



EBA REPORT

ON THE REVIEW OF THE REGULATORY TECHNICAL STANDARD ON THE MINIMUM MONETARY AMOUNT OF THE PROFESSIONAL INDEMNITY INSURANCE FOR MORTGAGE CREDIT INTERMEDIARIES

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EBA

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Contents

Abbreviations	3
Executive summary	4
1. Introduction and legal basis	5
2. Methodological approach	6
3. Assessment	8
4. Conclusions	13
Annex	14

Abbreviations

EBA	European Banking Authority
EU	European Union
MCD	Mortgage Credit Directive
NCA	National Competent Authority
PII	Professional Indemnity Insurance
RTS	Regulatory Technical Standards

Executive summary

Article 29(2) of the Mortgage Credit Directive (MCD) requires Member States to ensure that mortgage credit intermediaries hold professional indemnity insurance (PII) covering the territories in which they offer services, or some other comparable guarantee against liability arising from professional negligence. The MCD conferred on the European Banking Authority (EBA) the mandate to ‘develop draft regulatory technical standards to stipulate the minimum monetary amount of the professional indemnity insurance or comparable guarantee’. The regulatory technical standards (RTS) were published in the *Official Journal of the European Union* in October 2014 as Delegated Regulation (EU) No 1125/2014,¹ and they specify as minimum amounts:

- (a) EUR 460 000 for each individual claim;
- (b) in aggregate, EUR 750 000 per calendar year for all claims.

The MCD further provides that the ‘EBA shall review, and if necessary, develop draft regulatory technical standards to amend the minimum monetary amount of the professional indemnity insurance or comparable guarantee [...] for submission to the Commission for the first time by 21 March 2018 and every two years thereafter.

Given the late transposition of the MCD in some Member States, the EBA decided in early 2018 to postpone the review by two years, from 2018 to 2020.

To fulfil the above mandate, the EBA has assessed the responses to a survey sent by national competent authorities (NCAs) to the 10 largest credit intermediaries in their respective jurisdictions, intelligence gathered from the NCAs themselves and information gained from desk-based research.

In this report, the EBA provides an overview of the legal basis for its work and the methodology used in the EBA’s assessment. The report concludes that, based on the assessment, there is currently no evidence that would suggest that the minimum monetary amounts would need to be amended. In reaching this conclusion it is necessary to stress that the mandate given to the EBA by Article 29(2) of the MCD refers only to the threshold amounts themselves. The mandate does not extend to the EBA assessing, for example, the extent to which the use of the minimum payout amounts prescribed in the RTS, are potentially impeded by specific clauses in PII contracts; the nature of the comparable guarantees that may be used in the market; or what should be understood as a ‘comparable guarantee’. The EBA therefore did not analyse those elements or conduct a thorough assessment of the contents of insurance contracts.

¹ https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_305_R_0001&from=EN

1. Introduction and legal basis

1. Article 29(2) of the MCD requires Member States to ensure that mortgage credit intermediaries hold PII covering the territories in which they offer services, or some other comparable guarantee against liability arising from professional negligence.
2. PII is a liability insurance aimed at covering, either entirely or in part, sums to be paid by professionals to third parties as compensation for losses arising from acts committed by the professional during the conduct of business activities. The requirement for intermediaries to hold such insurance was one of the measures in the MCD intended to address issues that the legislators had identified pertaining to the professionalism and admission of mortgage credit intermediaries.
3. To support this particular requirement, Article 29(2) of the MCD confers on the EBA the mandate to ‘develop draft regulatory technical standards to stipulate the minimum monetary amount of the professional indemnity insurance or comparable guarantee’. During 2013, the EBA developed these RTS; it consulted on them in the first quarter of 2014 and submitted them to the European Commission in June 2014. The RTS were published in the *Official Journal of the European Union* in October 2014 as Delegated Regulation (EU) No 1125/2014,² and they specify as minimum amounts:
 - (a) EUR 460 000 for each individual claim;
 - (b) in aggregate, EUR 750 000 per calendar year for all claims.
4. Article 29(2) of the MCD further provides that the ‘EBA shall review, and if necessary, develop draft regulatory technical standards to amend the minimum monetary amount of the professional indemnity insurance or comparable guarantee [...] for submission to the Commission for the first time by 21 March 2018 and every two years thereafter.’.
5. Given the late transposition of the MCD in some Member States, as a result of which no experience with the PII RTS was available on which a review of the RTS in these jurisdictions could have been based, the EBA decided to postpone the review by two years, from 2018 to 2020.
6. In fulfilment of its mandate to review the RTS on PII for mortgage credit intermediaries, and given its statutory objective to contribute to the enhancement of consumer protection, the EBA has assessed if the minimum monetary amounts need to be amended.
7. The assessment was carried out based on the results of a survey sent by NCAs to the mortgage credit intermediaries in their respective jurisdictions, intelligence gathered from the NCAs themselves and information gained from desk-based research. This report presents the results of the analysis.

