

France/Air law - 21 January 2021

ACNUSA vs. airlines: the Council of State definitively confirms the lack of impartiality of ACNUSA's sanctions procedure...

...but flies to its assistance by substituting the cancelled fines for fines of the same amounts!

*Council of State, 29 July 2020, no. 432969, Air Horizont Ltd vs ACNUSA
Council of State, 2 October 2020, no. 432970, Air Horizont Ltd vs ACNUSA
Council of State, 2 October 2020, no. 432971, Jet Aviation AG vs ACNUSA
Council of State, 2 October 2020, no. 432972, Unijet SA vs ACNUSA
Council of State, 2 October 2020, no. 432973, Unijet SA vs ACNUSA*

Since 2017, ACNUSA has failed to demonstrate the impartiality of its sanctions procedure before the administrative courts, which have systematically cancelled the issued fines on the grounds that its president intervened both in the prosecution and in the judgment of the case by the sanctions panel.

In a ruling delivered on 29 July 2020, reiterated by four similar rulings of 2 October 2020, the Council of State definitively confirmed the violation of the impartiality principle. However, the Council of State's ruling is singular in that it henceforth invites administrative courts to reissue fines for the same amount as the ones they cancel, by virtue of the administrative judge's unlimited jurisdiction in appeals.

The numerous airlines penalized by ACNUSA in biased proceedings may harbour a form of incomprehension. On the one hand, ACNUSA sees its sanctions "restored" by the judge, despite its violation of a fundamental principle of law.

On the other hand, the administrative judge rather than ACNUSA is ultimately required to rule on breaches of airport noise nuisance regulations, even though the lawmaker considers that the administrative judge does not have the necessary technical expertise to judge such breaches and has accordingly entrusted the power to rule on such matters to an independent administrative authority.

In a series of rulings delivered on 15 and 30 December 2020, the Administrative Court of Paris sensibly followed the Council of State, cancelling ACNUSA's fines and imposing fines of the same amount as the cancelled fines.

Let's analyse this reversal, as sudden as it is unexpected.

Background:

On 29 July and 2 October 2020, the Council of State ruled on five cases under the former legislation, namely the legislation in force up to 30 June 2018.

These five cases follow on from three previous episodes of a judicial saga:

- **On 24 November 2017, the Constitutional Council** (Decision no. 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 therefore cannot in their defence invoke 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.
- **On 12 July 2019, the Administrative Court of Appeal** (cases 1803025, 1803026, 1803027, 1803028 and 1803029) 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*

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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.

The Council of State's rulings of 29 July and 2 October 2020

The Council of State quashed the Court of Appeal's rulings of 12 July 2019 on the grounds that the summons to attend proceedings sent to the airlines had not been signed by ACNUSA's President but by the permanent rapporteur "in the name of the authority", who was acting "with complete independence", thereby dismissing the President's alleged intervention both in the prosecution and in the judgment.

The other lessons drawn from the rulings of the Administrative Court of Paris of 15 and 30 December 2020:

1. The tax authority's demands for payment are null and void inasmuch as they are based on ACNUSA's decisions to impose fines. Accordingly, it is the rulings delivered by the Administrative Court that form the basis for the tax authority's collection notices against the airlines;

2. The office of permanent rapporteur is not incompatible with that of ACNUSA's legal officer, notwithstanding the permanent rapporteur's involvement (in his capacity as legal officer) in defending ACNUSA's interests before the courts.

The Council of State held as follows: *"In judging that Air Horizont Limited could reasonably get the impression of being prosecuted and judged by the same person, given the sequence of acts conducted during the proceedings before ACNUSA and thereby infer that the decision to sanction was made without regard for the principle of impartiality, the court held that ACNUSA's President had "had Air Horizont Limited summoned to attend" the hearing of 5 September 2017, during which its case was examined, and had sat in this hearing then took part in the deliberation. However, as the court pointed out on the basis of the exhibits of the case referred to it, the summons dated 13 July 2017 had not been signed by ACNUSA's President. **As ACNUSA's President had waived his prerogatives with regard to summoning the party complained against, the said letter had been signed by the permanent rapporteur acting "in the name of the authority" and exercising his authority "with complete independence" pursuant to article 3 of the deliberation of 28 April 2010 enacting ACNUSA's internal regulations. Under these conditions, by judging that the summons sent to Air Horizont Limited flouted the principle of impartiality guaranteed by article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the court committed an error in law."***

While the Court of Appeal had found that the permanent

rapporteur's signature on the summons clearly demonstrated that the President had “had the person concerned summoned”, which indeed implicated ACNUSA's President at the prosecution stage, conversely the Council of State considered that as the permanent rapporteur had signed the said summons “in the name of the authority”, ACNUSA's President had thereby “*waived his prerogatives with regard to summoning*”. Therefore it was not the President who had “had the airlines summoned” through the permanent rapporteur, but rather the permanent rapporteur who summoned them in the name of the authority, on his own initiative.

This analysis is very open to criticism, as:

- firstly, any waiver should originate from the person waiving his or her prerogatives (in this instance the President), not the person claiming to act for others. But the Council of State has no evidence demonstrating that the President himself waived his prerogatives;
- secondly, if the permanent rapporteur claims that he acted “in the name of the authority”, it is therefore he who was granted signing authority for that purpose. And yet, the delegations of competence, powers or signing authority at ACNUSA are public, and there are no delegations that would grant the Rapporteur the power to summon the parties complained against;
- lastly, even though article 3 of ACNUSA's internal regulations indeed states that the permanent rapporteur must sign a sworn statement whereby he undertakes to exercise his duties with complete independence and impartiality, it must nonetheless be pointed out that such a sworn statement had never been produced by ACNUSA and, until proved otherwise, does not exist.

The Council of State's reasoning can hardly be described as legally rigorous. It seems to be guided much more by the conclusion that the Council of State manifestly wishes to draw, namely to quash the appeal ruling and adjudicate on the merits of the case in lieu of ACNUSA, with a view to re-establishing the fines.

[What next?](#)

Taking due note of the Council of State's ruling, the Administrative Court of Paris, which had already heard many similar cases, logically fell into line with the Council of State's position in a series of rulings delivered on 15 and 30 December 2020. In each of these cases the Administrative Court of Paris cancelled the fines issued by

ACNUSA and imposed fines for similar amounts.

As there is henceforth little chance of being able to cancel the airlines' fines on the grounds of ACNUSA's procedural defects, the penalized airlines must - even more so than before - analyse the case files in detail, as the readings taken by the officials of the Directorate General of Civil Aviation are very often based on archaic and very approximate methods, and therefore highly open to dispute.

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