Composite administrative procedures are procedures in which administrative authorities from the Union and from Member States cooperate and each provide a relevant input into the final administrative decision taken at the Union or the national level. These procedures are becoming more and more frequent as a mechanism for the implementation of Union policies and they reflect a multi-layered system of EU and national administrative cooperation that goes beyond the old paradigm of the indirect implementation of EU Law. Nevertheless, they remain a relatively unexplored topic in European Administrative Law. However positive they may be for building networks of mutual trust between the Union and national administrative actors, and however efficient for the adoption of technically complete and consensual decisions, they raise many legal concerns. After defining these procedures and placing them in context, this book goes on to identify the legal shortcomings to which they give rise from the perspective of the individual and points towards potential solutions. Composite procedures reflect very well the current state-of-play of European integration with regard to Administrative Law, but the European citizen should not suffer in his legal position owing to their complexity.
# Table of contents

List of abbreviations .......................................................... 11

Foreword ............................................................................. 13

Presentation ......................................................................... 21

Chapter 1.—Introduction .................................................. 25
  1.1. Objective ................................................................. 25
  1.2. Structure .................................................................. 27
  1.3. Methodology ........................................................... 32

Chapter 2.—The European Union’s public administration ......... 35
  2.1. Justification, method and terminology ......................... 35
  2.2. Historical and comparative background of a European public administration .......................................................... 37
    2.2.1. Original design of a European public administration ........................................................................ 37
    2.2.2. The different models of federalism: dual federalism, cooperative federalism and executive federalism .......... 40
    2.2.3. The transformation into a new cooperative model ........................................................................ 45
  2.3. The mismatch: today’s European public administration and the classical legal approach ................................. 47
  2.4. A European public administration thoroughly different from its national counterparts. ................................. 53
  2.5. The impact of the European integration process in European public administration ........................................ 59
  2.6. European public administration in the Treaty of Lisbon ........ 64
    2.6.1. An open, efficient and independent European administration as an objective in the Treaties. Article 298(2) TFEU ........................................................................ 64
    2.6.2. Hierarchy of norms. Articles 290 and 291TFEU. ........................................................................ 70
    2.6.3. Fundamental rights. Articles 41 and 42 ChFR ........................................................................ 72
    2.6.4. The constitutionalisation of a European public administration ......................................................... 74
  2.7. What public administration? A European administration, a Union administration and an integrated administration of the EU ...................................................... 75
    2.7.1. Arguments for a European public administration. ........................................................................ 75
    2.7.2. The polysemy of a “European public administration” ........................................................................ 77
  2.8. Conclusions ................................................................... 83
# TABLE OF CONTENTS

## Chapter 3.—Administrative procedures in the European Union

3.1. Preliminary remarks ............................................ 87

3.2. **Early historical and academic background of the notion of administrative procedures** ................................. 89
   - 3.2.1. Scholarly notion of administrative procedures ................. 89
   - 3.2.2. Early concept of administrative procedures in Europe and in other countries .......................... 91
   - 3.2.3. The evolution towards a more central role of administrative procedures ........................................... 97
   - 3.2.4. The pending transformation of administrative procedures .... 104

3.3. **The concept of administrative procedures in European comparative law** .................................................. 106

3.4. **The concept of administrative procedures in the European Union** .......................................................... 113
   - 3.4.1. Is there such a thing as an «administrative procedure» of the European Union? ............................. 113
   - 3.4.2. The initial irrelevance of administrative procedures in the European Communities .......................... 117
   - 3.4.3. The evolution and consolidation of administrative procedures at the EU level ........................................ 119
   - 3.4.4. The case law of the Court of Justice and the development of general principles of European administrative procedural law ......................................................... 122
   - 3.4.5. The codification of administrative procedures in the European Union .................................................. 136
   - 3.4.6. Types of administrative procedures from the EU perspective .......................................................... 144

3.5. **Conclusions** ..................................................... 146

## Chapter 4.—Composite procedures

4.1. Preliminary remarks ................................................ 149

4.2. **Composite procedures: concept, term and scholarly attention** ............................................................ 150
   - 4.2.1. What are composite procedures? .............................. 150
   - 4.2.2. Why the term «composite procedures»? ....................... 154
   - 4.2.3. The increasing importance of composite procedures in legal academia .............................................. 155
   - 4.2.4. Classification of composite procedures ......................... 158

