

## DECISION 2010-03-25

### Travel Agency Commissioner Area 2

Helene Cedertorn  
Karlavägen 30  
172 76 Sundbyberg  
Sweden

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#### **The Case:**

Request for Review of Decision by the Passenger Agency Conference,  
(Decision Item R25 adopted by the PAConf No 32 - see appendix 1).

#### **Applicant:**

AFAT Tourisme & Affaires (referred to as "AFAT" or "Applicant")  
17, Avenue Honoré Serres  
31000 Toulouse, France  
Represented by Mr. John Butcher and Mr. Frederic Selnet.

#### **Respondent:**

The International Air Transportation Association (referred to as "IATA" or "Respondent"),  
800. Place Victoria, P.O. Box 113  
Montreal, Quebec, Canada H42 1M1  
Represented by Mr. Leslie Lugo and Mr. Jean Paul Poitras.

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### **1. Formalities etc:**

The Passenger Agency Conference (hereafter "PAConf") adopted modifications of the Financial Criteria used by IATA for the accreditation and financial review of Agents in France by a decision the on the PAConf/32 the 22-23 of October 2009, with effective date 1<sup>st</sup> of January 2010. The full decision as communicated to the Agents by letter the 16<sup>th</sup> of November 2009 is to be found in appendix 1.

The Applicant requested review by the Travel Agency Commissioner (hereafter "TAC") on the grounds of IATA Resolution 818 section 4.1.6., in an email the 15<sup>th</sup> of December 2009 (original later received). In an e-mail the 5<sup>th</sup> of January the Applicant provided some additional remarks.

The Respondent through IATA, representing the member Airlines, responded in an e-mail dated the 5<sup>th</sup> of January arguing and providing documents in support of its position that a TAC Review should not be granted.

The undersigned granted TAC Review in a decision communicated via e-mail the 11<sup>th</sup> of Jan 2010.

The Applicant submitted additional arguments and documentation in e-mail dated the 2<sup>nd</sup> of February.

The Respondent submitted additional documents in an e-mail dated the 9<sup>th</sup> of February.

The undersigned chaired a hearing in Paris the 11<sup>th</sup> of Feb 2010 in Paris. The participants at the hearing were as follows:

Chair: Travel Agency Commissioner Helene Cedertorn

Minutes: Mr. Vianney De Wit, FIDAL

Representatives of the Applicant:

Mr. Jean Pierre Mas, President AFAT

Mr. John Butcher, Sales Manager, AFAT

Ms. Isabelle Leroy, Advisor, ECTAA

Mr. Jean-Marc Roze, Advisor, SNAV

Mr. Frederic Selnet, Legal Advisor, AFAT

Representatives of the Respondent:

Mr. Jérôme Bonnin, Country Manager France, IATA

Mrs. Isabelle Dagallier, Chair of APJC France

Mr. John Mason, Head Agency Policies, IATA

Mr. Jean Paul Poitras, Legal Advisor, IATA

Mr. Leslie Allan Lugo, Senior Legal Counsel, Legal Services YMQ

The Respondent submitted a power point presentation, to be part of the material of the TAC Review, during the hearing. The parties were not able to reach an agreement at the hearing. The minutes of the hearing were communicated to the parties the 17<sup>th</sup> of Feb 2010, and both parties have thereafter provided some comments/clarifying notes to the minutes.

The Applicant thereafter submitted additional comments and documentation in an e-mail dated the 25<sup>th</sup> of Feb 2010, in response to what was presented by the Respondent at the hearing.

The Respondent provided its response to what was argued and further documentation in an e-mail dated the 11<sup>th</sup> of March.

The Applicant provided its response to what was argued in an e-mail dated the 17<sup>th</sup> of March.

The Respondent provided its final arguments in an e-mail the 18<sup>th</sup> of March.

The Applicant confirmed in an e-mail the 19<sup>th</sup> of March that it had no further comments.

## **2. The Applicants main and final arguments (summarized by the undersigned)**

AFAT requests, pursuant to Res 818 § 4.1.6, that the decision by PAConf/32 item R25, shall be cancelled, or at least, suspended until an agreement is reached in the Agency Programme Joint Council of France ("APJC France") and approved by the PAConf.

AFAT is financially aggrieved by the decision as AFAT will suffer serious damage as the new criteria will require AFAT to submit a bank guarantee or forces the agency to remit weekly, which is incompatible with the terms contractually agreed with the its clients. AFAT will also suffer serious and irreparable damage due to the modifications of the date of remittance (from 17th to 15th) whereas the agency has not been provided sufficient time to adapt its clients' contracts. Furthermore the proposal submitted to PAConf was not adopted by the local APJC France which is an infringement of Res 818 § 2.1.4., which requires a previous recommendation from the local APJC. This procedural defect requires annulment of the Decision. An annulment is compatible with the need to maintain airline prudential requirements, as the level of defaults has gone down to 0.02 % during the first nine months 2009 by mere application of the previous criteria.

AFAT considers the grievance suffered by AFAT as sufficient to justify review by the Travel Agency Commissioner. AFAT fulfils all the previous criteria, but has a liquidity ratio of 1.04, and would therefore have to provide a guarantee and/or change its payment terms under the new criteria. A letter from AFAT's bank suggests that the guarantee required under the new financial criteria should be contracted elsewhere or that AFAT should deposit 450,000 € on a blocked account. AFAT estimate the cost and impact of shorter payment times without revision of clients contracts at 200,000 € in 2010.

Res 818 section 4.1.6 uses the term "grievance" and this term is general and does not imply a minimum financial amount imposed on the Agent to entitle such Agent to seek review by the Travel agency Commissioner. – One has to remember that the Agency contract entered by IATA and each travel agent is not a contract that can be amended unilaterally by IATA without any remedy if the other party feels such unilateral change is causing grievance, whatever the grievance might be.

The addendum to the new financial criteria was not even submitted to the analysis of the APJC. A meeting to examine the addendum was set up, but was cancelled by the IATA Country Manager of France. This procedure is an absolute contradiction with Res 818 § 2.1.4 and constitutes an infringement of this resolution.

Contrary to the views of IATA, travel agents have made proposals in the framework of the joint working group created by the APJC France, to develop new financial criteria. These suggestions were; postponement of change of remittance date, progressive adaption of liquidity ratio, impact assessment study, reduction of amount of guarantee in case of direct debit, principle of possible reduction of amount of guarantee at the agent's request if more frequent remittance. The agents requested removal of the confidentiality agreement in order to analyse the impact. This was refused by IATA. The agents wanted to postpone application in order to allow sufficient time for analysis.

The measure adopted by PAConf/32 is not justified as the level of default has considerably decreased in the French market (divided by 7) under the former criteria. The percentage of defaults is close to lowest in Europe. It does not justify the implementation of new criteria,

nor the urgency. The amount of guarantee due on a monthly payment is disproportionate compared to the BSP monthly volume. The guarantee represents 79 % of monthly BSP volume. The guarantee would be more than 200 times larger than the global amount of default in complete year 2009. The intended change is illegitimate, as it appears to be based on one default case, which took place in 2008. The default figures presented by IATA for the years 2009-2010 appear to be high, notably compared to the figures for the 3 first quarters of 2009. In any case, according to IATA's table, the percentage of default in 2009, year during which IATA strictly applied the previous financial criteria, fell to a lower level than in 2004 when no revision was seen as necessary, and even less as urgently required.

