



## The *Kühne* obligation under the Portuguese Code of Administrative Procedure – In search of a Euro-compatible solution<sup>1</sup>

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*ABSTRACT: The purpose of this text is to analyse the solution enshrined in Article 168 (7) of the Portuguese Code of Administrative Procedure, which has been in force since 2015. The provision establishes a duty of administrative annulment of final administrative acts contrary to EU law and seeks to echo the case-law of the Court of Justice of the European Union (CJEU) which has the Kühne judgment as its landmark decision. However, a closer reading reveals that that provision is not entirely compatible with the case-law of the CJEU to which it, at first sight, relates to. After qualifying that national provision as a relevant rule of EU Administrative law, we will seek to decipher its meaning and scope, in light of the relevant case-law in order to find an interpretative solution that is compatible with EU law.*

*KEYWORDS: EU Administrative Law – Kühne case-law – review of final national administrative decisions contrary to EU law – principle of sincere cooperation.*

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## I. Introduction

The Decree-Law (DL) No. 4/2015 of 7 January approved the new *Código do Procedimento Administrativo*, the Portuguese Code of Administrative Procedure (hereinafter, CPA). It is not our purpose to proceed with an overall assessment of the Code in force today,<sup>2</sup> but merely to look into a specific solution enshrined within the system of annulment of administrative acts established therein<sup>3</sup> – the solution set forth in Article 168 (7) CPA, which establishes a duty of administrative annulment of final administrative acts contrary to European Union (EU) law.

First, and foremost, the provision under analysis does not stand out for its clarity:

*“As long as it still can do it, the Administration has the duty to annul an administrative act that was declared valid by final judgment handed down by an administrative court based on the interpretation of European Union law, invoking for that purpose a new interpretation of that law in a later and final judgment, handed down by an administrative court adjudicating at last instance which has enforced a judgment of a European Union court binding on the Portuguese State.”<sup>4</sup>*

Although tangled, the wording of Article 168 (7) CPA reveals right away that the administrative annulment in question relates to EU law. Contrary to its predecessor,<sup>5</sup> the new CPA did not disregard the relevance of EU law, which the initial considerations made in the Preamble of DL No. 4/2015 readily confirm. In it, the legislator gives an account of the need to update the general regime of the administrative procedure in light of the “*new requirements*” that have been put to the Public Administration and to the exercise of the administrative function, considering, in particular, the “*change of the framework*” in which the latter is exercised “*by virtue of the law and of European Union law.*”<sup>6</sup>

In terms of intentions, the CPA sought to find solutions that are compatible with EU law, which is visible in some provisions throughout the Code.<sup>7</sup> In this sense, the inclusion of a principle relating to the “*sincere cooperation with the European Union*” in the list of general principles of administrative activity is one of the “*significant*

<sup>2</sup> For what it is referred to more authorized doctrine – see Carla Amado Gomes, Ana Fernanda Neves and Tiago Serrão (eds.), *Comentários ao novo Código de Procedimento Administrativo*, 2<sup>nd</sup> edition (Lisbon: AAFDL, 2015); and Maria da Glória Garcia *et al.*, *Comentários à revisão do Código do Procedimento Administrativo* (Coimbra: Almedina, 2016).

<sup>3</sup> On the subject, see Licínio Lopes Martins, “A invalidade do acto administrativo no novo Código do Procedimento Administrativo: alterações mais relevantes”, and Mário Caldeira, “A figura da ‘Anulação Administrativa’ no novo Código do Procedimento Administrativo de 2015”, in *Comentários ao novo Código de Procedimento Administrativo*, 2<sup>nd</sup> edition, ed. Carla Amado Gomes, Ana Fernanda Neves and Tiago Serrão (Lisbon: AAFDL, 2015), 907-922 and 1033-1070, respectively.

<sup>4</sup> Free translation. The original version states as follows: “*Desde que ainda o possa fazer, a Administração tem o dever de anular o ato administrativo que tenha sido julgado válido por sentença transitada em julgado, proferida por um tribunal administrativo com base na interpretação do direito da União Europeia, invocando para o efeito nova interpretação desse direito em sentença posterior, transitada em julgado, proferida por um tribunal administrativo que, julgando em última instância, tenha dado execução a uma sentença de um tribunal da União Europeia vinculativa para o Estado português.*”

<sup>5</sup> The Code of Administrative Procedure approved by the DL No. 442/91, of 15 November, and altered by the DL No. 6/96, of 31 January.

<sup>6</sup> See Preamble of DL No. 4/2015, para. 1 (free translation).

<sup>7</sup> See Articles 19, 143, 146 and 168 (4 and 7) CPA.

*innovations*” introduced by the Code of 2015 and seeks to cover both “*the increasing participation of the Portuguese Public Administration in the decision-making process of the European Union and the participation of European Union institutions and bodies in national administrative procedures.*”<sup>8</sup> So far without any express general provision within the Portuguese administrative legal order, the principle, now enshrined in Article 19 CPA, joins the set of standard rules of all Portuguese administrative law,<sup>9</sup> although this already resulted from EU law and, from the outset – and with greater density –, from Article 4 (3) TEU.<sup>10</sup>

Indeed, in terms of normative content, the wording of Article 19 CPA<sup>11</sup> is rather poor:<sup>12</sup> *i*) the scope of the cooperation envisaged is confined to situations provided for under EU law; *ii*) the set of situations considered (providing information, submitting proposals and other forms of collaboration with the Public Administration of other Member States) is minimal (and does not meet the previously announced standards in the Preamble); and *iii*) the content of cooperation is limited to meeting deadlines. Taking advantage of a common expression in the European legal lexicon, the provision loses its *effet utile* by not including a general and open clause of cooperation applicable in the absence of a specific rule.<sup>13</sup> The provision of Article 19 CPA is, therefore, short of what results from Article 4 (3) TEU and its densification through the CJEU’s<sup>14</sup> case-law.

It is, in fact, settled case-law that, by virtue of the principle of sincere cooperation, all the authorities of the Member States, including their administrative bodies, must ensure the observance of EU law within the sphere of their competences,<sup>15</sup> and the CJEU did not hesitate to base on this principle, some specific obligations

<sup>8</sup> See Preamble of DL No. 4/2015, para. 5 (free translation).

<sup>9</sup> See Miguel Assis Raimundo, “Os princípios no novo CPA e o princípio da boa administração, em particular”, in *Comentários ao novo Código de Procedimento Administrativo*, 2<sup>nd</sup> edition, ed. Carla Amado Gomes, Ana Fernanda Neves and Tiago Serrão (Lisbon: AAFDL, 2015), 169.

<sup>10</sup> For a critical analysis, see Fausto de Quadros, in *Comentários à revisão do Código do Procedimento Administrativo*, ed. Maria da Glória Garcia *et al* (Coimbra: Almedina, 2016), 49-50.