4.3. **The origin and development of composite procedures** ........................................................................... 160
   - 4.3.1. Comitology ..................................................... 162
   - 4.3.2. Agencies ....................................................... 166
   - 4.3.3. Joint execution of EU budget, shared management of European funds ................................................. 170

4.4. **Composite procedures in EU law: Analysis and some examples** ............................................................ 173
   - 4.4.1. The logic of cooperation in the implementation of EU law and policy .................................................. 173
   - 4.4.2. Active substances and plant protection products (pesticides) ......................................................... 176
   - 4.4.3. Genetically modified organisms ................................ 182
   - 4.4.4. Pharmaceuticals for human use ................................ 186
   - 4.4.5. Biocides ....................................................... 192
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.4.6.</td>
<td>Chemicals</td>
<td>195</td>
</tr>
<tr>
<td>4.4.7.</td>
<td>Management of European funds</td>
<td>199</td>
</tr>
<tr>
<td>4.4.8.</td>
<td>Protection of geographical indications and designations of origin</td>
<td>203</td>
</tr>
<tr>
<td>4.4.9.</td>
<td>Ecolabels</td>
<td>206</td>
</tr>
<tr>
<td>4.4.10.</td>
<td>Procedures in the area of freedom, security and justice. Comparison of fingerprints relating to asylum and other international protection procedures</td>
<td>208</td>
</tr>
<tr>
<td>4.4.11.</td>
<td>Trade of endangered species of wild flora and fauna</td>
<td>211</td>
</tr>
<tr>
<td>4.5.</td>
<td>Conclusions</td>
<td>213</td>
</tr>
</tbody>
</table>

Chapter 5.—Legal challenges triggered by composite procedures ... 215

5.1. Preliminary remarks ... 215

5.2. The right to be heard in composite procedures ... 217

5.2.1. The right to be heard in the EU and in Member States ... 217

5.2.2. Evolution of the case law concerning the recovery of structural funds ... 220

5.2.3. Evolution of the case law of the CFI on the repayment of import duties ... 223

5.2.4. Case law on the listings of terrorist organisations ... 230

5.2.5. Remarks on the current state of affairs of case law on the right to be heard in composite procedures and rights-oriented approach ... 235

5.3. The obligation to state reasons ... 240

5.3.1. The right to a reasoned decision as a citizen’s right under EU law ... 240

5.3.2. The right to a reasoned decision in composite procedures ... 244

5.4. The right to judicial review in composite procedures ... 251

5.4.1. The right to judicial review as a fundamental right and a central element in the configuration of public administration ... 251

5.4.2. The rule of law in the European Union ... 254

5.4.3. The right to judicial review according to the Court of Justice ... 262

A) Direct challenge: action for annulment ... 264

B) Indirect challenge: Preliminary ruling procedure ... 269

5.4.4. Composite procedures and judicial review: identifying the lacunae ... 273

A) First gap: determining the competent court ... 274

b) Vertical downwards procedures ... 283

c) Horizontal procedures ... 290

B) Second gap: what acts can be reviewed? ... 295

a) Preparatory acts ... 297

b) Confirmatory acts ... 305

c) Transfer of information ... 307

C) Third gap: standing to sue ... 309

a) Different conditions of access to justice at the national and Union level ... 310

b) Uncertain definition of direct concern in the context of composite procedures ... 312

5.5. Conclusions ... 318
# Table of Contents

## Chapter 6.—Proposals

6.1. Initial remarks ................................................................. 321

6.2. Regulation of composite procedures in a General Act on EU Administrative Procedures ......................................................... 323

6.2.1. The General Act on EU Administrative Procedures: arguments in favour of a codification ..................................................... 323

6.2.2. The state of play of the process of codification ........................................ 329

6.2.3. The inclusion of composite procedures in the General Act on EU Administrative Procedures ..................................................... 332

6.2.4. A proposal for the provisions on composite procedures in the General Act of EU Administrative Procedures ............................. 339