IATA indicates that it was not the four months preceding PConf/32 which had led to the changes, but a longstanding background, evidenced in the data of the previous years. -If the financial criteria in France, unrevised since 1986, had been considered unsatisfactory for several years by IATA and airlines, then the lack of initiative from IATA or airlines before February 2009 to propose a revision and allow time for genuine negotiations within the APJC and Working Group, stems from IATA's and airlines' negligence. Airlines and IATA could not legitimately make up for such negligence by compelling a revision of the criteria within four months and making agents bear the consequences of a hasty and constrained revision.

The increase in the level of financial guarantee puts AFAT, and more generally, travel agents, in difficulty. The expedited effectiveness of this measure does not enable them to work out solutions. The new criteria concerns balance sheets that are already closed and therefore it is impossible to rearrange those balance sheets. The decision was published Nov 16 for effect 1st Jan. There is no justification for the urgency. Other European BSPs were given time to enable adaption of the market to new rules.

The proposal to reduce the amount of guarantee against weekly remittance is not compatible with the payments terms of public and private undertakings.

PConf has no unfettered discretion to institute changes to local financial criteria. IATA Resolution 818 Section 2.1.4 conditions the authority of PConf to adopt financial criteria on the basis of the local APJC's recommendation. Resolution 818 Section 2.1.4 states that the financial evaluation of agents "*shall be in accordance with established local criteria, as adopted by Conference and as recommended by the APJC, and published in the Travel Agents Handbook*" (emphasis added). The provision thus sets three cumulative conditions for local financial criteria to be applicable, through the use of the word "and".

The provision in Resolution 818 Section 2.1.4 was adopted in 2005 by PConf/28, following a review of accreditation rules in Europe, which was considered imperative by the European Commission to settle two anti-trust procedures on the Passenger Agency Programme. (This is relevant in order to understand the current wording of Res 818 2.1.4. regarding the local financial criteria, and the background of this text.) One of these procedures was the complaint of ECTAA and GEBTA against IATA and IATA Member Airlines, in the framework of which the European Commission requested the parties to carry out a review of accreditation rules. The parties set up an Accreditation Review Group, which negotiated amendments to Resolution 818. In an interim report sent by IATA to the European Commission on 14 October 2004 concerning the progress of this Group, IATA agreed in respect of financial criteria on "the provision for local variations developed at APJCs", and "that the local differences will continue to apply and these will fall to each APJC to recommend". This

interim report also includes the provisions agreed to reflect the concessions, among which a new Section 2.1.4, with the exact wording of the current Resolution 818 Section 2.1.4. - The words “fall to each APJC to recommend” used by IATA to present their concession over financial criteria show that they agreed that local criteria had to follow the recommendations of each local APJC.

These changes were submitted to PAConf/28, where it was again indicated that local differences would continue to fall to the various APJCs to recommend. The action proposed to PAConf was the adoption of amendments to Resolution 818, including the introduction of Section 2.1.4. PAConf adopted these amendments.

AFAT disagrees with IATA’s view that Resolution 818 Section 2.1.4 could easily be modified by a later pronouncement of PAConf to give itself sole authority to determine local financial criteria. The amendments adopted by PAConf/28 to review accreditation were regarded as imperative by the European Commission to settle the anti-trust procedures. IATA acknowledged this and made it clear to Conference delegates in the PAConf/28 agenda. Thus a change to an essential result of the accreditation review could not be adopted without a compensatory measure to ensure the proportionality of accreditation criteria, to comply with European competition law.

Until 2004, local APJCs had final authority to decide local financial criteria. A Special PAConf of March 2004 made changes to APJCs’ terms of reference and changed their authority into an authority to recommend local financial criteria. The following PAConf/27 adopted a new Resolution 818 for Europe, which maintained the change in APJCs’ authority; Section 1.1.2.2 of IATA Resolution 818 applicable in 2005 provided: “*the Council shall make recommendations to the Passenger Agency Conference regarding accreditation in respect of staff and financial standing*” (emphasis added). The words “shall make recommendations”, which are still today in APJCs’ terms of reference, already put on APJCs more than a mere possibility to make recommendations on financial criteria.

When the 2004 Special PAConf withdrew the authority of APJCs to decide local financial criteria to finality, this was outside the process of the European Commission review of the ECTAA/GEBTA complaint against IATA. This is evidenced by the presentation that ECTAA and GEBTA made to the 2004 Special PAConf, which specified that the withdrawal of APJCs’ authority was not required under European competition law and went against the recommendation of the European Commission that agents and IATA representatives get together to negotiate financial criteria. Contrary to what has been presented by IATA during the review, the concerns of the European Commission was not only about harmonizing the variations between local accreditation criteria, but also about the proportionality of those criteria with the way travel agents operate. Far from requiring that PAConf decide financial criteria unilaterally, the European Commission strongly recommended that IATA come together with travel agent representatives to review accreditation criteria.

In the framework of the negotiations between IATA and ECTAA/GEBTA under the purview of the European Commission, IATA conceded that agents would be assessed according to local criteria as recommended by APJCs. This concession was introduced with the adoption of the current wording of Resolution 818 Section 2.1.4, which became effective on 1 January 2006.

This resulted in a system where the final decision is taken by PAConf, but the adoption of local financial criteria must be on the basis of an APJC recommendation. This understanding of the decision making procedure for local financial criteria was confirmed by IATA in a meeting of the Euroforum (European Agency Programme Joint Council's Supervisory Board) of 22 May 2007, where IATA Legal Counsel confirmed that proposals for changes to local criteria would not come to conference unless they had been adopted by the APJC in accordance with the provisions of Resolution 818.

The drafting of Res 818 2.1.4. was reviewed by the EU DG Comp in the framework of a settlement between airline companies and agents. The word utilized in the new drafting, "recommend", could be replaced by one of its synonyms: "propose, put forward". But the APJC did not put forward, propose or recommend anything prior to the PAConf decision.

Proportionality and not only harmonization were the objective of the EU. During 2004-2006, the APJCs were purely consultative bodies. After the review from the EU DG Comp, the new section 2.1.4. approved by the EU Commission came in force in 2006 and the APJCs ceased to be only consultative.

This common understanding prevailed until now and it the first time known to AFAT with the case at stake, in Europe, that PAConf has adopted local financial criteria without acting on the basis of an APJC recommendation.

It is important to avoid over simplistic presentations of decision making processes, which are not limited to full authority or veto. There are other decision making processes, which allow for various degrees of involvement of different parties. The compromise reached between ECTAA/GEBTA and IATA under the purview of the European Commission is a system where the final decision is taken by PAConf, but the adoption of local financial criteria must be on the basis of an APJC recommendation. It gives APJCs the power to initiate or approve proposals on local financial criteria and gives to PAConf the final check on such proposals and the power to reject such proposals.

The theory developed by IATA, that the European Commission's review was all about harmonisation and that APJC's authority had been withdrawn for the sake of harmonisation stands even less as financial criteria have continued to be set on a country per country basis, even in the case at stake, where PAConf/32 has adopted new financial criteria for France. There is in fact no harmonisation.

