

Review of general insurance intermediaries' professional indemnity insurance: Report on the thematic project



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1.

Executive summary

Purpose of the review

- 1.1** Professional indemnity insurance (PII) provides important protection for firms and their customers, in the event of professional failings by the firm. We carried out this thematic review to:
- evaluate the individual policies purchased by a sample of firms to assess whether they complied with the requirements in our Handbook (MIPRU¹)
 - to consider, taking into account the views of industry participants, how effectively the general insurance (GI) PII market was functioning, particularly in terms of the breadth of the market and the availability of cover
- 1.2** From the population of over 6,000 authorised GI intermediaries we selected an initial sample of 200 firms to provide information to us including copies of their policies.

What we found

- 1.3 Availability of cover** – Firms were able to obtain cover for claims that might arise from the range of their GI business including insurance broking, being a managing general agent (MGA²), the operation of binding authorities, claims handling, and having appointed representatives (ARs). Policies were provided by over 50 insurers and MGAs all of which were authorised in jurisdictions allowed by our Handbook.³
- 1.4 Policy limits and excesses** – Firms were able to obtain cover for high limits of indemnity. In a small number of cases firms did not have the minimum level of cover required by our Handbook or had a policy excess greater than that permitted.
- 1.5 Exclusion clauses** – Policies contained exclusion clauses which gave us significant concerns as their effect could be to reduce the scope of the cover below that required by MIPRU. The four types of exclusion clause were: Suitability of insurer (11 policies), Unrated insurers (two policies), Non-admitted insurers (13 policies), and Insurer insolvency (140 policies).

1 The Prudential Sourcebook for Mortgage and Home Finance Firms, and Insurance Intermediaries (MIPRU).

2 The Managing General Agents Association (MGAA) defines an MGA as 'an agency whose primary function and focus is the provision of underwriting services and whose primary fiduciary duty is to its Insurer principal'. MGAs are authorised as intermediaries.

3 MIPRU 3.2.1R.

Appropriateness of cover and accuracy of wording

- 1.6** Many policies had inadvertent gaps in coverage or inaccuracies indicating that they had not been subject to appropriate review by firms themselves, the intermediaries they used to place their cover, or by the insurers and MGAs that provide products. This extended to:
- exclusions clauses intended to exclude investment-related activities but so widely drafted that they excluded GI intermediation
 - a lack of clarity about whether policies provided cover for: appointed representatives the firm might have; and for awards by the Financial Ombudsman Service (FOS) or inappropriate financial sub-limits for these awards
 - out-of-date language particularly when referring to financial services regulators. One provider's policies also included a Y2K Compliance clause

Action required and next steps

- 1.7** Where we have seen clear examples of non-compliance with our rules – such as inadequate policy limits or exclusions which exclude all activity – we have raised this with the firms and ensured corrective action is taken. We will also provide brief feedback to those firms within the review where we have concerns about inaccuracies or inadvertent gaps in their policies.
- 1.8** We will engage with the sector through the relevant trade bodies to ensure that the issues emerging from the review are properly understood. This includes our concerns about the exclusion clauses we found in some policies.
- 1.9** We expect GI intermediaries that were not included in the review to review their PII policies to ensure that they meet MIPRU requirements.
- 1.10** We expect insurers and MGAs that provide PII in this area to review their products in light of the findings in this report to ensure they are consistent with the needs of those intermediaries to whom they are providing cover – including meeting the requirement of MIPRU.

2. Purpose and scope of the review

- 2.1** The MIPRU 3 section of our Handbook requires firms carrying out GI mediation activities to have PII. This is to:
- ensure that firms have adequate resources to protect themselves, and their customers, against losses arising from breaches of their duties under the regulatory system or civil law⁴, and
 - implement the requirement of the IMD for intermediaries to hold PII against any liability that might arise from professional negligence⁵
- 2.2** As an alternative to PII, firms are permitted to have a comparable guarantee provided by another authorised firm that has net tangible assets of more than £10 million.⁶
- 2.3** This project was undertaken to assess the extent to which a sample of 200 GI intermediaries met the requirements of MIPRU. We had seen some isolated issues in the course of our reactive supervisory work and had not previously performed any detailed review work in this area; as such, we wanted to establish the extent to which a sample of intermediaries were complying with these requirements. We also wanted to assess the breadth of the market and availability of cover, considering both what policy limits firms are able to purchase and the extent to which they are able to obtain cover for all the activities they carry out.