6.3. Inverse preliminary ruling procedure ............................................. 350

6.3.1. The preliminary ruling procedure and its functions ......................... 350

6.3.2. The judicial dialogue in the EU .................................................. 354

6.3.3. A concrete proposal on the inverse preliminary ruling procedure .......... 357

6.4. Conclusions ................................................................. 360

## Chapter 7.—Conclusions .............................................................. 363

## Bibliography ................................................................. 373

Cited case law ................................................................. 405

Legislation ................................................................. 419
Foreword

The European Union (hereinafter «EU») is certainly a complex structural phenomenon that has experienced an intriguing institutional evolution. Originally, it was conceived as an association of States, incepted in the 50’s to obtain a deep economic integration and at the same time to ensure peace and democracy in a continent abused by centuries of war and distress. It then evolved to become a political integration organisation whose final destination is still unclear but which in any case is leaving progressively the coastline of International law to glimpse the shores of quasi-federal entities. A journey, by the way, that has provoked already some defections among the crew, unconvinced of this final likely destination.

In any event, the EU is not yet a «State», or a «state-type» entity, and this key acknowledgement has a pervasive influx on any dogmatic effort that might be carried out when a jurist analyses the European sphinx and tries to make categorisations about the Union’s internal decision-making processes and the results of such processes.

Some of these decisional outputs and actions can still be categorised easily using the methods of interpretation of regular International law, which in this case do function as a solid «terra cognita»: for instance, when the Union negotiates, signs or «ratifies» (celebrates) an International Treaty, or when it opens a diplomatic mission in a third-country.

However, when the Union does not act in the framework of regular International treaties and relations, as a persona enjoying full legal personality of International law, the question is under which type of Law does the Union work. The easy answer is that in those cases the Union acts under its own Law, that is, under EU law (formerly «Community law»). This answer though is far from satisfying an inquiring or restless legal mind, for the very nature of EU law is probably the most intriguing legal question of the European integration. At an early stage (Van Gend en Loos, 1962), the Court of Justice of the European Communities (nowadays, the «ECJ») clarified that «Community law» constituted a new, autonomous and proper legal order, independent and not to be confused with International law or with domestic law. Nevertheless, this assertion opens up a wide array of complex issues. The most important one is probably how to fill the gaps in this comprehensive but still subject-matter limited legal order, which is grounded on «constitutive Treaties» but lacks a true Constitution. In this line of reasoning, lawyers and scholars face the regular problem of categorising certain types of «activities», «actions» or decisional outputs of the Union.
Indeed, the Union is still largely seen as a «legislator» or a policy-maker. However, the Union is also an «administrative» phenomenon and this reality opens the door to the possibility of categorising it as a «Public Administration» or «Government». When the Union (essentially the Commission and the European Agencies) «administers», that is, when it implements or applies its own legal rules, plans and programs, it may certainly act like a domestic bureaucracy or administrative agency. In this capacity, the Union approves and adopts different types of «acts». For the purpose of these lines, the most relevant are the «decisions». The word «decision» is certainly used by primary law for different purposes: for imposing a fine on a company, for celebrating a Treaty (Council decision) or for adopting a multi-annual action plans on the environment (Decision of the European Parliament and of the Council). Here, we are interested in the Decision as a synonym of «administrative adjudication» that may enlarge or reduce the juridical sphere of an individual. These are the «decisions» that are addressed to specific recipients (art. 288, TFEU). But: what is a «Decision» in this sense? What is the very nature of such «Community acts»? The Treaties are silent on this crucial question, and secondary law has not yet provided a general definition or legal regime of such «binding decisions having a particular reach».

At that precise point is when lawyers and scholars have tried to categorise the different elements of such decisions. In the lack of substantive legal materials at EU level, they try to carry out such categorisation using their national, common concepts and legal methods. To put it quite plainly, a jurist may well consider applying the saying: «if it looks like a duck and flies like a duck … it’s a duck». So, when a jurist tries to identify the field of the Law which usually has to do with «equivalent» types of acts in his own country (decisions issued by governmental or Public-law bodies in the discharge of their powers and that are binding upon individuals) it may be easy for him to conclude that this field of reference is Administrative law.