In reality, a choice had to be made between the two objectives of harmonisation and proportionality, and proportionality was favoured through the wording proposed by IATA for Resolution 818 Section 2.1.4, which established that criteria would be "local" - thus not harmonised like in IATA's theory - and "as recommended" by APJCs, which in ECTAA/GEBTA's perspective would ensure some degree of proportionality.

With this clarified, it is even more obvious that Resolution 818 Section 2.1.4 can only be read as requiring that PAConf must act on the basis of an APJC recommendation.

PAConf/32 was requested to vote on item R25, of which the title was "*Modification of France Financial Criteria*" (emphasis added). Item R25 presented a package of modifications. PAConf was invited "*to agree on the revised criteria as set out in Attachment A*" of item R25, i.e. as a package of measures. It can easily be analysed that the various measures proposed

under R25 are not severable from one another; the proposal included measures concerning remittance schedules, measures concerning the ratios to assess the financial situation of agents, as well measures to calculate agents' bank guarantees on the basis of the financial ratios and of payment frequency. Thus payment schedules and financial criteria are deeply interrelated in the proposal. Thus it is not possible to consider that the decision of PAcnf/32 can be dissociated between elements which are purely about remittance frequency and elements which are purely about financial criteria. AFAT therefore considers that PAcnf infringed Resolution 818 Section 2.1.4 by adopting the package of measures proposed under item R25, which included important modifications of the financial criteria.

The modifications adopted by PAcnf/32 under item R25 were not legitimate, reasonable or proportionate. IATA explains in its presentation of the factual background that the financial criteria in France have not been changed since BSP France was created in 1986. AFAT notes that to complete a 25 year update of financial criteria, it cannot be considered legitimate, reasonable and proportionate to rush through negotiations in 3 months - from the first meeting of the Joint Agent-Airline Working Group on 10 April 2009, to the APJC of 8 July 2009, where the airlines declared that they would submit to PAcnf their unilateral proposal, which was eventually adopted by PAcnf/32. Such short negotiations did not allow reasonable time to reach an agreement on such a large scale revision.

The decision of PAcnf is all the less legitimate, reasonable or proportionate as the proposal was not only rushed through, but also without the support of the agency community reflected by the bypass of the APJC recommendation requirement, and was furthermore adopted with an expedited date of effectiveness. These accumulated characteristics are simply contradictory with the notions of legitimacy, reasonableness and proportionality.

Negotiations on financial criteria and remittance rules that were carried in other European countries, where there was no obvious consensus between airlines and agents, have all given significantly more time than in France to reach an agreement, and significantly more time before the entry into force of substantial changes with regards to remittance rules.

Concerning the time when AFAT was put on notice, AFAT cannot accept IATA's view that an agent informed of airlines' intentions in the first half of 2009 should have started already then to adapt to the potential new regime and to discuss potential changes with its customers. This denies any room for alteration of the proposals made by airlines during the negotiation process. In the framework of an APJC, where decisions are taken when a majority of the air carriers and a majority of the agents present vote in favour of a proposal, it was fully legitimate for an agent represented in the APJC to believe that the proposal would be altered during a process of negotiation between the parties before the APJC could agree on a common proposal that would then go to PAcnf. Even after airlines indicated during the APJC of 8 July 2009 that they would submit their unilateral proposal to PAcnf, agents considered that PAcnf could not validly adopt such proposal. The agents' representatives communicated to IATA and airlines' representatives their views about the implications of Resolution 818 § 2.1.4 during the PAPGJC meeting of 17 September 2009. Moreover, as indicated in the letters of 3 July 2009 and 10 September 2009 from the President of SNAV, the French agents were calling for a modification of the airlines' unilateral proposal, to pursue negotiations and to find a compromise.

It would have constituted unsound management of the business to start initiating substantial changes to the financial situation and in the relationships with customers, on the basis of hypothetical changes, which AFAT considered procedurally flawed. According to IATA's view, AFAT could not have taken into account the addendum that PAConf considered opportune to add without any previous consultation with agents.

Furthermore, IATA's view would imply that agents, which are represented in the local APJC are in a different situation than other agents to adapt to changes that may be adopted by PAConf, and should be treated differently in the framework of a review by the Travel Agency Commissioner. This would establish very serious discrimination between agents.

Therefore, the only time of notice that can be taken into account for any agent accredited in France, is the time of official notice by IATA France to accredited agents of the decision adopted by PAConf on item R25, i.e. 16 November 2009.

With this clearly established, AFAT refute IATA's assertion that the vast majority of agents will have had a full year to adapt to the new financial criteria. IATA states that 70% of agents close their accounts on 31 December, which means that they only had 1,5 month notice to take the necessary measures to rearrange their balance sheets in view of 2010 financial review, where the new liquidity ratio will be assessed and will determine whether they are required to provide a financial guarantee (or if they can fulfil the conditions of the addendum).

Concerning the new payment term, which comes into effect on 15 February 2010, agents including AFAT will have had only 3 months advance notice. IATA claims that there is no prejudice in the 2-day change in remittance, because SNAV was prepared to accept this change in its letter of 10 September 2009. Such presentation of SNAV's letter is misleading. The request of SNAV in this letter was to withdraw the proposed new financial criteria and to limit the proposal to the reduction by 2 days of the payment term. This was a proposal for a compromise, which confirms that agents made attempts to reach an acceptable agreement, contrary to what IATA claims. The part of SNAV's proposal on the reduction of the payment term cannot be validly invoked by IATA as an standalone acceptance of such reduction.

Concerning the assertion that France remittance rules must conform with Resolution 818, AFAT note that it is not uncommon in European markets to have specific remittance rules which differ from the general framework set in Resolution 818. It was therefore legitimate for AFAT to believe that airlines' proposal on remittance rules could also be negotiated as part of the package of measures to modernise financial risk management in France.

The financial criteria adopted for France are extremely restrictive compared to what applies in other European countries, notably with the introduction of a liquidity ratio, which did not exist in France before. In effect, an agents in France will need to have liquidity over 1,15 to be exempted from providing a bank guarantee.

In other European countries' local accreditation criteria, the liquidity requirement is only 1,00 in Belgium & Luxembourg, Cyprus, Estonia, Greece, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Denmark, Sweden, Norway, Slovenia, Switzerland and the United Kingdom (source: Travel Agent Handbook posted on IATA webpage for agents).

Moreover, IATA Resolution 800f, which is IATA's general framework for agents' financial evaluation criteria, only requires that current assets exceed current liabilities, without requiring a superior ratio such as 1,15. In Germany, the ratio of liquidity is higher, but it participates in a fine tuned solution agreed in the APJC, together with the share of cash turnover, to determine a percentage of daily turnover that agents can opt to put into a transit account. Thus the criteria adopted for France are undoubtedly among the strictest in Europe.

AFAT find the insistence of IATA during the review to compare the proposal to change the French criteria with the German criteria, inoperative. Firstly, this comparison was a very secondary element in the discussions that took place in the French Working Group, which legitimately focused on the situation and characteristics of the French market. The German and French markets for travel agents distributing air tickets through the IATA Programme are very dissimilar, notably with the important development of large consolidators in Germany, whereas consolidators are nearly absent from the French market. Moreover, the comparison made by IATA conceals that the liquidity ratio in the German model is not used in the same manner as under the French revised criteria.

