

EBA/CP/2016/12

22 September 2016, version 2*

Consultation Paper

Draft Guidelines

on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee under Article 5(4) of Directive (EU) 2015/2366

* Version amended on 19 October 2016 to reflect the corrigendum on page 20.

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1. Responding to this consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 30 November 2016. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive Summary

On 12 January 2016, the revised Payment Services Directive (EU) 2015/2366 entered into force in the European Union, and will apply from 13 January 2018.

The PSD2 particularly recognises new types of payment services that have emerged in the area of internet payments, such as payment initiation services and account information services. Since these services were not subject to Directive 2007/64/EC, i.e. PSD1, they were not necessarily supervised by competent authorities and were not required to comply with Directive 2007/64/EC. This raised a series of legal issues, such as consumer protection, security and liability as well as competition and data protection issues. The PSD2, therefore, aims at responding to these issues.

To that end, the PSD2 sets out specific conditions for providers of these services, including requirements they have to fulfil when applying for authorisation and/or registration. In this respect, Article 5(4) of the PSD2 mandates the EBA to issue guidelines addressed to the competent authorities on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance (PII) or other comparable guarantee to be held by undertaking that will apply for authorisation to provide payment initiation services and/or registration to provide account information services.

The draft Guidelines proposed in this Consultation Paper set out the criteria to be considered by the competent authorities. Furthermore, this Consultation Paper elaborates on how the EBA proceeded to fulfil the mandate, including summarising findings of the mapping exercise done by the EBA prior to developing the draft Guidelines.

In addition to the criteria, the Consultation Paper explains the EBA's proposal to use a formula for the calculation of the minimum monetary amount of the PII or comparable guarantee; explains as to when and how the lowest tier should be used; provides details on indicators for the criteria set out in the PSD2, and explains the calculation method proposed for some of the indicators. The Consultation Paper ends with practical examples for the calculation of the minimum monetary amount of the PII/comparable guarantee.

Next steps

The consultation period will run from 21 September 2016 to 30 November 2016. The final Guidelines will be published after consultation.

3. Background and rationale

3.1 Background

1. Article 5(4) of the revised Payment Services Directive (PSD2) mandates the EBA to issue guidelines addressed to the competent authorities on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance (PII) or other comparable guarantee for two new services defined in the PSD2: payment initiation services (PIS) and account information services (AIS). The PSD2 further specifies that, when developing these Guidelines, the EBA shall take into account the criteria specified in Article 5 (4) (a – d)), which are:
 - (a) the risk profile of the undertaking;
 - (b) whether the undertaking provides other payment services as referred to in Annex I of the PSD2 or is engaged in other business;
 - (c) the size of the activity:
 - i. for undertakings that apply for authorisation to provide payment services as referred to in point (7) of Annex I of the PSD2, the value of the transactions initiated;
 - ii. for undertakings that apply for registration to provide payment services as referred to in point (8) of Annex I of the PSD2, the number of clients that make use of the account information services;
 - (d) the specific characteristics of comparable guarantees and the criteria for their implementation.
2. As stated in Recitals 27 and 28 of the PSD2, technological developments in recent years have given rise to the emergence of new types of payment services, such as PIS and AIS. PIS play a part in e-commerce payments, by establishing a software bridge between the website of the merchant and the online banking platform of the payer's account servicing payment service provider (ASPSP) in order to initiate internet payments on the basis of a credit transfer. AIS provide the payment service user with aggregated online information on one or more payment accounts held with one or more other payment service providers and accessed via online interfaces of the account servicing payment service provider. The payment service user is thus able to have an overall view of its financial situation immediately at any given moment.

3. Furthermore, Recital 35 of the PSD2 explains that payment initiation service providers (PISPs) and account information service providers (AISPs) when exclusively providing payment initiation/account information services, do not hold client funds and it would therefore be disproportionate to impose own funds requirements on these new market participants. However, the PSD2 considers it important that these providers are able to meet their liabilities in relation to their activities, which is why Article 5(2) and (3) provides that Member States shall require AIS and PIS providers to hold PII or a comparable guarantee against specified liabilities as a condition for their authorisation/registration.
4. The same Recital then continues and, together with Article 5(4) of the PSD2, mandates the EBA to develop guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 (EBA Regulation) on the criteria on how to stipulate the minimum monetary amount of PII or comparable guarantee.
5. In what follows in the Rationale section below, this Consultation Paper sets out how the EBA proceeded to fulfil the mandate and develop the draft Guidelines proposed in Chapter 4 of this Consultation Paper. The Rationale summarises findings of the mapping exercise done by the EBA prior to developing the draft Guidelines; describes a formula for the calculation of the minimum monetary amount of the PII or comparable guarantee; explains the proposal as to when and how the lowest tier should be used; provides details on the criteria and indicators set out in the PSD2 and in the draft Guidelines; explains the calculation method proposed for some of the indicators; and states practical examples for the calculation of the minimum monetary amount of the PII/comparable guarantee.

3.2 Rationale

6. Prior to developing the mandate, the EBA mapped the existing characteristics of national markets with regard to PISPs and AISPs and any existing regulatory requirements imposed on them. The EBA also gathered information and data on current practices of insurance undertakings that provide PII to market participants involved in providing services similar to PIS and AIS. The aim of the mapping and data gathering exercise was to understand not only the market situation and existing issues but also to identify the reasons for these issues and any additional factors that could be considered by the EBA when developing the draft Guidelines.
7. To that end, the EBA approached national competent authorities (CAs) and, through them, also different types of relevant market participants, including account servicing payment service providers (ASPSPs), PISPs, AISPs, as well as insurance undertakings, with a view to ascertaining data that would help the EBA to develop the Guidelines using the criteria specified in the mandate.
8. The EBA received more than 100 questionnaire responses, from 26 EU Member States, which provided a good overview of existing market practices in the EU. However, the EBA recognises that not all PISPs/AISPs that are currently offering their services contributed to

the EBA questionnaire and that the responses might therefore not fully represent the market situation.

9. The responses received suggest that PISPs and AISPs, which are currently not regulated under the existing Payment Services Directive (PSD1), are not required to hold PII or a comparable guarantee in any of the 26 Member States, but that a small number of them have notwithstanding taken out such PII or a cover of a kind similar to PII.
10. The responses also showed that the majority of the AISPs and PISPs also offer services other than PIS and/or AIS, and that they usually operate in more than one country, including countries outside the EU.
11. In terms of the number of customers of PISPs or AISPs, the responses suggest that there is a range between less than 100 for some to more than 1 million for other providers and that their customers include both legal and natural persons.
12. On the basis of the responses to the questionnaire, none of the PISPs and AISPs that responded experienced any cybercrime events in 2014. With regard to lawsuits and complaints, only a small number of complaints and lawsuits were received by PISPs or AISPs, and no compensation was subsequently paid by them to their customers.
13. Having assessed the responses, the EBA came to the view that the qualitative richness of the information that has been made available to the EBA illustrated that, two years prior to the transposition date of the PSD2, the PIS and AIS market in the EU can be described as relatively small. However, the respondents to the mapping exercise were also of the view that the market will expand significantly in the coming years.
14. When developing the indicators for the criteria provided in the PSD2, and summarised in paragraph 1 above, the EBA had to recognise that, as mentioned above, PISPs/AISPs are not within the scope of PSD1 and they are therefore not necessarily supervised by CAs. Accordingly, CAs might have a limited market overview and available data on PISPs and AISPs operating and planning to operate in their market.
15. Furthermore, the EBA took into consideration the prudential rules for PISPs which, as stated in Recital 34 of the PSD2, should be appropriate to the risk relating to the payment service provided. The same Recital continues that “payment service providers that provide only PIS should be considered to be of a medium risk with regard to the initial capital”. With regard to AISPs, the PSD2 does not foresee any initial capital requirements.
16. Finally, the EBA notes that Recital 35 and Article 9(1) of the PSD2 stipulate that PISPs and AISPs, when exclusively providing PIS and AIS, do not hold client funds and that it would therefore be disproportionate to impose own funds requirements on those new market players.

