops up to the extent that the proposals put forward in this work lead to a claim of procedural legitimacy. Procedural legitimacy derives from procedures designed to ensure both the protection of the persons affected, the material justice, and the technical appropriateness of the decisions adopted by the EU administrative bodies.[39] This is in any case a different claim from the one underpinning the studies mentioned above. The extension of participation proposed in this work is not based on an argument drawn from a principle of participatory,[40] deliberative, economic, and social democracy, or administrative democracy.[41] Even if the book's propositions might be relevant from these standpoints, they are grounded in a reconstruction of the concept of participation which draws on values of the rule of law and on a conception of the relationships between decision-makers and recipients of decisions that abstracts from the form of the act adopted. These two aspects constitute the backbone of the proposed extension of participation rights to rule-making procedures.

The approach followed in this work brings it closer to the legal analyses that form the second strand of literature mentioned above, specifically to those that have attempted to provide broader views on participation, straying beyond the realm of sector specificities. The problem that grounds the topic of this book—the legal protection through the decisional procedure of

[39] On the fundamental ambiguity of the term procedural legitimacy, see Azoulai, *op. cit.*, pp. 403–4. Material justice is used throughout this work to refer to the substantive quality of a decision that embodies a composition of interests which results from taking due consideration and balancing the different public and private legally protected interests that the decision-maker is bound to take into account.

[40] On the ambiguity of the term in particular in relation to the topic of this study, see João Baptista Machado (1982) *Participação e descentralização. Democratização e neutralidade na Constituição de 76*, Coimbra: Almedina, pp. 136–9.

[41] These last two forms of democracy ground Azoulai's proposals for an extension of participation rights (*op. cit.*, pp. 484–50).

the persons who are confronted with the public regulatory powers of the EU institutions—is addressed in a 'horizontal' way, across sectors, therefore abstracting from, but not ignoring the developments which have occurred in the specific areas of substantive law. As such, the book will not offer a detailed account of the procedural rules which have tended to be the focus of legal studies (for example, competition law), but will refer to these studies in developing a wider approach to participation rights. Rather, it builds up a conceptual framework on the basis of general theories of administrative law that are valid in the EU context, and tests it in sector studies, the choice of which was explained above. Therefore, the analysis of the limits and possibilities of expanding participation rights in EU administrative law takes as a starting point previous works that have embraced this perspective.[42] At the same time, another feature defines the approach adopted: as mentioned, elements drawn from national administrative laws are crucial both to understanding current features of participation rights in EU law and to providing tools for a critical analysis of the *status quo*. Nevertheless, it was considered that there was no need to undertake in this book a comparative study proper, given that existing works provide enough elements for these purposes.

The approach described situates this work as a conceptual analysis undertaken in the field of EU administrative law, understood as the part of EU law that one may consider to be administrative law.[43] As endorsed here, this is not defined by reference to a typology of acts or of functions grounded in the 'traditional' separation of powers.[44] In accordance with the view of administrative law as an instrument to harness the exercise of public power to the rule of law, in particular in its relationships with private persons, the administrative law of the EU is delimited by identifying the scope of the regulatory action of the EU institutions which is capable of impacting directly on the legal sphere of private persons and, thus, creating legal links between these two poles.[45] There are admittedly considerable pitfalls in such an endeavour, but it is nonetheless believed that this might be a valuable path to define in the realm of EU law the area of law dealing with what, at the national level, is usually termed

[42] Namely the works of Paul Craig and Loïc Azoulai mentioned.

[43] Schwarze, *op. cit.*, pp. 3–10. This also underlines Craig's *EU Administrative law*.

[44] Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (2007) 'Introduction générale', in Auby and Dutheil de la Rochère (eds), *Droit administratif européen*, Bruxelles: Bruylant, pp. 1–22, at pp. 4–7.

[45] Cf. the second premise pointed out above, Section 0.

implementation or '*exécution de la loi*'. A second aspect of EU administrative law—the mutual interferences between the national and the EU administrative legal orders[46]—is muted in this study, in the sense that it is taken merely as a methodological premise which allows the author to resort to national law for the purposes stated above.

At the same time, the book sustains a paradigm of EU administrative law which propounds the adoption of rules and principles directed at ensuring the material justice and technical appropriateness of administrative decisions while respecting the subjective rights and legally protected interests of private persons, in the segment of EU administrative law which relates to the exercise of regulatory power by the EU institutions and bodies. This is consonant with the developments which have occurred in European law and which have enhanced the position of the individual in the European legal system.[47]

One final word is due, before presenting the structure of the book. The author does not ignore the political connotations of the topic. Participation—as a fact and as a topic of an academic study—is hardly ever ideologically neutral.[48] However, this aspect is not pursued in the analysis. The choice of 'ignoring' this dimension of participation follows from the aims of this work. In particular in the framework of EU legal-political studies, and given the more recent debates on the role of participation in the EU polity,[49] this choice is deemed to be important, in order to bring to light the legal values in which participation is grounded and to dwell upon the potentialities and limits of participation as a legal concept. This is the key to the book's contribution to the theory of EU administrative law.