Secondly, IATA chose the comparison with the only market where a liquidity ratio is higher than in the revised French criteria, to argue that the revision is reasonable. This argument falls when put in perspective compared to all other European countries, where liquidity ratios are in the vast majority of cases lower than in the revised French criteria.

IATA claims that it is not possible that the Travel Agency Commissioner's review results in the suspension or cancellation of the PAConf decision because any remedy would have to be consistent with the Resolutions, including the Provisions for the Conduct of the IATA Traffic Conferences. IATA submits that the Commissioner should uphold the Agency's Administrator's actions to implement the decision of PAConf/32 on agenda item R25.

Concerning the jurisdiction of the Travel Agency Commissioner, AFAT notes that Resolution 820e provides the Commissioner discretion to set the conditions to grant relief to the requesting agent, as long as these conditions may reasonably be applied under the Passenger Sales Agency Agreement and Rules and maintain appropriate airline prudential requirements (Section 3.1.5 and Section 3.2).

AFAT considers that the Travel Agency Commissioner could take a decision resulting in the suspension of the decision of PAConf/32 on agenda item R25 until an agreement is reached in APJC France and approved by the following PAConf, with both the conditions set under Resolution 820e being fulfilled. Such remedy will comply with airline prudential requirements, considering that the strict application of the previous financial criteria since 2009 has led to the level of agent default decreasing to the lowest level in France since 2004. AFAT recalls that in 2004, no revision of the financial criteria was seen as necessary, and even less as urgently required.

The grievance caused to AFAT in terms of finance and business activity is clear. IATA clearly admitted that no APJC recommendation was submitted to the PAConf, whereas such recommendation is necessary under Resolution 818 Section 2.1.4. The PAConf decision can be suspended and cancelled under IATA Resolutions.

AFAT therefore respectfully requests that the Travel Agency Commissioner order the suspension of the decision of PAConf/32 on agenda item R25 until an agreement is reached in APJC France and approved by PAConf.

The Applicant has submitted copies of the following documents:

AFAT Request for Review, received by e-mail on Dec 15, 2009 with Cover letter, Arguments and Appendix 1-5; Modification of Financial Rules in BSP France Project APJC 8 July 09, Notification by IATA France on 16 Nov 2009 of the decision PAConf/32, Analysis of the balance sheet of AFAT, Letter from the Chairwoman of the APJC France of 8 Oct 2009 scheduling an APJC meeting to examine an addendum, e-mail of 7 Oct 2009 from the IATA France Country Manager calling an APJC meeting on 13 Oct and an e-mail of 9 Oct 2009 cancelling the same meeting.

Response from AFAT received by e-mail on Feb 2, 2010 with "AFAT Response to IATA refusal to review - Additional comments" and Appendixes 1-7; Cover letter from IATA to the European Commission of 14 October 2004 on the progress of the Accreditation Review Group and annexed report from IATA on the negotiated draft changes, Agenda of PAConf/28, Resolutions finally adopted by the Special PAConf of March 2004, Extract from Resolution 818 applicable in 2005, Minutes of the Euroforum/24 of 22 May 2007, Agenda of the Special PAConf of December 2007, Minutes of the PAPGJC meeting of 15 October 2009

Additional comments by AFAT received in e-mail the Feb 25, 2010 with Appendixes 1-4; Chronology of modifications and negotiations on the financial criteria decision making process, ECTAA/GEBTA presentation to March 2004 Special PAConf, Letter of 'Credit Coopératif' to AFAT dated 9 Feb 2010, PAConf/32 agenda second transmittal

**3. The Respondents main and final arguments (summarized by the undersigned)**

IATA respectfully submits that AFAT has failed to demonstrate any prejudice that would justify granting relief under Res. 820e. The Commissioner should uphold the Agency Administrator's actions to implement the decision of PAConf/32 on Agenda Item R 25, and find against AFAT.

There is no evidence that AFTA will suffer serious damage as a result of the modification of the remittance date from the 17th to the 15<sup>th</sup> of each month or because a financial guarantee could be required in 2010; there is otherwise no basis for review by the Travel Agency Commissioner. AFAT has not provided any evidence that it will be unable to provide a bank guarantee nor that the cost of the guarantee would imperil the commercial viability of AFAT or otherwise cause serious damage. From a legal point of view some grievance had to be demonstrated by the applicant, whereas AFAT did not provide any evidence of any kind of prejudice that would justify a remedy under Res 820e.

Concerning the reduction of the remittance period by two days, AFAT alleges an annual cost of € 200,000 but provides no basis or explanation for this assertion. A simple analysis demonstrates that the cost to AFAT appears to be far less. Assuming that AFAT would require a "bridge loan" or overdraft facility to be able to pay IATA on the 15th instead of the 17th of each month and that the whole amount of cash sales over the year would be affected, a very conservative estimate of the interest charges suggests a cost of between € 1,252 and € 1,437 per year based on the 2008 and 2009 sales.

Concerning the requirement to provide a bank guarantee, the evidence of alleged prejudice provided by AFAT is a letter from its regular bank suggesting that AFAT should seek a guarantee from an institution specialized in providing such guarantees and if that option fails the bank would then discuss a blocked-account solution. IATA France's experience in working with other agents suggests that there are a number of financial institutions in France that regularly provide such guarantees and that the cost is not exorbitant.

Res 818 § 2.1.4 does not apply to the change of remittance date as such change is not a change of the financial criteria. There are two distinct legal analyses to be made, one about the financial criteria, and one about the modification of the period of remittance. The modified monthly remittance date from 17th to 15th brings France into conformity with the rules of subparagraph 1.6.2.1.(b) of Res 818 Attachment A. There is no basis to review the change, particularly given that the Chairman of AFAT was on notice that the airlines would seek this change as of 4 May 2009 and all the agents were informed when the minutes of the 8 July 2009 APJC meeting were circulated on 21 Aug 2009.

There is no limitation in the relevant rules on the ability of the PAAConf to modify the Passenger Agency Programme on the basis of a proposal from an IATA PAAConf Member Airline. The reference to an APJC recommendation in Res 818 § 2.1.4 makes it clear that an APJC can recommend a change in financial criteria, but does not limit the unfettered discretion of the PAAConf to institute changes based on its established procedures on the basis of an Airline Member proposal. The PAAConf usually refuses recommendations when it feels that agents were not consulted. In the matter at hand, agents were consulted. The delays in other countries showed that something had to be done quickly. As there was real and uncontested attempts to reach a common recommendation, PAAConf studied the matter and decided it was a legitimate change, adopted after a sufficient process. There is no basis for the PAAConf/32 being overturned or suspended.