² https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_305_R_0001&from=EN

2. Methodological approach

2.1 General approach

8. For the EBA to fulfil the mandate in a way that is comprehensive and methodologically robust, it would be necessary to assess a variety of data from all mortgage credit intermediaries across (at the time of collecting information of the report) the 28 European Union (EU) Member States (e.g. number of mortgages sold, revenue generated from mortgage credit intermediation activity, type of instrument held to mitigate risks arising from mortgage credit intermediation activities (PII or comparable guarantee), number and nature of claims, insurance premium paid, coverage amount, financial intermediation activities covered by the amount, types of risks arising from professional negligence covered, number and amount of claims subsequently paid out with recourse to the insurance contract, amount of claims paid out by reason, and amount of claims settled without recourse to the insurance contract).
9. However, such data are not publicly available, and this would require the EBA to approach all credit intermediaries (there are tens of thousands of mortgage credit intermediaries in some countries) with a one-off reporting request for said data. Given that any potential amendments to the minimum amounts in the RTS would have a rather limited impact on the premium costs that intermediaries would have to pay (which the EBA understands tend to be in the area of a few hundred euro per year, depending on the nature and size of the intermediary), the EBA arrived at the view that such a reporting request would be disproportionate. Instead, for the purposes of this assessment, it was deemed more proportionate and sufficient for the EBA to approach from a small sample of approximately 400 credit intermediaries from a subset of 23 Member States that made information available to the EBA. To this end, NCAs were requested to send at least the 10 largest intermediaries in their respective jurisdictions a survey developed by the EBA.
10. To fulfil the mandate conferred on the EBA, it used a range of data sources and types of information suitable for the type, scope and depth of analysis for a range of issues to be assessed, having regard to the qualitative or quantitative nature of each issue, the different maturities of the markets for mortgage intermediation across Member States and the assessment of the national market provided by each NCA. As a result, the analysis in relation to some issues is based on numerical data, while in other cases it is qualitative, and the depth of the analysis also varies between issues.

2.2 Data sources

11. The main source of information used for this report was a survey developed by the EBA and sent by NCAs in July 2019 to at least the 10 largest mortgage credit intermediaries in their respective jurisdictions. The annex includes the questionnaire. The EBA received responses from the NCAs of several non-EU European Economic Area countries, as well as those of all the EU Member States except five. Some NCAs did not respond because of the late transposition of the MCD in their countries. Although most respondents provided answers to all the questions, this was not always the case. For example, in some Member States, only one intermediary with no business was registered at the time of the survey, or no mortgage credit intermediaries at all were registered.
12. In addition, as part of the survey, each mortgage credit intermediary was invited to attach to the completed questionnaire a copy of its PII contract, to enable the EBA to gain a more detailed understanding of how such PII contracts are set up. The EBA received 51 contracts from 12 Member States.