17. Recital 33 of the PSD2 states that the aim of the Directive is to ensure continuity in the market, enable existing and new service providers, regardless of their business model, to offer their services under a clear and harmonised regulatory framework. It is the EBA's view that harmonisation can only be achieved if, other things being equal and taking into account national market specificities, the Guidelines lead to AISPs and PISPs with similar characteristics (according to Article 5(4) of the PSD2) having to take out similar coverage levels, irrespective of the Member State in which they are applying for authorisation/registration.
18. Because the undertakings that will apply for authorisation to provide PIS and/or registration to provide AIS must hold the PII or comparable guarantee as a condition of their authorisation and/or registration, the EBA has also concluded that for the undertakings to be able to take out the necessary PII coverage prior to the application, they should be in a position to know how CAs will calculate the minimum monetary amount of the PII or comparable guarantee and how much PII cover or comparable guarantee they will have to obtain.
19. To that end, the EBA's proposal in this Consultation Paper elaborates not only on the criteria stipulated in Article 5(4)(a-d) PSD2 and their indicators, but also proposes a formula to be used by CAs, and by implication also by the undertakings that will apply for authorisation/registration for the calculation of the minimum monetary amount of the PII or comparable guarantee.
20. The PSD2 itself performs already part of the task and for some of the criteria, the PSD2 provides the indicators that the EBA should take into account, which are as follows:
 - for the 'type of the activity' criterion (Article 5 (4)(b)), the indicators are:
 - whether the undertaking provides, in addition to PIS/AIS, also other payment services as referred to in Annex I; or
 - whether the undertaking is engaged in other business.
 - for the 'size of the activity' criterion (Article 5 (4)(c)), the indicators are:
 - for undertakings that apply for authorisation to provide PIS, the value of the transactions initiated;
 - for undertakings that apply for registration to provide AIS, the number of clients that make use of the account information services.
 - for the 'comparable guarantee' criterion (Article 5 (4)(d)), the indicators are:
 - specific characteristics of comparable guarantees; and
 - the criteria for their implementation.
21. By contrast, the PSD2 does not specify any indicator for the 'risk profile' criterion (Article 5(4)(a). Therefore, for this criterion, the EBA proposes in the draft Guidelines quantitative

indicators, as well as the methodology for calculating amounts reflective of these indicators, which in turn allows for an efficient and transparent calculation of the minimum monetary amount of PII or comparable guarantee.

22. The draft Guidelines set out that the quantitative data cover the conduct of the undertakings that apply for authorisation/registration during 12 calendar months before their application. The EBA chose a 12 month period because it expects that the PII contracts between the undertakings and insurance undertakings will be concluded for at least one calendar year. Similarly, the EBA expects that any agreements related to the comparable guarantee cover at least one calendar year.
23. In this context, the EBA noted that the activities of PISPs and AISPs might increase/decrease on a daily basis. Given that the mandate for the proposed Guidelines refers, predominantly, to the process of authorisation/registration of the undertakings, the EBA concluded that CAs could refer to the requirements laid down in the draft Guidelines in the fulfilment of their ongoing supervision responsibilities. This could, eventually, lead the CAs to the review of minimum monetary amounts that were required for the authorisation/registration and where applicable, withdrawal of the authorisation according to Article 13 of the PSD2.
24. The EBA also noted that Article 16 of the Directive set out that where any change affects the accuracy of information and evidence provided in accordance with Article 5, the payment institution, including PISPs and AISPs shall, without undue delay, inform the CAs of its home Member State accordingly. To that end, the draft Guidelines propose that CAs stipulate, when granting the authorisation and/or registration that the undertakings review, and if necessary re-calculate, the minimum monetary amount of the PII or comparable guarantee, and that they do so at least on an annual basis.

Question 1: Do you agree with the requirement that competent authorities require undertakings to review, and if necessary re-calculate, the minimum monetary amount of the PII or comparable guarantee, and that they do so at least on an annual basis, as proposed in Guideline 9?

25. For the actual calculation of the minimum monetary amount of the PII or comparable guarantee, the draft Guidelines propose a formula and require CAs, and by implication the undertakings, to populate each indicator with the relevant quantitative values and use the resultant amounts in the proposed formula.
26. When developing the indicators, the EBA noted that some undertakings that are entering the market might not have relevant data to populate the indicators. Therefore, the EBA proposes in the draft Guidelines how CAs, and by implication the undertakings, should calculate the

minimum monetary amount of the PII or comparable guarantee, including how and when the lowest tier, i.e. a default value, should be used.

27. For some of the indicators, the draft Guidelines also specify a method of calculation which allow the CAs and, and by implication the undertakings, to efficiently establish the correct amount for each indicator and subsequently to link the values for all criteria via the formula. The EBA have modelled the method of calculation based on the calculation of own funds in the PSD2, and adjusted the method accordingly.
28. The indicators in the draft Guidelines are denominated in Euro to mirror the approach taken in the PSD2 itself but may be converted into the respective national currency equivalent in each non-euro Member State.
29. In what follows below, this Consultation Paper provides details on the formula to be used by CAs, and by implication by the undertakings that apply for authorisation/registration, for the calculation of the minimum monetary amount of the PII or comparable guarantee. The Consultation Paper then follows with the explanation of the lowest tier and of the calculation method applicable for some indicators; followed by what the draft Guidelines require for each of the PSD2 criteria, including clarification on the indicators, and two practical examples on how the minimum monetary amount of the PII or comparable guarantee would be calculated.

3.2.1 Formula

30. Article 5(3) and (4) of the PSD2 specifies that undertakings that apply for authorisation to provide PIS/registration to provide AIS must hold the PII or comparable guarantee as a condition of their authorisation/registration. To allow the undertakings to calculate the minimum monetary amount of the PII/comparable guarantee before they submit their application for authorisation/registration to CAs, as well as to harmonise how the CAs stipulate the amount, the draft Guidelines propose the following formula:

$$\begin{array}{ccccccc}
 \text{Minimum monetary} & & \text{Amount reflective} & & \text{Amount} & & \text{Amount reflective of} \\
 \text{amount of PII} & = & \text{of risk profile} & + & \text{reflective of type} & + & \text{size activity criterion} \\
 \text{or comparable guarantee} & & \text{criterion} & & \text{of activity} & & \\
 & & & & \text{criterion} & &
 \end{array}$$

31. The EBA considered various options for the formula, such as proposing a default amount for a calculation and using multiplication factors. The EBA also noted that the formula should cover and address criteria and indicators proposed in Article 5 of the PSD2 and in the draft Guidelines and, at the same time, should be easily used by the CAs, and by implication, also by undertakings that will apply for authorisation/registration.
32. To that end, the draft Guidelines are proposing a simple formula under which the CAs should calculate amounts reflective of each criterion by adding amounts reflective of each indicator. Subsequently, the CA should add the amounts reflective of each criterion, as to calculate the

final amount representing the minimum monetary amount of the PII or comparable guarantee to be held by the undertakings that will apply for authorisation/registration.

33. The minimum monetary amount of the PII or comparable guarantee should be expressed as a figure per year.

Question 2: Do you agree with the formula to be used by competent authorities when calculating the minimum monetary amount of the PII or comparable guarantee as proposed in Guideline 2? Please explain your reasoning.

