

COMMISSION PAPER 5 of 2019

TRAVEL TRADE PROTECTION MEASURES - PHASE 2

RESPONSE OF AER LINGUS LIMITED

Commission Paper 5 of 2019

We refer to Commission Paper 5 of 2019 and the proposal to recommend Option F to the Department, to operate in conjunction with the availability to traders at all times of firm-level insurance (Option I).

While Option F provides the Commission with a discretion to set bonding levels to manage potential insolvency risks of individual firms, our view in broad terms is that the increase in the overall cost of bonding which will arise for the industry will be borne more by airlines than by their competitors, resulting in there being an uneven playing field in the market and airlines, in essence, subsidising the insolvency protection of far riskier traders.

We submit therefore that while Option F may cost more than other bonding options in the long run, that cost will be disproportionately levied against airlines as traders in package travel and linked travel arrangement (LTA) products.

When considered in tandem with the fact that the continued availability to airlines of Option I is subject to an appropriate insurance product being available from underwriters at an acceptable cost, the structure of Option F will present challenges to airlines in continuing to compete in this field.

CEPA Interim Report

With reference to the August 2019 CEPA Interim Report itself, we would like to make the following observations:

- (i) CEPA takes it as a guiding principle that all firms within scope of the EU Package Travel Directive should have access to the same protection options in order to ensure a level playing field within the industry. CEPA does not consider it appropriate for the TPF to be available only for certain types of package holidays / LTAs or to certain types of firms (travel agents, tour operators and presumably airlines). However, under this principal airlines which operate to facilitate LTAs alone (i.e., which do not offer packages) will find themselves, under Option F, subsidising the insolvency protection risks of their competitors.
- (ii) To better match what it costs airlines to take part in the scheme to the level of risk we pose, Aer Lingus would support the tailoring of bonding levels based on objective, risk-based criteria. We would echo references in the Report to demands for more stringent licensing requirements, better monitoring mechanisms and the adoption of measures against firms which might underestimate turnover. While we understand that no scheme can entirely avoid large insolvencies, licensing

requirements and monitoring procedures must be sufficiently effective, regardless of administrative burden, in order to provide for such events.

- (iii) If the recommendation is that the TPF is to be replenished at the cost of all traders (i.e., whether they offer packages or not) then bonding levels should be lower than those proposed at 8 - 20%, and tailored to the risk each individual trader presents; this principal is echoed in the CEPA Report. Bonding levels should be inversely proportional to TPF mechanism charges and also take account of both product offering and trader risk. The Dutch scheme, referenced in the CEPA Report, is a useful example of this: the Stichting Garantiefonds Reisgelden bonding at 1.5% of turnover with an annual contribution charge between €275 and €5,250;
- (iv) Based on the analysis set out in the CEPA Report, TPF insurance (like any insurance) will actually be a variable cost (and indeed, as referenced in the Report, is currently based on insurance industry estimates). This makes an assessment of Options F, G and I difficult, especially in light of a limited willingness of underwriters to offer an insurance product and the risk that insurers could wield significant leverage in terms of the structure of the overall scheme itself (e.g., by insisting upon increases in bonding levels to maintain premiums). Further, and as with the proposed bonding levels, a percentage levy to replenish the TPF does not take relative risk of individual traders into account;
- (v) The proposal under Option F to raise bonds to 25% for riskier traders may, in practice at that point, be of very little value. Where the Commission might identify a risk of trader insolvency then very likely at that point the trader will not be in a position to comply, especially if their bond is in the form of a bank guarantee or a cash deposit. We consider that bonds should be individually tailored to traders from the outset based upon their solvency position and likely risk; and
- (vi) The Commission's proposed re-definition of licensable turnover to exclude payments passed on immediately or revenue received in arrears (i) will operate adversely against airlines in determining bonding costs (because airline bonds will necessarily be far costlier than for other types of trader), (ii) will make airline contributions to TPF replenishment and maintenance more expensive than for their competitors, and (iii) will likely restrict the usefulness to airlines of options other than firm-level insurance.

Bonding at the level of trader risk

As we have stated, we consider that bonding levels should be based on objective, risk-based criteria applied to each individual trader. In this way, a level playing field is ensured and the costs to a trader of participation in the scheme fairly represent the level of risk that trader poses. Equally, more secure traders are not then required to subsidise riskier competitors' insolvency protection arrangements.

We do not agree that a perceived lack of an infallible (or low-administration) method of identifying riskier firms is justifiable reason not to recommend different bonding levels for different individual firms. A one-size-fits-all approach is not an equitable approach: in the

United Kingdom for example, new ATOL licensees are bonded to 15% of LTO, which reduces to 0% over four years.