3. Assessment

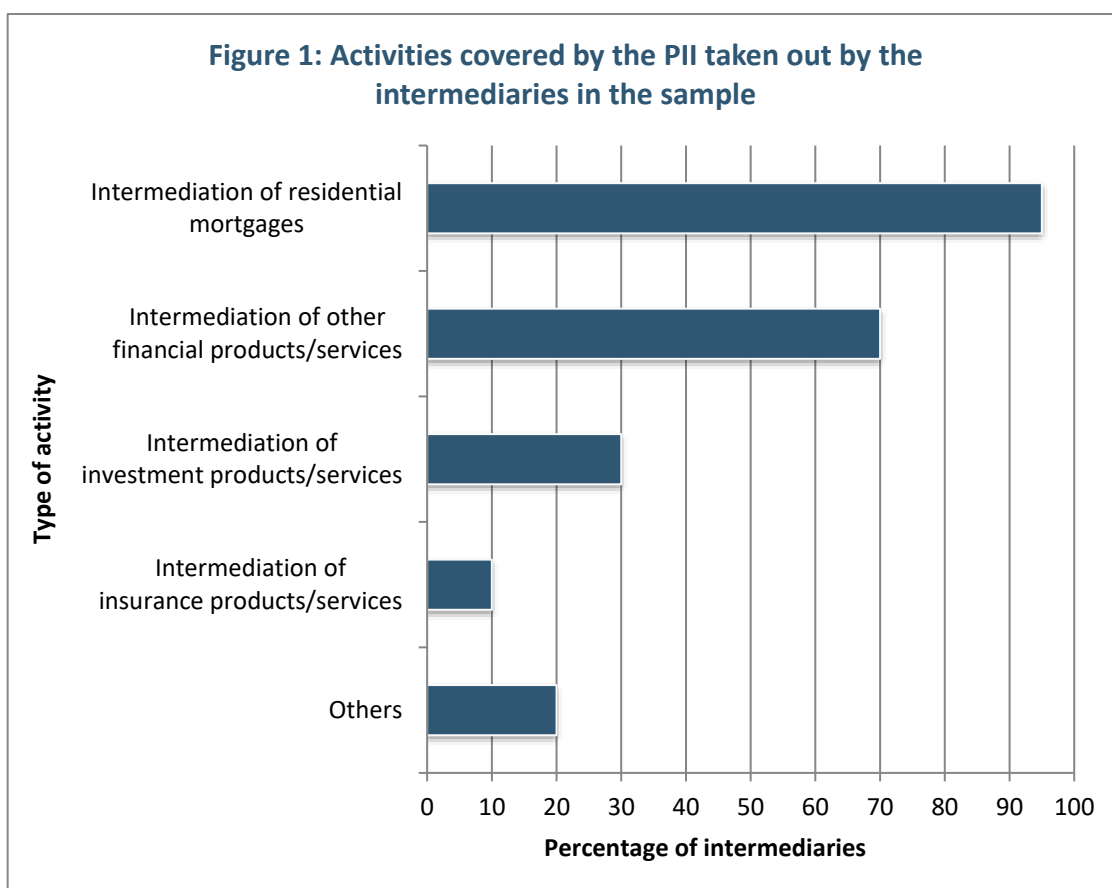
3.1 Number of mortgages sold, revenue generated and insurance premium paid

13. To enable the EBA to gauge the nature of the credit intermediaries that were part of the sample, the intermediaries were asked to provide some basic quantitative information, such as the number of mortgages they had sold in the calendar year 2018, the revenue they had generated from mortgage intermediation activities and the amount they had paid for the PII contract or comparable guarantee.
14. There is significant divergence between Member States concerning the number of mortgages sold through mortgage credit intermediaries in 2018, which varies widely, between 0 and 72 580.
15. The revenue generated from mortgage credit intermediation activities also varied significantly, depending on the type of intermediary, reaching a range between a minimum revenue of EUR 5 728 to a maximum of EUR 86 553 630. Only a few mortgage credit intermediaries did not have any such revenue to report or were unable to provide information on any such revenue.
16. Based on the data provided by the credit intermediaries, most respondents have taken out a PII contract and only very few mortgage credit intermediaries, in just two countries, make use of a comparable guarantee instead.
17. The annual insurance premium paid for the PII contract varies drastically between the intermediaries in the sample, from as little as EUR 100 for some intermediaries to as much as EUR 37 000 for others, according to the data provided.
18. The data also show that there is a scale-of-activity effect, in that entities with a larger larger scale of activity can optimise the unit cost of intermediating loan agreements. The absolute cost of compulsory insurance or a compulsory guarantee divided by the number of loan agreements concluded decreases for entities with a larger scale of activity, despite the fact that insurance premiums are higher for them. Similarly, for entities with a smaller scale of operations, that cost can be described as higher.