<sup>11</sup> Article 19 CPA, regarding the “*Principle of sincere cooperation with the European Union*”, provides as follows: “*1 - Where European Union law imposes on the Public Administration the obligation to provide information, submit proposals or otherwise collaborate with the Public Administration of other Member States, that obligation shall be fulfilled by the deadline set for that purpose. 2 - In the absence of a specific term, the obligation referred to in the preceding paragraph shall be fulfilled in the framework of the sincere cooperation that must exist between the Public Administration and the European Union.*” (free translation). The original version states as follows: “*1 - Sempre que o direito da União Europeia imponha à Administração Pública a obrigação de prestar informações, apresentar propostas ou de, por alguma outra forma, colaborar com a Administração Pública de outros Estados-membros, essa obrigação deve ser cumprida no prazo para tal estabelecido. 2 - Na ausência de prazo específico, a obrigação referida no número anterior é cumprida no quadro da cooperação leal que deve existir entre a Administração Pública e a União Europeia.*”

<sup>12</sup> Opinion already expressed during the revision that led to the adoption of the Code of 2015 by João Pacheco de Amorim, “Os princípios gerais da atividade administrativa no projeto de revisão do Código do Procedimento Administrativo”, *Cadernos de Justiça Administrativa* 100 (2013): 25.

<sup>13</sup> Miguel Assis Raimundo, “Os princípios no novo CPA...”, 179-180.

<sup>14</sup> As part of the reform of the EU’s judicial architecture, the Court of Justice of the European Union (CJEU) has since September 2016 incorporated two jurisdictions [Article 19 (1) TEU]: the Court of Justice (CJEU) and the General Court (GC) – the text refers to the first of those jurisdictions.

<sup>15</sup> See Judgments of the Court in *Germany v Commission*, 12 June 1990, Case C-8/88, EU:C:1990:241, recital 13; *Kühne*, 13 January 2004, Case C-453/00, EU:C:2004:17, recital 20; *Kempter*, 12 February 2008, Case C-2/06, EU:C:2008:78, recital 34; *Wall*, 13 April 2010, Case C-91/08, EU:C:2010:182, recital 69; and *Byankov*, 4 October 2010, Case C-249/11, EU:C:2012:608, recital 64.

within the sphere of administrative authorities of the Member States.<sup>16</sup> Thus, the provision of Article 19 CPA fails to convey the true dimension of the principle of sincere cooperation as a structuring principle in the necessary intersystematic and internormative articulation that governs the exercise of the EU administrative function and the law that governs it. On the way, the notion which underlies the principle is lost: the National Administrative Authorities – and, thus, the Portuguese Public Administration – are the *EU Administrations of general jurisdiction*,<sup>17</sup> and to them is entrusted, in the first line (Article 291 TFEU),<sup>18</sup> the implementation of EU law as a mission that is “*essential for the proper functioning of the Union*” and a “*matter of common interest*” (Article 197 TFEU).<sup>19</sup>

This assessment will be the main coordinate that will guide the following analysis regarding the solution enshrined in Article 168 (7) CPA.

<sup>16</sup> The case-law established by the CJEU under the principle of sincere cooperation, with regard to primacy of EU law, direct effect and consistent interpretation, although essentially developed with reference to national courts, also concerns the application of EU law by administrative bodies of the Member States. These principles give rise to specific obligations for national administrative authorities, obligations which are particularly relevant in the event of a contradiction between provisions of national law and of EU law applicable in a given situation, in which case they ought to give preference to the provisions of EU law, by interpreting the provisions of national law accordingly or, where such interpretation is not possible, refraining from applying provisions of national law which conflict with EU law and, where appropriate, apply the provisions of EU law which have direct effect – see, among others, Judgments of the Court in *Fratelli Costanzo*, 22 June 1989, Case 103/88, EU:C:1989:256, recital 31; *Ciola*, 29 April 1999, Case C-224/97, EU:C:1999:212, recital 30; *Larsy*, 28 June 2001, Case C-118/00, EU:C:2001:368, recitals 51-53; *Henkel*, 12 February 2004, Case C-218/01, EU:C:2004:88, recital 60; *Impact*, 15 April 2008, Case C-268/06, EU:C:2008:223, recital 85; *Gavieiro*, 22 December 2010, Joined Cases C-444/09 and C-456/09, EU:C:2010:819, recitals 72 and 73. In legal literature, see John Temple Lang, “The Duties of National Authorities Under Community Constitutional Law”, *European Law Review* 23(2) (1998): 109-131; and Maartje Verhoeven, *The Costanzo Obligation. The Obligation of National Administrative Authorities in the Case of Incompatibility between National Law and European Law* (Intersentia: 2011).

<sup>17</sup> Taking advantage of the expression used by the (then) Court of First Instance (CFI) referring, however, to the national courts – see Judgment of the General Court, *Tetra Pak*, 10 July 1990, Case T-51/89, EU:T:1990:41, recital 42. Also qualifying the national public administrations as “*administrations communes du système européen*”, see Mario Chiti, “Les droits administratifs nationaux entre harmonisation et pluralisme eurocompatible”, in *Traité de droit administratif européen*, 2<sup>nd</sup> édition, dir. Jean-Bernard Auby and Jacqueline Duthéil de la Rochère (Brussels: Bruylant, 2015), 870.

<sup>18</sup> The wording given to Article 291 TFEU by the Treaty of Lisbon supports this reading. Under this provision, the implementation of legally binding Union acts falls, on the first line, on Member States (para. 1) and only “*where uniform conditions*” for implementation are needed on the Commission (under the control by Member States in accordance with para 3) and “*in duly justified specific cases*” on the Council (para. 2).

<sup>19</sup> A single provision of a chapter introduced by the Treaty of Lisbon on *administrative cooperation*. According to Jürgen Schwarze, the amendments introduced by the Treaty of Lisbon specifically concerning the administrative implementation of EU law, such as the new wording given to Article 291 TFEU and the introduction of Article 197 TFEU, demonstrate that Member States are not willing to relinquish their administrative autonomy; in relation to the latter provision, the Author emphasizes that, despite its symbolic importance, the provision does not create new obligations in the sphere of Member States beyond those already resulting from the principle of sincere cooperation – cfr. Jürgen Schwarze, “European Administrative Law in the Light of the Treaty of Lisbon”, *European Public Law* 18(2) (2012), 285-304. On the contrary, Mario Chiti considers Article 197 TFEU as the “*clé de voûte*” of the whole discipline of the administrative question under the Treaty of Lisbon, concluding that it has largely wiped out the administrative autonomy of the Member States – Mario Chiti, “Les droits administratifs nationaux entre harmonisation et pluralisme eurocompatible”, 874-875.

## II. The provision of Article 168 (7) CPA as a rule of EU Administrative Law

The intersystematic, composite or multilevel nature of the EU administration is widely highlighted,<sup>20</sup> as it is a function ensured both by the institutions, bodies, offices and agencies of the Union, and by the administrative authorities of the Member States as co-dependent bodies<sup>21</sup> of the administrative authority of the Union.<sup>22</sup> The legal framework governing the exercise of that function includes not only rules governing the organization and the functioning of the European administration in an organic sense (institutions, bodies, offices and agencies of the Union), but also the general principles and rules governing the activity of the administrative authorities of the Member States as the European administration in a functional sense. Therefore, within this “administrative space of internormativity”<sup>23</sup> coexist both sources of EU law and of national law.