3.2.2 Lowest tier

34. When developing the indicators, the EBA had to recognise that some new undertakings that are entering the market, and are applying for authorisation/registration might do so without an existing client base or revenue to show for, and might therefore have no data for some of the indicators specified in the Guidelines, such as the indicator 'number of contracts' used for the criterion 'risk profile'. To address such cases, the draft Guidelines specify that the undertakings are required to use the expectations they have set out in the business plans and programmes of operations and that they are submitting as part of their application for authorisation/registration.
35. For indicators for which the undertakings do not have any forecasts at all, the draft Guidelines specify the lowest tier of the PII or comparable guarantee to be used instead of actual values for each indicator. This tier is to be used as a default value for the calculation of the minimum amount in all cases, unless the particular indicator stipulates a different amount.
36. When defining the lowest tier, the EBA considered the responses received in the mapping exercise, the provisions and recitals in the PSD2 itself, and experience from other markets where PII is used, such as the PII for mortgage credit intermediaries under the Mortgage Credit Directive, in relation to which the EBA published in 2014 draft Regulatory Technical Standards¹. In so doing, the EBA had to recognise that experience in the market for payment services such as PIS and AIS is very limited and that the robustness of the methodology for the determination of the base amount is therefore limited.
37. Similarly, with regard to the PII market for mortgage credit intermediaries, the EBA arrived at the conclusion that the nature of the service and the risks related to this market are different to that for PISPs and AISPs. The difference between the markets is in the market penetration

¹ EBA RTS on the PII under the MCD: <https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/draft-regulatory-technical-standards-rts-on-professional-indemnity-insurance-pii-for-mortgage-credit-intermediaries>

of the participants which is, according to the EBA's observations, higher for mortgage credit intermediaries compared to the number of PISPs and AISPs². Another difference is in the nature of detriment. While the mortgage tends to be the largest financial transaction many consumers enter into in their lives, the nature of the detriment as compensable loss they could potentially experience is limited. This is because in a mortgage transaction, the consumer receives the money (i.e. the loan) upfront. The mortgage lender and intermediary fulfil their commitments instantaneously, and no expected transfer could potentially remain unfulfilled. Leaving aside loss from mis-selling, this significantly reduces the extent of detriment and compensable loss.

38. Having considered the provisions in Article 5 as well as Recitals 31, 34 and 35, the EBA took a view that the nature of services offered by PISPs/AISPs, and the detriment that might arise from their activities, is different. Nevertheless, the EBA proposes the same lowest tier for both types of undertakings. This is because the value of the lowest tier is reasonably high to cover detriment that might arise from, for example late or non-executed transactions in case of the PISPs, as well as the detriment arising from non-authorised or fraudulent access to or non-authorised or fraudulent use of payment account information in case of AISPs.
39. To that end, the EBA proposes to determine the lowest tier by mirroring the separate amount on initial capital for PISPs, as set out in Article 7(b) of the PSD2; i.e. EUR 50,000, which applies as further defined for each indicator below.
40. The draft Guidelines also propose that this tier is to be used in calculations of the minimum monetary amount of the PII or comparable guarantee for undertakings that apply for authorisation/registration to provide PIS/AIS for those indicators for which the undertaking does not have relevant historic data, or forecasts in the business plan and/or programme of operations of the undertakings.
41. If the amounts reflective of the relevant indicators, resulting from the application of the forecasts in the business plan and/or programme of operations are lower than 50, 000, the draft Guidelines propose that the lowest tier is used instead. This is to avoid that new undertakings would underestimate their forecasts with an aim to hold low minimum monetary amount of the PII/comparable guarantee.

3.2.3 Calculation method for indicators

42. When defining the indicators, the EBA recognised that the quantitative indicators, such as indicators under the 'size of activity' criterion, cover wide range of values. To allow CAs, and by implication the undertakings that apply for authorisation/registration, to efficiently establish the correct amount for each indicator and subsequently to link the values for all criteria via a formula, the draft Guidelines propose using a method of calculation based on the calculation of own funds in the PSD2. In so doing, the indicators are counted in units such

² European Commission (2009), *Study on Credit Intermediaries in the Internal Market (MARKT/2007/14/H)*, p. 111, available at http://ec.europa.eu/internal_market/finances-retail/credit/intermed/index_en.htm

as 'value of transactions in Euro', 'number of transactions initiated', or 'number of contracts', and are then used in the formula to calculate the PII amount in Euro.

43. The method proposed by the EBA in the draft Guidelines uses, similarly to Method B in the PSD2, five tranches for the calculation of the amount reflective of particular indicator.

3.2.4 The risk profile criterion

44. Unlike for other criteria listed in Article 5(4), the PSD2 does not provide any indicators for the risk profile. To that end, the EBA proposes in the draft Guidelines the following set of quantitative indicators to be used in the calculation of the minimum monetary amount of the PII/comparable guarantee:

Value of indemnity claims received

45. The responses to the EBA questionnaire suggested that only a small number of complaints and lawsuits have so far been received by PIPs or AIPs, and no compensation was subsequently paid by them. Nevertheless, the EBA considers the value of indemnity claims, i.e. the sums claimed to be paid as compensation for losses arising from acts committed by the undertakings that apply for authorisation/registration during the conduct of their business activities, as a suitable indicator for the risk profile of an undertaking.
46. Given that Articles 5(2) and (3) of the PSD2 provide that all liabilities of undertakings that apply for authorisation to provide PIS (as specified in Articles 73, 89, 90 and 92 of the PSD2) and of undertakings that apply for registration to provide AIS (as specified in Article 5(3) of the PSD2) shall be covered by the PII or comparable guarantee, the EBA arrived at the view that the indicator of claims should be based on the value of claims made by ASPSPs and payment service users against undertakings, and not merely the subset of claims that eventually led to compensations paid by the undertakings.
47. To that end, the draft Guidelines propose that CAs, and by implication the undertakings that apply for authorisation/registration, use the aggregated value of all claims received in the previous 12 calendar months related to the liabilities referred to in Articles 73, 89, 90 and 92 of the PSD2 for undertakings that apply for authorisation to provide PIS and in Article 5(3) of the PSD2 for undertakings that apply for registration to provide AIS. The resultant amount should be then included in the formula for the calculation of the minimum amount.
48. If no claims were made against the undertakings in the previous 12 months, the resulting value to be used in the formula would be '0'. For the undertakings that do not have any historic data, the draft Guidelines propose that the value of claims forecasted in the business plan and/or programme of operations of the undertakings is used. If there are not such forecasts, or if the amount reflective of this indicator resulting from the application of the value of indemnity claims received is lower than the lowest tier, the draft Guidelines propose to use the lowest tier instead.

Geographical location of the undertaking

49. The responses to the EBA's survey suggest that PISPs and AISPs provide their services online regardless of national borders. To reflect this, the draft Guidelines propose the same requirements related to the calculation of the PII or comparable guarantee amounts, irrespective of the EU Member State in which the undertaking applies for the authorisation and/or registration.
50. The EBA also noted that undertakings might provide their services in the EU and also outside the EU. In such cases, foreign jurisdictions might impose different rules for undertakings than the provisions of the PSD2 and the EBA Guidelines and these provisions might have impact on the ability of undertakings to pay compensations to their customers.
51. In order to cover potential different and/or additional regulatory requirements, the draft Guidelines propose that for those undertakings that aim to provide services not only within the EU Member States but also outside the EU (i.e. are registered/authorised in the EU and provide services in the EU Member States as well as in other countries than the EU Member States), CAs should add the lowest tier in the calculation of the PII or comparable guarantee amounts.
52. Where an undertaking aims to provide services outside of the EU, as well as in EU Member States, and can prove to the CA that they hold a guarantee similar to PII to cover their liabilities for activities outside the EU, then the CA does not have to consider this indicator, i.e. does not have to add any amount in the calculation. For those undertakings that aim to provide their services only in the EU Member States, CAs also do not have to consider this indicator.

