The Model Rules on EU Administrative Procedures: Adjudication

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CHAPTER 4

The Book III of the ReNEUAL Model Rules from a Spanish Perspective

When Procedural Law Becomes Substantive

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A. Introduction

In this chapter I will analyse Book III of the ReNEUAL Model Rules (Model Rules)[1] from the perspective of Spanish Administrative law.

Adopting a national perspective to analyse an academic code mainly addressed to the EU institutions may be questionable. Within the Member States, it is certainly not usual to examine the law applicable to the national central Administration from the perspective of the regional Administrative law.

This approach is however justified at least for the following reasons.

First, although European Administrative law – in its narrow sense[2] – has experienced a strong development particularly in the last two decades, it still isn't as mature as national Administrative law. It presents many gaps and has achieved so far a lower degree of academic systematisation. With the only exception of the non-binding European Code of Good Administrative Behaviour,[3] there is no other similar code at EU level or at an equivalent supranational level that the Model Rules can be compared with. Book III of the Model Rules has been therefore strongly inspired by the existing national codifications[4].

Second, even if – mainly for strategic reasons – Book III of the Model Rules is only applicable to the EU institutions (unless sector-specific EU law or the respective Member State law renders it applicable to Member State authorities[5]), it is also expected to inspire national legislators, judges, officials and scholars.[6]

Third, from a theoretical point of view, a comparison between the law applicable to EU institutions and the national law is interesting to identify regulatory models and influences and see how they circulate within the European legal (and administrative) space.[7]

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1 H. C. H. Hofmann, J.-P. Schneider, J. Ziller, J.-B. Auby, P. Craig, D. Curtin, G. della Cananea, D.-U. Galetta, J. Mendes, O. Mir, U. Stelkens, M. Wierzbowski (eds.) *ReNEUAL Model Rules on EU Administrative Procedure*, version for online publication, 2014, available at http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/ReNEUAL-%20Model%20Rules-Compilation%20Books%20I_VI_2014-09-03.pdf.

2 As the law applicable to the EU Administration ("*Eigenverwaltungsrecht der EU-Administration*" according to E. Schmidt-Assmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2nd ed., Springer 2006) 385 ff.)

3 European Ombudsman, *The European Code of Good Administrative Behaviour*, Luxembourg, Office for Official Publications of the European Communities, 2005.

4 See paragraphs 28 to 33 of the introduction to the ReNEUAL Model Rules included in Book I Model Rules and the explanations of Book III Model Rules.

5 Art. III-1(1) Model Rules.

6 See paragraphs 6 and 11 of the explanations of Book I Model Rules.

7 On the notion of European legal space see A. von Bogdandy and P. M. Huber, '§ 42 – Staat, Verwaltung und Verwaltungsrecht: Deutschland', in A. von Bogdandy, S. Cassese and P. M. Huber (eds.) *Handbuch Ius Publicum Europaeum*, vol. III (C. F Müller 2010) paragraphs 1 ff. (with Spanish translation:

Last but not least, national experts usually know their own national Administrative law far better than European Administrative law. Hence, comparing the Model Rules with the different national codifications allows them to be visible and understandable for a broader audience.

In this chapter I will therefore briefly compare Book III with the Spanish regulation on single case decision-making. First I will present some of the many similarities existing between them (B.) and then I will focus on the main differences (C.), the most important being the more substantive approach of the Model Rules to administrative procedure. The chapter will show that even if Spanish administrative procedure law has a very long and influential tradition, it may be notably enriched by other European experiences reflected in Book III of the Model Rules.

A further preliminary remark has to be made before beginning this comparison: for two reasons my analysis may be biased. First, I cannot be fully impartial, even if I try, because I participated in the working group that elaborated Book III of the Model Rules.[8]

Second,, as a scholar interested in European and comparative Administrative law, I will probably tend to overestimate solutions coming from abroad and be too critical with regard to Spanish law; it is an empirically verifiable fact that when scholars know other legal systems better than their compatriots they tend unconsciously to present them as a model to follow by the national law and science.