Scope of the review

- 2.4** The initial 200 firms were selected predominantly via random sampling, but with the aim of including a wide cross-section of firms varying by size and whether GI intermediation was their primary activity or whether it was ancillary to their main business activity (such as property management, the sale of cars or other goods and services). The sample included Lloyd's brokers, intermediaries acting as MGAs, trade/professional bodies that provide insurance to their members, and insurers where they were carrying out intermediation.
- 2.5** Through an electronic data request, the 200 firms selected were asked to provide details of their PII, including a copy of their policy and their recent claims history. This information was intended to supplement what firms provide to us in their Retail Mediation Activities Return (RMAR). The returns were analysed against the requirements of MIPRU.

⁴ MIPRU 3.1.3G (2).

⁵ MIPRU 3.1.3G (1).

⁶ MIPRU 3.1.1R (3).

- 2.6** In practice, 186 firms were surveyed. The other firms had, between the point in time from when the sample was selected and the date the data request was sent out, ceased business for various reasons or asked for their GI intermediation permission to be withdrawn. One firm in the sample had a comparable guarantee.
- 2.7** In addition to the survey of firms, we met with trade associations representing brokers (including London Market brokers), insurers, and MGAs. The aim was to seek the views of market participants about the size and breadth of the market, the range of cover available, and how the product performs. In general, what industry stakeholders told us about the market and availability of cover was consistent with what emerged from our analysis of individual firms' policies.
- 2.8** When considering the PII that firms had in place, we assessed this against the requirements set out in MIPRU 3.2, which include:
- The product must be purchased from an insurer with appropriate authorisation in: the EEA; a Zone A country; or the Channel Islands, Gibraltar, Bermuda or the Isle of Man.⁷
 - There must be cover for claims arising from the conduct of the firm, its employees and ARs.⁸
 - Cover must meet the minimum limits of indemnity requirements.⁹
 - Cover must meet the requirements as to the policy excess.¹⁰
 - There must be appropriate cover in respect of legal defence costs.¹¹
 - There must be continuous cover.¹²
 - There must be cover for Ombudsman awards made against the firm.¹³

7 MIPRU 3.2.1.

8 MIPRU 3.2.4 (1).

9 MIPRU 3.2.7.

10 MIPRU 3.2.11 and 3.2.12.

11 MIPRU 3.2.4 (4).

12 MIPRU 3.2.4 (5).

13 MIPRU 3.2.4 (6).

3. Our findings

a. Availability of cover

- 3.1** In the course of our meetings, industry participants suggested that about 30 insurers were active in the market, indicating that there is sufficient breadth within the market to provide choice. In fact, we found that the market for GI PII was even wider than market participants thought. Within the sample of firms in the review, we found policies from nearly 60 providers. These comprised 40 insurers (not including those which provided 'following' capacity on larger subscription risks) and 16 MGAs. Of the insurers, 18 wrote only a single policy within our sample. The capacity of the MGAs was provided both by insurers that underwrite PII in their own right and by other firms.
- 3.2** Of the insurers and MGAs providing PII cover to firms within our sample, nearly 90% are located in the UK. All are authorised in jurisdictions permitted by MIPRU.¹⁴
- 3.3** We found that GI intermediaries were able to buy cover for the range of their GI business. This included insurance broking, being an MGA, operating binding authorities, claims handling, and having ARs. The terms under which cover was available varied and were more restricted in some instances. For example, in relation to binding authorities, cover was (in some cases) limited to binding authorities where all terms and conditions were pre-agreed; in other cases, cover was provided without these restrictions.
- 3.4** A limited number of firms in the review had cover for personal investment, pensions, and related activity. However, such activities were normally excluded from policies, as many of the firms in the sample do not undertake these activities.

b. Limits of indemnity

- 3.5** We found that firms are able to buy high limits of indemnity where they require these. Four firms in the sample had policy limits greater than £100m (or currency equivalent). A further four firms had policy limits of between £50m and £75m.
- 3.6** We analysed the degree to which firms had bought policy limits that met the minimums stipulated in MIPRU.¹⁵ These are:
- the equivalent of Euros 1,120,200 for a single claim, and
 - the equivalent of Euros 1,680,300 in the aggregate, or 10% of a firm's income if this would result in a higher limit, up to a limit of cover of £30m

¹⁴ MIPRU 3.2.1R.

¹⁵ MIPRU 3.2.7.

3.7 MIPRU¹⁶ also requires that if a policy is denominated in any currency other than Euros, a firm must take reasonable steps to ensure that the limits of indemnity are, when the policy is effected and at renewal, at least equivalent to those required. The vast majority of policies in our sample had limits denominated in sterling, though there were also policies with limits in US dollars (six policies) and Euros (four policies).

