

France/Air law – 23 July 2019

## **ACNUSA vs. The airlines: the lack of impartiality of ACNUSA's sanctions procedure confirmed by the Administrative Court of Appeal of Paris**

*In five judgements delivered on 12 July 2019, the Administrative Court of Appeal of Paris confirms the cancellation of five fines imposed by ACNUSA against three airlines on the grounds of the intervention of ACNUSA's President in both the prosecution phase and the judgment phase of these cases.*

*Administrative Court of Appeal of Paris, cases 1803025, 1803026, 1803027, 1803028 and 1803029*

### Background:

This concerns five cases judged under the former legislation, namely the legislation in force up to 30 June 2018.

The judgments of the Administrative Court of Appeal of Paris delivered on 12 July last follow on from two previous episodes of a long-running legal saga:

- **On 24 November 2017, the Constitutional Council** (Decision n°2017-675QPC) judged ACNUSA's sanctions procedure contrary to the principle of impartiality (on the grounds of article 16 of the Declaration of the Rights of Man and of the Citizen of 1789), while at the same time deciding to defer the repeal of unconstitutional statutory provisions to 30 June 2018. The penalized airlines must thus abide by the decision of the Constitutional Council to cancel their fines, even though they were imposed under a 'biased' procedure;
- **On 10 July 2018, the Administrative Court of Paris** (cases 1713855, 1802571 and 1802575, 1802574 and 1802578) cancelled these five fines with immediate effect, this time on the grounds of article 6§1 of

the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court considered that the impartiality principle had been violated not just 'in abstracto' (as the Constitutional Council had ruled) but also 'in concreto'. In other words, *the Court has established the ACNUSA's President effectively intervened in each of the five cases concerned, both in the prosecution phase and in the judgment phase.* In these circumstances, the airlines had good reason to fear that their fate would be sealed even before their cases were examined by ACNUSA's sanctions panel.

It is these 5 decisions of the Administrative Court, contested by ACNUSA, that were confirmed by the Administrative Court of Appeal of Paris on 12 July last.

**On the same subject:**

"ACNUSA & Airlines: very much in the news" - [18 July 2019](#)

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"A lack of impartiality on the part of ACNUSA's President: the airlines win another battle" - [11 July 2018](#)

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"The Constitutional Council censures ACNUSA's sanctioning power", [27 November 2017](#)

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*The judgments of 12 July 2019:*

The Court held that, inasmuch as ACNUSA's President had summoned the airlines to attend the sessions of ACNUSA's sanctions panel, **notifying them of the grievances against them**, the airlines concerned could "*legitimately have the impression of being prosecuted and judged by the same person, given the sequence of acts conducted during the proceedings before ACNUSA, in particular the confusion of the roles played by the President*". Accordingly, the Court concluded that the sanction pronounced by ACNUSA's college was imposed in violation of the requirement for impartiality as established in article 6§1 of the European Convention on Human Rights.

In passing, the Court confirmed the ACNUSA President's intervention 'in concreto' on the substance of the cases, and consequently his failure to honour his impartiality obligation.

Similarly, the Court has brushed aside the argument whereby the cancellation of the fines would lead the administrative court to impinge on the final decision having the force of 'res judicata' delivered by the Constitutional Council (which had decided to defer the effects of the repeal of the law under which the fines had been imposed). It considers that "*with regard to the repeal of the statutory*

*provisions it censures, the 'res judicata' decision delivered by the Constitutional Council does not require the cancellation of the administrative decisions made on the grounds of the said statutory provisions to be postponed to the date it has set."*

### What are the consequences for ongoing cases?

After the Constitutional Council's decision of 24 November 2017, ACNUSA could have averted its procedural irregularities by not having the President attend the meetings of ACNUSA's College. This is because the texts simply require a quorum of five members to make a decision and do not impose the presence of the President. ACNUSA has never wished to explain itself before the courts regarding this custom whereby the College never makes a decision in his absence...

1. The airlines sanctioned by ACNUSA before 30 June 2018, whose fines are currently contested before the Administrative Court or the Administrative Court of Appeal of Paris, can in principle invoke the judgments of the Administrative Court of Appeal of Paris of 12 July 2019. On the other hand, the fines pronounced before 30 June 2018 that were not contested in good time can no longer be contested, as the two-month deadline for contesting them has (almost certainly) expired.
2. The fines pronounced by ACNUSA after 30 June 2018 cannot benefit from the judgments of 12 July 2019, as they come under new legislation that came into force on 3 October 2018. Other arguments could nonetheless be exploited, as we have described in a previous article: "ACNUSA & Airlines: very much in the news" 18 July 2019. (<https://www.chesneau-fischel.com/news/>)

### What next?

One cannot rule out the possibility of ACNUSA lodging an appeal on points of law before the Council of State. The saga may therefore not be over yet. To be continued in the next episode?

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