Certainly, neither Canon law, nor Commercial law or Criminal law can provide analytical tools that might be used «by analogy» to categorise an EU decision (for instance, a Commission decision imposing a fine on a company for a breach of EU competition Law) while Administrative law has been for centuries the sector of the legal system governing the relations between the government (la «puissance publique») and the individuals. And one can guess that, beyond the unclear and evolving legal nature of the Union, nobody may deny that it is a «governmental-type» of organisation. The Union has governmental, regulatory and Public-law powers (the most relevant being its power to enact legal rules that are binding on individuals and moreover on its constituent sovereign States). Therefore, Administrative law could plausibly be the preferential branch of the Law that might be used to categorise EU decisions, when the Union operates like a domestic executive, governmental power.

There is still an intellectual obstacle that could make uneasy or problematic the use (per analogiam) of the tools and instruments of national Administrative
Law when we want to built a dogmatic construct on the «administrative» activity of the Union: Administrative Law presupposes the existence of a «Government», Public Administration or *Administration Publique*. But, if the Union is not a State, can it really have a «Public Administration» in the technical sense of the word? If the Union is not explicitly structured on the mould of the Separation of Powers principle, how can it have an «executive power», especially in the light that the Treaties do not use that terminology? It is true that the EU «administers», «runs» or «manages» programs, plans and legal rules, but in which way is the Union different from —for instance— the Council of Europe, an intergovernmental organisation that also administers, runs and manages its own programs and activities? The crucial difference is that the Union may trigger formalised legal relationships with individuals and firms (which cannot be categorised as «interna corporis» relationships), and that at the end of a proceduralised path it may issue unilateral decisions that are binding on citizens and may extend o restrict the juridical sphere of such individuals and firms: for instance, the successful registration of a chemical substance in the ECHA, authorising a merger of firms, imposing a fine on a company or granting a «Jean Monnet fellowship» to a University professor.

This is certainly a crucial legal debate, that was solved step by step (albeit without a clear or comprehensive picture) by the ECJ and —especially— by the General Court (formerly, «Court of first instance»). For instance, in the early *Von Lachmüller* case, adjudicated in 1960, the ECJ declared that the legal personality of the Commission was «one of public law by virtue of the powers and duties appropriate to it».

In this endeavour, the European courts were certainly conditioned by two constraints: the «Scylla»of the principle of autonomy of EU Law, under which that Law is a «tertium genus», original and alien to the categories of national law; and the «Charybdis» that the legal ideology inspiring the individual EU «decisions» and the judicial control of such decisions was clearly grounded on classical French Administrative law. Just a summary reading of the articles of the TFEU regulating the «action for annulment» reveals that this remedy replicates to a large extent the «recours administratif» sculpted by the great continental tradition of *Droit Administratif*, which irradiated the *Old Continent* and some South-American countries during the XIX century.

At the same time, the European Communities approved quite early legal rules on matters which clearly referred to the matters that are typically regulated by national Administrative law and by the domestic regulation of Administrative procedures. For instance, Regulation 1182/71, of 3 June 1971, determining the rules applicable to periods, dates and time limits (in handling files and administrative dossiers); or Council Regulation No. 1, of 15 April 1958, determining the languages to be used by the European Economic Community (especially in handling files and dossiers, and in its relationships with firms and individuals).
For several decades the situation could be characterised as a «hiatus» between the judicial practice and the works of commentators on the one hand, and the «written» EU Law on the other. Academics quickly assumed the convenience and even the logic of using national Administrative Law categories to rationalise EU «decisions», and concluded that «decisions» are in reality «actes administratifs unilatéraux», to use the classical French terminology. Consequently, Public-law scholars agreed on the scientific viability to depict the group of rules and principles governing the relations between the European institutions and the citizens as «European Administrative Law», and consequently edited extensive collective books presenting the different elements and areas of such legal field (inter alia: J.Schwarze (1992), M.Chiti (1999), L.Parejo (2000); P.Craig (2012); J.Auby & J.Dutheil de la Rochère (2014), etc).