3.8 In regard to whether firms had the required minimum levels of cover:

- At the time of our assessment (June 2016), one firm did not have the required minimum limit of cover for a single claim. At renewal of its PII, the firm had increased the amount of cover it bought to a limit greater than the required minimum.
- Four firms did not have annual aggregate cover that equated to 10% of their annual income, up to a limit of cover of £30m. The degree of shortfall varied from £10.8m to £120k. In two cases, this was because the firm had misinterpreted MIPRU and the need to have cover up to 10% of annual income up to £30m of cover. These firms all bought additional cover or increased their limits so that they met the minimum requirements.
- We asked 26 firms whether, at the time they had bought or renewed their policy, its sterling limits equated, at the prevailing exchange rates, to the minimum 'any one claim' and 'aggregate' Euro limits required by MIPRU. Thirteen firms provided information confirming that their policies were compliant. Twelve firms increased the sterling limit of indemnity on their policies. One firm had ceased to trade since originally being surveyed.

c. Maximum excess levels

3.9 MIPRU¹⁷ stipulates that the maximum excess on a firm's PII policy should be:

- the higher of £2,500 and 1.5% of annual income for firms that do not hold client money or other client assets; or
- the higher of £5,000 and 3% of annual income for firms that hold client money or other client assets

3.10 If firms have a higher excess than these relevant limit levels, they must hold additional capital. The tables in MIPRU¹⁸ stipulate how much additional capital must be held, depending on the firm's income and the level of its policy excess.

3.11 We found that:

- Of the sample, 169 firms had excesses at or below the maximum permitted level.
- Thirteen firms had excesses greater than those permitted but held at least the required level of additional capital.
- One firm had an excess greater than permitted and did not have the additional capital required to support the increased excess. When this issue was raised, this firm reduced the excess on its policy to a compliant level.

¹⁶ MIPRU 3.2.8.

¹⁷ MIPRU 3.2.11 and 3.2.12.

¹⁸ MIPRU 3.2.14.

d. Exclusion clauses

3.12 In our review and assessment of policies, we found a number of exclusion clauses that remove certain types of claim from cover. This raised the question of whether these clauses were formulated in a way that leads to the MIPRU requirement to have cover in relation to claims for which the firm may be liable not being met.¹⁹ The four broad types of exclusion we identified in the sample of policies related to suitability of insurer, unrated insurer, non-admitted insurer, and insurer insolvency.

Suitability of insurer exclusion

3.13 We found this type of exclusion in 11 policies, from five different providers, most of which were providing PII cover for intermediaries operating as insurance brokers with regulatory permission to provide advice. An example of such a clause is:

'Any claim arising from advice by the insured on the suitability (which expression shall, without prejudice to the generality of such term, include financial standing) of any insurer with whom any insurance (including reinsurance) is placed.'

3.14 One of the core functions these intermediaries were performing is providing advice about the suitability of insurance companies, including their products, claims service and financial standing. This exclusion therefore appears to be inconsistent with the MIPRU requirement for cover to be for insurance mediation. We raised this issue with the intermediaries in question, who then had this exclusion removed from their existing policy or by arranged alternative cover.

Unrated insurer and Non-admitted insurers exclusion

3.15 We found the Unrated Insurers exclusion in two policies, which were from the same provider. The wording of the clause is:

'...arising directly or indirectly out of the placement of insurance or reinsurance with any insurer or reinsurer who, at the time of the placement, held a financial strength, credit or other similar rating of less than A- from any one of A M Best, Standard & Poor's, Moody's or Fitch Ratings. However, this EXCLUSION shall not apply where you have obtained written agreement from your client to place their insurances with this insurer or reinsurer.'

3.16 We found one variant or another of the Non-admitted insurer exclusion in thirteen policies from four different providers. An example of this exclusion is:

*'Any business placed with any insurer or reinsurer who is not authorised to transact insurance business in the United Kingdom by the Department of Trade and Industry or any other equivalent European regulatory body, unless you have informed your client of this and of the fact that the policy will not be protected by the Policyholders Protection Fund and your client has nevertheless given you written instructions to place the business with that insurer.'*²⁰

3.17 If the intermediary does place business with unrated or non-admitted insurers without obtaining the necessary written client agreement, then the effect of this clause is to remove claims arising from this business from the cover under the policy. This appears to be inconsistent with the requirement in MIPRU for cover to be for claims for which the firm may be liable as a result of its conduct.

¹⁹ MIPRU 3.1.1 (1).

²⁰ The out-of-date references to the DTI and PPF are as included within the policy wording.