3.2 Coverage amount, intermediary activities and types of risks covered by the PII contract or comparable guarantee, and claims made

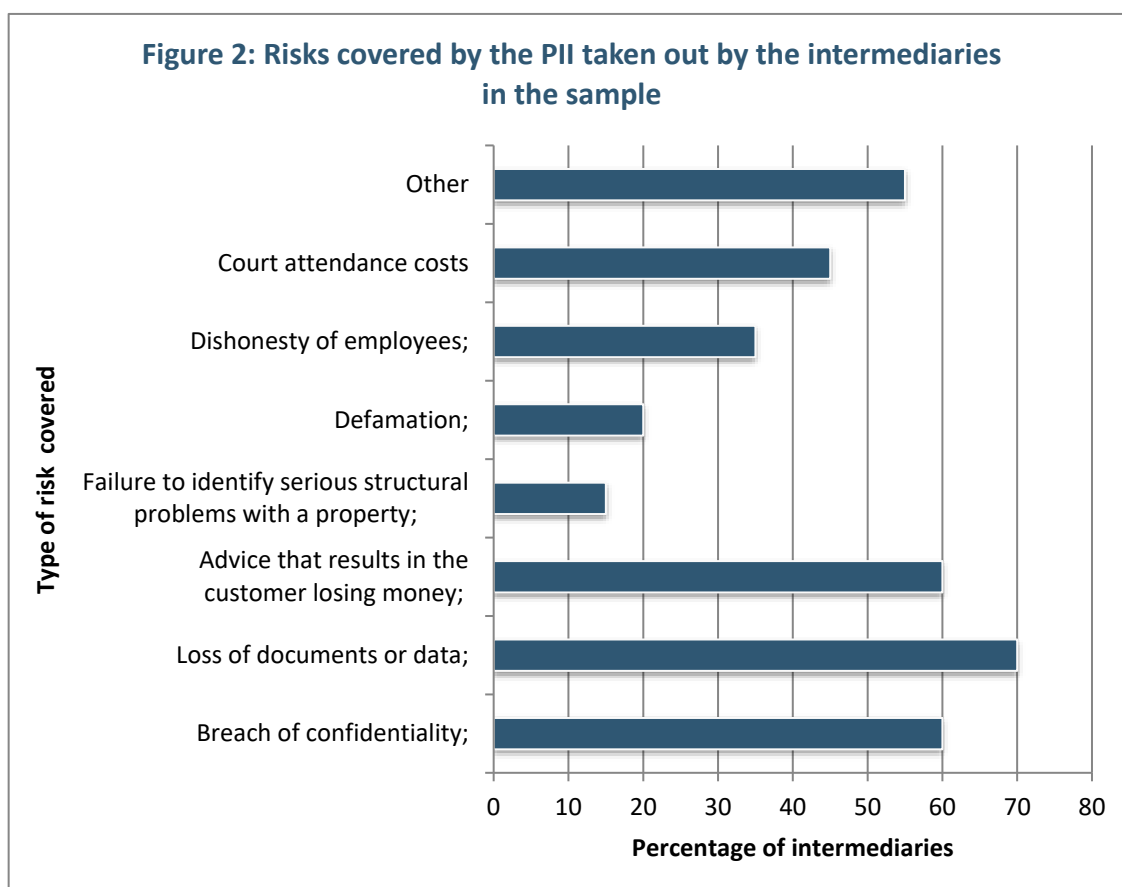
19. The mortgage credit intermediaries were asked to provide the coverage amount they apply per claim and per year in PII contracts or comparable guarantees. This provided the EBA with an overview of the coverage amount of the PII contracts or comparable guarantees currently held by mortgage credit intermediaries, and constituted a key input for the pending decision on whether or not to amend the minimum monetary amounts of this coverage.

