

## NOISE POLLUTION

### Curfew in Nantes and Mulhouse: more than two years of uncertainty and still so many unanswered questions!

What is meant by “*flights delayed for reasons beyond the control of the carrier*”, within the meaning of the orders restricting operation to NTE and MLH<sup>1</sup>?

This is the question on which ACNUSA has been called upon to rule for two years and the one on which the Administrative Court of Paris has just provided clarification in a judgment of June 27, 2024<sup>2</sup>.

*Administrative Court of Paris, 27 June 2024, n°2323131, Xxx vs. ACNUSA*

#### **Issue at stake:**

Within the meaning of the aforementioned orders which establish a curfew at NTE (between 0:00 a.m. and 6 a.m.) and MLH (between 11 p.m. and 6 a.m.), no aircraft may take off or land at NTE or take off from MLH during curfew hours, except these are flights which were scheduled (between 9 p.m. and 11:30 p.m. or between 6:30 a.m. and 9:00 a.m. at NTE, without a particular time slot for MLH) and “*which were delayed for reasons beyond the control of the carrier*”.

The fines incurred are €40,000 per breach.

The implementation of these orders had encouraged airlines to bring forward their programming for the 2022 summer season - which corresponded to the first season of application of the curfew - in order to give themselves sufficient margin. The airlines then estimated

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<sup>1</sup> **NTE:** Order of September 28, 2021 restricting the operation of the Nantes-Atlantique aerodrome (Loire-Atlantique).

“Article 1 – IV.

a) No aircraft may land or leave the parking point between 00:00 and 06:00 a.m. for take-off.

b) The provisions of a) do not prevent the landing and take-off of aircraft carrying out:

– flights scheduled between 9 p.m. and 11:30 p.m. and which were delayed for reasons beyond the control of the carrier;

– flights scheduled between 6:30 a.m. and 9 a.m. and which have been anticipated for reasons beyond the control of the carrier. »

**MLH:** Order of August 6, 2021 restricting the operation of the Basel-Mulhouse aerodrome (Haut-Rhin):

“Article 1 – V.

a) Subject to the specific provisions provided for in b), no commercial flight may leave the parking point, with a view to taking off, between 11 p.m. and 12 a.m.

b) The provisions of a) do not prevent the takeoff, between 11 p.m. and 0 a.m., of aircraft carrying out commercial flights, scheduled outside the time slot provided for in a), which have been delayed for reasons beyond the control of the carrier.”

<sup>2</sup> Administrative Court of Paris, case n°2323131, judgment dated 27 June 2024

Number of cases heard  
by the ACNUSA :

In 2019 (before the orders):

. 31 at MLH

. 46 at NTE

In 2022 :

. 200 at MLH

. 231 at NTE

In 2023 :

. 133 at MLH

. 290 at NTE

In the absence of precise  
criteria in the orders,  
ACNUSA decides to  
transpose the applicable  
case law in matters of  
passenger compensation.  
Thus, according to ACNUSA,  
only "flights which have  
been delayed due to  
extraordinary  
circumstances which could  
not have been avoided  
even if all reasonable  
measures had been taken"  
can be exempted.

that delays imposed by air traffic control, by problems of lack of infrastructure, lack of reception capacity or equipment in airports or even by the accumulation on the same rotation of several causes of minor delays, could justify an exemption from the curfew, since these events are in practice beyond their control. It appeared later to not be the case.

Several hundred notices of breach were issued by DGAC agents during the 2022 summer season which indicated a clear intention of the authorities to strictly interpret the orders.

### **The DGAC and ACNUSA decided to adopt a very restrictive position:**

As early as December 2022, ACNUSA ruled on the first cases of breaches of NTE and MLH curfews calling for an interpretation of the exemption. At the same period, it published guidelines in January 2023 (NTE) and April 2023 (MLH), explaining the framework of its interpretation.<sup>3</sup>

In essence, ACNUSA's position was then as follows: to transpose the case law that emerged from Regulation No. 261-2004 applicable to passenger compensation, in order to rely on criteria known to the courts and airlines. ACNUSA thus writes in its guidelines: "*it does not seem possible to hold that, since the airline has not explicitly stated its wish to operate one of its movements during the curfew period but that, in fact, it made such a movement, it must be regarded as having suffered a delay or an anticipation for reasons beyond its control. Such a reading of the order would lead to depriving the rule of any effectiveness. This is why when presenting this rule, before its entry into force, **the civil aviation administration explained that it had to be read in the light of case law on passenger rights in the event of flight cancellations or delays.***"

The college has retained this reading grid, desired by the regulatory authority which enacted the restriction. Thus, for each breach of the curfew in force at Basel-Mulhouse [and Nantes-Atlantique] airport, it assesses on a case-by-case basis whether the consequences of the various hazards which impacted each disputed movement examined, to the point that it was operated during the curfew

<sup>3</sup>

Guidelines – Press release of ACNUSA dated 11 January 2023 (NTE) and 25 April 2023 (MLH)

*period, could have been avoided if the carrier had taken all reasonable measures in its power to observe this curfew. In other words, it assesses whether the carrier could, by adopting reasonable measures, counter the consequences on the scheduling of its flights of the various hazards which, by their nature or their origin, are inherent to the activity of an air carrier. »*

#### **Airlines challenge the legality of ACNUSA fines:**

Heavily sanctioned by a multiplicity of breaches, several airlines operating regular flights at NTE and MLH challenged, before the Paris administrative Court, the legality of the ACNUSA fines on the ground that ACNUSA had applied criteria which are not those of the Order but those taken from Regulation 261-2004. The criticism has merit when we know - apart from the a priori obvious lack of legal basis - that the case law on passenger compensation has developed in order to repair the damage suffered by passengers who have suffered cancellations of flights or delays of more than 3 hours<sup>4</sup> - this case law is therefore necessarily protective for passengers and therefore severe against airlines - while exceeding the curfew are sanctioned by the DGAC and ACNUSA at the slightest minute of breach. There is therefore no sense in transposing, as ACNUSA does, the case law of Regulation 261-2004 to orders regarding noise pollution which have their own criteria, for the sole reason that the actors targeted by these two texts are the same, namely the airlines.

