

*France/Air law – 18 July 2019*

## **ACNUSA & Airlines: very much in the news!**

*In 2019, ACNUSA was forced against its will to forego penalizing more than 200 offences committed by the airlines...*

*At the same time, ACNUSA has significantly increased the average amount of the fines it imposes...*

*ACNUSA's President for his part is lobbying intensely with the Minister of Transport to obtain a fivefold increase in the maximum fine, i.e. €200,000 for an offence instead of €40,000 today...*

*A new regulation on ACNUSA's sanctioning power came into force in October 2018...*

**Since 24 November 2017 and the Constitutional Council's censure of ACNUSA's sanction procedure, ACNUSA has been more and more in the news. Airlines are more than ever urged to be doubly careful with regard to noise and environmental regulations.**

### **News review**

#### **A new regulation strengthening the powers of the permanent rapporteur:**

In its decision no. 2017-675 of 24 November 2017, the Constitutional Council had judged that the ACNUSA's sanctioning procedure was contrary to the principle of impartiality and had repealed the disputed provisions (in this instance, article L. 6361-14 of the Transport Code) from 30 June 2018.

In law no. 2018-699 of 3 August 2018 and enabling decree no. 2018-835 of 2 October 2018, a new sanctioning procedure was then instituted within ACNUSA, correcting the procedural defects of the previous regulation.

In substance, we should bear in mind that the President of ACNUSA is no longer involved in bringing legal proceedings against the airlines, this henceforth being devolved on ACNUSA's permanent rapporteur. From now on its President only intervenes at the sanctioning phase, which is a salutary reform with regard to the constitutional principle of impartiality.

What should be borne in mind regarding this new regulation is the considerably strengthened role of ACNUSA's permanent rapporteur, as it is henceforth up to him to assess with complete impartiality whether a case can or cannot be dropped. The new article R.227-2-1 of the Civil Aviation Code states **three cases in which the permanent rapporteur can close the case:**

The new provisions of Article L.6361-14 of the French Transport Code:

"[...] The investigation and the proceedings before the authority are *inter partes*. [...]  
After ascertaining that the case file is complete, the permanent rapporteur serves it to the person concerned and asks the latter to submit his written observations within one month, by any means, including by electronic means. At the end of this *inter partes* procedure, the permanent rapporteur closes the preparatory inquiry and either drops the case if at least one of the cases listed in the Council of State decree is verified, or passes on the complete case file to the authority. This decision is served to the person concerned. [...]  
In carrying out his duties, the rapporteur cannot be give instructions or orders. Before the authority's panel, his brief is to present the questions that each case raises for judgment and make known with complete independence his conclusions and assessment, which must be impartial, of the de facto circumstances of the case and the applicable rules of law, as well as his opinion about the solution to be provided. [...]"

**1°** The report of the offence was drawn up more than two years after the offence was committed. Here we should note that the two-year period runs from the date of the offence to that of the report, whereas in the previous regulation it could be contended that the said period ran from the date of the offence to that of the start of legal proceedings, namely the date on which the airline was summoned to appear before ACNUSA's sanctions panel. But generally the airline is summoned to appear before ACNUSA's sanctions panel manage without 18 months after the offence. These new provisions are therefore not in favour of the airlines, as no text limits the length of the investigation of cases or that of the legal proceedings. This exposes airlines to more uncertainty regarding whether or not to take corrective measures and whether or not they will suffer financial penalties.

**2°** The person referred to by the report is not among those listed in article L. 6361-12 of the Transport Code). On this point, one can regret a conflict of jurisdiction between ACNUSA and the Minister of Transport with regard to offences concerning night flights in particular. The Minister indeed has jurisdiction - pursuant to article R.160-1 of the Civil Aviation Code - to impose a fine on an airline that performs a landing or take-off without having the corresponding time slot. But the Minister's fines are limited to €7,500 (€15,000 for a repeat offence), whereas ACNUSA's fines can be as much as €40,000. We consider that this conflict of jurisdiction is absolutely open to dispute as things stand in the current legislation.

**3°** In producing an official document bearing a certain date, the person concerned establishes that the operations on which the report is based were permitted the date on which they occurred. By official document is meant a document drawn up by an administration or an authority. One can regret that the clearance given by a control tower to a pilot to land or take off outside authorized hours is not among the cases of exemption of article R.227-2-1, a situation that nonetheless is frequent.

*ACNUSA must forego the sanctioning of more than 200 offences:*

Three months elapsed between the repeal of the former regulation (repeal of article L.6361-14 of the Transport Code on 30 June 2018) and the entry into force of the new regulation (enabling decree no. 2018-835 of 2 October 2018 entered into force on 3 October 2018).

More than **30 million euros of fines have been collected by the State from airlines** in recent years on the basis of a procedure contrary to the Constitution

This period from 1<sup>st</sup> July to 2 October 2018 is thus a legislative and regulatory vacuum, during which a number of procedural measures were nevertheless carried out by the DGCA (Directorate General of Civil Aviation) and ACNUSA.

Aware of the risk of airlines contesting fines, ACNUSA was forced to take the initiative and forego sanctioning more than 200 offence cases under investigation.

ACNUSA justified its decision in these terms *"Considering that It follows that the prosecutions brought between 30 June and 3 October 2018 have no legal basis; that the legal proceedings based on these acts can but be abandoned"*.