20. Analysing the data provided, the EBA arrived at the view that most intermediaries apply the coverage amounts prescribed by the RTS, meaning not more than EUR 460 000 per claim and EUR 750 000 per year, and do not cover markets or territories other than those in which they are admitted. Only in a limited number of cases is the coverage amount higher than prescribed by the RTS. This higher level of coverage could be explained by the fact that those mortgage credit intermediaries are also insurance intermediaries, which have to comply with the Insurance Distribution Directive, which sets additional minimum requirements. The abovementioned coverage amounts for PII contracts need also to be considered in the context of the type and number of activities that the intermediaries in the sample carry out. As depicted in Figure 1, most intermediaries in the sample provide only mortgage credit intermediation as defined in the MCD, while for a small number of intermediaries the amounts also cover other types of activities, for example buy-to-let mortgages, insurance or investment intermediation, deposit products, retirement pensions, saving products, corporate loans or consumer credit activities.



21. The variation in the amounts reported might also be linked in certain cases to the size of the distribution network, the number and nature of activities carried out by the intermediary, and the portfolio diversification in terms of credit products sold (in addition to those asked about in the questionnaire).

22. In addition, most respondents reported that their contracts covered mainly four types of risks, namely loss of documents or data, breach of confidentiality, advice that results in the customer losing money, and court attendance costs, as depicted in Figure 2. Only a small number of respondents reported that dishonesty of employees, third party losses due to misconduct or negligence, or costs arising from criminal proceedings and regulatory investigation were also types of risks covered by their contracts.
23. The divergence in terms of types of risks covered by PII contracts across the sample suggests that the harmonisation of the minimum amounts through the RTS may potentially still give rise to different degrees of protection being offered to customers across different PII contracts, depending on the number and types of risks covered by each contract.



24. Finally, the intermediaries were requested to provide data on the number and amount of claims lodged by borrowers against the intermediary in 2018; the number and amount of claims subsequently paid out with recourse to the insurance contract in 2018; the amount of claims paid out by reason in 2018; and, finally, the number and amount of claims settled without recourse to the insurance contract in 2018.

25. According to the data collected, only a limited number of intermediaries had claims settled without recourse to their PII contracts in 2018. A high proportion of respondents (around 90%) reported that no claims had been lodged by borrowers against them. The survey also revealed that mortgage credit intermediaries from only six Member States reported such claims. Unsurprisingly, the great majority of the 1 155 claims that were reported by the sample were made in markets where intermediation activity was the highest, and where remortgaging is common (because contracts typically feature initial introductory rates of two to five years). It is also important to note that some NCAs consulted more than 10 mortgage credit intermediaries and only a limited number of claims had been lodged against the intermediaries (e.g. 12 claims lodged against a sample of 222 intermediaries).
26. The EBA therefore concludes that the claims lodged by borrowers against credit intermediaries are very limited and do not suggest that the minimum amounts specified in the RTS are insufficient and require upwards adjustment.

3.3 Additional assessment

27. During its review of the RTS, the EBA also arrived at the view that it might add value to assess also the types of comparable guarantees being taken out and the extent to which certain clauses in the insurance contracts impede the extent to which the aims of the indemnity insurance can be reached. Greater clarity on the risks arising from the professional liabilities that the PII contracts are intended to cover could be indeed beneficial, in order to assess the various clauses in the contracts and to check if they sufficiently mitigate the risks covered by the MCD.
28. However, apart from the requirements in relation to the minimum monetary amount of indemnity insurance, the MCD does not lay down any further requirements with regard to the content of insurance contracts or comparable guarantees.
29. Article 9 of the EBA Regulation (EU) No 1093/2010³ (the EBA's founding regulation) tasks the EBA with taking a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market. In line with this mandate and with the MCD's objective, mentioned in recital 5⁴, of ensuring that financial institutions act professionally and responsibly in order to protect consumers, the EBA assessed the minimum payout amounts prescribed in the RTS in the context of the overall consumer protection objectives of the MCD while adopting a proportionate approach to avoid creating an excessive burden for mortgage credit intermediaries.