Case law on passenger compensation penalizes flight cancellations or delays of more than 3 hours, while on the basis of the NTE and MLH orders the DGAC and ACNUSA sanction violations of the curfew from the first minute of breach.

#### **The judgment of the Paris Administrative Court of June 27, 2024:**

First of all, a satisfaction, since the Court decides to reject the legal basis retained by the ACNUSA: "3. *Contrary to what the ACNUSA argues, it does not result from these provisions (i.e. from the Order applicable to MLH) that reasons beyond the control of the carrier would be restricted to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. »* ACNUSA is therefore clearly disavowed.

<sup>4</sup> ECJ, Nelson dated 23 October 2012 ; ECJ, Sturgeon dated 19 November 2009, Cour de cassation n°13-25.351 dated 15 January 2015

The legal approach of ACNUSA is rejected by the Court

The Court assesses the airline's prudence in scheduling its flights

Then, the Court sets out its own criteria and establishes a new approach: "However, when the delay of flights results from the imprudent behavior of the carrier who did not take reasonable measures to protect against frequent or foreseeable events, this failure cannot be considered as having been caused by reasons beyond the control of the carrier." The Court continues in these terms: "4. In this case, it results from the investigation that in order to impose the disputed fines, the ACNUSA noted that the carrier did not take operational measures **to counter frequent or foreseeable events, inherent to the normal exercise of the activity of an air carrier**, in particular the shift in the take-off slots of flights not immediately preceding the flights giving rise to sanctions in the rotation order, congestion at the level of passport control, equipment problems from service providers or unscheduled maintenance. **ACNUSA relied on the circumstance that the company 'Xxx' had behaved imprudently by not having adopted or attempted to adopt measures to adapt its initial scheduling in order to ensure compliance with environmental restrictions of operation and having provided a margin of maximum one hour and twenty minutes before the cut-off time of 11 p.m.**, the departure time from its parking point since this margin did not allow it to face foreseeable events in the normal exercise of its air carrier activities. Therefore, the company 'Xxx' is not justified in challenging the fines imposed on it by ACNUSA by its decisions of June 6, 2023. »

In other words, the Court assesses, in particular by referring to the scheduling of the flight concerned, whether or not the airline was prudent and the Court considers that a margin of 1 hour 20 minutes is not sufficient to counter frequent or predictable events.

In the end, while having rejected the legal approach of ACNUSA, the Administrative Court of Paris maintains the fines imposed against the airline.

**Analysis:**

The judgment of the Paris Administrative Court is open to criticism in several respects:

The position of the Paris Administrative Court leads to nonsense, and makes the regulations in force more illegible than ever.

- Referring to the airline's flight schedule goes against the provisions of the NTE and MLH orders since these orders provide for the possibility of exemptions for scheduled flights - in the case of NTE - between 9 p.m. and 11:30 p.m. or between 6:30 a.m. and 9:00 a.m. and – in the case of MLH – for flights scheduled outside the 11:00 p.m. to 00:00 a.m. time slot. Thus, by estimating that a margin of 1 hour 20 minutes is not a prudent margin allowing the airline to be exempt, the Court reduces the 'exemptable' flights to much smaller periods: between 9 p.m. and 10:40 p.m. or between 7:20 a.m. and 9:00 a.m. for NTE and flights scheduled before 9:40 p.m. for MLH. While the orders put all scheduled flights on an equal footing, the Court breaks this equality by establishing a criterion which clearly should not have been taken into account.
- The NTE and MLH curfews are in fact brought forward by 1 hour 20 minutes, which in no way corresponds to the project that was presented to local stakeholders. While these are curfews that tolerate exemptions, the NTE and MLH curfews are in practice more restrictive than the firm ORY curfew, which does not tolerate any exemptions. The position of the Court therefore leads to a contradiction.
- The order in force at NTE was the subject of an amending order, published on May 23, 2024, the purpose of which is to provide clarification on the criteria for assessing exemptions. The Court took no account of this amending order. Although it only applies to NTE while the Court ruled on breaches noted at MLH, the regulations are entirely comparable and must receive the same interpretation. The position of the Court therefore risks leading to differentiated treatment of breaches of NTE and MLH, adding more complexity and risk of confusion for airlines.
- Airlines are no more enlightened today than before, since ACNUSA has not called into question its guidelines. This results in a particularly illegible situation since the airlines find themselves confronted, for the same notion, with four different interpretations:

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- . That resulting from the provisions of the orders;
  - . That resulting from the ACNUSA guidelines;
  - . That resulting from the NTE amending order;
  - . That resulting from the judgment of the Paris Administrative Court of June 27, 2024.
- Saying that a margin of 1h20 is not sufficient does not imply that a margin of 1h30 or 2h00 would be. At this stage, we do not yet know where the Court will place the cursor of what prudent scheduled flights are.

**Conclusion:**

More than two years after the entry into force of the NTE and MLH orders, their interpretation by the DGAC, ACNUSA and the Court remains completely illegible, to the detriment of airlines. In 2023, 5 million Euros in fines were imposed against the airlines operating at NTE and MLH. We can bet that the Paris Administrative Court of Appeal and the ACNUSA will clarify the situation and put an end to this regrettable and costly legal uncertainty.

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