B. Main Similarities Between Book III of the ReNEUAL Model Rules and the Spanish Administrative Procedure Law

There are many more similarities than differences between Book III of the Model Rules and Spanish administrative procedure law. Such similarities make this Book perfectly understandable for a Spanish reader, who

A. von Bogdandy and P. M. Huber, 'Estado, Administración y Derecho administrativo en Alemania', in A. von Bogdandy and O. Mir (eds.) *Ius Publicum Europaeum. El Derecho administrativo en el espacio jurídico europeo* (Tirant lo Blanch 2013) paragraphs 1 ff.).

8 Along with Paul Craig, Giacinto della Cananea, Jens-Peter Schneider, Vanessa M. Tünsmeyer and Marek Wierzbowski.

will find its structure and main concepts very familiar,[9] as was evidenced during the presentation and discussion of the Model Rules in Spain.[10]

I. The importance given to the codification of administrative procedure and the relationship with specific procedural legislation

The similarities begin with the importance given to the codification of administrative procedure itself. Spain has a very long codifying tradition. The first Spanish general codification on administrative procedure was passed in 1889,[11] the same year in which the Spanish Civil Code was adopted. That was almost forty years before Austria enacted its famous *Allgemeines Verwaltungsverfahrensgesetz* of 1925.

The later Spanish Administrative Procedure Act (*Ley de Procedimiento Administrativo*) of 17 July 1958, which was technically much better and much more effective than the Act of 1889, had a remarkable influence in other countries – particularly in Latin America[12] – and established an advanced regulation of the matter that is still present in its key elements in the current Spanish Administrative Procedure Act, the Act 30/1992 of 26 November 1992 (*Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* – LRJPAC –[13]).

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9 The same can be said about Book II of the ReNEUAL Model Rules on administrative rulemaking and on Book V on mutual assistance (even if the regulation of the latter is much more detailed than that contained in Article 4 of the Spanish APA). Book IV on contracts and Book VI on administrative information management may instead be more difficult to understand for a Spanish reader. In the case of Book IV, this happens because it is based on the current legal situation of EU contracts, which are normally subject to private law (while in Spain public contracts are normally subject to Administrative law); Book VI is particularly innovative and addresses issues that haven't been much regulated yet by Spanish Administrative law. These difficulties arose during the translation process of the Model Rules into Spanish, which I coordinated (the Spanish translation has already been published: *Código ReNEUAL de procedimiento administrativo de la Unión Europea* (INAP, 2015) available at http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/codigoreneualdeprocedimientoadministrativodelaue.pdf).

10 Conference "Jornada: El Código ReNEUAL de procedimiento administrativo de la Unión Europea", held at the Faculty of Law of the University of Barcelona, 30 January 2015, Barcelona (programme available at http://www.reneual.eu (section "Events"); the video recording of the Conference is available at http://uboc.ub.edu/portal/Play/41422a83413e41cb895827246fbaadcb1d).

11 *Ley de bases del procedimiento administrativo* of 19 October 1889.

12 E. García de Enterría, 'Introducción: un punto de vista sobre la nueva Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común de 1992', in J. Leguina Villa and M. Sánchez Morón (eds.) *La nueva Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (Tecnos 1993) 11.

13 Last amended by Act (*Ley*) 15/2014 of 16 September 2014. The LRJPAC has 146 articles and 26 final provisions. It not only regulates administrative procedure *stricto sensu* and related questions, such as

The LRJPAC plays a central role in Spanish Administrative law and there is a wide consensus among Spanish scholars on the convenience of having such a general codification.

In this context, it is no surprise that Administrative law scholars have strongly supported the idea of enacting an administrative procedure act for the EU institutions.[14] The very fact that the term "Code" (*Código*) has been used (only) in the title of the Spanish version of the Model Rules[15] shows the positive connotation it has in this country.

The existing parallels regarding the relations between the different legal sources at EU level and in Spain lead also to a similar relationship between the Model Rules/LRJPAC and specific procedural rules envisaged by other pieces of legislation (Article I-2 Model Rules).

