

France / Air law – 11 July 2018

LACK OF IMPARTIALITY ON THE PART OF ACNUSA'S PRESIDENT: THE AIRLINES WIN ANOTHER BATTLE !

Whereas ACNUSA considered that its sanctioning procedure could no longer be disputed until it is effectively repealed on 30 June 2018¹, the Administrative Court of Paris has just cancelled a series of fines pronounced previously, confirming the lack of impartiality on the part of ACNUSA's President.

Many airlines could opportunely base their defence on these decisions in the coming weeks.

Administrative Court of Paris, cases 1713855 (Jet Aviation AG), 1802571 and 1802575 (Unijet SA), 1802574 and 1802578 (Air Horizont Ltd)
Constitutional Council, decision no. 2017-675 QPC of 24 November 2017

ACNUSA's decision 'backfired':

i) After the decision of the French Constitutional Council, ACNUSA could have decided to no longer sanction the airlines until the enactment of a new law; on the contrary, relying on the disputed texts, ACNUSA preferred to continue and imposed no fewer than **144 new fines in 2018, totalling €2,206,200²**:

ii) The Administrative Court of Paris considered that, even though the repeal would only take effect on 30 June 2018, the proceedings before ACNUSA were biased in view of the circumstances of each case, as **the President is led to prejudge each case before actually judging them.**

Background:

In its decision no. 2017-675 of 24 November 2017, the French Constitutional Council (Conseil Constitutionnel) judged that the ACNUSA's sanction proceedings were contrary to the principle of impartiality, but decided to postpone to 30 June 2018 the repeal of the disputed legislative provisions (in the case in point, article L. 6361-14 of the Transport Code). ACNUSA may have assumed that all fines imposed up to that date were therefore indisputable...

On the contrary, in five identical decisions delivered on 10 July 2018,³ the Administrative Court of Paris has just cancelled five fines pronounced under texts disputed before the Constitutional Council (but not repealed on the date of the said fines), this time based on the concrete circumstances in which ACNUSA's President exercised his power to prosecute.

¹ The Constitutional Council considered that "with regard to sanction proceedings before the French Authority for Airport Noise Control (ACNUSA), 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. 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."

² Source: ACNUSA, <https://www.acnusa.fr/fr/actualites/contentieux-amendes-acnusa-aer-lingus/194>

³ Administrative Court of Paris, cases 1713855 (Jet Aviation AG), 1802571 and 1802575 (Unijet SA), 1802574 and 1802578 (Air Horizont Ltd),

These were thus the first cases concerning the lack of impartiality of ACNUSA's President that were referred to the Administrative Court of Paris since the decision of the Constitutional Council.

As the Administrative Court does not have the competence to ascertain the constitutionality of a law under the principle of impartiality within the meaning of article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, as the Constitutional Council was able to do, the petitioners therefore had to base their claims on other grounds in order to win their case.

Fines totalling 4 to 5 million euros have been imposed each year on airlines based on sanction proceedings offering no guarantee of impartiality

[The decisions of the Administrative Court of Paris of 10 July 2018:](#)

The Administrative Court was asked to give a ruling on the following question: are ACNUSA's sanction proceedings impartial within the meaning of article 6§1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? The Administrative Court was thus called on to exercise its assessment of "conventionality".

Unlike the proceedings before the Constitutional Council, which had to demonstrate the unconstitutional nature of the acts of law at issue (demonstration "*according to an abstract standard*"), this time the petitioners had to demonstrate, with supporting documents, to what extent the President's intervention in the prosecution phase constitutes a provisional judgment before he is led to hear the same cases on the trial bench (demonstration "*in the particular case*").

On the basis of the writings and documents produced, the Administrative Court considered that "**the President of ACNUSA effectively uses his power to discontinue proceedings when he deems that the requisite conditions are met**", confirming the conclusions of the reporting judge (*Rapporteur public*) in every respect.

That being the case, the Court goes on to say that "**in taking part in the proceedings and the vote, after which a sanction was imposed on company 'X', ACNUSA's President should be regarded as having breached the principle of impartiality as stated in article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**".

What are the consequences for ongoing cases?

1. Any airline can legitimately expect the following fines to be cancelled if it challenges these fines before the Administrative Court...:

- a. The fines pronounced by ACNUSA during its session of June 2018 (or even those of February and March 2018), as long as the two-month time limit for appealing (four months for a foreign-based company) has not expired. These fines could be cancelled even if they have already been paid by the sanctioned airlines;
- b. The fines for which appeals have already been submitted to the Administrative Court or the Court of Appeal of Paris, whose cases are still pending to date, provided an external cause for claim has already been submitted by the sanctioned airline;

...provided: **α)** this is based on article 6§1 of the ECHR;
 β) evidence is produced that in each case establishes the bias of ACNUSA's President *in the particular case*.

2. As the text of article L. 6361-14 of the Transport Code was repealed on 30 June 2018, ACNUSA currently has no sanctioning power, until the law that will institute new sanctioning procedures is passed, which is expected for the second half of 2018. No new fines will therefore be pronounced by ACNUSA in the meantime.

3. Roughly 600 cases are currently being investigated by ACNUSA, which could impose further fines in the months to come. The fines resulting from these cases (which will in all likelihood be pronounced between the end of 2018 and sometime during the course of 2019, once the new law has been passed) will certainly not be cancelled on the grounds of the lack of impartiality of ACNUSA's President because:

- A new sanctioning procedure under the new law will then be in force and followed by ACNUSA in forthcoming cases of sanctions;
- In the procedural acts carried out by ACNUSA up to 30 June 2018 (therefore under the repealed texts), the President will not yet have had the opportunity to exercise his right to prosecute that made the proceedings biased (that is to say, he will not have summoned the airlines to a plenary session, as these sessions will not be held before the end of 2018).

For more information:

See the Constitutional Council's site at www.conseil-constitutionnel.fr (Case no. 2017-675 QPC). The Constitutional Council's **decision no. 2017-675 QPC** and the documentary record are available for consultation at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-675-qpc/decision-n-2017-675-qpc-du-24-novembre-2017.150205.html>

So one should consider on a case-by-case basis whether ACNUSA's future fines could be challenged on other grounds.

4. The five decisions handed down by the Administrative Court of Paris on 10 July 2018 can be appealed against. Pending the outcome of these proceedings, the three airlines concerned have also challenged the notices of payment served to them by the tax authorities to collect these fines, so that the said airlines can calmly continue to assert their rights without being required to pay the fines before their dispute is settled.

What provision does the new law make to restore the impartiality of the President?

The 'former' version of article L.6361-14 of the Transport Code gave the President of the ACNUSA the power both to prosecute and to judge.

The new version of article L.6361-14 should give the *Rapporteur permanent* of the ACNUSA the power to decide not to sue an airline, thereby limiting the President's role to that of judge.

ACNUSA's lack of impartiality would thus be corrected in this respect.

* *

Amaël CHESNEAU
Lawyer at the Bar in Paris
achesneau@chesneau-fischel.com
www.chesneau-fischel.com