1.4 Structure

The conceptual framework on which the book is based is presented in Chapter 2. This characterizes the concept of participation adopted in the book. A legal-technical approach is proposed, since this work addresses mostly the legal dimensions of participation, even if these are analysed in

[46] Schwarze, *op. cit.*, *loc. ult. cit.*; Auby and Dutheil de la Rochère, *op. cit.*, pp. 3–4 and 6–7.

[47] See Section 0 above.

[48] Mario Nigro (1980) 'Il nodo della partecipazione', *Rivista trimestrale di diritto e procedura civile*, Vol. 34, pp. 225–36, at p. 229.

[49] See Chapter 3.

the context of its political significance and developments. The concept of participation adopted allows us to single out a rights-based approach to participation from other forms of participation. It is built by reference to the functions of participation and to the persons who are entitled to access the procedure. Furthermore, an overview of the basic rules and principles of some national legal orders provides a solid basis to understand the reasons and limits of the distinction between rule-making and individual determinations, which delimits the scope of participation rights both in national and in EU law. The chapter assesses the limits of this approach and this opens the way to proposing the concept of legal administrative relationship as the framework for the recognition and interpretation of participation rights. Finally, participation rights are characterized as relative rights, given that, in justified circumstances, incompatible requirements of decision-making may prevail; in any case, this contingency needs to be framed within specific limits, an aspect which is also addressed in this chapter.

As mentioned above, the legal analysis undertaken in this book is embedded in the political and institutional contexts of European integration. Thus, Chapter 3 seeks to understand the development and meaning of participatory mechanisms in the EU, thereby providing a broader view on the role of participation in the EU legal and political system. Based on an historical-institutional analysis, this chapter highlights the origins of interest representation in the European integration process, covering both the European Coal and Steel Community (ECSC) and the European Community (EC). Furthermore, it describes the forms of participation that permeate the EU institutional set-up and in each case draws attention to the underlying rationales of participation. Chapter 3 reveals, in particular, the continuity between the long-standing practices of interest representation and the participation practices that have been developed under the so-called new modes of governance. Moreover, it characterizes interest representation as a constitutive feature of the EU institutional set-up, revealing its constitutional significance. In addition, the various forms of participation mentioned in Chapter 2, which are different from the rights-based participation endorsed in this book, are illustrated here, namely consultation, forms of involvement of private persons that lead to power-sharing, and organic participation. The analysis of their meaning shows the contrast between these forms and the rights-based participation defended in this work.

Chapters 4 and 5 are the core of the book. Together, they reveal the strengths and weaknesses of the Courts' case law in relation to the scope of protection afforded to natural and legal persons through participation

rights in decisional procedures that might have an adverse effect on their legal sphere. Both chapters approach participation from a rights-based perspective and present how participation is and may be legally conceived in EU law. In the main, Chapter 4 examines and points out the limits of the Courts' stance in relation to procedures leading up to the adoption of individualized decisions. This study is introduced by a brief overview of how the procedural protection of the individual has been devised in EU law. This draws on the relation between procedural protection and judicial review and characterizes the general approach of the EU legislator in this regard. This overview highlights the importance of the Courts' role in the development of participation rights, and, at the same time, defines the context that frames the Courts' jurisprudence. The analysis of the Courts' case law on the right to be heard constitutes then the main part of the chapter. It shows, in particular, how the right to be heard has been conceived and approached by the Courts and it will demonstrate how their stance is predetermined by the conception of the procedure as entailing a bilateral relationship between the deciding body and the addressee of the decision or, more generally, the persons thereby affected.

Chapter 5 complements Chapter 4, insofar as it examines the Courts' approach to participation in rule-making procedures. It is argued that the different positions of the Court on the right to be heard in individual procedures, on the one hand, and rule-making procedures, on the other, are grounded in the same premise, in particular on the preconception regarding the structure of the procedure that is identified and characterized in Chapter 4. Although intertwined with other factors, this was determinant in the *Atlanta* judgment, the Courts' leading ruling on participation rights in rule-making procedures. In this chapter, the rule according to which participation rights cannot be recognized in rule-making procedures is deconstructed. The reasons why the Courts excluded general acts from the realm of participation rights are scrutinized and criticized, including both the arguments invoked in *Atlanta*, which were limited to acts adopted on the basis of a Treaty article, and the extension of this exclusion operated by subsequent judgments. In fact, the same arguments were then used to cover other acts of a general nature, but no further reasons were given to support this extension. After having dissected the Courts' stance with regard to participation rights, this chapter assesses how the concept of participation rights proposed in Chapter 2 may contribute to surmount the shortcomings of the Courts' approach with regard to the legal protection of the individual confronted with the regulatory

intervention of the European Union. Finally, the last part of the chapter considers how the modifications proposed could impact on the scope of other procedural guarantees that are ancillary to the right to be heard, namely the right to access information, the duty to state reasons, the duty of careful and impartial examination, and language rights.