³ 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. 12–47.

⁴ Recital 5 of the MCD: 'In order to facilitate the emergence of a smoothly functioning internal market with a high level of consumer protection in the area of credit agreements relating to immovable property and in order to ensure that consumers looking for such agreements are able to do so confident in the knowledge that the institutions they interact with act in a professional and responsible manner, an appropriately harmonised Union legal framework needs to be established in a number of areas, taking into account differences in credit agreements arising in particular from differences in national and regional immovable property markets.' 28.2.2014, OJEU L 60/35.

30. The EBA also conducted some desk research and examined a small, non-representative sample of insurance contracts from ten jurisdictions, with the support of technical experts from some of the European Insurance and Occupational Pensions Authority (EIOPA)'s members authorities, with a view to identifying if an insurance contract could potentially contain clauses that might limit the extent to which said insurance contracts mitigate the risks that MCD envisages to be met. However, the EBA did not conduct any more detailed analysis of the content of the insurance contracts.
31. This assessment has shown that the consumer protection objectives of the MCD are met in most cases, as the majority of the contracts assessed did not seem to contain clauses that could have detrimental effects for consumers. However, this conclusion is not robust, owing to the limited scope of the EBA's assessment, which, for example, did not include an assessment of the general terms and conditions.
32. One national supervisory authority reported that it had published methodological guidelines with the aim of resolving potential issues related to particular exclusions that cannot be part of the PII contracts. Other supervisory authorities explained that they request, on an annual basis, that mortgage credit intermediaries provide information about the insurance contracts concluded and check if insurance provisions are aligned with existing texts. Finally, another supervisory authority specified that, in its jurisdiction, all insurance undertakings that distribute compulsory insurance products in the territory are required to register the general and special conditions attached to insurance policies (as well as any amendments) with the insurance supervisory authority. Registration is preceded by the verification of the legal conformity of those general and special clauses with the applicable legal requirements.

4. Conclusions

33. Based on the assessment, there is currently no evidence that would suggest that the minimum monetary amounts would need to be amended. In reaching this conclusion it is necessary to stress that the mandate given to the EBA by Article 29(2) of the MCD refers only to the threshold amounts themselves. The mandate does not extend to the EBA assessing, for example, the extent to which the use of the minimum payout amounts prescribed in the RTS are potentially impeded by specific clauses in PII contracts; the nature of the comparable guarantees) that may be used in the market; or what should be understood as a 'comparable guarantee' at all. The EBA therefore did not analyse those elements or conduct a thorough assessment of the content of insurance contracts.

Annex

Questionnaire for the review of the European Banking Authority's Regulatory Technical Standards on PII under the Mortgage Credit Directive

Respondent's identification

Member State: _____

Competent Authority: _____

Intermediary Name: _____

Intermediary's contact person:

Name: _____

Position: _____

Email: _____

Tel. no: _____

Fax no: _____

Background

Article 29(2) of the Mortgage Credit Directive (MCD) requires Member States to ensure that mortgage credit intermediaries hold professional indemnity insurance (PII) covering the territories in which they offer services, or some other comparable guarantee against liability arising from professional negligence.

In order to support this particular requirement, Art 29 (2) of the MCD confers on the European Banking Authority (EBA) the mandate to ‘develop draft regulatory technical standards (RTS) to stipulate the minimum monetary amount of the professional indemnity insurance or comparable guarantee’. Accordingly, EBA developed these RTS and submitted them to the European Union (EU) Commission. The RTS were then published in the Official Journal in October 2014 as Delegated Regulation (EU) No 1125/2014, apply since the implementation date of the MCD of 21 March 2016 and specify as minimum amounts:

- (a) EUR 460 000 for each individual claim; and
- (b) in aggregate, EUR 750 000 per calendar year for all claims.

These amounts apply to all PII contracts that have been taken out since the implementation date of the MCD, or the date of its transposition into national law.