The Provisions for the Conduct of the IATA Traffic Conferences stipulate that PAAConf "shall take action on matters relating to relationships between Airlines and recognized passenger sales agents and other intermediaries but excluding remuneration levels". The Provisions also stipulate that any "voting Member" (any full IATA Member Airline) may submit an Agenda Item for PAAConf to consider and ultimately vote on. Res 818 and the provisions dealing with APJCs confirm that it in no way prevents PAAConf from exercising its powers established by the Provisions for the Conduct of IATA Traffic Conferences. APJCs are consultative bodies that make recommendations only and assist PAAConf, but clearly have no power to veto or otherwise block PAAConf action. The provision of Res 818 § 2.1.4 cannot be read as requiring PAAConf to adopt financial criteria "only on the basis of" an APJC recommendation. The provision would have been worded differently to achieve this result. Even if the provision would have been worded in this way, ultimately PAAConf could directly or indirectly modify the provision given that Resolution 818 has no super-legislative type status and therefore a later pronouncement of PAAConf would prevail to the extent of any inconsistency.

PAAConf adopted the decision on the basis of a full record of the agent-airline discussions that took place in the context of an APJC working group created to update the financial criteria. The ordinary consultation process for PAAConf agenda items was followed before PAAConf ultimately adopted its decision on the basis of Agenda Item R25. The Agents and specifically

the Chairman of AFAT have been aware of the airlines' intention to pursue these changes since the final APJC agent-airline working group meeting on 2 July 2009.

The financial criteria in France have not been changed since BSP France was created 1986. The new liquidity ratio and resulting modification to the financial guarantee criteria were a reasonable and proportionate response to the risks highlighted by the default trends 2006-2008, and the current economic crisis. In terms of absolute numbers the amount of unrecovered funds doubled in 2007 compared to 2006 and then doubled again in 2008 reaching almost 17 million Euro.

The airline members of the APJC France raised concerns regarding the default position of France at the APJC on 23 Feb 2009. The APJC agreed to set up a joint agent-airline working group to study revisions of the financial criteria. The working group met four times between 10 April and 2 July 2009, and the airlines highlighted at the first meeting that any modifications would have to be submitted to PAConf/32. The working group was not able to reach an agreement. During the working group process there was no analysis by the agents or proposals to modify the financial criteria. The airlines formulated a final guarantee proposal that took into account the form of payment in addition to the remittance frequency, as requested by the agents. The liquidity ratio was also reduced compared to the initial suggestion, making them significantly less onerous than the system in Germany.

At an APJC meeting on the 8 of July 2009, the working group process was summarized and the airlines' final proposal was discussed and voted on. The attending airline members all approved the proposal and the attending agent members all opposed the proposal. The airline members confirmed that they would submit their proposal to PAConf/32.

The APJC Airline members' proposal was submitted to PAConf and circulated according to PAConf procedures on 20 Aug 2009 including to the PAPGJC and the EAPJC. PAConf was informed of the agents' objections and also provided with the minutes and the related slides for the working group meetings.

On 10 Sept 2009 the President of SNAV wrote to the APJC Chairwoman and requested that the airlines should reconsider their proposal as concerns the new liquidity/ratio/guarantee system, but proposed to accept the change in remittance date. The APJC Chairwoman explained that the airlines had decided not to modify their proposal. Nevertheless she suggested that a joint airline-agent committee should be created to address real and documented difficulties the agents might have in adapting to the new rules. An invitation was sent on the 7<sup>th</sup> of Oct to the APJC for a meeting the 13<sup>th</sup> of Oct to discuss this new proposed addendum. On the 8<sup>th</sup> of Oct the Chairman of AFAT, in his capacity as President of the Air Committee of SNAV, responded and rejected the proposal to create a joint agent-airline committee. Amongst the reasons given was that such committee would violate EU competition law. – In light of the response and that an APJC meeting would be pointless IATA France cancelled the proposed APJC meeting. - IATA furthermore submits that the position taken in the letter from the President of SNAV, with regards to the acceptance of the new remittance date, is evidence that the change did not lead to significant prejudice on the part of the agent community as a whole.

The airline members nevertheless modified their initial proposal to PAConf/32 and included an addendum proposing that IATA be given the power during 2010 to review situations where agents were experiencing difficulties in meeting the new criteria. The addendum authorized IATA to allow such agents to operate without a bank guarantee provided certain criteria were met, including that the Agents opt for weekly remittance until 2010 results financial review. The main change to the proposal previously communicated to the agents was that the elimination of the joint agent-airline committee as a result of the concerns raised by the Chairman of AFAT.

The new liquidity criteria and rules on guarantees have been adapted and taken into account issues raised by the agents, and are significantly less burdensome than those in other European countries (notably Germany), and provide a wide range of options for either reducing the amount of the guarantee required or avoiding the requirement entirely.

The new payment terms take effect the 1<sup>st</sup> of Jan 2010 with the first payment due on 15 Feb. The new liquidity ratio will be assessed during the first financial review in 2010 for each Agent and a bank guarantee, where applicable under the new criteria, will have to be in place two months after the assessment is completed. Approximately 70 % of the Agents close their books on 31 Dec and will be reviewed in May/June. All Agents will have until the date a guarantee is required to adapt their situation and provide an updated auditor statement reflecting any changes in the liquidity ratio or opt for more frequent remittance in order to reduce or eliminate any guarantee required. A capital injection to increase capital would be acceptable.

The modification to the remittance date and the new liquidity ratio/guarantee system in France are legitimate, reasonable and proportionate. The changes were based on the default experience recent years (2006-2008). In France only 16 % of Agents and 11 % of BSP Sales were covered by bank guarantees according to the former rules. The drop of defaults in 2009 does not affect this analysis at a time when, at best, economic conditions are weak and there remains a pressing need to strengthen the protection of monies that the Agents collect on behalf of and trust for the airlines. The problems started as early as 2006 and were not just about one default case. A huge jump of defaults sustained through 2009, and IATA knew the deterioration of financial situation of the agents. IATA has worked very closely with the weakest agents to address their problems.

Those Agents that are not able to provide a guarantee under the new criteria present a clear risk of non-recovery of the monies they collect on behalf of and in trust for the Airlines.

The change in the current wording of Res 818 2.1.4. was not part of the key changes asked by the EU DG Comp. The concern of the commission was about barriers preventing harmonization of the market. Before 2001, the financial criteria were decided upon by the APJC only, which was regarded as potential segmentation of the national markets of EU member states. In a letter dated 24 June 2003 the EU DG Comp stated that the accreditation criteria may constitute an important barrier to enter the market. The financial criteria or co-decision procedure was not focused on for the EU DG Comp. The change of taking the decision-making power from the APJC responded to the segmentation concern.

The declaration from IATA Legal Counsel at the Euroforum meeting of 22 of May 2007 was not an appropriate statement of the law.

The ECTAA-GEBTA case demonstrated that segmentation of the internal market was the key concern for the EU DG Comp, that co-decision was rejected by IATA and that EU DG Comp did not pursue that system, and that ECTAA strongly opposed to the APJCs becoming consultative bodies in 2004. By doing so, they admitted that the APJCs had no veto power.

AFAT submission contains a lengthy section that purportedly is meant to clarify the meaning of section 2.1.4 of Res. 818. The submission focuses on proportionality and asserts that the wording of section 2.1.4 of Res 818 was a compromise meant to ensure proportionality. IATA submits that the interpretation argued for by AFAT is not supported by the record. More importantly, the submissions of AFAT on section 2.1.4 do not prevent PAAConf from acting on a proposal from an airline, a group of airlines, an agent or a group of agents given PAAConf's unfettered legislative powers under the Provisions for the Conduct of the IATA Traffic Conferences.

