

France / Air Law – 27 November 2017

THE CONSTITUTIONAL COUNCIL CENSORS ACNUSA'S POWER TO SANCTION

A business aviation company wins its case against ACNUSA by denouncing its lack of impartiality

(Constitutional Council, decision No.2017-675 QPC of 24 November 2017)

The decision of the Constitutional Council is important in several respects:

i) It establishes very clearly that ACNUSA's sanction proceedings are contrary to the Constitution in that they are not impartial;

ii) Yet it adjourns until 30 June 2018 the revocation of Article L. 6361-14 of the French Transport Code, thus granting ACNUSA the possibility of continuing to sanction aviation companies until that date, in violation of their fundamental rights

Sanctioned to pay two fines of €24,000 and €30,000 by ACNUSA¹ on 10 January 2017, a Czech business aviation company immediately referred the matter to the Administrative Court in Paris for a Priority Ruling on a Question of Constitutionality (QPC) in order to dispute how the sanction proceedings before ACNUSA were run.

According to the said company, these proceedings did not offer the guarantees of independence and impartiality required by Article 16 of the Declaration of Human and Civil Rights of 1789.

As this question was judged to be of a serious nature by the Administrative Court in Paris² and then by the French Council of State³, it naturally fell under the Constitutional Council's competence to judge if the disputed provisions of the French Transport Code (namely Articles L. 6361-11 and L. 6361-14) complied or not with the Constitution.

In what way can the ACNUSA sanction proceedings be considered anti-constitutional ?

By a decision dated 24 November 2017, the Constitutional Council esteemed that *"in the framework of sanction proceedings before the French Authority for Airport Noise Control, its President has the power of discretionary prosecution for infringements recorded while being at the same time a member of the trial bench for the said infringements.*

¹ French Authority for Airport Noise Control

² Order of the Administrative Court in Paris, case No. 1706129, of 5 July 2017, company QUEEN AIR s.r.o / ACNUSA

³ Order of the French Council of State, case No. 412205, of 20 September 2017, company QUEEN AIR s.r.o

Therefore, the disputed provisions make no clear separation within the Authority for Airport Noise Control between, on the one hand, the prosecution functions for possible infringements and, on the other hand, the judgment functions for the same infringements. They therefore do not respect the principle of impartiality. Consequently, the second, and fifth to ninth subsections of Article L. 6361-14 of the same said Code must be declared contrary to the Constitution.”

Between 4 and 5 million euros in fines are inflicted each year on aviation companies on the basis of legislative provisions which are contrary to the Constitution.

Basically, the Constitutional Council judged that, in that he has the power to dismiss files whose investigation has been closed, this in view of the circumstances of the case and the allegations made about the company concerned, **the President has the power to prosecute for ACNUSA, leading him to ‘make a preliminary decision’ about a case whereas he will then be called to rule on it while on the trial bench.** In this respect the provisions of Article L. 6361-14 of the French Transport Code do not ensure the division between the power of judgment and the power of prosecution.

[What are the consequences for ACNUSA and for the files under investigation?](#)

Other Authorities, before ACNUSA, have seen their sanction proceedings censored by the Constitutional Council for the same reasons.

New texts were then voted contributing to the improvement of the legislative rules in force.

1. For the time being, subsections 2, 5, 6, 7, 8 and 9 of Article L.6361-14 of the French Transport Code (the President's power to prosecute) remain applicable until 30 June 2018. A relatively rare fact, the Constitutional Council considered that, in view of the number of files under investigation by ACNUSA, an immediate revocation would have clearly excessive effects.

The fines which have been disputed by the aviation companies on the basis of the unconstitutional nature of Article L. 6361-14 and whose files are still pending before the jurisdictions⁴ should therefore not be set aside on the basis of the revocation of this Article. This being said, the said companies can opportunely use the decision of the Constitutional Council to invoke another argument altogether, which shall be judged by the Administrative Court in the coming weeks.

⁴ Either before the Administrative Court, or before the Administrative Court of Appeal, or also those pending before the French Council of State.

2. ACNUSA's power to sanction can continue to be exercised on the basis of the current legislation. Nonetheless, the legislator must prepare a new text, in order to institute a new sanction procedure in compliance with the principle of impartiality in order to replace the current provisions which shall come to an end on 30 June 2018.

Aviation companies must bring into question the legality of the pending fines if the investigation and the prosecution by ACNUSA is carried out under the provisions which have been censored

3. Around 500 files are under investigation by ACNUSA and could give rise to fines in the coming months; these files should be examined one at a time to see if the fines can be disputed. Of course the decision of the Constitutional Council must be invoked as it is inconceivable that companies can be sanctioned although it has been established by the highest jurisdiction in France that the ACNUSA procedure is contrary to the French Constitution.

4. Between 15 and 30 fines were pronounced by ACNUSA at its Plenary Assembly held on 5 September 2017, none of these fines has been notified to date to the aviation companies sanctioned on the grounds that ACNUSA wished to know beforehand the decision of the Constitutional Council. Of course, these fines will be disputed if they are notified to the said companies.

5. The aviation companies who have not disputed the fines notified to them and for which the deadline for appeal has expired, in principle, will not be able to take advantage of the decision of the Constitutional Council to cancel them (except in the case of a possible error in the notification which did not allow the full deadline for dispute to run, it being specified that the two-month deadline for dispute is extended to four months when the decisions concerning fines are notified to companies domiciled abroad).

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To know more:

The **complete file** concerning this case can be consulted on the site of the French Constitutional Council: www.conseil-constitutionnel.fr (Case No. 2017-675 QPC)

Decision No. 2017-675 QPC of the Constitutional Council and the documentary file can be consulted on the following link: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017-675-qpc/decision-n-2017-675-qpc-du-24-novembre-2017.150205.html>

The **censored provisions** of Article L. 6361-14 of the French Transport Code are the subsections 2, 5, 6, 7, 8 and 9 following, underlined and in bold print:

"The civil servants and officers mentioned in Article L. 6142-1 record the infringements to the measures defined in Article L. 6361-12. These infringements are the object of a report which, together with the amount of the fine incurred, are notified to the entity concerned and communicated to the authority.

At the end of the investigation, the President of the authority can dismiss the proceedings if the special circumstances when the event took place justify this or if they do not constitute an infringement giving rise to a sanction.

The investigation and the proceedings before the authority are inter partes.

The investigation is ensured by the civil servants and officers referred to in Article L. 6142-1 other than those who noted the infringement, which can include anybody likely to contribute to the information and be given all the necessary documents.

A permanent reporting Judge and his substitute are placed within the authority.

At the end of the investigation, the reporting Judge notifies the full investigation file to the entity concerned. The said entity can make its observations to the reporting Judge.

The authority does everything possible to allow the entity concerned to appear before it or to be represented. It deliberates validly if the entity concerned does not appear or is not represented.

After hearing the reporting Judge and, if need be, the entity concerned or its representative, the authority deliberates without them being present.

The associate members take part in the meeting. They do not take part either in the deliberations or in the vote."

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