Article 29(2) MCD further provides that the ‘EBA shall review, and if necessary, develop draft regulatory technical standards to amend the minimum monetary amount of the professional indemnity insurance or comparable guarantee [...] for submission to the Commission for the first time by 21 March 2018 and every two years thereafter.’

The deadline of 21 March 2018 has been postponed to take into account the late transposition of the MCD and the authorisation/registration process of the intermediaries in Member States.

In order to fulfil its mandate in order to review the RTS, the EBA is now conducting a survey across the industry to collect data deemed particularly important and included in the following questionnaire.

The availability and the analysis of such data would allow the EBA to develop a proper review of the RTS, modelling it in order to meet the optimal trade-off between the conflicting aims of maximising the protection of consumers and minimising the impact on intermediaries. Furthermore, the EBA is keen to factor in information in relation to the number, amount and outcome of previous claims when determining the levels of cover going forward. This will allow the EBA to gauge if the coverage amounts are too low or too high. Finally, an additional set of more qualitative information (see questions n. 7-12) is deemed relevant also for supervisory and/or general MCD review purposes.

In addition, on a voluntary basis, mortgage credit intermediaries are invited to attach to the questionnaire a copy of their respective PII contract, in order in order for the EBA to gain a more detailed understanding how such PII contracts are set up. If so, mortgage credit intermediaries are invited to anonymise the content by redacting passages that would otherwise reveal the identity of particular natural or legal persons. However, should these persons be identifiable in the contracts, neither the National Authorities nor the EBA can guarantee that these identities can be treated confidentially while the review is ongoing.

Questionnaire

1. Number of mortgages sold in 2018 (please specify):

.....

2. Revenue generated from the mortgage credit intermediation activity in 2018 (please specify, including currency):

..... (Currency)

3. For risks arising from your mortgage credit intermediation activities, do you hold (tick as appropriate):

a professional indemnity insurance contract; or

a comparable guarantee?

4. What insurance premium did you pay for your PII contract or comparable guarantee in 2018 (please specify, including currency)?

(Premium paid) (Currency)

5. What does your PII contract or comparable guarantee specify in terms of coverage amount per claim and/or per year?

..... (Currency, please specify) per claim;

..... (Currency, please specify) per year.

6. Which financial intermediation activities does the amount cover (tick as appropriate)?

Intermediation of residential mortgages;

Intermediation of other financial products/services;

Intermediation of investment products/services;

Intermediation of insurance products/services;

Other, please specify

7. Does the amount cover markets/territories other than those in which you carry out your mortgage intermediation activity (tick as appropriate)?

Yes;

No.

8. What types of risks arising from professional negligence are covered by your PII contract or comparable guarantee (tick as appropriate)?

Breach of confidentiality;

Loss of documents or data;

Advice you give that results in the customer losing money;

Failure to identify serious structural problems with a property;

Defamation;

Dishonesty of employees;

Court attendance costs;

Other, please specify

9. Number and amount of PII claims lodged by the borrowers against the intermediary in 2018 (please specify, including currency):

No

Am Currency

10. Number and amount of claims subsequently paid out with recourse to the insurance contract in 2018 (please specify, including currency):

No

Am Currency

11. Amount of claims paid out by reason in 2018 (please specify, including currency):

Breach of confidentiality: am currency

<p><input type="checkbox"/> Loss of documents or data:</p> <p><input type="checkbox"/> Advice you gave that resulted in the customer losing money:</p> <p><input type="checkbox"/> Failure to identify serious structural problems with a property:</p> <p><input type="checkbox"/> Defamation:</p> <p><input type="checkbox"/> Dishonesty of employees:</p> <p><input type="checkbox"/> Court attendance costs:</p> <p><input type="checkbox"/> Other, please specify: am curr.....</p>
<p>12. Number and amount of claims settled without recourse to the insurance contract in 2018 (please specify, including currency):</p> <p>No</p> <p>Am Currency</p>
<p>Anonymised sample of PII contract attached on a voluntary basis (tick as appropriate):</p> <p><input type="checkbox"/> Yes;</p> <p><input type="checkbox"/> No.</p>



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