The normative segment that might be entitled *Administrative Law of the European Union*<sup>24</sup> presupposes a normative pluralism, leading, of course, to multiple methodological difficulties,<sup>25</sup> but which must be guided by an idea of “*Euro-compatible administrative pluralism*”.<sup>26</sup> Thus, the expression *EU Administrations of general jurisdiction* is not merely descriptive of the leading role of the administrative authorities of the Member States in the implementation of EU law, but also of their place in the integrated administrative system of the Union: while continuing to integrate their respective national administrative systems, their action as the European administration in a functional sense is governed by EU law<sup>27</sup> and, in the absence of EU law, by national law *in compliance with EU law* or in accordance with the criteria laid down by it.<sup>28</sup>

So, in particular, if the national law which regulates, or in so far as it is used to regulate, the activities of the administrative authorities of the Member States as EU

<sup>20</sup> See, among others, Maria Luísa Duarte, *Direito Administrativo da União Europeia* (Coimbra: Coimbra Editora, 2008), 28-30; Claudio Franchini, “Les notions d’administration indirecte et de coadministration”, in *Droit administratif européen*, dir. Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (Brussels: Bruylant, 2007), 261; and Mario Chiti, “Forms of European Administrative Action”, *Law and Contemporary Problems* 68 (2004), 38, respectively.

<sup>21</sup> Jürgen Schwarze, *Droit Administratif Européen*, 2<sup>nd</sup> edition (Brussels: Bruylant, 2009), I-67.

<sup>22</sup> Jacques Ziller, “L’Autorité administrative dans l’Union européenne”, in *L’Autorité de l’Union européenne*, dir. Loïc Azoulay and Laurence Burgogues-Larsen (Brussels: Bruylant, 2006), 122.

<sup>23</sup> Maria Luísa Duarte, *Direito Administrativo da União Europeia*, 100.

<sup>24</sup> See Maria Luísa Duarte, *Direito Administrativo da União Europeia*, 17-20 and 28-30; and Sophie Perez Fernandes, “Administração Pública”, in *Direito da União Europeia – Elementos de Direito e Políticas da União*, ed. Alessandra Silveira, Mariana Canotilho e Pedro Madeira Froufe (Coimbra: Almedina, 2016), 77-85.

<sup>25</sup> José Joaquim Gomes Canotilho, “Estado de Direito e Internormatividade”, in *Direito da União Europeia e Transnacionalidade*, ed. Alessandra Silveira (Lisbon: Quid Iuris, 2010), 171-185.

<sup>26</sup> Mario Chiti, “Les droits administratifs nationaux ...”, 868.

<sup>27</sup> According to the Court’s settled case-law on the principle of procedural autonomy of the Member States, it is, in the absence of relevant EU rules, for the national legal systems to regulate the legal procedures designed to ensure the implementation of EU law at national level. On this principle and the limits arising from the principles of effectiveness and equivalence, see in Portuguese legal literature, among others, Miguel Prata Roque, *Direito Processual Administrativo Europeu: a convergência dinâmica no Espaço Europeu de Justiça Administrativa* (Coimbra: Coimbra Editora, 2011), 66-88; Fausto de Quadros, *Direito da União Europeia: Direito Constitucional e Administrativo da União Europeia*, 3<sup>rd</sup> edition (Coimbra: Almedina, 2013), 648-652; and ours “Administração Pública”, 106-113.

<sup>28</sup> Fausto de Quadros, *Direito da União Europeia...*, 641 and 643.

Administrations of general jurisdiction, falls within the scope of EU (Administrative) law, then it is possible to qualify Article 168 (7) CPA as a (Portuguese legal) rule of Administrative Law of the European Union, since its purpose is to regulate a specific duty of the Portuguese Public Administration as EU Administration of general jurisdiction. As already mentioned, the provision's hypothesis refers exclusively to EU law. It is based on “*a new interpretation of that law in a later and final judgment, handed down by an administrative court adjudicating at last instance which has enforced a judgment of a European Union court binding on the Portuguese State...*”, that the Administration is under (“*As long as it still can do it...*”) the duty to annul the administrative act “*that was declared valid by final judgment handed down by an administrative court based on the interpretation of European Union law*”.<sup>29</sup>

The purpose of this text is to examine the solution contained in the provision in light of the case-law of the CJEU that the legislator of the CPA voluntarily sought to codify.<sup>30</sup> After all, as *EU Administrations of general jurisdiction*, the loyalty of the administrative authorities of the Member States lies not only in their respective national legal systems, but also in certain circumstances as a matter of priority (primacy) in the EU legal order, which they ought to assimilate, as such (that is, in accordance with the criteria laid down by EU law), as equally their own.<sup>31</sup> The same sense of loyalty manifests itself in the interpretation of provisions of national law which govern them when they act within the scope of EU law.

### III. The provision of Article 168(7) CPA in light of the case-law of the CJEU

As EU law is part of the legal framework binding on the administrative authorities of the Member States, it does not leave national administrative laws unscathed,<sup>32</sup> but alters them, conditions their creation, guides their interpretation and adjusts their application. In the Code of Administrative Procedure currently in force in Portugal, the provision that we propose to analyse is of such paradigmatic example.

The solution enshrined in Article 168(7) CPA seeks to codify the case-law of the CJEU concerning the delicate problem of the “*review of national administrative decisions that have become final but are contrary to EU law as revealed after their consolidation within the legal order*”. It is, moreover, almost intuitive to associate it with the *Kühne*<sup>33</sup> judgment, the landmark decision handed down by the CJEU in this matter. Any solution to that problem must seek to reconcile requirements of legal certainty, which point to the stability of the administrative decision, and requirements of legality under EU law,<sup>34</sup>

<sup>29</sup> Emphasis added.

<sup>30</sup> In fact, as we shall see below, EU law leaves the “*greatest discretion to the national legislature as to whether or not prescribe the figure (expressly or implicitly) and to regulate it (for example, the time-limit for the individual to request the annulment)*”, so that Article 168 (7) CPA cannot be “*justified as a result of an obligation under EU law*”, Rui Tavares Lanceiro, “O dever de anulação do artigo 168.º, n.º 7, do novo CPA e a jurisprudência *Kühne & Heitz*”, ICJP, 22-23, available at [www.icjp.pt](http://www.icjp.pt) (last accessed on 20.6.2017) (free translation).

<sup>31</sup> See Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2011), 137.

<sup>32</sup> EU law shapes or “penetrates national administrative laws”, Fausto de Quadros, *Direito da União Europeia...*, 633 (free translation).

<sup>33</sup> Rui Tavares Lanceiro, “O dever de anulação...”, 9.

<sup>34</sup> As the CJEU put the terms of the equation in *Byankov*, recital 77.

which ought, in principle, to be restored. As already pointed out,<sup>35</sup> the problem also relates to the relationship between the legal orders of the Member States and of the Union. It is no coincidence that, in the *Kühne* judgment and others that followed, the question was referred to and answered by the CJEU in light of the principle of sincere cooperation.<sup>36</sup>

The problem identified – and for which Article 168(7) CPA then offers a legal solution – has arisen in the case law of the CJEU in three types of situations.