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the validity, effects, enforcement and withdrawal of administrative acts, but also some general aspects on administrative organization, administrative appeals, administrative sanctions and state liability. Contracts and administrative rulemaking are regulated in other pieces of legislation (the Spanish Act on public procurement – *Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público* of 4 November 2011 – and the national and regional Acts on the respective Governments). The LRJPAC is applicable to all Spanish administrative authorities, also those at regional and local level. On 18 May 2015 two bills intended to repeal and replace the LRJPAC (and other Acts) came up for discussion at the Spanish Parliament: the bill on the Common Administrative Procedure (*Proyecto de Ley del Procedimiento Administrativo Común de las Administraciones Públicas*, Ref. 121/000155, available at http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-155-1.PDF) and the bill on the Legal Regime of the Public Sector (*Proyecto de Ley de Régimen Jurídico del Sector Público*, Ref. 121/000155, available at http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-154-1.PDF). The regulation of administrative procedure and of the aforementioned related questions (validity, effects, enforcement and withdrawal of administrative acts, as well as administrative appeals and a new part on administrative rulemaking) is included in the first bill, without presenting substantial changes with respect to the LRJPAC. The discussion in this chapter will therefore remain valid even if this bill is finally passed by the Parliament.

[14] See e.g. E. Nieto Garrido and I. Martín Delgado, *European Administrative Law in the Constitutional Treaty* (Hart Publishing 2007) 115 ff. and 137 ff.; O. Mir, 'La codificación del procedimiento administrativo en la unión administrativa europea', in F. Velasco and J. -P. Schneider (eds.) *La unión administrativa europea* (Marcial Pons 2008) 73-85 (with German translation: 'Die Kodifikation des Verwaltungsverfahrensrechts im Europäischen Verwaltungsverbund', in J.-P. Schneider and F. Velasco (eds.) *Strukturen des Europäischen Verwaltungsverbunds* (Duncker & Humblot 2009) 198-210); O. Mir, 'Arguments in favour of a general codification of the procedure applicable to EU administration', in European Parliament, *Workshop on EU administrative law: state of play and future prospects*, PE453.215, Brussels, European Parliament, 2011, pp. 67-74; M. Fuertes, 'The importance of keeping it simple: Reflections on a Law on Administrative Procedure for EU Institutions', PE462.419, Brussels, European Parliament, 2011, pp. 4-10; J. E. Soriano (ed.) *Procedimiento Administrativo Europeo* (Civitas-Thomson Reuters 2012) *passim*.

[15] See n 9.

II. The general conception, structure and functions of administrative procedure

The general conception of the administrative procedure as the process by which a public authority prepares and formulates a decision (Article I-4(2) Model Rules), its sequential structure (initiation ex-officio or by an application, gathering of all information needed to take a sound and lawful decision, including the hearing and consultation of the public and of other public authorities, conclusion of the administrative procedure) and its investigatory, non-adversarial nature are similar too.

Administrative procedure also fulfils in Spain the twofold function of fostering the effective discharge of public duties and protecting the rights of individuals[16] and has acquired a central position within Spanish Administrative law as a key steering instrument of Administrative action.[17]

III. The main procedural rights

The main procedural rights are also the same in Book III Model Rules and in the LRJPAC: the right to be represented by a lawyer or some other person (Article III-8(1)(e) Model Rules /Articles 32 and 85(2) LRJPAC), the right to use any of the official languages (Article III-8(1)(c) Model Rules /Articles 35(d) and 36 LRJPAC), the right to request the exclusion of non-impartial officials (Article III-3(4) Model Rules /Article 29 LRJPAC), the right to propose witnesses and experts (Article III-15(2) Model Rules /Articles 80 and 81 LRJPAC), the right to access their own file (Article III-22 Model Rules /Articles. 35(a) and 84(1) LRJPAC), the right to be heard (Article III-23 and III-24 Model Rules /Articles 35(e), 79, 84 and 89(1) LRJPAC), the right to be given reasons for the final decision (Article III-29 Model Rules /Articles 54 and 89(3) LRJPAC), the right to be informed of the available remedies (Article III-30 Model Rules /Articles 58 and 89(3) LRJPAC) or the right to be notified of the final decision (Article III-33 Model Rules /Articles 58 and 59 LRJPAC) within a maximum time-limit (Article III-9 Model Rules, establishing a default time-limit of three months, as in Article 42(3) LRJPAC).

The general list of rights contained in Article 35 LRJPAC served particularly as a source of inspiration for Article III-8(1) Model Rules.

There are however relevant differences regarding the content of some of these rights, as will be seen below.

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16 Paragraph 11 of the introduction included in Book I Model Rules.