Number of contracts with the undertaking applying for authorisation to provide PIS

53. The EBA considered the number of subjects with whom an undertaking that apply for authorisation to provide PIS has a contract, to be an indicator suitable to characterise the risk profile of the undertaking.
54. The draft Guidelines propose that each subject of the contract is considered separately; i.e. if a parent company contracts with a PISP on behalf of a number of subsidiaries, each subsidiary should count as a subject.
55. The draft Guidelines propose that the amount reflective of this indicator is the sum of the following elements, where N represents the number of subjects with whom the undertaking had the contract in the last 12 months:
 - (a) 40% of the slice of N up to 100 subjects;
 - plus
 - (b) 25% of the slice of N above 100 subjects up to 10 000 subjects;

plus

- (c) 10% of the slice of N above 10 000 subjects up to 100 000 subjects;

plus

- (d) 5% of the slice of N above 100 000 subjects up to 1 million subjects;

plus

- (e) 2.5% of the slice of N above 1 million subjects.

56. The undertakings who have not been offering services in the last 12 months, should apply the number of contracts forecasted in their business plan and/or programme of operations. If there are no such forecasts, or if the amount reflective of this indicator resulting from the application of the number of forecasted contracts is lower than the lowest tier, the draft Guidelines propose that CAs use in the calculation the lowest tier instead.

Number of initiated payment transactions by undertakings applying for authorisation to provide PIS

57. Similarly to the previous indicator, under the size criterion, the PSD2 sets out the value of the transactions initiated as an indicator for the undertakings that apply for authorisation to provide PIS. The EBA is of the view that the number of initiated payment transactions is also a relevant indicator and therefore, the draft Guidelines propose it as an indicator for the risk profile criterion.

58. The range of the number of payments initiated by the PISPs who responded to the EBA's mapping exercise was between less than 100 000 and more than 5 million. To address this wide range, the draft Guidelines propose that the amount reflective of this indicator is the sum of the following elements, where N represents the number of payment transactions initiated by the undertaking that applies for authorisation to provide PIS in the last 12 months:

- (a) 40% of the slice of N up to 10 000 initiated payments;

plus

- (b) 25% of the slice of N above 10 000 initiated payments up to 100 000 initiated payments;

plus

- (c) 10% of the slice of N above 100 000 initiated payments up to 1 million initiated payments;

plus

(d) 5% of the slice of N above 1 million initiated payments up to 10 million initiated payments;

plus

(e) 2.5% of the slice of N above 10 million initiated payments.

59. For undertakings that apply for authorisation to provide PIS and that have not been offering services in the last 12 months, CAs should apply the number of transactions forecasted in their business plan and/or programme of operations.

60. If there are no such forecasts, or if the amount reflective of this indicator resulting from the application of the number of forecasted transactions is lower than the lowest tier, the draft Guidelines propose that CAs use in the calculation the lowest tier instead.

Number of different payment accounts accessed by undertakings applying for registration to provide AIS

61. To provide the payment service user with aggregated online information on one or more payment accounts held with one or more other payment service providers, the undertakings have to access these accounts. The EBA considers the number of accounts accessed as a relevant indicator of the conduct of undertakings and their exposure to liability risks that are covered by their PII/comparable guarantee.

62. The range of the number of accounts accessed by the AISPs who responded to the EBA's mapping exercise was between less than 100 000 and more than 2 million. To address this wide range, the draft Guidelines propose that the amount reflective of this indicator is the sum of the following elements, where N represents the number of different payment accounts accessed by the undertaking that applies for registration to provide AIS in the last 12 months:

(a) 40% of the slice of N up to 10 000 accessed accounts;

plus

(b) 25% of the slice of N above 10 000 accessed accounts up to 100 000 accessed accounts;

plus

(c) 10% of the slice of N above 100 000 accessed accounts up to 1 million accessed accounts;

plus

(d) 5% of the slice of N above 1 million accessed accounts up to 10 million accessed accounts;

plus

(e) 2.5% of the slice of N above 10 million accessed accounts.

63. For undertakings applying for registration to provide AIS that have not been offering services in the last 12 months, CAs should apply the number of accesses forecasted in their business plan and/or programme of operations. If there are no such forecasts, or if the amount reflective of this indicator resulting from the application of the number of forecasted accessed accounts is lower than the lowest tier, the draft Guidelines propose that CAs use in the calculation the lowest tier instead.

Question 3: Do you agree with the indicators under the risk profile criterion and how these should be calculated, as proposed in Guideline 5? Please explain your reasoning.

3.2.5 Type of activity criterion

64. For this criterion, Article 5(4)(b) of the PSD2 requires that, in developing the Guidelines, the EBA shall take account of whether the undertaking provides other payment services as referred to in Annex I of the PSD2 or is engaged in other business.
65. In order to fulfil this mandate, the EBA arrived at the view that this criterion should be read in conjunction with Recital 31, which states that when a PISP intends to provide payment services in relation to which it holds user's funds, it should obtain full authorisation for those services. On the other hand, the EBA concludes that this would mean that undertakings that provide other payment services listed in Annex I of the PSD2 than PIS and/or AIS; i.e. service in relation to which they hold users' funds, have to fulfil requirements on the initial capital and on the own funds which will cover all their liabilities. However, they will still need to hold also the PII/or comparable guarantee as to cover all liability's claims arising from the provisions of PIS and/or AIS.
66. The EBA also concluded that if the undertaking is engaged in other business; i.e. business not related to providing payment services listed in Annex I of the PSD2, such engagement does not have impact on its liabilities specified in Articles 73, 89, 90 and 92 of the PSD2 for undertakings that apply for authorisation to provide PIS, and in Article 5(3) of the PSD2 for undertakings that apply for registration to provide AIS, which are the activities to be covered by the PII or comparable guarantee.
67. However, the engagement might have impact on the payment ability of the undertakings and therefore, the EBA took the same approach as proposed for the indicator of geographical

location of the undertakings under the risk profile criterion. To that end, the draft Guidelines propose that to cover potential additional requirements that might be resulting from the engagement in other business, CAs should add the lowest tier in the calculation of the PII or comparable guarantee amounts.

68. If an undertaking that applies for authorisation to provide PIS intends to provide not only the PIS but also AIS, or if an undertaking that applies for registration to provide AIS intends to provide not only AIS but also PIS, the draft Guidelines propose that CAs calculate the minimum monetary amount of the PII or comparable guarantee separately for each service; i.e. calculate amounts reflective of all criteria for provision of PIS, calculate amounts reflective of all criteria for provision of AIS and add the amounts to calculate the final minimum monetary amount of the PII/comparable guarantee.
69. When considering the type of activity criterion in these separate calculation, the CAs do not add the lowest tier in the formula as the undertaking does not provide PIS/AIS exclusively but provides both of them at the same time.

Question 4: Do you agree how the indicators under the type of activity criterion should be calculated, as proposed in Guideline 5? Please explain your reasoning

3.2.6 Size of activity criterion

70. The PSD2 entails different indicators for this criterion for undertaking that apply for authorisation to provide PIS and for undertakings that apply for registration to provide AIS. The draft Guidelines further elaborate on the indicators and propose that the amount reflective of this indicator for the undertaking that applies for authorisation to provide PIS is the sum of the following elements, where N represents the total value of all transactions initiated by the undertaking in the last 12 months:

- (a) 40% of the slice of N up to EUR 500 000;
plus
- (b) 25% of the slice of N above EUR 500 000 up to EUR 1 million;
plus
- (c) 10% of the slice of N above EUR 1 million up to EUR 5 million;
plus
- (d) 5% of the slice of N above EUR 5 million up to 10 million;

plus

(e) 2.5% of the slice of N above EUR 10 million.