### 1. Situation 1 – the *Kühne* judgment

In the first situation, the review concerns an administrative decision that became final by virtue of a final judicial decision. That was the case in *Kühne*. In particular, the Netherlands authorities, after carrying out checks on the declarations lodged by Kühne & Heitz, reclassified the goods exported by the latter and demanded reimbursement of the amounts granted as export refunds. The court that dismissed the appeal lodged by Kühne & Heitz considered, in the light of the *CILFIT* case-law,<sup>37</sup> that the interpretation of the relevant EU rules did not raise doubts, neither did Kühne & Heitz request that a question be referred to the CJEU for a preliminary ruling. Years later, following a judgment in a case involving other parties<sup>38</sup> in which the CJEU interpreted the term ‘leg’ in a way that was favourable to it, Kühne & Heitz requested from the Netherlands administration, payment of the refunds which the latter had, in its view, wrongly required it to reimburse. Following the rejection of its request, Kühne & Heitz brought an action to the referring court.<sup>39</sup>

In its judgment, and again in *Kempter*,<sup>40</sup> the CJEU first addressed the tension between legal certainty and legality under EU law, which was underlying the problem at hand. By virtue of the latter, “*it is for all the authorities of the Member States to ensure observance of the rules of Community law within the sphere of their competence*”, so that National Administrative Authorities shall apply the rules of EU law as interpreted by the CJEU “*even to legal relationships which arose or were formed before the Court gave its ruling on the question on interpretation*”.<sup>41</sup> In other words, the interpretative ruling given by the CJEU is declarative in nature and, therefore, has *ex tunc* effects.<sup>42</sup> Thus, the imperative of legality under EU law points to the restoration of the legality infringed through the elimination of the measure that was contrary to it. However, the principle of legal certainty, which is “*one of a number of general principles recognised by Community law*”,<sup>43</sup> points to the stability of administrative decisions as compliance with that

<sup>35</sup> Sophie Perez Fernandes, “O reexame de atos administrativos definitivos contrários ao direito da União em matéria de cidadania – os contornos do acórdão *Byankov*”, *Debater a Europa* 9 (2013), 81-82, available at [debateruropa.europa-direct-aveiro.aeva.eu](http://debateruropa.europa-direct-aveiro.aeva.eu) (last accessed 20.6.2017).

<sup>36</sup> See judgment *Kühne*, recitals 19 and 28; *i-21 Germany and Arcor*, 19 September 2006, Joined Cases C-392/04 and C-422/04, EU:C:2006:586, recital 17; and *Byankov*, recitals 28 and 64-66.

<sup>37</sup> Judgment of the Court in *CILFIT*, 6 October 1982, Case 283/81, EU:C:1982:335, recitals 13-21.

<sup>38</sup> Judgment of the Court in *Voogd*, 5 October 1994, Case C-151/93, EU:C:1994:365.

<sup>39</sup> See judgment *Kühne*, recitals 5-10 and 18.

<sup>40</sup> In which the problem was once again raised in the context of export refunds – *Kempter*, recitals 8-18.

<sup>41</sup> See judgment *Kühne*, recitals 20-22; and *Kempter*, recitals 34-36.

<sup>42</sup> Without prejudice on the temporal restrictions that the CJEU may, exceptionally and in the exercise of exclusive jurisdiction, place on the interpretation which it lays down – see Judgment of the Court in *Denkavit italiana*, 27 March 1980, Case 61/79, EU:C:1980:100, recitals 16-18.

<sup>43</sup> See judgment *Kühne*, recital 24; and *Kempter*, recital 37.

principle prevents them from being called into question indefinitely;<sup>44</sup> so, “[finality] of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty”.<sup>45</sup>

Seeking a compromise solution,<sup>46</sup> the CJEU established the following jurisprudence. As a rule, the principle of legal certainty, as recognised by EU law, “does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final”. However, the principle of sincere cooperation imposes on an administrative body, where some circumstances are met, “an obligation to review that decision in order to take account of the interpretation of the relevant provision of Community law given in the meantime by the Court”.<sup>47</sup> Those circumstances/conditions<sup>48</sup> are the following:

- 1) the administrative body concerned must have, under national law,<sup>49</sup> “competence to reopen the decision” which has become final;
- 2) the decision must have become final “as a result of a judgment of a national court against whose decisions there is no judicial remedy”;<sup>50</sup>
- 3) that judgment must have been based “on an interpretation of Community law which, in light of a subsequent judgment of the Court, was incorrect and which was adopted without a question being referred to the Court for a preliminary ruling”;<sup>51</sup> and
- 4) the individual concerned must have complained to the competent administrative body within a reasonable time-limit under national law.<sup>52</sup>

<sup>44</sup> See judgment *i-21 Germany and Arcor*, recital 51.

<sup>45</sup> See judgment *Kühne*, recital 24; and *Kempter*, recital 37.

<sup>46</sup> Maria Luísa Duarte, *Direito Administrativo da União Europeia*, 111.

<sup>47</sup> See judgment *Kühne*, recitals 24, 27 and 28; *Kempter*, recitals 37-38; *i-21 Germany and Arcor*, recitals 51-52; and *Byankov*, recitals 76-77 (emphasis added).

<sup>48</sup> While in *Kühne*, recital 27, the CJEU refers to “circumstances”, in subsequent case-law it refers to them as “conditions” – see *Kempter*, recital 39; and *i-21 Germany and Arcor*, recital 52.

<sup>49</sup> In its Opinion in *i-21 Germany and Arcor*, 16 March 2006, Joined Cases C-392/04 and C-422/04, EU:C:2006:181, recital 67, Advocate General D. R. Jarabo Colomer reports “the error in the rule in *Kühne & Heitz*” due to the “reliance on national law, as advocated by the Court of Justice in such cases”, which “raises serious problems, including, in particular, disparities in the protection of rights derived from the Community legal order.” For a general overview of existing legal systems in the various Member States on the subject, see *Consequences of Incompatibility with EC Law for Final Administrative Decisions and Final Judgments of Administrative Courts in the Member States* (Warsaw: Association of the Councils of State and Supreme Administrative Jurisdictions, 2008). Criticising the solution, see Dominique Ritleng, “Le retrait des actes administratifs contraires au droit communautaire”, in *L'état actuel et les perspectives du Droit Administratif Européen*, dir. Jürgen Schwarze (Brussels: Bruylant, 2010), 266-270; Laurent Coutron, “L'irénisme des Cours européennes. Rapport introductif”, in *L'obligation de renvoi préjudiciel à la Cour de justice. Une obligation sanctionnée?*, dir. Laurent Coutron (Brussels: Bruylant, 2014), 40-41.

<sup>50</sup> As will be seen below, the *Kühne* case-law does not apply where the person concerned has not acted judicially in order to challenge the administrative decision which, thus, became final upon expiry of the time-limits for legal remedies available to it.

<sup>51</sup> The judgment in *Kempter*, recitals 43-44, clarified that the claimant is not required “to have raised, in his legal action under domestic law, the point of Community law that was subsequently the subject of the Court’s preliminary ruling”; in order for that condition to be satisfied, it is sufficient that the point of EU law the interpretation of which proved to be incorrect in light of a subsequent judgment of the CJEU was either considered by the national court ruling at last instance or could have been raised by the latter of its own motion.

<sup>52</sup> The CJEU in some way replaces in *Kempter*, recitals 54-60, the immediacy resulting from the judgment in *Kühne*, recital 28, with the reasonable nature of the time-limits laid down by national law. However, as EU law does not impose a time-limit for the submission of a request for review of national administrative decisions which have become final, the time-limits set for that purpose by national law must comply with both principles of equivalence and effectiveness.