17 O. Mir, '§ 84 Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Spanien', in von Bogdandy, Cassese and Huber (n 7), paragraphs 49 and 50 (with Spanish translation: O. Mir, 'El Derecho administrativo español en el actual espacio jurídico europeo', in von Bogdandy and Mir (n 7) paragraphs 49 and 50).

IV. The high degree of convergence achieved within the European Administrative Space

Considering that Book III of the Model Rules was not drafted only by a Spaniard, in view of Spanish Administrative law, but by a group of scholars coming from five different legal traditions,[18] in light of a wide range of legal sources (mainly primary and secondary EU law, jurisprudence of the CJEU, EU and Council of Europe soft law and Administrative Procedure Acts of the different Member States),[19] the aforementioned similarities show that a remarkable degree of convergence regarding the administrative procedure has been already achieved within the European Administrative Space.

Such convergence goes far beyond the minimum requirements of Article 41 of the Charter of Fundamental Rights of the EU. It makes clear that a sufficient level of maturity has been reached in order to codify the regulation of administrative procedure at EU level.

C. Main Differences Between Book III of the ReNEUAL Model Rules and the Spanish Administrative Procedure Law

Despite the substantial coincidence described in the previous paragraphs, there exist a number of important differences between Book III of the Model Rules and the Spanish LRJPAC. Some of them constitute best practices that in my view should be adopted by the Spanish legislator.

The following fifteen differences are the most relevant.

I. The definition of the central notions of "decision", "party" and "public authority"

The definition of the central notions of "decision", "party" and "public authority" diverge. The concept of decision that derives from the definition contained in Article III-2(1) Model Rules, imported with some differences from the German definition of "administrative act" (§ 35 of the German APA,[20], which was to be found in Article 4(5) of the Community Customs Code of 1992[21]), is much narrower than the concept of administrative act used – but not defined – by the Spanish legislation and jurisprudence.

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[18] Working Group II of ReNEUAL was composed of six members coming from Germany (Jens-Peter Schneider and Vanessa M. Tünsmeyer), Italy (Giacinto della Cananea), Poland (Marek Wierzbowski), Spain (Oriol Mir) and the UK (Paul Craig). It was surprisingly easy to agree on the general conception and on the concrete features of Book III.

[19] As the explanations of Book III Model Rules show.

[20] Verwaltungsverfahrensgesetz ([2003] I Bundesgesetzblatt 102), last amendment of 27 July 2013 ([2013] I Bundesgesetzblatt 2749).

[21] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.

The concept of administrative act mainly used in Spain, inspired by the Italian *atto amministrativo,*[22] also includes non-binding acts such as opinions and recommendations, preparatory measures and acts having purely internal effects.

The narrow notion of the Model Rules resembles nevertheless the dogmatically less developed concept of "*resolución (que pone fin al procedimiento administrativo)"* contained in Article 89 LRJPAC, which also is the administrative act *par excellence* in Spain.[23]

The definition of the other key notion of "party" (Article III-2(3) Model Rules) also differs. While the Model Rules concept includes "the addressee of the intended decision and other persons who are adversely affected by it and who request to be involved in the procedure", the Spanish central notion of "*interesado*" (Article 31 LRJPAC) is based on the traditional and less clear distinction between subjective rights and – individual or collective – legitimate interests.

In practice, according to the Spanish jurisprudence all persons who might benefit or be adversely affected by the decision may request to be involved in the procedure and acquire the status of *interesado*.[24] This includes NGOs and other legal persons acting in defence of collective interests. But even if the Spanish courts have interpreted the notion of *interesado* in very broad terms, the distinction between the addressee and other persons who are adversely affected seems to be clearer and to offer a better basis for developing an adequate protection of third parties within administrative procedures.

Similarly to Article 31(1)(c) LRJPAC, for efficiency reasons Article III-2(3) Model Rules does not impose on the public authority the duty to identify all those persons who might be adversely affected by the intended decision. It is up to them to make themselves known and to request to be involved in the procedure. But if they do so, they are entitled to become parties with the same procedural rights as the addressee. The authority has no discretion in this regard.

Unlike the LRJPAC, Article III-8(3) Model Rules empowers the public authority to appoint ex-officio a joint representative for all those parties affected in a similar way in procedures where the number of persons adversely affected

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[22] As formulated by G. Zanobini, *Corso di Diritto Amministrativo*, vol. 1 (8th ed., Giuffrè 1958) 243.