Additionally, airlines could be required to bond at 25% based on circumstances mooted in the CEPA Report which would not usually give cause for concern in the case of the airline business. Specifically, the Commission would be able to increase bonding requirements to 25% in otherwise uncontroversial, very low-risk and typical business situations in the airline industry, such as (i) an ‘reliance on a single supplier for air travel’; (ii) ‘introduction of a new business model’; or (iii) a ‘significant change in ownership/management’.

Questions

Broadening the scope of insolvency protection following the introduction of EU PTD II

5.1 Do you agree that providers of Linked Travel Arrangements are included in the same insolvency protection regime as organisers of package travel holidays? If not, what protection arrangements should be in place for customers of Linked Travel Arrangements?

No. As we have outlined, the likely position will be that many airlines (while being LTA facilitators) will not be package providers and we think that bringing LTA facilitators into the entire scheme such that they are obliged to contribute to the replenishment and maintenance of a fund designed to protect consumers of organised packages amounts to underwriting other traders’ businesses and risks, when conceivably those airlines might not themselves be offering package holidays.

5.2 Should the licensing and bonding regime be extended to include all package travel and Linked Travel Arrangements within the scope of the new EU Directive? If not, what do you believe would be the most appropriate arrangement for these sales?

No, as to licensing we do not see the need to licence airlines in the same way as travel agents and tour operators, principally because Irish airlines are already subject to the Commission’s stringent airline operating licence oversight and requirements.

Proposed options for reform

5.3 Are there other reforms that you think should have been considered that would ensure appropriate levels of protection for consumers of package travel/Linked Travel Arrangements?

In addition to the views we have outlined above, we would point out that consumers are also protected in respect of airline sales through (i) the facilitation of private insurance, (ii) credit card protection schemes and (iii) existing inter-airline repatriation arrangements.

5.4 Which reform options do you think the Department of Transport, Tourism and Sport should pursue? Do you agree with the proposal to pursue Option F? Why and if not why not? If you consider another option to be preferable, why?

We refer you to our views outlined above.

5.5 Do you agree with the proposal in options D, E and F to base bonds on eligible turnover, which excludes immediate supplier payments bills paid in arrears, rather than projected licensable turnover? Do you agree that it is then appropriate to increase bonding to double the current proportion?

As we outline above, this proposal results in airlines paying more than their competitors in this industry and thus subsidising other traders' business and risks. We consider that bonding levels should be set lower than the 8-20% proposed and tailored to individual firm risk.

5.6 Do you agree that an insurance policy with a higher levy for the first ten years is the most appropriate way to avoid a gap in protection, as presented in Option F? If not, what alternative(s) would you suggest?

Yes, although we consider it high when compared to Options E and G and would reiterate our view that LTA providers should not have to contribute to the TPF.

5.7 Do you agree that the Commission should be able to increase bonding for firms they perceive to be at a higher risk of insolvency/ under-bonding? Why? Do you agree with the guidelines for bonding increases set out in Option F? Are there other guidelines that should be considered?

Yes, as outlined above. However, traders should be able to bond at a level below 8 - 20%, which reflects their risk profile.

Impact of options on travel trade industry

5.8 The report has assessed that Option F has a lower impact on the travel industry than Options C, D and E because the cost of replenishing the Travellers' Protection Fund is spread over several years, rather than concentrated into a short period. What impact does this have on your business? Would you prefer to pay a higher levy over a shorter period?

LTA facilitators who do not organise packages will have real concerns about the cost of replenishing the TPF when they are not involved in competition with those traders most likely to give rise to a call on the fund. For the reasons outlined above, this will go to the commercial viability of offering LTAs.

5.9 Options D, E and F base bonding on eligible turnover. This requires firms to provide data on both projected and realised supplier payments and payments in arrears. Do you agree with the report's view that the additional burden of providing such information is limited?

No, we envisage more than just a limited administrative burden. It is notable that (by dint of EU PTD II) in many cases traders will not be aware of the creation of an LTA until so informed by the successive travel service supplier. Addressing this issue is already giving rise to systems development and administrative difficulties.

5.10 Do you agree with the report's assessment that Option I is too administratively costly (for both industry and the Commission) given the current scope of consumer protection arrangements? Why and if not why not?

No, as outlined above we think that having an equitable approach which takes account of individual trader risk and applies a level playing field to all competitors is critical to the fairness and viability of the regime.