In particular, the second condition makes it possible to limit the scope of the *Kühne* case-law to cases in which, in addition to the consolidated nature of the administrative decision, there is the force of *res judicata* of the final judicial decision by virtue of which the former became final. The *Kühne* case-law essentially “*provides a means of mitigating, [through the principle of sincere cooperation], the negative effects of the lack of a reference for a preliminary ruling*” (which is embodied in the judicial decision by virtue of which the administrative decision contrary to EU law became final), “*by offering individuals who have exhausted the remedies available under domestic law a further opportunity to assert the rights conferred upon them by Community law.*”<sup>53</sup> The *Kühne* case-law adds to the framework of ‘sanctions’ of EU law for the failure of national courts against whose decisions there is no judicial remedy to comply with the obligation to make a reference for a preliminary ruling under Article 267 (3) TFEU.<sup>54</sup>

It further follows from the *Kühne* judgment that, where those conditions are met, national administrative bodies are under an obligation to review an administrative decision contrary to EU law which has become final – only on the basis of the outcome of that review shall they determine to what extent they are “*under an obligation to reopen, without adversely affecting the interests of third parties, the decision in question.*”<sup>55</sup> As explained above, EU law does not require National Administrative Authorities to be placed under a general obligation to reopen (revoke/annul) an administrative decision which has become final (principle of legal certainty), but only when certain conditions are met, are they under an obligation to review that decision in order to take account subsequent case-law of the CJEU in light of which that decision was found to be contrary to EU law (principle of sincere cooperation). Once the review has been carried out in light of the correct interpretative legal framework and all the public and private interests involved have been weighed, it is for the National Administrative Authority concerned to determine whether or not to revoke/annul the administrative decision – what the requirements of legality under EU law do not tolerate is the inertia of the administrative authorities of the Member States in these cases.

## 2. Situation 2 – the *Lucchini* judgment

In relation to the *Kühne* case-law, the *Lucchini* judgment introduced a sectoral exception.<sup>56</sup> In fact, in addition to the review of an administrative decision that has become final by virtue of a final judicial decision, the case also raised a problem of competence since the recovery of State aid declared incompatible with the Internal Market was in question. Before the Commission had taken that decision, *Lucchini* had already brought proceedings against the Italian authorities in order to establish its right to the payment of the aid claimed, initiating a judicial saga during which the Commission’s decision taken in the meantime was ignored. Moreover, neither *Lucchini* nor the Italian Government brought an action against the Commission’s

<sup>53</sup> Opinion of Advocate General Yves Bot in *Kempton*, 24 April 2007, Case C-2/06, EU:C:2007:245, recital 82.

<sup>54</sup> Laurent Coutron, “L’irénisme des Cours européennes...”, 39-52.

<sup>55</sup> See judgment *Kühne*, note 14, para. 27 (emphasis added).

<sup>56</sup> Laurent Coutron, “L’irénisme des Cours européennes...”, 32. To Fausto de Quadros, *Direito da União Europeia...*, 684-687, it follows from the judgments in *Kühne* and *Lucchini* differentiated schemes for revocation/annulment depending on whether the administrative decision concerns matters falling within the exclusive competence of the Union.

decision declaring the State aid incompatible with the Internal Market. As a result, the decision granting the aid to Lucchini became final by virtue of a final judicial decision. It was only after exchange of correspondence with the Commission that the Italian authorities revoked that decision and ordered Lucchini to reimburse the amounts paid, together with interest. The court that heard the appeal brought by Lucchini upheld its claim on the ground that the Public Authorities' powers to revoke their own invalid acts were limited in the case by the finding in a final judgment, that there was a right to be granted aid. An appeal was lodged with the *Consiglio di Stato*, which gave rise to the reference for a preliminary ruling at the origin of the *Lucchini* judgment.<sup>57</sup>

According to settled case-law, recovery of State aid declared incompatible with the Internal Market is the logical consequence of the finding that it is unlawful, so that the role of national authorities is limited to ensuring that the execution of the Commission's decision (they do not enjoy a discretionary power to decide differently). If, in the absence of relevant EU rules, the recovery of aid must take place in accordance with the relevant procedural provisions of national law, those provisions are to be applied in such a way that the recovery required by EU law is not rendered practically impossible and taking fully into consideration the interests of the Union.<sup>58</sup> In particular, in *Alcan*, the CJEU had already held as a result, that the competent national authority is under the obligation “to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the authority has allowed the time-limit laid down for that purpose under national law in the interest of legal certainty to elapse” as, once the Commission notifies its decision, the recipient of unlawfully granted aid ceases to be in a state of uncertainty about the possibility of recovery of the aid.<sup>59</sup>

If further follows from *Lucchini* that the obligation to recover the aid remains in spite of a national judicial decision to the contrary and despite the fact that that decision has become final. The CJEU held that EU law precludes the application of a provision of national law which seeks to lay down the principle of *res judicata* in so far as its application prevents the recovery of State aid which has been found to be incompatible with the Internal Market in a decision of the Commission which has become final.<sup>60</sup> The ruling in *Olimpiclub* would clarify that the extent of this erosion of the principle of *res judicata* is limited to the “highly specific situation”, in question in *Lucchini*, concerning the division of powers between the Member States and the Union in the area of State aid and in which the Commission has, under the control of the judge of the Union, exclusive competence to assess a national State

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<sup>57</sup> See Judgment of the Court in *Lucchini*, 18 July 2007, Case C-119/05, EU:C:2007:434, recitals 17-39; for a chronological reconstruction of the facts, see Opinion of the Advocate General L. A. Geelhoed in *Lucchini*, 14 September 2006, Case C-119/05, EU:C:2006:576, para. 13.

<sup>58</sup> See, among others, Judgments of the Court in *Deutsche Milchkontor*, 21 September 1983, Joined Cases 205 to 215/82, EU:C:1983:233, recitals 30-33; *Alcan*, 20 March 1997, Case C-24/95, EU:C:1997:163, recitals 24, 25 and 34; *Commission v Portugal*, 27 June 2000, Case C-404/97, EU:C:2000:345, recitals 38 and 55; *Commission v Slovak Republic*, 22 December 2010, Case C-507/08, EU:C:2010:802, recitals 42, 43 and 52. That case-law has found an echo in secondary legislation – see Article 16 (3) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9-29).

<sup>59</sup> See judgment *Alcan*, recitals 35-38.

<sup>60</sup> See judgment *Lucchini*, recital 63.

aid measure's compatibility with the Internal Market.<sup>61</sup>

Strictly speaking, Lucchini's claim sought the consolidation of a national judicial decision which, while blatantly ignoring the applicable EU law, recognised its right to the payment of the aid when national courts have no competence to decide on the compatibility of State aid measures with the Internal Market.<sup>62</sup> In addition, that national judicial decision became final *after* the Commission's own decision had become final. The CJEU clarified in *Commission v Slovak Republic* that, on the contrary, where the final judicial decision precedes the decision whereby the Commission requires the recovery of the aid, "Lucchini cannot be of direct relevance".<sup>63</sup> Thus, the exceptional and particular character of the *Lucchini* jurisprudence is confirmed: as was clear from earlier case-law and was subsequently confirmed, "European Union law does not in all circumstances require a national court to disapply domestic rules of procedure conferring the force of *res judicata* on a judgment, even if to do so would make it possible to remedy an infringement of European Union law by the judgment in question."<sup>64</sup> EU law did not impose such an obligation in the case underlying the judgment in *Commission v Slovak Republic*, but that did not prevent the CJEU from declaring that the Slovak Republic had failed to fulfill its obligations by failing to take within the prescribed period, all the measures necessary to recover the aid from the beneficiary undertaking.<sup>65</sup>

### 3. Situation 3 – the *i-21 Germany* and *Arcor* and *Byankov* judgments

As mentioned above, the second condition for the application of the *Kühne* case-law is that the administrative decision must have become final "as a result of a judgment of a national court against whose decisions there is no judicial remedy". That not being the case, that is, if the administrative decision has become final upon expiry of the time-limits for legal remedies, the judgment in *Kühne* "is not directly relevant" – thus clarified

<sup>61</sup> Judgment of the Court in *Olimpiclub*, 3 September 2009, Case C-2/08, EU:C:2009:506, recital 25 (emphasis added).