[23] Some relevant Spanish scholars have suggested in recent years to import the German narrow concept of administrative act: R. Bocanegra, *Lecciones sobre el acto administrativo* (4th ed., Civitas-Thomson Reuters 2012) 27 ff., 33 ff.; J. García Luengo, *La nulidad de pleno derecho de los actos administrativos* (Civitas 2002) 31 ff. In favour of a broad concept of administrative act for the EU Administration, in the Spanish literature, X. Arzoz, *Concepto y régimen jurídico del acto administrativo comunitario* (IVAP 1998) 66 ff., 193 ff.; X. Arzoz, 'Acto y procedimiento administrativo en el Derecho de la Unión Europea: un catálogo de problemas', in J. E. Soriano (n 14) 204-215.

[24] See e.g. the judgements of the Spanish Supreme Court (Third Chamber; *Tribunal Supremo, Sala de lo Contencioso-Administrativo*) of 19.5.2000 (appeal Nr. 4605/1994, Court Consideration Nr. 4) and of 2.6.2014 (appeal Nr. 41/2013, Court Consideration Nr. 6), with regard to the closely related question of the standing of parties before the courts, based on the same concept of *interesado* and of legitimate interest.

is large. This provision, inspired by § 18 of the German APA, is also aimed at granting administrative efficiency.

A third relevant conceptual difference regards the notion of "public authority" subject to the Model Rules. Such notion is broader than that of "public Administration" used by the LRJPAC (Article 2) and includes not only public law bodies, but also private persons "when they are entrusted with administrative action on behalf of the EU" (Article I-4(5) Model Rules). This is coherent with the functional approach of the entire Model Rules and of EU law in general that will be addressed below.

In recent years a number of scholars have called for an extension of the rules on administrative procedure to private persons entrusted with public tasks in order to grant an adequate protection of the citizens they relate to.[25]

EU law has already been forced to broaden the concept of contracting authorities traditionally used by the Spanish legislation, a concept restricted to public law bodies, in order to meet the functional requirements of the Directives on public procurement.[26]

II. The duty to appoint a responsible official

The duty to appoint a responsible official for managing the procedure (Article III-7 Model Rules) is another significant difference. This duty, taken from the Italian experience,[27] seems particularly important to avoid the dilution of responsibilities and to promote better management of the procedure.

In this regard, Article 41 LRJPAC has been criticized for being too vague and not giving an obligation to appoint a concrete responsible official.[28] This duty is starting to be introduced in Spain at regional level.[29]

III. Reinforced information rights of the parties

Book III of the Model Rules reinforces information rights of the (potential future) parties even before the administrative procedure is initiated. In this regard, Article III-4 Model Rules establishes the duty to promote the provision of general updated online information on the existing administrative procedures, going far beyond Article 42(4) LRJPAC and taking advantage of information technologies. This information should allow potential applicants to

[25] See Mir (n 17) paragraphs 39-41.

[26] Case C-214/00 *Commission v Spain* [2003] ECR I-4667; Case C-283/00 *Commission v Spain* [2003] ECR I-11697; Case C-84/03 *Commission v Spain* [2005] ECR I-139.

[27] Arts. 4-6 of the Italian APA (*Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192)*).

[28] M. Sánchez Morón, *Derecho Administrativo. Parte General* (10th ed., Tecnos 2014) 493.

[29] Arts. 48(3) and 50 of the Catalan APA (*Llei 26/2010, del 3 d'agost, de règim jurídic i de procediment de les administracions públiques de Catalunya*), with a wording that could be improved.

know in advance what the applicable legislation is and the procedural and substantive legal requirements that have to be fulfilled to obtain permits, subsidies, etc., avoiding the public authority the costs of informing them individually and of processing defective applications.

Once the procedure is initiated, Article III-5(2) and (3) and Article III-6(3) Model Rules contain a clearer regulation of the notification of ex-officio initiation and of the acknowledgement of receipt of applications, providing the party with more information than Articles 42(4), 70 and 71 LRJPAC. It seems particularly important that the notification of ex-officio initiation contains the rationale for the initiation of the procedure.

When the final decision is adopted, it has not only to indicate the possibilities of administrative appeal and of judicial challenge (as Articles 58(2) and 89(3) LRJPAC also require), but also of recourse to an Ombudsman (Article III-30(2) Model Rules). Ombudsmen also exist in Spain at the national and at the regional level, although they still haven't acquired the social and political relevance of their counterparts at the EU level and in other countries.