While the Constitutional Council had exceptionally postponed by 7 months (from 24 November 2017 to 30 June 2018) the repeal of ACNUSA's sanctioning procedure, thereby (according to ACNUSA) enabling it to save more than 600 cases under investigation, in the end the date of entry into force of the new texts obliged ACNUSA to drop more than 200 cases, **representing savings on fines in the region of 3 to 5 million euros for the airlines...** which is far less than the fines imposed on the airlines in recent years on the basis of a procedure contrary to the Constitution (more than 30 million euros).

*ACNUSA's fines are increasingly harsh: more and more fines attain the €40,000 cap!*

In its session of 5 March 2019, ACNUSA imposed 16 fines at the maximum amount of €40,000 each, out of a total of 35 cases. Never has ACNUSA sanctioned the airlines so harshly.

The following sessions of 2019 also revealed an increase in the average amount of the fines, irrespective of the type of offence committed.

There are two reasons for this trend: firstly, the ACNUSA's panel and its President consider that the airlines (in particular the low-cost airlines) have an economic interest in incurring an ACNUSA fine (by flying at night without an authorized time slot) rather than paying their passengers compensation for a delayed flight. ACNUSA therefore considers that there is no reason to show leniency towards them. This standpoint is clearly stated by ACNUSA in its 2019 annual report. Secondly, ACNUSA has for a long time campaigned for an increase in the cap on fines, so in order to be consistent with its standpoint it is in its interests to take advantage of the €40,000 cap as often as possible.

*ACNUSA recommends that the Minister of Transport should raise the cap on fines to €200,000*

In its 2019 annual report (page 38 et seq), ACNUSA names a limited number of airlines guilty of most of the offences, more particularly with regard to night flights.

It thus recommends raising the cap on fines to €200,000, instead of the current €40,000 cap. It is obvious that such a high cap would quite simply be fatal for many airlines. It is important to realize that many offences are committed inadvertently, once in a while, mostly by airlines having a weak financial standing. Currently a fine of €7,000 or even €4,000 is already enough for an airline to consider appealing against it before the Administrative Court.

This approach seems overly punitive and a source of additional tensions between economic agents and the authorities.

Several airlines also consider that in fact this repression puts pilots under even more stress during take-off and landing phases and that in this respect it compromises safety.

It is regrettable that the legislation on the contrary is not evolving towards more consultations and dialogue between aviation actors. With regard to sanctions, this could be achieved by giving ACNUSA and the airlines the possibility of seeking a compromise for their cases, i.e. a reduction in the amount of the fines in exchange for undertakings by airlines to implement action plans that meet the requirements of ACNUSA and local residents in environmental and noise pollution matters, which the current legislation does not allow.

Feedback:

Several airlines are currently contemplating the possibility of contesting the fines imposed by ACNUSA in May and June 2019.

On the substance, all their cases deserve to be examined closely, because the regulations are particularly technical and detailed, more particularly with regard to flight paths and noise thresholds. The airlines should not hesitate to confront the DGAC and ACNUSA with their analysis and understanding of the texts if they believe that a rule has been misinterpreted by the authorities. Moreover, it is more efficient to contest a fine with the DGAC and ACNUSA at the investigatory stage rather than contesting it before the Administrative Court.

On the form, fines can no longer be contested on the grounds of the unconstitutionality of the former legislation, so they have to be contested on other grounds. Several grounds can be considered with regard to the new sanctioning procedure. But the Administrative Court has not yet delivered any decisions approving or invalidating the implementation of this new procedure by ACNUSA.

Faced with these uncertainties, it is better to reduce the risk of offences by regularly raising awareness among the pilots and scheduling staff about the rigour of the regulations and the air traffic control authorities.

**Next stages:**

The Administrative Court of Appeal of Paris will rule on the cases of UNIJET SA, AIR HORIZONT LTD and JET AVIATION AG by August 2019. (see summary at <https://www.chesneau-fischel.com/news/>)

For the record, in five identical decisions delivered on 10 July 2018,<sup>1</sup> the Administrative Court of Paris had cancelled five ACNUSA fines imposed on the grounds of the former legislation contested before the Constitutional Council (but not repealed on the date of the said fines), based on the actual circumstances in which ACNUSA's President had exercised his power to prosecute.

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<sup>1</sup> Administrative Court of Paris, cases 1713855 (Jet Aviation AG), 1802571 and 1802575 (Unijet SA), 1802574 and 1802578 (Air Horizont Ltd),

ACNUSA appealed against these 5 decisions in September 2018. The judgements of the Administrative Court of Appeal of Paris are important in several respects:

**On the same subject:**

*"A lack of impartiality on the part of ACNUSA's President: the airlines win another battle" - 11 July 2018*

*"The Constitutional Council censures ACNUSA's sanctioning power", 27 November 2017*

<https://www.chesneau-fischel.com/news/>

- the Court of Appeal has to analyse 'in concreto' the intervention of ACNUSA's President in order to assess whether or not the sanctioning procedure is unbiased. So will ACNUSA's sanctioning procedure, which has already been considered 'biased' by the Constitutional Council (on the grounds of article 16 of the Universal Declaration of Human Rights of 1789), be regarded as 'unbiased' by the Court of Appeal (on the basis of article 6-1 of the European Convention on Human Rights)?
- Roughly **70 similar cases, representing 20 airlines**, are pending before the Administrative Court of Paris, which awaits the judicial outcome of the UNIJET SA, AIR HORIZONT LTD and JET AVIATION AG cases.

Whatever the forthcoming decisions of the Administrative Court of Appeal of Paris, the procedure should be referred to the Council of State, because these cases raise new legal questions, which in the opinion of the unsuccessful party very certainly deserve to be submitted to the highest court.

We will find out in the near future.

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