<sup>62</sup> See judgment *Lucchini*, recitals 50-52 and 62. The attitude of Lucchini, which, addressing the national courts, sought "the weakest link in the chain of courts which can be called upon to adjudge the lawfulness of the granting of State aid" was only considered by Geelhoed in its Opinion but as a "subordinate argument" – Opinion in *Lucchini*, recitals 68, 75 and 83.

<sup>63</sup> See judgment *Commission v Slovak Republic*, recitals 57-58.

<sup>64</sup> See judgment *Commission v Slovak Republic*, recital 60. The importance of the principle of *res judicata* within the EU legal order was confirmed in, among others, the Judgments of the Court in *Köbler*, 30 September 2003, Case C-224/01, EU:C:2003:513, recital 38; *Kapferer*, 16 March 2006, Case C-234/04, EU:C:2006:178, recitals 20-21; and *Olimpiclub*, recitals 20-23.

<sup>65</sup> In the case, the State measure at issue consisted in the writing-off of a tax debt of Frucona as part of an arrangement with creditors approved by the competent court within a recovery procedure. In order to execute the Commission's decision by which the State aid thus granted to Frucona was declared incompatible with the internal market, the competent tax office called on Frucona to repay the unlawful aid and, since Frucona did not comply with that order, brought a debt recovery action before the competent national courts. As its claim was not upheld, the tax office requested the filing of an extraordinary appeal for review of the judgment on the arrangement with creditors, which had acquired the force of *res judicata*. Without criticizing the judicial procedure followed, the CJEU declared that the Slovak Republic had failed to fulfil its obligations as the information provided was not sufficient to conclude "that it took, within the prescribed period, all the measures which it could have employed in order to obtain the repayment of the aid at issue", nor to explain, in particular, "what action was taken in response to the request by the tax office that an extraordinary appeal be brought against the contested judgment" – see *Commission v Slovak Republic*, recitals 6-14, 53 and 61-65.

the judgments in *i-21 Germany and Arcor and Byankov*.<sup>66</sup> Neither those companies nor Hristo Byankov had made use of the available judicial remedies to challenge the administrative decisions charging the former fees for individual telecommunications licences and prohibiting the latter from leaving the Bulgarian territory. In the first case, the two telecommunications undertakings sought the withdrawal of those fee notices on the ground that the Regulation under which they were adopted was illegal and unconstitutional. An assessment, in the meantime, was made in court in the context of another procedure in subsequent judicial proceedings, in which the undertakings also relied on the national Regulation in question being inconsistent with Directive 97/13.<sup>67</sup> In turn, Hristo Byankov applied for annulment of the prohibition on leaving the territory, invoking his status as a citizen of the Union, his right to move and reside freely within the Union associated with that status and the Directive 2004/38 governing its exercise.<sup>68</sup> None of the claims were successful as the conditions for the withdrawal/annulment of final administrative decisions laid down by the domestic laws in question were not met.<sup>69</sup>

In both cases, the CJEU considered the National Regulations under which those administrative decisions had been adopted contrary to EU law.<sup>70</sup> Even though those decisions had become final, the question was whether EU law required their review and possible revocation/annulment by the competent administrative authorities to safeguard the rights which individuals derive from EU law.<sup>71</sup> Though the judgment in *Khiine* was not “*directly relevant*”, the CJEU recalled the principle established therein: “*finality of an administrative decision contributes to legal certainty, with the consequence that EU law does not require that an administrative body be, in principle, under an obligation to reopen an administrative decision which has become final.*”<sup>72</sup> Thus, in the absence of relevant EU rules, the issue would be to resolve in accordance with the national law of each Member State, provided that both principles of equivalence and effectiveness were respected.<sup>73</sup>

In the *i-21 Germany and Arcor* case, the referring court explained that, according to German case-law, administrative bodies have discretion, in principle, to withdraw an unlawful administrative decision even if it has become final. That discretion may, however, be extinguished if, to uphold the decision in question, would be “*downright*

<sup>66</sup> See judgment *i-21 Germany and Arcor*, recitals 53-54; and *Byankov*, recital 51.

<sup>67</sup> Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services (OJ L 117, 7.5.1997, p. 15-27), repealed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ L 108, 24.4.2002, p. 33-50).

<sup>68</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77-123).

<sup>69</sup> See judgment *i-21 Germany and Arcor*, recitals 9-13; and *Byankov*, recitals 19-27.

<sup>70</sup> The system of calculation of the fees for individual licences laid down in the relevant German legislation was contrary to Article 11 (1) of Directive 97/13 and the restriction on the freedom of movement resulting from the relevant Bulgarian legislation did not comply with the conditions laid down in Article 27 (1) (2) of Directive 2004/38 – see *i-21 Germany and Arcor*, recitals 28-42; and *Byankov*, recitals 34-48.

<sup>71</sup> See judgment *i-21 Germany and Arcor*, recital 56; and *Byankov*, recital 65.

<sup>72</sup> See judgment *i-21 Germany and Arcor*, recital 51; and *Byankov*, recital 76.

<sup>73</sup> See judgment *i-21 Germany and Arcor*, recital 57; and *Byankov*, recital 69.

*intolerable*” in respect of public policy, good faith, fairness, equal treatment, or “*manifest unlawfulness*”. The question was raised as to whether the latter concept was applied in accordance with the principle of equivalence. As the CJEU had clarified that the German legislation at issue was “*clearly incompatible*” with EU law, it called on the national authorities to draw all the necessary conclusions from it, since, “*pursuant to rules of national law, the authorities are required to withdraw an administrative decision which has become final if that decision is manifestly incompatible with domestic law, that same obligation must exist if the decision is manifestly incompatible with Community law*”.<sup>74</sup>

In the *Byankov* case, the CJEU’s scrutiny was more detailed. According to the information provided by the referring court, Bulgarian law allows for the annulment of final administrative decisions under specified conditions, in particular, where there has been a material breach of one of the conditions governing its legality. In this case, however, that power may only be exercised within a period of one month from the date on which the decision concerned was adopted, in addition to the fact that the procedure may not be reopened at the request of the addressee. As a result, Hristo Byankov was unable to obtain a review of his case, even though the territorial prohibition to which he was subject was “*clearly contrary to the requirements of EU law*”. Considering (i) “*the importance which primary law accords to citizenship of the Union*”, (ii) that the national legislation at issue perpetuated for an unlimited period a prohibition on leaving the territory, thus being the “*antithesis of the freedom conferred by Union citizenship to move and reside within the territory of the Member States*”, and (iii) that the obligation to review laid down in Article 32 (1) of Directive 2004/38 was to be a fortiori observed in a situation such as that at issue, the CJEU concluded that the Bulgarian legislation at issue could not “*reasonably be justified by the principle of legal certainty*” and was contrary to the principles of effectiveness and sincere cooperation.<sup>75</sup>

#### IV. In search of a ‘Euro-compatible’ solution for Article 168 (7) CPA

Article 168 (7) CPA is part of the distinction made by the new CPA between the figures of administrative revocation and administrative annulment and their respective schemes.<sup>76</sup> As a manifestation of *active administration*, revocation determines the cessation of the effects of a primary administrative act for reasons of merit, convenience, or opportunity, having, as a rule, *ex nunc* effects, while annulment, as a manifestation of *control administration*, causes the destruction of the effects of a primary administrative act on the grounds of its invalidity, having, as a rule, *ex tunc* effects.<sup>77/78</sup> With regards to the latter, the difference between administrative annulment and judicial annulment was also made evident. Their respective deadlines do not necessarily coincide, in addition to being allowed, under certain circumstances

<sup>74</sup> See judgment *i-21 Germany and Arcor*, recitals 8, 14 and 61-72.