By the turn of the millennium, different key legal developments took place in primary and secondary law, which in my view did clarify the methodological questions that are presented here. On the one hand, and for the first time, the Treaties welcomed the concept of a Union «open, efficient and independent administration» (art. 298 TFEU). Although the word «administration» is certainly polysemic in English (as a function/process, or as an organisation), it is clear in our view that the Treaty incepts here an «organic» sense of the word. That is, it refers to a bureaucratic compact, a sort of «governmental» structure or Public Administration (*Administration Publique*), especially in the view of the legal nature of the Union as a governmental phenomenon. The consultation of the different versions of TFEU confirms this understanding: the Treaties have for the first time acknowledged the existence of an Administration (a «Public» one) in the organic sense of the word (and not the functional). In this sense, the «organic» meaning of the word «administration» used at art. 298 TFEU contrasts with the functional one used at art. 41 of the CFREU (precisely, the *good administration*).

Moreover, different pieces of secondary law have eventually welcomed and introduced the crucial concept of «administrative act» (in the French-tradition sense of «acte administratif») in a way that almost makes interchangeable this construct with that of a «decision». This is the case of Regulation 1367/2006, of 6 September 2006 (the so-called «Aarhus regulation»), especially at art. 3.1. (g), and Regulation 582/2012, of 22 May 2012, on biocides [art. 3.2. (m)]. For instance, the former the «administrative act» as «any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects».

This probably too long introduction is to defend the theoretical possibility to identify the existence of «administrative procedures» in the EU (even if the Treaties and the secondary law mostly ignore this terminology) and the viability to analyse and discuss them critically, using the tools and conceptual references of national Administrative law. In this sense, any reflection or study on the «administrative» application of EU law is irretrievably connected with the ques-
tion of «how» it is applied. The two basic questions here are: who applies?, and following which steps, modus operandi or procedures?

From the perspective of the first key question, scholars have identified two basic ways by which Union law is «administered», implemented, applied or executed. On the one hand, the implementation that is carried out by what Union rules generically identify as «the authorities of the Member States», which in reality means the MS internal agencies and Public Administrations. As it is well-known, this is the most common scenario, in which the Union legislates, while the Member States implement and apply European legislation. This form of implementation Union law is usually identified by scholars as «indirect» administrative application or execution (mise en œuvre indirecte, in the French terminology). In principle, this form of administrative implementation of EU law is entirely governed by national administrative law (under the principle of national institutional autonomy) although this principle has received many corrections on the ground of the effet utile of EU law by way of the case-law of the European court, thus provoking some of the most striking transformations of the MS legal orders in the last decades.

By contrast, the «direct» administrative application of Union law (mise en œuvre directe) is the process by which the institutions, bodies and agencies of the Union execute, implement or apply the rules previously approved by the Union itself. This is, then, the application of European law by the Administration of the Union, a concept that, as seen supra, the Treaty of Lisbon has just established at constitutional level.

This executive dimension of the Union (Commission and Agencies) involves, like in the case of the indirect implementation of EU law, the adjudication and disposal of rights and interests of the citizens, as a result of the exercise of administrative, governmental-like powers. Furthermore, these powers are discharged in the framework of formalized processes that are structured on the model of the legal relationship. Those processes, in which individuals have certain rights or guarantees (even crystallized at «constitutional» level through the CFREU) do terminate in decisions or administrative acts that are binding for their addressees.

The growing executive role of the European administration has triggered the parallel development of the so-called «European administrative law». That is, the direct administrative application of Union law is the legal process that constitutes the fertile ground on which the European Administrative law has been born and has developed. In the same way that domestic «administrative law» flourished during the last two centuries in connection with the domestic public administrations, so has a set of European rules governing the «procedures», «the powers» and the «acts» of the European administration. All these provisions, along with the case-law of the European courts that have interpreted them (especially distilling «principles» of more or less universal application) constitute the European Administrative law.
At this point, we should not forget that in the Western legal culture, an administrative decision assumes the pre-existence of an «administrative procedure» (procedures administratives, procedimiento administrativo, procedimento amministrativo) which is the group of steps, inputs and stages, ordained in a temporal sequence, that an administrative agency has to follow in order to reach a decision or adjudication. This is not only a corollary of any efficient resource management (private firms also follow «procedures») but a guarantee of the «due process» principle that pervades all the relationships between the State and the individual.

Correlatively, the concept of European administrative procedures has also been developed, by way of mimesis or analogy with domestic Law. The European law on administrative procedures may consequently been defined as the set of provisions, rules and principles that regulate the formalized procedures through which the EU institutions and bodies adopt particular decisions or administrative acts that affect positively or negatively the citizens, businesses and other legal persons. By the way, we should use this word in plural, since it is not regulated in a unitary way. For the time being, there is no «European administrative procedure», but hundreds of them, each one regulated by one directive or regulation, or by a group of them.