IV. Explicit consideration of competitive award procedures

Administrative procedures leading to the allocation of scarce resources have their own particular features and have received a special attention in recent academic literature.[30] Book III of the Model Rules is aware of it and refers *mutatis mutandis* to the competitive award procedure regulated in Book IV Chapter 2 Section 3 Model Rules – with regard to the conclusion of EU contracts – where the number of applications to be granted is limited and such a competitive procedure is to be used (Article III-6(4) Model Rules).

Hence, a minimum common regulation is given to this important type of procedure, that goes far beyond the few provisions on it in the LRJPAC (Articles 54(2), 59(6)(b) and 71 LRJPAC). Sector-specific legislation may of course regulate such procedures in more detail, taking into account sector-specific requirements.

V. Deeper regulation of the gathering of information by the public authority

Chapter 3 of Book III Model Rules, along with Books V and VI on mutual assistance and administrative information management,[31] also contains a much deeper regulation of the gathering of information by public authorities.

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[30] In Spanish literature recently L. Arroyo and D. Utrilla (eds.) *La administración de la escasez* (Marcial Pons 2015) *passim*, taking into account the German discussion on the *Verteilungsverfahren*.

[31] On Books V and VI see above n 9.

Inspections are not regulated in the LRJPAC,[32] but only in sector-specific legislation and in the Catalan APA,[33] and they have become particularly important after the transposition of the Services Directive,[34] since it has led to the abolition of a large number of authorisation procedures and to a greater relevance of *ex post* control instruments. Articles III-18 to III-21 Model Rules are probably more necessary at EU than at national level, because national inspections not related to EU law only exceptionally count with inspectors from other jurisdictions, but Articles III-16 and III-17 Model Rules could serve as a starting point for a future general regulation of inspections within the Spanish APA.

In particular the duty of careful investigation, a central requirement of the CJEU incorporated into Article III-10(1) Model Rules (and also present in the other Books of the Model Rules) is not adequately considered by the LRJPAC nor the Spanish jurisprudence.[35] This is closely related to the traditional formalistic approach of the Spanish administrative procedure law, as will be seen below.

VI. More detailed and substantive regulation of the right to access the file, to be heard and of the duty to give reasons

Chapter 4 of Book III Model Rules contains a more detailed regulation of the right of access to the file (Article III-22 Model Rules) and of the right to be heard (Article III-23 Model Rules), especially with regard to composite procedures (Article III-24 Model Rules), not considered at all by the older LRJPAC.

Article III-25 Model Rules also includes new consultation mechanisms other than the traditional submission of written comments, such as t public hearings and online consultations, which may be better suited to fostering real and effective participation.

In Chapter 5 on the conclusion of the procedure, Article III-29 Model Rules establishes the duty to give reasons for all decisions and not only for those

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[32] A number of Spanish authors have suggested the inclusion of a minimum general regulation of the inspections in the LRJPAC that goes beyond the few references contained in Arts. 39, 39.bis and 137(3). See e.g. J. M. Pemán, 'La función inspectora. Conclusiones', in J. J. Díez Sánchez (ed.) *La función inspectora. Actas del VIII Congreso de la Asociación Española de Profesores de Derecho Administrativo* (INAP 2013) 246 and 249.

[33] Arts. 88-101 of the Catalan APA (see *supra* n 29). On these provisions V. Aguado, 'La primera regulación general de la función de inspección: luces y sombras', in J. Tornos (ed.), *Comentarios a la Ley 26/2010 de régimen jurídico y de procedimiento de las administraciones públicas de Cataluña* (Iustel 2012) 563 ff., welcoming the existence of a general regulation of inspections and criticising that these provisions don't go further.

[34] Art. 9(1)(c) of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[35] J. Ponce, 'El derecho a una buena administración: Derecho administrativo y lucha en pos de una buena gestión pública', in Tornos (n 33) 238 ff., criticising that this duty has not been included either in the recent Catalan APA.

included in a list (compare it with Article 54 LRJPAC). It must, however, be said that the list of Article 54 LRJPAC includes almost all kinds of decisions and even relevant procedural steps other than the final decision. Article III-29 Model Rules adopts nevertheless a much more substantive approach, as will be seen below.

