



Council of the European Union
General Secretariat

Brussels, 24 April 2025

Interinstitutional files:
2023/0209 (COD)
2023/0210 (COD)

WK 5227/2025 INIT

LIMITE

EF
ECOFIN
CODEC

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WORKING DOCUMENT

From: General Secretariat of the Council
To: Working Party on Financial Services and the Banking Union (Payment Services/
PSR/PSD)
Financial Services Attachés

Subject: Presidency Discussion Note - Discussion on professional indemnity insurance and
comparable guarantee

WK 5227/2025 INIT

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Polska Prezydencja w Radzie UE
Polish presidency of the Council of the EU
Présidence polonaise du Conseil de l'UE

Payment services package proposals (PSD3/PSR)

Brussels, 29 April 2025

Presidency Discussion Note

Discussion on professional indemnity insurance and comparable guarantee

Professional indemnity insurance and comparable guarantee

Although Member States generally supported the direction taken by the Presidency in the latest discussion notes on this issue, one Member State proposed two alternative options at the last CWP meeting on 4 April 2025, i.e. i) to add a reference to Articles 3(5) and 36(4a) PSD3 stating that the own funds or initial capital of the entity shall not be excluded from what constitutes a comparable guarantee, or ii) to leave the clarification of what constitutes a comparable guarantee to national discretion.

Based on the Member States' written submissions, the majority of Member States supported the first option, i.e. the inclusion of appropriate references to Articles 3(5) and 36(4a) PSD3. Only a few Member States supported the option of leaving it to Member States to clarify what constitutes a comparable guarantee. The Presidency notes that only a few Member States did not agree with the proposed addition in the recent questionnaire.

Taking into account the outcome of this discussion, the Presidency has decided to proceed with the first option, which received strong support. In addition, the reference in the EBA mandate that the EBA should specify the conditions under which own funds or initial capital can be considered a 'comparable guarantee' has been deleted. However, such an approach could set the basis for divergent approaches across Member States.

Please note that the PCY amendments from the January CWP meeting are in red, amendments from the March CWP meeting are in green and new amendments are highlighted in yellow.

Article 3 PSD3

[...]

4. Member States shall require undertakings that apply for authorisation to provide payment services as referred to in Annex I, point (6) as a condition of their authorisation, to hold a professional indemnity insurance, covering the territories in which they offer services, or some other comparable guarantee against liability to ensure that:

~~(a) they can cover their liabilities as specified in Articles 56, 57, 59, 76, and 78 of Regulation XXX [PSR];~~

~~(b) they cover the value of any excess, threshold or deductible from the insurance cover or comparable guarantee;~~

~~(c) they monitor the coverage of the insurance or comparable guarantee on an ongoing basis.~~

~~Any excess, deductible or threshold set by the professional indemnity insurance or comparable guarantee referred to in the first subparagraph shall be allowed only if they do not prejudice repayments resulting from requests for refunds of payment service users and account servicing payment service providers.~~

5. The EBA shall develop draft regulatory technical standards specifying:

(a) the information to be provided to the competent authorities in the application for the authorisation of payment institutions, including the requirements laid down in paragraph 3, points (a), (b), (c), (e), ~~(f)~~ and (g) to (k), (r) ~~and (s)~~, ~~and in the application for registration as an independent ATM deployer, under Article 38 this Directive;~~

(b) a common assessment methodology for granting authorisation as a payment institution, or registration as an ~~account information service provider or independent~~ ATM deployer, under Article 38 this Directive;

(c) what is a comparable guarantee, as referred to in paragraph 4, ~~first subparagraph~~, which should be interchangeable with a professional indemnity insurance;

(d) the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee as referred in paragraph 4, ~~the conditions under which an excess, deductible or threshold set by the professional indemnity insurance or comparable guarantee is allowed~~ and the conditions under which additional initial capital or own funds may be deducted from taken into account for the purpose of reducing the minimum monetary amount of the professional indemnity insurance or other comparable guarantee.

For the purposes of point (c), a payment institution's own funds or initial capital beyond the level required by this Directive shall not be excluded from what constitutes a comparable guarantee.

~~For the purposes of point d), where a payment institution—an undertaking that applies for authorisation to provide payment services as referred to in Annex I, point (6) holds additional initial capital or own funds beyond the level required pursuant to this Directive or own funds, the respective funds may be deducted from the minimum monetary amount of the professional indemnity insurance or comparable guarantee as referred in paragraph 4, subject to the conditions to be set in the regulatory technical standards referred to above.~~

Article 36(4)

Member States shall require persons as referred to in paragraph 1, as a condition of their registration, to hold a professional indemnity insurance covering the territories in which they offer services, or some other comparable guarantee to ensure that:

~~(a) they can cover their liability vis-à-vis the account servicing payment service provider or the payment service user resulting from non-authorized or fraudulent access to or non-authorized or fraudulent use of payment account information service.;~~

~~(b) they can cover the value of any excess, threshold or deductible from the insurance or comparable guarantee;~~

~~(c) they monitor the coverage of the insurance or comparable guarantee on an ongoing basis.~~

~~Any excess, deductible or threshold set by the professional indemnity insurance or comparable guarantee referred to in the first subparagraph shall be allowed only if they do not prejudice repayments resulting from requests for refunds of payment service users and account servicing payment service providers.~~

Article 36(4a)

The EBA shall develop draft regulatory technical standards specifying:

(a) the information to be provided to the competent authorities in the application for registration as an account information service provider under this Directive;

(b) a common assessment methodology for granting registration as an account information service provider under this Directive;

(c) what is a comparable guarantee, as referred to in paragraph 4, which should be interchangeable with a professional indemnity insurance;

(d) the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee as referred to in paragraph 4, ~~the conditions under which an excess, deductible or threshold set by the professional indemnity insurance or comparable guarantee is allowed and the conditions under which additional initial capital or own funds may be deducted from taken into account for the purpose of reducing the minimum monetary amount of the professional indemnity insurance or other comparable guarantee.~~

For the purposes of point (c), an account information service provider's own funds or initial capital shall not be excluded from what constitutes a comparable guarantee.

~~For the purposes of point d), an undertaking that applies for registration as an account information service provider holds any initial capital or own funds held by an account information service provider, the respective funds may be deducted from the minimum monetary amount of the professional indemnity insurance or comparable guarantee as referred to in paragraph 4, subject to the conditions to be set in the regulatory technical standards referred to above.~~

Questions for the Member States:

1. Do you agree with the proposal to delete the reference in the EBA mandate that the EBA should specify the conditions under which own funds or initial capital can be considered a 'comparable guarantee' or do you prefer to keep this reference?