IATA does not dispute that the proportionality of specific elements of the program was a focus of DG Competition and by extension of the joint agent-airline accreditation review group that worked on revising the Agency Programme. A large number of changes were made to specific requirements or criteria to address potential issues and update the requirements of the Programme to the realities of agents' business. IATA strongly disagrees, however, with the interpretation advanced by AFAT/ECTAA-GEBTA to the effect that the change to section 2.1.4 was meant to guarantee proportionality and that, either as a matter of competition law or because of an alleged settlement, PAAConf is prevented from acting on an airline, agent or third-party proposal regarding local financial criteria. The record simply does not support that interpretation.

IATA determined that in order to address the fundamental internal market barrier issue raised by DG Competition it was necessary to remove decision making authority on financial criteria from the local APJCs and make PAAConf responsible. The correspondence exchanged by ECTAA-GEBTA and IATA in June and July 2004 occurred in part because of this change. This correspondence demonstrates clearly that (i) ECTAA-GEBTA argued for a co-decision structure along the lines that had existed previously, (ii) IATA rejected ECTAA-GEBTA's position, and (iii) the current wording of section 2.1.4 was adopted in order to reflect the new structure under which APJC's were limited to making recommendations and not taking final decisions on local financial criteria.

The AFAT submission concedes that the interpretation of section 2.1.4 being advanced is ECTAA/GEBTA's perspective on 2.1.4: "proportionality was favoured through the wording proposed by IATA for Resolution 818 Section 2.1.4, which established that criteria would be 'local' - thus not harmonised like in IATA's theory - and 'as recommended' by APJCs, *which in ECTAA/GEBTA's perspective would ensure some degree of proportionality.* [emphasis added]". In reality, proportionality is determined on the basis of the end result not the process. While agreement between the agents and airlines, and therefore a recommendation from the APJCs, is clearly one way to have confidence that new criteria are proportionate (and perhaps even the preferred manner from PAAConf's perspective), it is equally clear that a proportionate outcome can be achieved by other means and without any airline-agent agreement.

IATA submits that the arguments grounded in proportionality advanced by AFAT cannot be a basis for the Travel Agency Commissioner to accept AFAT/ECTAA-GEBTA's interpretation of

the scope and meaning of section 2.1.4. The interpretation advanced by AFAT/ECTAA-GEBTA would effectively require a co-decision before any changes could be made to financial criteria. In a case such as this one, where an APJC agreement proved impossible despite agent-airline consultations, AFAT's interpretation would in effect block PConf from acting in situations where it deemed necessary. The Provisions for the Conduct of the IATA Traffic Conferences do not permit this result nor does the record related to the ECTAA-GEBTA complaint support this result. PConf remains the sole legislative body/decision-making authority for the Passenger Agency Programme under the Provisions for the Conduct of the IATA Traffic Conferences, including as concerns Res. 818 section 2.1.4. As such, PConf can take general or specific decisions related to Res. 818 section 2.1.4 and local financial criteria subject only to the constraints of EU competition law and any other applicable laws.

AFAT requests that "the Travel Agency Commissioner order the suspension of the decision of PConf/32 on agenda item R25 until an agreement is reached in APJC France and approved by PConf." IATA respectfully submits that there is no basis or power for the Travel Agency Commission to grant the requested relief.

It must be recalled that the current review from a strict legal perspective concerns only the situation of AFAT and the alleged grievance that is said to arise from incorporation into its Passenger Agency Agreement of the changes that result from PConf's decision on agenda item R25. The Travel Agency Commissioner is therefore limited to examining the specific case of AFAT and granting specific relief, if any, to AFAT. The relief requested goes far beyond dealing with AFAT's specific case and would affect all agents in France. Apart from the strict terms of the review and the fact that a review under Res. 818 section 4.1.6 is limited to the case of one agent, there is no evidentiary basis to grant the blanket relief requested. Such relief would also not be consistent with the "need to maintain appropriate airline prudential requirements" under Res. 820e section 3.1.5 given the diverse position of agents in France, many in a weaker financial position than AFAT. AFAT's submission that the low non-recovery ratio in 2009 supports such relief ignores the still relatively high number of defaults that occurred in 2009 and the situation of financial crisis that was a key driver of the APJC Airlines' proposal to strengthen the financial protections in France as well as the continuing situation of economic weakness and uncertainty.

The PConf decision is valid and the interpretation as well as arguments advanced by AFAT to effectively give a veto to agents or airlines in the APJC cannot be sustained. Section 2.1.4 can be given full effect as concerns changes adopted on the basis of an APJC recommendation. However, where no agreement is possible in the APJC and therefore no APJC recommendation is possible, then PConf remains free to act on the basis of an agent proposal, an airline proposal, or a proposal from a third party.

As concerns PConf's powers and review by the Travel Agency Commissioner, IATA's position is that the Provisions for the Conduct of the IATA Traffic Conferences provide the authority for PConf to adopt a decision based on a proposal from a member airline, a group of airlines or any third party including agents and that section 2.1.4 of Resolution 818 is therefore not a barrier to PConf 32's adoption of the decision on item R25. PConf's powers in this regard do not undermine the Travel Agency Commissioner's jurisdiction to conduct a review of an agent's alleged grievance and decide "what corrective and/or remedial action, consistent with applicable Resolutions and with Section 3 of this Resolution [820e], is to be taken to put matters right" (section 1.2.4 of Resolution 820e).

IATA's submission remains that suspending the decision on item R25 would not be "consistent with applicable Resolutions" and notably with the Provisions for the Conduct of the IATA Traffic Conferences. AFAT has not demonstrated that it is grieved in the sense of 820e. Even if AFAT did, 820e makes it clear that any remedy would have to be consistent with the resolutions, including Traffic Conference resolutions. Res 820e 3.1.5 would require a remedy be consistent with prudential requirements. Travel Agency Commissioner could not cancel, suspend or annul the PAcnf decision and the Travel Agency Commissioner must comply with all the IATA Res, this includes also the Provisions for the Conduct of the IATA Traffic Conferences.

Based on its written and oral submissions to date and the above remarks, IATA respectfully requests that the Travel Agency Commissioner find against AFAT pursuant to Resolution 820e sections 1.2.4 and 3.1.6, conclude that no relief is appropriate in this case and thereby uphold IATA France's application of PAcnf 32's decision on item R25 to AFAT.