In some countries (such as Spain or the USA) the administrative procedures have been codified in a sort of general rule with a vocation of universal or cross-cutting application in every field of governmental activity. In other countries, on the contrary, there is no general regulation of the administrative procedures, for different reasons. Probably the legal and intellectual tradition of the country rejects such categorisations. Maybe the legislators have been unable to arrive to a common regulatory denominator for all the different procedures that are handled by the plethora of administrative agencies under the ever increasing jungle of administrative laws and regulations, something that makes impossible to reduce to a single mould the diversity of administrative procedures.

In the case of the EU, the situation is well-known: at least for the moment, the Union does not have a general provision regulating in a comprehensive or detailed way the administrative procedures that must be followed by the Commission and the European «decentralised» Agencies) when they apply directives and regulations. Nevertheless, this does not mean that the European administrative procedures are not regulated, since the Union has a noticeable bunch of legal rules on this matter, ranging from primary law (for instance, the right to a good administration) to secondary law (like the regulations mentioned supra) and even internal and codes of good administrative practices. Moreover, the case-law of the European Courts has laid down numerous general principles that can be applied in practically any procedural context. However, these principles have been formulated as specific solutions in response to particular challenges posed by the dynamic process of application of Union law by the Commission and
the European Agencies, and for this very reason their legal force is conditioned or limited by the factual scenario in which they flourished.

This legal (and soft-law) context is undoubtedly extensive, but also fragmented and lacking an internal system or holistic conception. Hence, many have underlined the convenience or even the need to carry out a process of codification of the said European legislation. The pro-codificatio impetus has already generated important results, possibly the most successful attempt being the RENUAL project, promoted by the European Parliament itself. However, the project has not achieved the necessary political consensus and presents its own legal challenges, apart from the fact that the concept of codification itself can be seen as unnecessary or alien to numerous national legal traditions.

The present situation should produce some concerns among lawyers, because the lack of a general framework reference for administrative procedures may produce countless problems. This sensation is reinforced if we analyze the modus operandi of the Commission and the European Agencies when they implement complex legal rules affecting thousands of firms and citizens, which were enacted without having a clear «administrative law» awareness. Loopholes and lacunae are common, and the recourse to «general principles of EU Administrative law» is not always viable or satisfactory. One of the best examples of this is probably the implementation of Regulation 1907/2006 («REACH») by the ECHA and by the Commission. In my view, it is probably evident that there is an asymmetry between the range of the task to be performed by the Union administration (namely that of applying a complex and ever growing bunch of regulations and directives) and the tools that are at its disposal (an heterogeneous and unsystematic construction based on «ad hoc» solutions).

A final key reflection in this field is the fact that the «direct» and «indirect» implementation or administrative implementation of EU law do differ only according to the organic level (European or domestic) that carries out the task or process of application-execution of the rules. However, in many cases these two organisational levels do no operate as disconnected or watertight compartments. On the contrary, they may appear mixed or intertwined. In this sense, it was inevitable that, in the heat of the increasing administrative cooperation between the European and national administrations in the application of many Union rules, a kind of «tertium genus» would emerge. In these cases, both the European and the domestic public administrations do take certain steps and introduce different inputs in the administrative procedures (an opinion, a report, a proposal, etc.) although the responsibility for adopting the final decision or adjudication corresponds exclusively to the European or to the national administration. To clarify, at the end of the procedures there is no «joint» decision, that is, the decision is authored either by the Commission (or a Union agency) or by the national agency, Ministry or department. Hence this growing form of implementation of EU law is identified by scholars as «mixed» or «hybrid». Cor-
respondingly, this scenario or shared participation in the handling of the file or dossier generates administrative procedures that have been depicted as «mixed» or «composite» administrative procedures.