71. The draft Guidelines propose that the amount reflective of this indicator for the undertaking that applies for registration to provide AIS is the sum of the following elements, where N represents the number of clients that made use of the AIS in the last 12 months:

(a) 40% of the slice of N up to 100 clients;

plus

(b) 25% of the slice of N above 100 clients up to 10 000 clients;

plus

(c) 10% of the slice of N above 10 000 clients up to 100 000 clients;

plus

(d) 5% of the slice of N above 100 000 clients up to 1 million clients;

plus

(e) 2.5% of the slice of N above 1 million clients.

72. For the undertakings that have not been offering services in the last 12 months, CAs should apply the total value of transactions (undertakings that apply for authorisation to provide PIS) and number of clients (undertakings that apply for registration to provide AIS) forecasted in their business plan and/or programme of operations.

73. If there are no such forecasts, or if the amount reflective of the relevant indicator, resulting from the application of the forecasted total value of transactions (undertakings that apply for authorisation to provide PIS) and the forecasted number of clients (undertakings that apply for registration to provide AIS), is lower than the lowest tier, the draft Guidelines propose that CAs use in the calculation the lowest tier instead.

74. For the purpose of this indicator, the draft Guidelines propose that each client is considered separately; i.e. if a client contract with the AISP on behalf of a number of subjects, each subject should count as a client.

Question 5: Do you agree how the indicators under the size of activity criterion should be calculated, as proposed in Guideline 7? Please explain your reasoning

3.2.7 Comparable guarantee criterion

75. The final criterion stipulated in the PSD2 is for the Guidelines to take into account the specific characteristics of comparable guarantees and the criteria for their implementation. In this context, the EBA acknowledges that Recital 35 of the PSD2 states that the EBA should not differentiate between PII and a comparable guarantee, as they should be interchangeable.
76. Given that the PSD2 does not specify any other link between the PII and comparable guarantee, the EBA concludes that an undertaking can either hold the PII, or comparable guarantee, and that it cannot hold both of them at the same time.
77. For the purpose of authorisation/registration, the EBA also concludes that CAs should consider only those guarantees that are indeed 'comparable', i.e. have characteristics that are equivalent to the protection provided by PII and would allow the PISPs/AISPs using it to cover their liabilities as stated in Article 5(3) and (4) of the PSD2.

Question 6: Do you think the EBA should consider any other criteria and/or indicators to ensure that the minimum amount is adequate to cover the potential liabilities of PISPs/AISPs in accordance with the Directive? Please explain your reasoning.

Question 7: Do you have any other comments or suggestions that you think the EBA should consider in order to ensure that the minimum amount is adequate to cover the potential liabilities of PISPs/AISPs in accordance with the Directive? Please explain your reasoning.

3.2.8 Example how to apply the formula

78. For illustrative purpose only, the EBA provides below two examples of calculation of the minimum monetary amount of the PII or comparable guarantee using the indicators and the formula prescribed in the draft Guidelines.
79. For the purpose of the calculation, the first example illustrates the calculation of the minimum monetary amount for a new undertaking that applies for authorisation to provide PIS. The second example illustrates the calculation of the minimum monetary amount for an existing undertaking that applies for registration to provide AIS.

Example 1

80. A new undertaking intends to apply for authorisation and plans to operate in the EU. According to the business plan it will submit as part of its application for authorisation, its forecast for the number of merchants with whom it will enter into a contract is 700 000; it expects to initiate 1 500 000 payments in the next 12 months of a value EUR 2 million; it does not offer any other service than PIS and does not hold any comparable guarantee.

81. The minimum monetary amount of the PII or comparable guarantee applicable in Example 1 would be calculated as shows in the following formula:

	Amount reflective of risk profile criterion:				
	Amount reflective of value of indemnity claims received: 50,000				
Minimum monetary amount of PII or comparable guarantee per calendar year covering all claims	=	Amount reflective of geographical location of the undertaking: 0	+	Amount reflective of type of activity criterion	+
EUR 666, 500*³		Amount reflective of number of contracts: 50,000		0*⁴	Amount reflective of size activity criterion
					425,000
		Amount reflective of number of initiated payment transactions: 141,500			
		241,500			

Example 2

82. An existing undertaking that applies for registration to provide AIS has received in the past 12 months claims from ASPSPs of the value of EUR 10,000 and claims from payment services users of the value of EUR 30,000. All claims related to the provision of AIS. It operates in the EU as well as outside the EU and has accessed 12 million accounts in the last 12 months. The undertaking provides also the PIS and all services listed in the Annex I of the PSD2. It has 1 million contracts and it has initiated 1 million payments of total value EUR 1 million. With regard to providing AIS, it has 800 000 clients and it holds a comparable guarantee of the value of EUR 200,000.
83. The minimum monetary amount of the PII or comparable guarantee applicable in Example 2 would be calculated as shows in the following formula:

	Amount reflective of risk profile criterion for PIS				
	Amount reflective of value of indemnity claims received: 0				
Minimum monetary amount of PII or comparable guarantee per calendar year covering all claims resulting from PIS activities	=	Amount reflective of geographical location of the undertaking: 50,000	+	Amount reflective of type of activity criterion	+
EUR 588,015				n/a	Amount reflective of size activity criterion for PIS
					325,000
		Amount reflective of			

³ *Corrigendum: '666,500' has replaced '716,500' that was included in the original version

⁴ *Corrigendum: '0' has replaced '50,000' that was included in the original version

		number of contracts: 56, 515		
		Amount reflective of number of initiated payment transactions: 116,500		
			223,015	
			Amount reflective of risk profile criterion for AIS	
			Amount reflective of value of indemnity claims received: 40,000	
Minimum monetary amount of PII or comparable guarantee per calendar year covering all claims resulting from AIS activities	=	Amount reflective of geographical location of the undertaking: 50,000	+	Amount reflective of type of activity criterion n/a
			+	Amount reflective of size activity criterion for AIS 46,515
EUR 753,015		Amount reflective of number of different payment accounts accessed: 616,500		
			706.500	

84. Considering the fact that the undertaking already holds a comparable guarantee worth EUR 200,000, the undertaking should either increase the value of comparable guarantee to reach EUR 1,341,030 as calculated, or take out the PII cover of at least the level calculated; i.e. EUR 1,341,030.

4. Draft guidelines

EBA/GL-REC/20XX/XX

DD Month YYYY

Draft Guidelines

on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee under Article 5(4) of Directive (EU) 2015/2366

1. Compliance and reporting obligations

Status of these guidelines

1. This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010⁵. In accordance with Article 16(3) of Regulation (EU) No 1093/2010, competent authorities and financial institutions must make every effort to comply with the guidelines.
2. Guidelines set the EBA view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities as defined in Article 4(2) of Regulation (EU) No 1093/2010 to whom guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

Reporting requirements

3. According to Article 16(3) of Regulation (EU) No 1093/2010, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by ([dd.mm.yyyy]). In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form available on the EBA website to compliance@eba.europa.eu with the reference 'EBA/GL/201x/xx'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities. Any change in the status of compliance must also be reported to EBA.
4. Notifications will be published on the EBA website, in line with Article 16(3).

⁵ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, (OJ L 331, 15.12.2010, p.12).