<sup>75</sup> See judgment *Byankov*, recitals 14-17, 60-62 and 72-82.

<sup>76</sup> For a critical analysis of this option, and referring to the doctrinal debate scrutinized there, Carla Amado Gomes, “A ‘revogação’ do acto administrativo: uma noção pequena”, in *Comentários ao novo Código de Procedimento Administrativo*, 2<sup>nd</sup> edition, ed. Carla Amado Gomes, Ana Fernanda Neves and Tiago Serrão (Lisbon: AAFDL, 2015), 1005-1008; and Marco Caldeira, “A figura da ‘Anulação Administrativa’...”, 1036-1041.

<sup>77</sup> See Articles 165 and 171 (1) and (3) CPA.

<sup>78</sup> See Mário Aroso de Almeida, in Maria da Glória Garcia *et al.*, *Comentários à revisão do Código do Procedimento Administrativo* (Coimbra: Almedina, 2016), 337-338.

and conditions, the administrative annulment of administrative acts which can no longer be judicially challenged.<sup>79</sup> The regime embodied in Article 168 (7) CPA, precisely underlies a case of administrative annulment of administrative acts that can no longer be judicially challenged by virtue of the fact that the judicial decision that declared it valid has become final.

As stated at the outset, the provision relates exclusively to EU law.<sup>80</sup> The basis for annulment is the non-conformity of the primary administrative act with the requirements imposed on it by EU law. More for “*pedagogical reasons*” than from an imperative of EU law, as the case-law of the CJEU is, in itself, binding on all Member States,<sup>81</sup> it seems that the intention of the legislator was to ‘transpose’ the *Kühne* case-law. There is, however, no complete coincidence between the conditions set out in that judgment and the wording of Article 168 (7) CPA. Moreover, the terms of the provision do not appear to be entirely compatible with the case-law of the CJEU to which it relates.

The first part of the provision needs a first precision. According to the wording of Article 168 (7) CPA, the duty to annul provided for therein arises from an administrative act that was declared valid by a final judicial decision handed down by an administrative court based on the interpretation of EU law, on the basis of a “*new interpretation*” of EU law. It is not, however, a case of supervening invalidity as, after the administrative act was adopted, its legal framework of validity is not changed<sup>82</sup> – what is revealed is the correct interpretation of EU law in light of which it should have been adopted. As the CJEU recalled in *Kühne*, National Administrative Authorities shall apply the rules of EU law as interpreted by the CJEU even to legal relationships which arose or were formed before the CJEU gave its interpretative ruling.<sup>83</sup> To the extent that this judgment has *ex tunc* effects, the non-conformity of the administrative act with EU law is original, referring to the moment of its adoption, but is revealed by a supervening/subsequent judgment of the CJEU.

In addition, the error of law in the interpretation and application of EU law committed by the administrative body is subsequently repeated in the courts – that is also the case underlying the *Kühne* case-law. Moreover, that case-law seeks to mitigate

<sup>79</sup> See Preamble of DL No. 4/2015, para. 18.

<sup>80</sup> There is no duty to annul similar to that provided for in Article 168(7) CPA for situations that remain exclusively domestic. The existence of a double standard, whether or not EU law is applicable, for the treatment of the same legal question is not unknown within the Portuguese legal order – Article 13 (2) of the *Regime da Responsabilidade Civil Extracontratual do Estado e demais entidades públicas* (non-contractual civil liability of the State and other public bodies’ regime) approved by the Law No. 67/2007, of 31 December (and altered by the Law No. 31/2008, of 17 July) being a paradigmatic example of this subsequent to recent case-law (see Judgment of the *Tribunal Constitucional* No. 363/2015, 9 July 2015, Case 185/15, and Judgment of the Court in *Ferreira da Silva*, 9 September 2015, Case C-160/14, EU:C:2015:565). However, as a potentially harmful result in the light of the principle of equality, it is likely to fuel the debate about the (un)constitutionality of the provision of Article 168(7) CPA, not regarding to the solution enshrined therein, but in relation to its scope. Questioning the constitutionality of the provision, see Paulo Otero, “Problemas constitucionais do novo Código do Procedimento Administrativo – uma introdução”, in *Comentários ao novo Código de Procedimento Administrativo*, ed. Carla Amado Gomes, Ana Fernanda Neves and Tiago Serrão (Lisbon: AAFDL, 2015), 23-26, and Marco Caldeira, “A figura da ‘Anulação Administrativa’...”, 1053; rejecting any problem of constitutionality, see Fausto de Quadros, in Maria da Glória Garcia *et al.*, *Comentários à revisão do Código do Procedimento Administrativo*, 363.

<sup>81</sup> *Ibid*, 359 (free translation).

<sup>82</sup> Marco Caldeira, “A figura da ‘Anulação Administrativa’...”, 1057.

<sup>83</sup> See *Kühne*, recitals 20-22; and *Kempter*, recitals 34-36.

the negative effects of the absence of a reference for a preliminary ruling by offering individuals a further opportunity to assert their rights under EU law. However, and contrary to the conditions laid down in the *Kühne* judgment, Article 168 (7) CPA does not require that the judgment that has declared the administrative act valid to be rendered by a court adjudicating at last instance, nor does it need to refer to the lack of a reference for a preliminary ruling – it only requires that the judgment becomes final. To that extent, the provision is broader than the hypothesis underlying the *Kühne* case-law as it qualifies for annulment an administrative act that has become final by virtue of a final judicial decision, even if it has not been delivered by a court adjudicating at last instance and irrespective of whether there has been a reference for a preliminary ruling (in case it has been withdrawn or the CJEU's judgment has not been duly considered).