The sector studies undertaken in Chapters 6 to 8 illustrate the limitations of the current *status quo*. In addition, they explain which type of situations should give rise to the recognition of participation rights, according to the proposed construction, and to whom these should be granted. The problems that could result from the extended scope of participation rights that is defended in the book are also considered.

Chapter 6 addresses the role of consultation procedures in the context of the Lamfalussy process, contrasting it with the rights-based approach to participation that underpins the book. Therefore, in a way, it builds a bridge between the political and the legal strands of participation. The Lamfalussy process is of particular interest in this work because participation—in the form of consultation procedures—has a prominent role in this regulatory structure. The study undertaken in this chapter has a threefold purpose. First, admitting that some of the reasons that ground consultation are also present in other sectors of EU policy-making, this chapter contributes to clarifying the reasons why participation has become one of the principles of EU governance. At the same time, the specificities of consultation in the field of financial services are highlighted, as well as the features that distinguish them from the rules and standards of consultation defined in the Commission White Paper and in its Communication 'Towards a reinforced culture of consultation'. This study, therefore, relates to and concretizes some of the themes developed in Chapter 3. Secondly, it clarifies the distinction between, on the one hand, the rights-based participation put forward in the book and, on the other, consultation procedures as they have been designed and conceived in the context of EU governance and developed especially by the Commission's governance initiatives. The analysis of rule-making following the Lamfalussy process illustrates the differences but also the points of contact between consultation and rights-based participation. This chapter shows how the latter has been quite a distant concern in the setting up of the consultative procedures, specifically, in the area of financial services, and, in general, in the consultation practices that pervade European governance. Thirdly, one specific decisional procedure covered by the Lamfalussy process—the one ruling the adoption of accepted market practices—is analysed. This illustrates one of the aspects of

rights-based participation presented in Chapter 2: the contingency of participation in the face of general conditions and functions of decision-making. In this respect, Chapter 6 addresses the problems ensuing from the recognition of participation rights in rule-making procedures and elaborates on the solutions to circumvent these problems that are proposed in Chapter 2.

Chapter 7 analyses selected legal regimes in the sector of food law. These have in common the fact that they frame the adoption of decisions that impact directly on the legal sphere of private persons. The procedures analysed in this chapter also illustrate how the growing decisional powers of the Commission in these matters contrast with scant concern for ensuring procedural guarantees to persons affected by its decisions. This chapter dwells particularly upon two threads of the book. First, the distinction between general and individual acts should not ground the scope of participation rights. In other words, the form of the act adopted should not be the criterion to determine in absolute terms when they are recognized or not. This is demonstrated by characterizing a specific type of act: the market authorizations of foodstuffs. Depending on the legislative technique chosen in each case, these may be adopted either through an individual decision or a general act, both having similar regulatory effects. Secondly, Chapter 7 illustrates the type of regulatory intervention that is at the origin of administrative legal relationships and analyses the consequences that should ensue in terms of participation rights. In addition, it is argued that two different layers of participation rights may be identified in the procedures leading to the adoption of market authorizations. This difference will be further examined and clarified in Chapter 8, namely by highlighting the different procedural status attendant on the exercise of participation rights.

Chapter 8 examines the only provision of the Treaty that makes the decisional powers of the Commission dependant on a participatory procedure (Article 108(2) TFEU). The study of the Courts' case law regarding the rationale of the procedural intervention of persons concerned, as well as the very concept of persons concerned for the purposes of this norm will test four essential aspects of the construction of participation rights presented: the functions of participation as inseparably encompassing a dignitarian and an instrumental rationale (even though they may have different weight in different circumstances);[50] the distinction between two categories

[50] The term 'dignitarian' is used in this book to refer to the fundamental dignity of the person when subject to an administrative intervention.

of interested persons which grounds different procedural status; the claim that the scope of those entitled to participate needs to pay heed to the rationales of participation and is dependent on the substantive link of the person concerned with the underlying material situation; and the inconsistencies of the general/individual divide to ground participation rights, illustrated by the fact that state aid decisions may impinge upon general acts adopted by Member States. This sector study demonstrates that, despite the Courts' hesitations and some contradictions, there are enough indications in the jurisprudence to ground the distinction between the two layers of participation rights that are defended in this work: those of holders of subjective rights and those of holders of legally protected interests. Furthermore, the analysis of the Courts' case law on these matters illustrates how the rules on standing have influenced the way participation rights have been conceived in EU law. Finally, this chapter also tests whether the provision of Article 108(2) TFEU should be extended by analogy to rule-making procedures that have become an acquired competence of the Commission. This examination is made on the basis of the following assumption: one can deduce from the Treaty that, in the field of state aid, the powers expressly assigned to the Commission that may impact on private persons' legal spheres were intended to be framed by a participatory procedure. This assumption is backed up by an overview of the preparatory works of the Treaty in this regard.