VII. Reluctance regarding implied decisions

From a Spanish perspective it seems particularly relevant that Article III-9 Model Rules, unlike Article 43 LRJPAC, does not expressly refer to implied decisions as the general solution for all those application procedures in which the public authority does not adopt the decision within the established time-limit.

Implied decisions have a long tradition in Spanish Administrative law and have been long questioned by many Spanish scholars, as they may entail important risks for the public interest and for third parties and do not provide sufficient legal certainty for the applicants.[36] The CJEU has also been reluctant to admit implied decisions as an alternative to explicit, reasoned decisions in certain fields.[37]

VIII. A better regulation of the rectification and withdrawal of decisions

Chapter 6 of Book III Model Rules contains a much better regulation of the rectification and withdrawal of decisions (Articles III-35 and III-36 Model Rules).

The Spanish regulation of this important issue laid down in Articles. 102-106 LRJPAC is very confusing, incomplete and unbalanced, raising many problems. These provisions do not regulate the rectification and withdrawal of lawful decisions that are beneficial to a party (this is foreseen in sector-specific legislation in an unsystematic way). The fact that they allow parties to request the rectification or withdrawal of unlawful decisions outside the time-limits for legal challenge, without conceiving it as a discretionary power of the public authority, makes it difficult to distinguish this instrument from legal remedies. No rules are envisaged regarding the effects of the rectification and withdrawal (retroactive or prospective and on third parties).

Above all, they are too restrictive regarding the rectification and withdrawal of unlawful decisions that are beneficial to a party, admitting it only where they

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[36] L. Parejo, *Transformación y ¿reforma? del Derecho Administrativo en España* (INAP/Global Law Press 2012) 147-164; Mir (n 17) paragraph 65, with further references.

[37] Case C-360/87 *Commission v Italy* [1991] ECR I-812, paragraphs 30-31; Case C-131/88 *Commission v Germany* [1991] ECR I-865, paragraph 38; Case C-230/00 *Commission v Belgium* [2001] ECR I-4595, paragraphs 14 ff. On this jurisprudence and the LRJPAC A García Ureta, *Procedimiento administrativo y Derecho comunitario*, (IVAP 2002) pp. 43 ff.

are null and void ("*nulidad de pleno Derecho*", absolute nullity, *Nichtigkeit, nullità*) (Article 102 LRJPAC)[38]. Where decisions are merely annullable ("*anulabilidad*", relative nullity, *Anfechtbarkeit, annullabilità*), the public authority may only challenge them before the courts within a time-limit of four years since the decision was adopted (Article 103 LRJPAC). This rigid approach leads in practice to an expansive interpretation of the grounds for absolute nullity, may infringe the EU principle of effectiveness in certain cases and in fact only shifts the problem to the courts. Instead, Article III-36(2) Model Rules adopts a more flexible and substantive solution for all kinds of unlawful decisions based on the principle of legitimate expectations, in line with the jurisprudence of the CJEU and of other national Administrative law systems.

Apart from these fifteen relevant concrete differences that have been outlined, there is a general feature of Book III of the Model Rules (and of the entire Model Rules) that distinguishes it from the Spanish administrative procedure law: its more substantive approach. This deserves a separate paragraph.

D. The Substantive Approach of the ReNEUAL Model Rules to Administrative Procedure

Administrative procedure is often characterised in Spain by a highly formalistic approach. Public authorities often still conceive administrative procedures as a merely formal duty they have to comply with ("checklist approach"), or as a barrier to protect themselves against time-consuming applications by citizens, and not as an efficient instrument to gather the information they need in order to duly exercise their powers and adopt the best possible decisions.

This happens not only with regard to single case decisions, but also to rule-making: the reinforced duties to give reasons and to make consultations before adopting new rules introduced in recent years in light of the Better Regulation movement (to comply with the higher international standards established by the OECD or the EU) lead usually to very poor regulatory impact assessments and to merely formal consultation exercises.