2. Subject matter, scope and definitions

Subject matter and scope of application

5. These guidelines specify criteria and indicators on how to stipulate the minimum monetary amount of the professional indemnity insurance (PII) or other comparable guarantee to be held by undertakings that apply for:
 - i. authorisation to provide payment services under point (7) of Annex I (Payment initiation services, PIS) according to Article 5 (2) of Directive 2015/2366 of the European Parliament and of the Council on payment services in the internal market (PSD2); or
 - ii. registration to provide payment services under point (8) of Annex I (Account information services, AIS) according to Article 5 (3) of the PSD2.
6. The guidelines also set out a formula for the calculation of the minimum monetary amount of the PII or comparable guarantee.
7. Competent authorities should use the criteria, indicators and the formula when stipulating the minimum monetary amount of the PII or other comparable guarantee to be held by undertakings that apply for authorisation and/or registration.
8. Competent authorities should make the criteria, indicators and the formula available to the undertakings before they apply for authorisation and/or registration.
9. The minimum monetary amount of the PII or comparable guarantee calculated by competent authorities and, by implication also by the undertakings that apply for the authorisation and/or registration, should be expressed as a figure per year.
10. Competent authorities should use the PII and comparable guarantee as mutually exclusive and should require the undertakings that apply for the authorisation and/or registration to hold either the PII, or comparable guarantee.
11. Competent authorities should, when granting the authorisation/registration, stipulate that the undertakings review, and if necessary re-calculate, the minimum monetary amount of the PII or comparable guarantee, and that they do so at least on an annual basis.

Addressees

12. These guidelines are addressed to competent authorities as defined in point ii of Article 4 (2) of Regulation (EU) No 1093/2010.

Definitions

13. Unless otherwise specified, terms used and defined in PSD2 have the same meaning in the guidelines. In addition, for the purposes of these guidelines, the following definitions apply:

	<p>A provider that applies for authorisation to provide payment services as referred to in point 7 of Annex I to the PSD2; i.e. to provide payment initiation service (PIS); or</p>
<p>Undertaking</p>	<p>a provider that applies for registration to provide payment services as referred to in point 8 of Annex I to the PSD2; i.e. to provide account information service (AIS).</p> <p>A type of liability insurance intended to protect undertakings and their businesses by covering their legal and other costs and expenses arising from liabilities as follows:</p> <ul style="list-style-type: none"> ▪ for undertakings that apply for authorisation to provide PIS: as specified in Art. 73, 89, 90 and 92 PSD2; ▪ for undertakings that apply for registration to provide AIS: vis-à-vis the ASPSP or the payment service user resulting from non-authorised or fraudulent access to or non-authorised or fraudulent use of payment account information.
<p>Professional indemnity insurance</p>	<p>The costs and expenses must only be incurred in the claims and defence of claims made by persons with whom the undertakings are in contractual relationship, such as merchants, customers, or by the account servicing payment service providers (ASPSP) who are suggesting that they have suffered loss as a result of one or more causes of claim covered by the liabilities defined above.</p> <p>A cover other than a professional indemnity insurance which would provide undertakings with financial resources to cover their legal and other costs and expenses arising from liabilities as follows:</p>
<p>Comparable guarantee</p>	<ul style="list-style-type: none"> ▪ for undertakings that apply for authorisation to provide PIS: as specified in Art. 73, 89, 90 and 92 PSD2;

- for undertakings that apply for registration to provide AIS: vis-à-vis the ASPSP or the payment service user resulting from non-authorized or fraudulent access to or non-authorized or fraudulent use of payment account information.

The costs and expenses must only be incurred in the claims and defence of claims made by persons with whom the undertakings are in contractual relationship, such as merchants, customers, or by the ASPSPs who are suggesting that they have suffered loss as a result of one or more causes of claim covered by the liabilities defined above.

An agreement which governs provision of PIS.

Contract

Each subject that is covered by the contract is considered separately; i.e. if a parent company contracts with a PISP on behalf of a number of subsidiaries, each subsidiary; i.e. each legal entity, is considered separately. For purposes of calculating a number of contracts, each subject, i.e. each legal entity, is considered as one contract.

Client

A user of an AISP, whereupon each client is considered separately; i.e. if a client contracts the AISP on behalf of a number of subjects, each subject counts as a client.

3. Implementation

Date of application

14. These guidelines apply from 13 January 2018.

4. Guidelines on the criteria on how to stipulate the minimum monetary amount of the PII or other comparable guarantee

Guideline 1: Professional indemnity insurance and comparable guarantee

- 1.1 Competent authorities should ensure that the minimum monetary amount of the PII or comparable guarantee referred to in paragraphs (2) and (3) of Article 5, Directive (EU) 2015/2366, allows undertakings, as defined in these Guidelines, to effectively meet the liabilities in relation to their activities by verifying that a PII or comparable guarantee does not have any excess as a threshold and is valid when the liability occurs.

Guideline 2: Criteria and indicators

- 2.1 When stipulating the minimum monetary amount of the PII or comparable guarantee to be held by undertakings, competent authorities should use the following criteria and their indicators:
- (a) the risk profile criterion:
 - i. value of indemnity claims received by the undertakings;
 - ii. geographical location of the undertakings;
 - iii. number of contracts with the undertakings that apply for authorisation to provide PIS;
 - iv. number of initiated payment transactions by the undertakings that apply for authorisation to provide PIS;
 - v. number of different payment accounts accessed by the undertakings that apply for authorisation to provide AIS;
 - (b) the type of activity criterion:
 - i. whether the undertaking provides exclusively PIS or AIS;

- ii. whether the undertaking provides other payment services as referred to in Annex I of the PSD2; or
 - iii. whether the undertaking is engaged in business other than payment services;
- (c) the size of the activity criterion:
- i. for undertakings that apply for authorisation to provide PIS, the value of the transactions initiated;
 - ii. for undertakings that apply for registration to provide AIS, the number of clients that make use of the AIS;
- (d) comparable guarantee criterion:
- i. specific characteristics of the comparable guarantee;
 - ii. criteria for the implementation of the comparable guarantee.

Guideline 3: Formula

- 3.1 To calculate the minimum monetary amount of the PII or comparable guarantee to be held by undertakings, the competent authorities should use the following formula:

$$\begin{array}{l}
 \text{Minimum monetary} \\
 \text{amount of PII} \\
 \text{or comparable} \\
 \text{guarantee}
 \end{array}
 =
 \begin{array}{l}
 \text{Amount} \\
 \text{reflective of risk} \\
 \text{profile criterion}
 \end{array}
 +
 \begin{array}{l}
 \text{Amount} \\
 \text{reflective of type} \\
 \text{of activity} \\
 \text{criterion}
 \end{array}
 +
 \begin{array}{l}
 \text{Amount reflective of} \\
 \text{size activity criterion}
 \end{array}$$

- 3.2 To calculate the minimum monetary amount of the PII or comparable guarantee, the competent authorities should populate indicators under each criterion with the relevant values as specified in Guidelines 5 to 7, calculate amount reflective of each criterion separately by adding the amount reflective of each indicator and use the resultant amounts in the formula.
- 3.3 Values in these Guidelines are expressed in EUR. In Member States, where the official currency is other than EUR, competent authorities may convert the amounts reflective of each criterion into the respective national currency equivalent.

Guideline 4: Publication

- 4.1 Competent authorities should make the criteria, indicators and the formula publicly available, so as to enable the undertakings to calculate the minimum monetary amount of the PII or comparable guarantee before they apply for authorisation and/or registration.

Guideline 5: Calculation of risk profile criterion

Value of indemnity claims received

- 5.1 When calculating the value of the indicator of indemnity claims received, competent authorities should use the aggregated value of all claims made by ASPSPs and payment service users against the undertaking in the previous 12 calendar months.
- 5.2 Competent authorities should take into account only those claims that related to the liabilities referred to in Articles 73, 89, 90 and 92 of the PSD2 for the undertaking that applies for PIS, and in Article 5(3) of the PSD2 for the undertaking that applies for AIS.
- 5.3 If no claims were made against the undertaking in the previous 12 months, competent authorities should set to '0' the value for this indicator in the formula.
- 5.4 For the undertakings that have not been offering services in the last 12 months, competent authorities should use the aggregated value of all claims as forecasted in the business plan and/or programme of operations submitted by the undertaking as part of its application for authorisation/registration.
- 5.5 If the undertaking does not include any forecasts related to the claims in its business plan and/or programme of operations, or if the amount resulting from the application of the forecasted total value of indemnity claims received is lower than EUR 50 000, competent authorities should set to '50 000' the value in the formula.