On the other hand, by imposing a *duty* to annul, the provision makes it unequivocal that the first condition set out in *Kühne* is fulfilled. At the same time, it goes beyond the compromise solution resulting from the case-law of the CJEU previously mentioned. It does not follow from that case-law that there is, under EU law, a general obligation to revoke/annul an administrative decision which has become final by exhaustion of the available legal remedies (or upon expiry of the reasonable time-limits for those remedies),<sup>84</sup> but only an obligation to review that decision in order to take account of subsequent case-law of the CJEU in light of which that decision was found to be contrary to EU law. Only in the field of State aid does EU law require the revocation/annulment of the decision granting the aid declared incompatible with the Internal Market and the consequent recovery of the aid granted, even if both take place in accordance with the relevant procedural provisions of national law.<sup>85</sup> Without being obliged to do so by EU law, the CPA chose to impose a duty to annul, which is unequivocal from the rigidity of the expression “*has the duty to annul*” and reinforced by the consideration of the discretionary power to annul conferred to the Administration in the other cases provided for in Article 168 CPA.<sup>86</sup>

One may question the legitimacy of the imposition of such a duty to annul in light of the increased need for legal certainty underlying cases in which, since the administrative act has been subject to judicial review, so to the final administrative decision adds the authority of *res judicata*. It follows from the *Kühne* judgment itself that the national administrative bodies determine whether to revoke/annul the administrative decision, weighting all the public and private interests involved.<sup>87</sup> Perhaps this is the meaning to be attributed to the initial safeguard clause of Article 168 (7) CPA by which the Administration is under a duty to annul “*as long as it still can do it*”. This segment can therefore be interpreted (in compatible terms with EU law) as excluding the duty to annul for reasons of public interest or for the protection of the rights and legitimate interests of third parties, or upon the expiry of the time-limits set in Article 168 CPA.<sup>88</sup> In particular, assuming that the highlighted segment refers to deadlines, this should have been made clearer from the wording of the provision, as, according to the case-law of the CJEU, the application of a limitation period established by national law in a situation governed by EU law must be “*sufficiently foreseeable*” to respect the principle

<sup>84</sup> See note 48.

<sup>85</sup> See notes 59 and 60.

<sup>86</sup> Marco Caldeira, “*A figura da ‘Anulação Administrativa’...*”, 1053.

<sup>87</sup> See *Kühne*, recital 27.

<sup>88</sup> Referring to deadlines, see Rui Tavares Lanceiro, “*O dever de anulação...*”, 16.

of legal certainty.<sup>89</sup>

Continuing the analysis of the first part of the provision, the question arises as to whether the annulment provided for therein is also required when the administrative act has not been judicially challenged and thus, has not been declared valid by a final judicial decision.<sup>90</sup> Such an extensive interpretation would cover situations such as those underlying the *i-21 Germany and Arcor* and *Byankov* judgments, in addition to allowing an interpretation of Article 168 (7) CPA as an expression of a general rule by which the Administration must, if not annul, at least review administrative acts that, regardless of whether or not they have been judicially challenged, have become final in order to take into account the interpretation of the relevant provision of EU law subsequently given by the CJEU. The combined reading of those two judgments also reveals the need to take account of the importance of the material field of EU law in question in order to assess the compatibility with EU law of the national legal remedies applicable under the principle of procedural autonomy, in addition to emphasize the need to comply with the conditions resulting from the principles of equivalence and effectiveness<sup>91</sup> – a coordinate particularly relevant with regard to the second part of the provision under analysis.

Indeed, pursuant to Article 168 (7) CPA, the (subsequent) interpretation of EU law on which the annulment is based must be set out “*in a later and final judgment, handed down by an administrative court adjudicating at last instance which has enforced a judgment of a European Union court binding on the Portuguese State.*” This latter segment needs a first precision as it must be interpreted as referring to the correct interpretation of EU law resulting from a subsequent judgment of the CJEU, but not necessarily resulting from a judgment given in a case which has the Portuguese State as one of the ‘parties’, such as an action for failure of the Portuguese State to fulfill obligations or a reference for a preliminary ruling on the initiative of a Portuguese court.<sup>92</sup>

In any case, here the provision sets a filter,<sup>93</sup> incompatible with EU law, to the application of the case-law of the CJEU: the Administration is only under the duty to annul if the correct interpretation of EU law resulting from a subsequent judgment of the CJEU is later enforced (implemented/received) in a judgment handed down by a Portuguese administrative court adjudicating at last instance and which has in the meantime become final. Two such proceedings are possible – either said judgment would be delivered in a case involving the administrative act in question, or in another case involving other parties but which would call the same legal framework under which it was adopted. The first might be carried out through an extraordinary appeal for review,<sup>94</sup> but the result of it ends up rendering the administrative annulment provided for in Article 168 (7) CPA useless. In any case, none of them is compatible

<sup>89</sup> See, among others, Judgments of the Court in *Danske Slagterier*, 24 March 2009, Case C-445/06, EU:C:2009:178, recitals 30-34, and *Cruz & Companhia*, 17 September 2014, Case C-341/13, EU:C:2014:2230, recitals 57-58.

<sup>90</sup> Raising the question, Marco Caldeira, “A figura da ‘Anulação Administrativa’...”, 1054.

<sup>91</sup> See note 74.

<sup>92</sup> Rui Tavares Lanceiro, “O dever de anulação...”, 17.

<sup>93</sup> *Ibid*, 18.

<sup>94</sup> On the basis of Article 696 (f) of the Code of Civil Procedure, also applicable to administrative procedure pursuant to Article 154 (1) of the Code of Procedure in Administrative Courts. For a critical analysis of the provision in the light of EU law, see Maria José Rangel de Mesquita, *O Regime da Responsabilidade Civil Extracontratual do Estado e demais Entidades Públicas e o Direito da União Europeia* (Coimbra: Almedina, 2009), 73-92.



with EU law.<sup>95</sup> Not only do they make it, in practice, impossible or excessively difficult for private parties to exercise the rights which they derive from EU law, but they mainly make the binding nature of the interpretation of EU law given by the CJEU for the Administration dependent on judicial intermediation when, as pointed out in *Kühne*, it is for the administrative authorities of the Member States to ensure compliance with EU law as interpreted, with *ex tunc* effects, by the CJEU.<sup>96</sup>

In other words, the second part of the provision neglects that the case-law of the CJEU is in itself part of the legal framework binding on National Public Administrations as EU Administrations of general jurisdiction. It is, therefore, sufficient for the Administration (of its own motion) or for the individual concerned<sup>97</sup> to invoke, for the purposes of the annulment provided for in Article 168(7) CPA, the judgment of the CJEU which, after the judicial decision that declared the administrative act valid has become final, clarifies the meaning and scope that should have been given to the relevant rules of EU law since their entry into force.

## V. Concluding remarks

The legislator sought, in Article 168 (7) CPA, to echo the case-law of the CJEU concerning the review of final national administrative decisions whose non-conformity with EU law stems from subsequent jurisprudence of the CJEU. In addition to other problems of interpretation raised by the rather unfortunate wording of the provision, it is by making the annulment conditional upon judicial intermediation which makes it incompatible with EU law. In any case, as EU law that is enshrined in national law, the provision of Article 168 (7) CPA is not only an example of the permeability of national administrative law to EU law, but also enhances the sense of loyalty that must guide the Portuguese Public Administration as an EU Administration of general jurisdiction. When applying the solution enshrined therein, its sense of loyalty is also, if not primarily, directed to the EU legal order, which ought to be assimilated in accordance with its own criteria. Only administrative and judicial practice, however, will make it possible to assess more accurately the real impact of this reception on the general law of the administrative procedure of such obligations arising from the principle of sincere cooperation, in particular as interpreted in the case-law of the CJEU.

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<sup>95</sup> As explains Rui Tavares Lanceiro, “O dever de anulação...”, 18-22.

<sup>96</sup> See *Kühne*, recitals 20-22.

<sup>97</sup> The individual’s initiative for the review is clear from the *Kühne* case-law, which, it is recalled, offers individuals a further opportunity to assert their rights under EU law in the absence of a reference for a preliminary ruling in the judicial proceedings by virtue of which the administrative decision became final.