The Respondent has submitted copies of the following documents:

Response from IATA by e-mail the 5th of Jan with Cover letter, Response, Annex 1-5; Revision of FR criteria PAcnf Package, SNAV-AF Exchange of letters dated 3 and 20 July 09, SNAV letter dated of 10 Sept 09, AFAT-SNAV letter 8 Oct 09, Provisions of the Traffic Conferences

Additional submissions from IATA by e-mail the 9th of Feb with 6 attachments; DG COMP Letter to IATA - 24 Jun 03, DG COMP Letter to IATA - 15 Mar 04, ECTAA-GEBTA Letter of 24 Jun 04, IATA response 7 Jul 04, DG COMP Letter to IATA - 23 Jul 04, ECTAA-GEBTA Press Release Announcing Withdrawal of 2002 Complaint - 16 Dec 05

At hearing 11<sup>th</sup> of Feb; Power Point named "AFAT TAC Review- IATA Background Slides"

Response from IATA by e-mail the 11<sup>th</sup> of March with appendix 1-2; IATA list of banks providing guarantees in 2009, Minutes of APJC-NL in Jan, Apr and Jul 09

#### **4. The Review and the Authority of the TAC**

The authority and duties of the Travel Agency Commissioner (hereafter referred to as "TAC") are primarily set out in IATA Resolution 820e, but there are also other rules granting rights for Agents to request review by the TAC. In this matter the Applicant has requested a review on the basis of Resolution 818 § 4.1.6. This section states:

*"notwithstanding the provisions of Paragraph 2.3 of the Passenger Sales Agency Agreement, in the event that (an) Agent is aggrieved by the incorporation into its Agreement of amendments made by the Conference to IATA Resolutions it shall be the grounds for the Agent, within 30 days receipt of the Agency Administrator's notification of such amendments, to seek review of its grievance by the Travel Agency Commissioner."*

As the authority of the TAC with regards to review of PAcnf decisions has been somewhat debated in this matter, there is a need to clarify that the undersigned finds that the above section gives the TAC authority to intervene also with regards to PAcnf decisions, provided that the Agent is able to demonstrate that it is aggrieved by the decision. The terms

“aggrieved” and “grievance” are terms that could cover a variety of situations. One could argue that a procedural error by the PAcConf, or a decision by PAcConf with other defects, in itself creates a situation whereby the Agent suffers grievance. - In my opinion however the term grievance requires that there are some sort of measurable effects financially or otherwise of some significance, as a result of the procedural error or defective decision.

With regards to what actions the TAC would potentially be able to take in this matter it is noted that the Res 820e provides for a variety of possibilities, but also some requirements. It is clearly stated that the TAC is bound by the provisions of the applicable resolutions, and may only make findings of facts and conclusions in accordance with those resolutions (see Res 820e section 2.7).

There is a list of possible courses open to the TAC contained in Res 820e section 3.1. The list is indicative and not exhaustive. The list contains one section I find of special interest in this matter; an Agent aggrieved by impending amendment to its Passenger Sales Agency Agreement may be granted such relief as may be appropriate having regard to the need to maintain appropriate airline prudential requirements (see section 3.1.5). Furthermore section 3.2 states that in arriving in any of the decisions outlined in Paragraph 3.1. above, the Commissioner shall have the discretion to set such conditions as are consistent with and may be reasonably applied under the Passenger Sales Agency Agreement and the Passenger Sales Agency Rules.

By this I find that the TAC is empowered to take corrective actions to put matters right, as long as the decision by the TAC considers relevant IATA Resolutions and ensures that appropriate airline prudential requirements are maintained.

It is correct as the Respondent has stated that the TAC formally only is able to make a decision in favour of the Agent requesting review, not for the agency community as a whole. However I cannot conduct my review in any other way than to try to interpret the rules in question to the best of my ability, from the perspective that there is a contract between the IATA Airlines and the Agent that needs to be interpreted. - The IATA Resolutions do not cover every situation that may occur in this contractual relationship, and there will consequently sometimes be necessary for the parties acting on basis of the rules to interpret situations in light of the IATA framework.

With this as background I will conduct my review.

## **5. The Case**

### **5.1. Rules of interest:**

To become an Accredited Agent an Agent signs a Passenger Sales Agency Agreement (hereafter referred to as the Agreement) in accordance with IATA Resolution 824. In this contractual relationship the Director General of IATA represents the IATA Members (or in other words the IATA airlines) and acts for and behalf of these.

The Agreement stipulates that terms and conditions governing the relationship between the Carrier and the Agent are set forth in the Resolutions (and other provision derived

therefrom) contained in the Travel Agent's Handbook (hereafter referred to as the Handbook) as published from time to time under the authority of the Agency Administrator. The Handbook incorporates the Sales Agency Rules, the Billing and Settlement Plan rules, such local standards as may be provided for under the Sales Agency Rules and other applicable IATA Resolutions (see Res 824 section 2.1(a) and its subparagraphs).

Local financial criteria applicable in a certain area/country are such local standards that may be provided for under the Sales Agency Rules. The Sales Agency Rules for France are contained in Res 818 (from 1<sup>st</sup> June 2010 Res 818g will apply). - The local financial criteria are consequently to be considered as part of the contractual relationship between the individual Agent and the IATA Members.

Resolution 818 section 2.1.4 under the heading "Finances" stipulates the following:

*"The financial stability of the applicant is assessed in relation to the funds at risk, taking into account net equity, net current assets compared to the net cash sales of an average prescribed reporting and remitting period. Such evaluation shall be in accordance with established local criteria, as adopted by the Conference and as recommended by the APJC, and published in the Travel Agents Handbook."*

The IATA Resolutions may change from time to time, as decided by the Passenger Agency Conference (referred to as PAConf). The PAConf has the overall decision making authority with regard to the IATA Resolutions.

The Agreement/Res 824 stipulates that the Agency Administrator shall provide the Agent with subsequent editions of the Handbook and all amendments thereto. The agent shall be notified by the Agency Administrator of any amendments to the contents of the Handbook and such amendments shall be deemed to be incorporated in the contract unless within 30 days of receipt of such notification, the Agent terminates the Agreement by written notice to the Agency Administrator.

## 5.2. Conclusions and reasons for decision:

The relationship between Airlines and Agents must be built on trust, as the Agents acts on behalf of the Airlines and collects its monies, exposing the Airlines for financial risks if the Agents are not financially sound. The Airlines therefore have a legitimate interest in ensuring that the Agents meet certain standards financially and otherwise. However the Agents are many times dependent on the IATA Accreditation for their commercial survival. In addition the procedure for changes to the Agreement is unilateral. The Agents have to comply with new terms or terminate the Agreement. To protect the Agents from being aggrieved by a decision of the PAConf the Agents have the right to request review of its grievance by the TAC under Res 818 section 4.1.6. It should be noted that there are also many other rules contained in the IATA Resolutions to ensure the Agents will be treated fairly.

The key questions here are consequently whether or not AFAT has been aggrieved in any way by the PAConf decision, and if so what effect this would have on the decision in question.

Both parties agree to that the PAConf decision under review was not based on any APJC France recommendation. First of all I therefore need to investigate the procedure as described in Res 818 2.1.4 (full text to be found above section 5.1.). The parties have diverging views on the background of the text, and thereby also diverging views on the interpretation of the rule. The issue is whether the rule mandates a specific procedure for implementation of new local financial criteria, or if it only provides for one procedure amongst others.

Given the background material provided by both parties I can only conclude that the text as it stands now was voted for by PAConf/28 and part of a long list of changes of Res 818. The previous text in effect did not contain any reference to that financial criteria should be recommended by the APJC. The material provided by both parties clearly shows that all changes adopted by the PAConf were discussed and analysed in depth by the agent community, as well as the airline community. In my opinion this gives the actual text as it is written high relevance. The last section of the text states: *“Such evaluation shall be in accordance with established local criteria, as adopted by the Conference and as recommended by the APJC, and published in the Travel Agents Handbook.”*(emphasis added) - I note that this is a rule or clause included in the Agreement between the Airlines and the Agent through the Passenger Sales Agency Rules (Res 818), clearly stating that the evaluation of an Agent shall be in accordance with established local criteria, as adopted by the Conference and as recommended by the APJC. In my opinion the text clearly indicates a mandated procedure with regards to on what local criteria an Agent shall be evaluated.