Geographical location of the undertaking

- 5.6 Competent authorities should add the value of '50 000' in the formula for those undertakings that are registered/authorised in the EU and provide services not only in EU Members States but also in other countries outside the European Union.
- 5.7 However, if such an undertaking can prove that it is holding a guarantee similar to the PII to cover their liabilities in those other countries, competent authorities should set to '0' the value for this indicator in the formula.
- 5.8 If the undertaking provides the services only in the EU Member States, competent authorities should set to '0' the value for this indicator in the formula.

Number of contracts with the undertaking applying for authorisation to provide PIS

5.9 Competent authorities should calculate the value of the indicator of number of contracts as the sum of the following elements, where N represents the number of subjects with whom the undertaking had the contract in the last 12 months:

- (a) 40% of the slice of N up to 100 subjects;
plus
- (b) 25% of the slice of N above 100 subjects up to 10 000 subjects;
plus
- (c) 10% of the slice of N above 10 000 subjects up to 100 000 subjects;
plus
- (d) 5% of the slice of N above 100 000 subjects up to 1 million subjects;
plus
- (e) 2.5% of the slice of N above 1 million subjects.

5.10 For the undertaking that has not been offering services in the last 12 months, competent authorities should use the number of contracts forecasted in the business plan and/or programme of operations submitted by the undertaking as part of its application for authorisation.

5.11 If the undertaking does not include any forecasts related to the number of contracts in its business plan and/or programme of operations, or if the amount resulting from the application of the forecasted number of contracts, is lower than '50 000', competent authorities should set to '50 000' the value for this indicator in the formula.

Number of initiated payment transactions by undertakings applying for authorisation to provide PIS

5.12 Competent authorities should calculate the value of the indicator of number of initiated payment transactions as the sum of the following elements, where N represents the number of payment transactions initiated by the undertaking that applies for authorisation to provide PIS in the last 12 months:

- (a) 40% of the slice of N up to 10 000 initiated payments;
plus
- (b) 25% of the slice of N above 10 000 initiated payments up to 100 000 initiated payments;

plus

- (c) 10% of the slice of N above 100 000 initiated payments up to 1 million initiated payments;

plus

- (d) 5% of the slice of N above 1 million initiated payments up to 10 million initiated payments;

plus

- (e) 2.5% of the slice of N above 10 million initiated payments.

5.13 For the undertaking that has not been offering services in the last 12 months, competent authorities should use the number of initiated payment transactions forecasted in the business plan and/or programme of operations submitted by the undertaking as part of its application for authorisation.

5.14 If the undertaking does not include any forecasts related to the number of initiated payment transactions in its business plan and/or programme of operations, or if the amount resulting from the application of the forecasted number of initiated payment transactions is lower than '50 000', competent authorities should set to '50 000' the value for this indicator in the formula.

Number of different payment accounts accessed by undertakings applying for registration to provide AIS

5.15 Competent authorities should calculate the value of the indicator of number of accessed payment accounts as the sum of the following elements, where N represents the number of different payment accounts accessed by the undertaking that applies for registration to provide AIS in the last 12 months:

- (a) 40% of the slice of N up to 10 000 accessed accounts;

plus

- (b) 25% of the slice of N above 10 000 accessed accounts up to 100 000 accessed accounts;

plus

- (c) 10% of the slice of N above 100 000 accessed accounts up to 1 million accessed accounts;

plus

(d) 5% of the slice of N above 1 million accessed accounts up to 10 million accessed accounts;

plus

(e) 2.5% of the slice of N above 10 million accessed accounts.

5.16 For the undertaking that has not been offering services in the last 12 months, competent authorities should use the number of accessed payment accounts forecasted in the business plan and/or programme of operations submitted by the undertaking as part of its application for registration.

5.17 If the undertaking does not include any forecasts related to the number of accessed payment accounts in its business plan and/or programme of operations, or if the amount resulting from the application of the forecasted number accessed accounts is lower than '50 000', competent authorities should set to '50 000' the value for this indicator in the formula.

Guideline 6: Calculation of type of activity criterion

6.1 Competent authorities should set to '0' the value for this indicator in the formula for those undertakings that apply for authorisation to provide only PIS.

6.2 Competent authorities should set to '0' the value for this indicator in the formula for those undertakings that apply for registration to provide only AIS.

6.3 If an undertaking that applies for authorisation to provide PIS also applies for registration to provide AIS, or if an undertaking that applies for registration to provide AIS also applies for authorisation to provide PIS, competent authorities should calculate the minimum monetary amount separately for each service and add the resultant amounts to get the minimum monetary amount of the PII or comparable guarantee of the applying undertaking, i. e. calculate amounts reflective of all criteria for provision of AIS and PIS separately.

6.4 If an undertaking provides also payment services other than PIS/AIS as referred to in Annex I of the PSD2, competent authorities should calculate the minimum monetary amount of the PII or comparable guarantee for providing PIS, or AIS, or both without prejudice to requirements related to the calculation of initial capital according to Article 7 of the PSD2 and/or own funds according to Article 9 of the PSD2.

6.5 If an undertaking is also engaged in business other than providing payment services as referred to in Annex I of the PSD2, competent authorities should add in the formula, in addition to the values required for the type of activity the undertaking aims to provide, the value of '50,000' to cover the other business.

Guideline 7: Calculation of size of activity criterion

7.1 Competent authorities should calculate the amount reflective of the size of activity criterion for the undertaking that applies for authorisation to provide PIS as the sum of the following elements, where N represents the total value of all transactions initiated by the undertaking in the last 12 months:

- (a) 40% of the slice of N up to EUR 500 000;
plus
- (b) 25% of the slice of N above EUR 500 000 up to EUR 1 million;
plus
- (c) 10% of the slice of N above EUR 1 million up to EUR 5 million;
plus
- (d) 5% of the slice of N above EUR 5 million up to 10 million;
plus
- (e) 2.5% of the slice of N above EUR 10 million.

7.2 Competent authorities should calculate the amount reflective of the size of activity criterion for the undertaking that applies for registration to provide AIS as the sum of the following elements, where N represents the number of clients that made use of the AIS in the last 12 months:

- (a) 40% of the slice of N up to 100 clients;
plus
- (b) 25% of the slice of N above 100 clients up to 10 000 clients;
plus
- (c) 10% of the slice of N above 10 000 clients up to 100 000 clients;
plus
- (d) 5% of the slice of N above 100 000 clients up to 1 million clients;
plus
- (e) 2.5% of the slice of N above 1 million clients.

- 7.3 For the undertaking that has not been offering services in the last 12 months, competent authorities should use the number of all transaction initiated/number of clients forecasted in business plan and/or programme of operations submitted by the undertaking as part of its application for authorisation/registration.
- 7.4 If the undertaking does not include any forecasts related to number of all transaction initiated/number of clients in its business plan and/or programme of operations, or if the amount resulting from the application of the forecasted total value of transactions (undertakings that apply for authorisation to provide PIS) and the forecasted number of clients (undertakings that apply for registration to provide AIS), is lower than '50 000', competent authorities should set to '50 000' the value for these indicator in the formula.

Guideline 8: Comparable guarantee criterion

- 8.1 Competent authorities should require the undertakings to hold either the PII, or a comparable guarantee.

Guideline 9: Review

- 9.1 When granting the authorisation and/or registration to the undertakings, competent authorities should stipulate that the undertakings review, and if necessary re-calculate, the minimum monetary amount of the PII or comparable guarantee, and that they do so at least on an annual basis.