This formalistic conception is also present in the Spanish jurisprudence. Spanish administrative courts tend to exercise a superficial control on procedural aspects (such as the duty to give reasons), not requiring public authorities to comply with the duty of careful investigation and not examining whether the various different procedural requirements have been fulfilled. Often procedural

[38] Art. 62(1) LRJPAC lists the circumstances that render an administrative act null and void. Unlike the German or Italian APAs, according to the LRJPAC absolute nullity does not imply that the act has no legal effects. It will have legal effects until the public authority or the courts declare the nullity. The differences between absolute and relative nullity are therefore in Spanish Administrative law much less relevant than in Spanish civil law or in other national Administrative law systems. See on this Mir (n 17) paragraphs 77 and 87-90.

defects are also used as an excuse for the courts to annul decisions and administrative regulations without entering into the merits of the case. This kind of "blind control" leads both to overestimation and underestimation of procedural defects.

This formalistic approach is in contrast with the more substantive, functional approach of EU law and jurisprudence.

Book III of the Model Rules offers in my opinion many examples of this function-oriented approach, including elements in different provisions that guide the interpretation to be done by public authorities and courts.

Some of them include:

- Article III-3(3), with regard to the conflicts of interest: instead of including a list of possible conflicts of interest (as Article 28(2) LRJPAC does), this provision obliges the superior to exclude the affected official "where the impartial and objective exercise of the official´s function is compromised";
- Article III-8(1)(a), granting the right of the parties to be given information on all questions related to the procedure "in a fast, clear and understandable manner";
- Article III-10(1): "When taking decisions, the public authority shall investigate the case *carefully and impartially*. It shall take into consideration the *relevant* factors, including those favourable to the parties, and *give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration*";
- Article III-13(1): "The parties shall assist in ascertaining the facts of the case. In particular they shall state such facts and evidence as are known to them and *which can reasonably expected to be presented by them*";
- Article III-22, with regard to the right to access the file:

  "Every party shall have the opportunity to examine all documents in his or her file, *which may be relevant for its defence*, including incriminating and exculpatory evidence, before the decision is taken.

  The way in which access to the file is provided is for the public authority to determine, and may be regulated through sector-specific EU law, *provided that it does not undermine the substance of the right*. Subject to this caveat, access to the file may be provided either through copies of documentation, or the opportunity to study the file in the office of the public authority, or a combination of both";
- Article III-23, with regard to the right to be heard:

  "Every party has the right to notice of the *central issues that are to be decided by the public authority and the core arguments that inform its reasoning, in order that the party can effectively make known its views on the matter and can exercise its rights of defence*.

  Every party *must have adequate time in which to respond* after notice in accord with paragraph 3 has been provided. The public authority should set clear time-limits within which the response is to occur.
- The public authority has discretion as to the form and content of the hearing. This includes the choice as to whether the hearing should be written

or oral, whether to allow cross-examination. *In choosing how to exercise this discretion the public authority should take into account the objectives of the legislation, the legislative provisions, the importance of the person's interests, the importance of the additional procedural safeguards for protection of the person's interest, and the costs of granting such specific procedural safeguards*";

- Article III-24, with regard to the right to be heard in composite procedures:
  "The right to be heard must be respected at all stages of a composite procedure between the EU and the Member States leading to a decision in the manner set out in this article. *The application of the right to be heard will depend on the division of responsibility in the decision-making process*.
- In a case of composite procedure, the form and content of the hearing provided pursuant to Article III-23(5) by the public authority that makes the decision *will be affected by the extent to which the rights of the defence were adequately protected at a prior stage in the administrative proceedings by another public authority*";
- Article III-28: "A decision made by the public authority shall be clearly specified *in order to enable the parties to understand their rights or duties*";
- Article III-29, with regard to the duty to give reasons:
  "The public authority shall state the reasons for its decisions *in a clear, simple and understandable manner*. The statement of reasons *must be appropriate to the decision and must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the decision in such a way as to enable the parties to ascertain the reasons for the decision and to enable the competent court to exercise its powers of review*.
- The duty to provide reasons in cases of composite procedures *will be shaped by the respective roles of the EU and the Member State in making the decision*, as set out in Article III-24".

None of these "functional safeguards" are included in the Spanish LRJPAC. They should be considered by the Spanish legislator, along with the best practices of Book III Model Rules enumerated in the previous paragraph, where it aims to carry out a deep reform of the administrative procedure that allows the full potential of this central steering instrument of administrative action to be reached. This is certainly not the case of the ongoing reform of the LRJPAC.[39]

[39] See above n 13.