

## Decision 08 / 2019 Travel Agency Commissioner - Area 2

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**Applicant: Sunshine Cruise Holidays (IATA code 91-27911 2)**  
Salford Quays, Salford  
England, M50 3AH

Represented by: Mr Chris Photi (White Heart Associates)

**Respondent: IATA**  
Torre Europa  
Paseo de la Castellana, Número 95,  
28046 MADRID, Spain

Represented by: Ms. Michaela Badanova, Assistant Manager Accreditation

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### I. The Case

On 12 February 2019 Sunshine Cruise Holidays ("SCHL") was notified about the upcoming "go-live" of the NewGen (Resolution 812) provisions in the UK.

Quoting IATA:

*"...As a Go Standard Agent, your Agency will be assigned the following Risk Status and Remittance Holding Capacity. **Agent Risk Status: B***

*Your Agent's Risk Status is the result of your Agency's Financial Assessment results and overall Risk History Assessment:*

- Your latest Financial Assessment result: SATISFACTORY*
- Risk History Assessment result: Failed (Major Change of Shareholding)*

*Financial Security requirement: GBP 711.000,00"*

Resolution 846, §5, mandates IATA to assess all Agents in Markets where NewGen is to be implemented and assign a "Risk Status" considering any "Risk Event" not having expired at the "*time of implementation*". In this case a Risk Event such as a Change of Ownership ("CoO") will be as of 16 February 2017 and onward, since the "**go-live**" for **New Gen in the UK was planned for 16 February 2019.**

The issue is if an "event", by IATA **approved as a Non-Risk Event** prior to the implementation of NewGen in a specific market, can or should be considered as a Risk Event after NewGen actually is implemented in that same market.

In this case SCHL had a CoO” on 13 April 2018. The change was confirmed as “satisfactory” by IATA without informing SCHL about the effects of such a change, in respect to at that time already adopted Resolution 812, with effectiveness less than 2 months away.

## II. The core of the Applicant’s arguments in summary

Quoting Mr. Photi:

*“IATA are seeking to apply, retrospectively, a financial security against SCHL for a period from 16 February 2019 (the date of change of control was 13 April 2018), through. At least, until 13 April 2020.*

*At 13 April 2018 under the Local Financial Criteria (“LFC”) UK, IATA did not consider this a “risk event” as SCHL provided a satisfactory Creditsafe report reflecting “good creditworthiness” ....., SCHL maintains a good creditworthiness rating with Creditsafe of 74.*

*IATA and the airlines collectively are a large organisation of substantial influence who are legally precluded from the misuse of such a position in relation to smaller entities such as travel agents. Simply for them to implement retrospective material impact change to something that took place in the past is not just. Given IATA’s comments it is clear they seek to apply the NewGen ISS recognition of a “risk event” (Change of Ownership) retrospectively. An acquiring party in this period may well not have completed an acquisition if such a situation had been known then.”*

## III. The core of the Respondent’s arguments in summary

Quoting the Respondent:

*“...in accordance with Resolution 846, section 5, prior to the implementation of NewGen ISS, IATA will assign a Risk Status to all Agents, considering any Risk Events incurred which have not expired at the time of go-live. Due to the Major Change of Ownership/Shareholding for your Agency which took place on **13th April 2018**, this Major Change will be assessed as a Risk Event and recorded in your Agency's Risk History until **13th April 2020**.*

*As this Risk Event will result in a Risk History failure, impacting your Agency’s overall Risk Status, to maintain authorization to use Cash Payment Method, your Agency will be required to provide IATA with a Financial Security, as set out in Resolution 812 section 5.5.2.”*

(Commissioner’s comment; “the Financial Security requested was GBP 711.000,00”)

## IV. Oral Hearing

Both Parties have agreed to waive their right to an oral hearing and to allow this Office to reach a Decision based on the written submissions and evidence presented by and communicated to both Parties.

## V. Considerations leading to Decision

Resolution 812 came in effect 01 June 2018. SCHL's "CoO" took place on 13th April 2018. At that time the CoO was approved "as satisfactory" and did meet all requirements of the Local Financial Criteria for the UK ("UK-LFC").

Resolution 812 § 5.3.2.2 (Ongoing Risk History Assessment) states: "*Risk Events will be recorded and remain in the Agent's Risk History for a period of 12 months, other than the following Risk Events which will apply for a period of 24 months.... b) Major change of ownership or legal status*"

It is notable that the above Resolution uses the wording "*will be recorded*" implying "**an event having consequences for the future**", rather than in the following § 5.3.2.3 where "retroactive events" are deemed as "*Risk Events recorded in the Agent's Risk History*".

What particularly catches my eyes is SCHL's statement according to which: "***An acquiring party ...may well not have completed an acquisition if such a situation had been known then.***"

Foreseeability is a corner stone of every agreement signed in countries who praises themselves to be governed according to the Rule of Law.

Not only did SCHL adhere to Resolutions requirements at the time of the change, but also § 6 in the UK-LFC (in effect until **01 February 2019**) was very clear when stating:

***“Notwithstanding the above and for the purposes of this Section only (Changes of Ownership- my comment), the credit rating of an Agent obtained from a Credit Information company appointed by IATA, may be taken into account to form a complete evaluation of the financial status and creditworthiness of an Agent. Provided that the credit rating of an Agent is at a level of ‘good credit worthiness’ (or the equivalent), an Agent will not be required to provide a Financial Security.”***

Notwithstanding the above reasoning about applying approved events as "Risk Events" retrospectively, **it is obvious that IATA had all possibilities to initiate a change in the UK-LFC at a much earlier stage**, since the preparations and extensive work put into NewGen had been ongoing for years prior to SCHL's Change of Ownership on 13<sup>th</sup> of April 2018.

Finally, this topic of "retroactive application of Resolutions" has been extensively discussed and clarified with IATA legal in at least seven previous TAC decisions. Most exhaustively in the 21<sup>st</sup> of March 2018, a TAC1 Decision, rendered in a case initiated by a Canadian Agent, including the TAC's clarification, requested by IATA's external counsels, dated 03<sup>rd</sup> of May 2018.

**Those Decisions are clear precedents and do guide also this Decision.**

## VI. Decision

Having carefully considered the Resolutions and the evidence presented by the Parties it is hereby decided:

- The “Risk evaluation” notified in February 2019 concerning the CoO alone and approved at the time of the change, shall not constitute “Risk Event” as per Resolution 812 § 5.3.2.2.
- Consequently, based only on the CoO, the request for a financial security should not apply to the Agent.

**This Decision is effective as of today** and in accordance with Resolution 820e, § 2.10, any Party may ask for: *“an interpretation of the decision or correct in the decision any error in computation, any clerical or typographical error, or any error or omission of a similar nature.”*

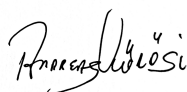
The timeframe for these types of requests will be maximum 15 calendar days after receipt of this decision. Meaning as soon as possible and **not later than 20 March 2019**.

Please also be advised that, unless I receive written notice from either one of you **before** the above mentioned date this decision will be published in the Travel Agency Commissioner's secure web site, provided no requests for clarification, interpretation or corrections have been granted by this Commissioner, in which case the final decision will be posted right after that.

Please note that if after having asked for and obtained clarification or correction any Party still considers aggrieved by this decision, as per Resolution 820e, §4, the Party has the right to seek review by Arbitration in accordance with the provisions of Resolution 824, §14.

I would be grateful if both Parties could acknowledge receipt of this decision.

Kind Regards,



Andreas Körösi  
Travel Agency Commissioner  
(for Europe, Middle East & Africa)

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Sweden