I also note that if this procedure was not intended as a mandated procedure it would more or less be pointless to include the text, as the APJCs would also without this text be able to file proposals to the PAConf (see APJC terms of reference (now as well as 2005) stating that the APJC shall make recommendations to PAConf on accreditation criteria of financial standing).

By this I have established that the text of Res 818 mandates a special procedure for inclusion of local financial criteria into the Agreement between the Agents and the Airlines. I cannot find that the Provisions for the Conduct of the IATA Traffic Conferences conflicts with this interpretation, as argued by the Respondent. These provisions are important rules for the work of the Traffic Conferences, but have no direct bearing on the Agreement between the Agent and the Airlines in this particular context. The fact that an Airline has a right to file proposals and have these voted on at the PAConf, does not mean that such decision is always possible to effect with regards to other parties, as there may be other obstacles based on for example law or contractual rights.

My interpretation is also to some extent supported by the fact that this procedure has previously been honoured with regards to local financial criteria, despite that there have been difficulties in some countries to reach an agreement in the local APJC (Poland is a well known recent example).

As I have now established that PAConf has violated the procedures as established in the Agreement with the Agent by the decision under review, I need to investigate the effects of this violation.

The Respondent claims that PAConf's latest decision should be the valid decision as ultimately PAConf could directly or indirectly modify the provision given that Res 818 has no super-legislative type status, and therefore a later pronouncement by PAConf would prevail to the extent of any inconsistency. - In my opinion this must be thoroughly analysed, as the procedural rule is part of the Agreement with the Agent (and still is), and there are many interpretational principles of law that could potentially be of interest here. - I prefer to try to seek some guidance in the Resolutions, as well as see the wider context of this matter, not forgetting that the correct question to ask is if the violation of the rule has caused the Applicant grievance in the meaning of Res 824 4.1.6.

For this I note that Res 824 section 2.4 states:

*"...In the event of any conflict, contradiction or inconsistency between any provisions with which the Agent is required to comply under Subparagraph 2.1 of this Paragraph, and any of the provisions of this Agreement, the provisions of this Agreement shall prevail."* - I note that "Agreement" in this context means Res 824.

It is hereby of interest to read the rule under paragraph 2.1 (a)(iii) of Res 824, that incorporates local standards into the Agreement between the Agent and the Airline;

*"The Handbook incorporates:*

*:...2.1(a)(iii) such local standards as may be provided for under the Sales Agency Rules,..."*  
(emphasis added)

These two rules above in combination indicates that rules in the Sales Agency Rules at least have some sort of additional weight as, if not provided for under the Sales Agency Rules, local standards could be seen as not duly incorporated in the Agreement. Though this could be seen as an indication of that the Agent has been caused grievance of some kind, when the mandated procedure of the Sales Agency Rules was set aside in a decision concerning local standards, I prefer not to base a decision on more or less narrow textual interpretations, there is need also see to the general context of the relevant rules.

The procedure for implementation of new contractual terms is special in the Agent – Airline relationship. It is, as mentioned above, not a contract between parties with equal powers, the Airlines are able to impose new terms, and the Agents have only the choice to accept or to terminate the Agreement. This procedure for inclusion of new terms into the Agreement is likely to be a necessity, simply due to the fact that it would be impossible to negotiate and agree with each and every individual Agent separately. The Airlines are also the principals allowing the Agents to act on their behalf and collecting their monies in trust, and this consequently means that the principal must be able to ensure the Agents fulfills certain requirements, as defined by the Airlines.

- However if the Airlines in the Passenger Sales Agency Rules, that is the one of the most important resolutions in the Agent – Airline relationship, have given the agency community certain rights with regards to the procedure for implementing new local financial criteria, it is in my opinion to some extent an infringement of the rights of any Agent if this procedure is simply set aside. The PAConf would potentially first have to change the procedure, as described in Res 818 2.1.4, giving the agency community a chance to debate and discuss this

new procedure, before PAConf implements new financial criteria that are not recommended by the local APJC.

As mentioned above I do not find that “grievance” in the context of Res 818 is constituted only on the grounds of a procedural error or a defective decision. There needs to be some measurable negative effect. The parties in this matter have debated whether or not the Applicant has been able to prove such effect. I find that the Applicant has been able to demonstrate that it will suffer financially of some significance, as it will have to provide for a bank guarantee under the new financial criteria and/or change its payment frequency.

Altogether the infringement of the established process for implementation of the new local financial criteria, as well as the financial suffering due to the decision, constitutes a situation where the Applicant in my opinion is aggrieved by the PAConf decision as meant in Res 818 4.1.6.

I also need to investigate if the PAConf decision shall be seen as one as a whole or as two separate items; one concerning local financial criteria and one concerning remittance dates. The decision is headed “Modification of Financial criteria....” and contains a package of measures. - This indicates that the decision should be seen as one. On the other hand Res 818 handles the elements of local criteria and remittance dates quite separately. It is for example clearly for the PAConf to establish the standard frequency of Agent’s remittance (Res 818 1.6.2) and IATA also has some mandate with regards to remittance dates (see Res 818 section 1.6.2.1). This makes me inclined to see this as two separate elements, though of course the frequency of remittance has a direct bearing on the financials risks and therefore also on the local financial criteria. The main argument however is that as PAConf would be able to implement new remittance dates without this being recommended by the local APJC, I cannot see this element of the decision as an infringement of any procedures as laid out in the Agreement between the Agent and the Airlines. There could potentially be other grounds that constitutes grievance in the sense of Res 818 4.1.6, as for example the short notice period the agents had to adapt to the new remittance dates. Though this was a short period for adaption, and I agree with the Applicant that the only notification period here that could be relevant is from the 16<sup>th</sup> of Nov 2009 when the changes were formally communicated by IATA, I do not find that this constitutes such grievance as stipulated in the applicable resolution.

Altogether this means that I find that the PAConf Decision under review, excluding the section regarding terms of payment, shall not be applied with regards to the Applicant. I do not find that this decision, based on the information at hand, would mean that appropriate airline prudential requirements are not maintained.

I do not think it is appropriate that I suspend the decision until APJC France has made recommendations on local criteria for adoption by the PAConf, as suggested by the Applicant. There may be other scenarios on how this situation is dealt with, depending on the involved parties’ willingness to find solutions, and I do not find it appropriate that I set certain requirements that would potentially be an obstacle to other solutions.

## 6. Decision

The decision by PAcnf/32 Item R25 with regards to new local financial criteria shall not be applied with regards to the Applicant. However the section of the decision relating to terms of payment, or new remittance date, stands.

Decided in Sundbyberg 2010-03-25

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Helene Cedertorn

Signed original copies of this decision will be sent by postal mail to the parties.  
Sent this date by e-mail to: Mr Lugo, Mr Butcher, Mr Poitras and Mr Selnet

Appendix 1: PAcnf Dec/32 item R25

**Note:**

**The parties may, if considered aggrieved by this decision, seek review by arbitration in accordance with the provisions of Resolution 818, section 12.**