5. Accompanying documents

5.1 Draft cost-benefit analysis / impact assessment

85. 'Article 16(2) of the EBA Regulation provides that the EBA should carry out an analysis of 'the potential related costs and benefits' of any guidelines it develops. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.'

5.1.1 Problem identification and baseline scenario

86. The market for payment services in the EU is developing very dynamically. With the number of users and providers of innovative payment services rising continuously, the need for an adequate regulatory and governance framework for this market becomes more urgent. Absent an adequate regulatory and governance framework, there would be an increasing risk of market failures, potentially resulting in consumer detriment and a lack of trust in those innovative services. Besides potentially adverse effects on consumers' demand for innovative payment solutions, also the supply side of the payment market could be distorted, including unfair competitive practices.
87. Currently, many of payment services providers, such as PISPs and AISPs operate outside of a prudential regulatory and supervisory framework in most EU MS, as found by EBA's survey conducted for development of these draft Guidelines. The gap between dynamic developments of this market and the applicable regulatory framework would widen further, absent regulatory intervention. For instance, currently providers offering AIS and PIS are not required to offer any mitigation/insurance against the case that payments were initiated/processed erroneously, potentially to the detriment of payment service users in the EU.
88. Therefore, PSD2 mandates EBA to develop these draft Guidelines on criteria how to stipulate the minimum monetary amount of the PII or other comparable guarantees against their liabilities, including those resulting from unauthorised or fraudulent access to or use of payment account information. PSPs shall be required to hold such insurance or comparable guarantees as condition for their authorisation or registration (Art. 5(2, 3) PSD2).

5.1.2 Policy objectives

89. Generally, these draft Guidelines aim at contributing to the development of the internal market and the growth of the digital economy in the EU as well as to the protection of the users of payment services. More specifically, these draft Guidelines intend to ensure that PISPs and/or AISPs hold sufficient PII or other comparable guarantees against liabilities arising, amongst others, from unauthorised or fraudulent access or use of payment account

information. Operationally, these draft Guidelines are drafted with a view to ensure that criteria can be consistently and efficiently applied by payment service providers and application effectively supervised by CAs.

5.1.3 Options considered and preferred option

90. For the development of these draft GL, the EBA approached CAs and, through them, also different types of relevant market participants, including ASPSPs, PISPs, AISPs, as well as insurance undertakings, with a view to ascertaining data that would help the EBA to develop the Guidelines using the criteria specified in the mandate.
 91. The EBA received more than 100 questionnaire responses, from 26 EU Member States, which provided a good overview of existing market practices in the EU.
 92. The responses received suggest that PISPs and AISPs, which are currently not regulated under the existing Payment Services Directive (PSD1), are not required to hold PII or a comparable guarantee in any of the 26 Member States, but that a small number of them have notwithstanding taken out such PII or a cover of a kind similar to PII.
 93. The responses also showed that the majority of the AISPs and PISPs also offer services other than PIS and/or AIS, and that they usually operate in more than one country, including countries outside the EU.
 94. In terms of the number of customers of PISPs or AISPs, the responses suggest that there is a range between less than 100 for some to more than 1 million for other providers and that their customers include both legal and natural persons.
 95. Having analysed the responses, the EBA considered the following options for the draft Guidelines:
 - operationalising the risk profile criterion by defining it qualitatively (option 1.1)
 - operationalising the risk profile criterion by assigning an indicator to it (option 1.2)
 96. Defining the risk profile criterion in a qualitative manner would probably result in a criterion hard to apply consistently across 28 EU MS and difficult to combine with quantitative indicators specified for the other criteria to stipulate the minimum monetary amount for the PII or comparable guarantee to be held by PISPs and/or AISPs.
 97. To facilitate combination with other criteria and its consistent application across Member States, EBA proposes to specify the risk profile criterion of PSD2, relying on indicators relating to the value of indemnity claims received, the number of contracts, the number of initiated payment transactions and the number of payment accounts (option 1.2).
 - Stipulating the minimum required amount based on an innovative formula (option 2.1)
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- Stipulating the minimum required amount based on existing formulae in PSD2 (option 2.2)
98. To effectively stipulate the minimum monetary amount of the PII or comparable guarantee, each PISP's/AISP's performance in terms of indicators specified in the PSD2 and in these draft GL needs to be combined, for an overall assessment of the minimum amount required to cover relevant risks.
99. Calculating this total scoring based on a completely new formula would result in additional costs for PISPs and AISPs, and CAs to develop, test and implement it, entailing in addition the risk of its methodological inaccuracy. Consequently, EBA proposes to combine each PISP's/AISP's' performance per criterion, consistent with the formula set out in PSD2 for the calculation of own funds, based on an additive cluster method (option 2.2).

5.1.4 Cost-Benefit Analysis

100. The draft GL on the minimum monetary amount of PII or other comparable guarantee is going to mainly affect payment service user, PISPs and AISPs as well as CAs engaged in authorisation/registration of such payment-related service providers. In large, also other payment-related service providers and the broader economy are going to be affected.
101. A study of the European Commission on the impact of various policy changes in the PSD2 concludes a positive effect by regulating PSPs on legal certainty, potential security risks in the payment chain and consumer protection. The EBA questionnaire prior to the Guidelines draft, including CA and relevant market participants, points to the increased importance of PISPs and AISPs and thus the draft Guidelines will contribute to create a stable market for those services in an early phase, decreasing the adjustment costs in a later stage.
102. The clear allocation of liabilities creates transparency and will benefit consumers' trust in the new electronic services, thereby eliminating barriers for market access and providing the environment for a competitive market. The positive dynamics towards more efficient pricing, in turn, will benefit consumers.
103. The option proposed by these draft Guidelines recommends the use of quantitative indicators, mainly already specified by the PSD2. This methodology allows an efficient and transparent calculation of the PII or comparable guarantee.
104. For CA the use of prior identified PSD2 indicators facilitates their work (authorisation, registration and supervision) and enables them to reflect better the growth of PISPs and AISPs. In the long run, the standardized process will create scale benefits for CA and PISPs and AISPs.
105. At the same time, the calculation methodology (formula) stipulated would facilitate competitive dynamics and entrance of new participants, by allowing expectation-based calculations.

106. The implementation of the draft Guidelines requires further regulatory costs for accessing information about PISPs and AISPs, especially in regard to the risk criterion.

107. In overall, the benefits in increased competition of the payment-related services market, consumer protection and economy of scale in the calculation process outweigh the possible additional costs.

5.2 Overview of questions for consultation

Question 1: Do you agree with the requirement that competent authorities require undertakings to review, and if necessary re-calculate, the minimum monetary amount of the PII or comparable guarantee, and that they do so at least on an annual basis, as proposed in Guideline 8?

Question 2: Do you agree with the formula to be used by competent authorities when calculating the minimum monetary amount of the PII or comparable guarantee as proposed in Guideline 3? Please explain your reasoning

Question 3: Do you agree with the indicators under the risk profile criterion and how these should be calculated, as proposed in Guideline 5? Please explain your reasoning.

Question 4: Do you agree how the indicators under the type of activity criterion should be calculated, as proposed in Guideline 6? Please explain your reasoning.

Question 5: Do you agree how the indicators under the size of activity criterion should be calculated, as proposed in Guideline 7? ? Please explain your reasoning

Question 6: Do you think the EBA should consider any other criteria and/or indicators to ensure that the minimum amount is adequate to cover the potential liabilities of PISPs/AISPs in accordance with the Directive? Please explain your reasoning.

Question 7: Do you have any other comments or suggestions that you think the EBA should consider in order to ensure that the minimum amount is adequate to cover the potential liabilities of PISPs/AISPs in accordance with the Directive? Please explain your reasoning.