Although the legal literature analysing the «direct» and the «indirect» implementation of EU law is certainly plentiful, there is still a big room to explore in the field of «mixed» or «hybrid» implementation and in the legal governance of «composite» administrative procedures. The questions and challenges are countless, since this reality is even more difficult to encapsulate by the Law: domestic legislation may ignore the input of the Union administration or may depict it as an «alien» or «foreign» input (therefore not regulated by domestic law), and the same rationale may apply to European Law. In the middle, in the unclear dynamics of mutual interaction between two separate governmental levels, the problems may arise for the citizens (administrative and judicial appeals, weight of the input of the Union in the final decision of the national bureaucracy and vice-versa, etc.)

This is why the book of Dr. Sergio Alonso that I have the pleasure to preface is so interesting. These types of contributions are of utmost importance because they explore a sort of «inter regnum» between direct and indirect administrative implementation of EU law. In reality, these two categories are far from being neatly distinguishable both in theory and in practice, and many administrative procedures involving EU law are, in reality, «composite» or hybrid. In this sense, Dr. Alonso undertakes a careful and comprehensive exploration of this field, and solves in an authoritative way both the conceptual intricacies and the technical and practical problems that are triggered by the mixed administrative procedures in EU law, both from the perspective of the citizen’s rights and legitimate expectations, and from the institutional machinery of the Union. In this sense, he not only describes and presents the current legal scenario, but dares to propose possible solutions to circumvent the numerous loopholes and lacunae that those procedures raise at present.

This monograph is the final and updated version of the doctoral dissertation that the author wrote under my supervision at Carlos III University of Madrid, which obtained the highest academic grade. Furthermore, his brilliant work eventually obtained the prestigious International Prize for European Public Law Research «Luis Ortega Álvarez», awarded by the Center of European Studies of the University of Castilla-La Mancha, on the proposal of an international jury composed by prominent experts on these topics.

I am more than sure that the inquisitive reader, researcher or practitioner will not be disappointed by this book, and that he will find many interesting insights and perspectives.

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Presentation

One of the main duties of a University Research Institute should be to promote the results of the work carried out by the specialists in its scope of research. Furthermore, when that University Centre bears the name of its founder, doing so is a way of honouring him and connecting his memory to the relevant issues he dealt with.

This is the dual purpose with which we, at the Centre for European Studies «Luis Ortega Álvarez» of the University of Castilla-La Mancha, on April 15, 2015, coinciding with the first anniversary of the death of Professor Ortega, held the First Edition of the International Prize for European Public Law Research. On March 9th of this year, in the context of the XXVII Seminar on Regional Studies —which he also promoted—, a jury made up of world-renowned lawyers (Professors Luciano Vandelli, who presided the session, Tomás Font, Elisenda Malaret and Francisco Balaguer) granted the first award, unanimously and in accord with its originality, scientific rigour and relevance to the development of European Public Law, to Sergio Alonso de León for his work Composite Administrative Procedures in the European Union.

In my capacity as Director of the Centre for European Studies, it is my privilege to thank all the members of the jury for their thorough work in examining the studies presented and their professionalism in the deliberations to award the prize. It is also necessary to mention the essential economic support of the Dean of the Faculty of Law and Social Sciences of the University of Castilla-La Mancha, the research group on Administrative Law of the University of Castilla-La Mancha and the Parliament of Castilla-La Mancha for the co-publication of the work, along with Iustel Publishing. With this first volume, we will open a new collection that we hope will be fruitful.

Of course, the author of the book, Dr Alonso de León, deserves special recognition, not only for his generosity in deciding to attend the Prize call, but also for his excellent work, the thoroughness with which he deals with research and the contributions he makes on a topic of unquestionable interest, directly connected with one of the lines of research that Professor Ortega opened during his academic career.

When we thought about this prize, we deemed it appropriate to include a prologue as a presentation of the winning piece. Once the jury had made a decision and the results were known, it was pertinent to entrust this task to Ángel Manuel Moreno Molina, Professor of Administrative Law at the Univer-
sity Carlos III of Madrid and the supervisor of the PhD thesis that provides the basis of the work now being published. Thanks also to Professor Moreno for his reflection in the Preface.

Although the Spanish Universities are probably not going through their best moment due to the lack of support for research, the publication of this work reveals a double reality: on the one hand, that the monographic study on European Law issues is still absolutely necessary to contribute to the advance of legal Science and to the construction of Europe itself; on the other hand, that the modesty of a Research Institute and the youth of a University are not incompatible with excellence in the diffusion of knowledge.

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