3.18 Where we found these clauses in the policies of firms within the review we raised our concerns with them. In all cases they confirmed that they did not place business with unrated or non-admitted insurers. Nevertheless, where PII providers have concerns, due to financial rating or other reasons, about intermediaries placing business with particular categories of insurer firms may wish to consider mitigating strategies which do not risk excluding the required cover for claims for which the intermediary may be liable.

Insurer insolvency exclusion

3.19 In one form or another, we found insurer insolvency exclusions in 140 of the policies we assessed. Some of the clauses referred to the insolvency of insurers; others, more commonly, extended to the insolvency of the range of financial institutions with which a firm has had dealings, including building societies, banks, investment managers, and stockbrokers.

3.20 In our discussions with PI insurers, they explained that insurer insolvency exclusions are included in policies, as they do not want to underwrite the credit risk of the insurers with which the intermediary places policies. In the event of the insolvency of an insurer, they considered that policyholders should seek compensation from the Financial Services Compensation Scheme (FSCS).

3.21 However, we found that the breadth of the exclusion clause varied widely – specifically how closely linked the claim needs to be to the insolvency of the insurer or other financial institution to be excluded. In many cases, we were concerned that the exclusion clause would not provide intermediaries with the necessary cover under the policy for claims for which they may be liable. This could be because the intermediary did not act on instructions and add an item to the insurance or increase a sum insured, and the client's insurance happens to be placed with an insurer that has become insolvent. Alternatively, there may have been negligence on the part of the intermediary in the selection of an insurer that subsequently became insolvent.

3.22 It is not clear to us how insurer insolvency exclusion clauses, formulated in a broad fashion, would operate effectively to ensure that the required cover under MIPRU remains in place.

The implications for firms

3.23 The obligation is on GI intermediaries to ensure their policy is compliant with MIPRU and provides adequate cover for claims arising from their intermediation activities. Firms will want to assess, with the assistance of specialist PII brokers (where they use one to place their insurance), whether any exclusions in the PII policy has the effect of the requirements of MIPRU not being met, as the policy does not provide appropriate cover for all of the intermediation activities that they carry out.

3.24 Product providers (insurers and MGAs) should also consider whether exclusions within their policies mean they are providing products suitable for the GI intermediary customers within their target market.

e. Cover for Appointed Representatives (ARs)

3.25 We found that 119 policies explicitly provided cover for ARs. The basis on which they provided this cover varied. In some cases, all ARs had to be notified to, and agreed by, the insurer. In other cases, the ARs were listed in the schedule to the policy. In other cases, there was blanket cover for the firm's ARs, with no requirement for them to be notified to, or agreed by, the insurer.

- 3.26** In the policies of 69 firms there was no specific cover for claims in relation to the conduct of ARs. 21 of these firms currently have ARs on the Financial Services Register, creating the risk that there is not appropriate cover in place for these AR activities. In some cases, where there was not explicit cover for ARs, the policies did include 'agents' of the firm generally. Other policies contained a clause stating that the policy provided cover that met the minimum insurance requirements required by the FCA. However, policies that do not make explicit provision for ARs risk not meeting the requirements of MIPRU.

f. Cover for FOS awards

- 3.27** The FOS can make binding awards up to £150k. The amount FOS could award was increased from £100k to £150k for complaints received after 1 January 2012. We considered how and whether the policies in our sample provided cover for FOS awards and found that, in the majority of policies, there was explicit cover for FOS awards. However, some policies that provided explicit cover only did so subject to a financial sub-limit. In 15 policies, the sub-limit was £100k for any one claim, the limit presumably not having been increased in line with the increase in the maximum FOS award, and therefore being insufficient to provide full cover for FOS awards. Sixteen policies had an annual aggregate limit of cover for FOS awards of, most typically, £150k which could be exhausted quickly if FOS made a number of awards against the firm, and did not appear to provide the minimum extent of cover required by MIPRU. In 48 policies, cover for FOS awards was not explicitly provided. We saw policies containing various different formulation of what was covered under the insuring clause, where it was not clear that the policies provided cover for FOS awards. Policies with no explicit provision for FOS awards risk not meeting the requirements of MIPRU.

g. Inaccuracies in policies

- 3.28** In addition to the findings already mentioned, there was other evidence to suggest that policy wordings were not being regularly and carefully reviewed and updated as necessary. We saw a small number of policies that contained exclusions which, as drafted, excluded GI mediation. The purpose of these exclusions appeared to be to exclude investment-related activities. However, because of the way these exclusions were drafted, and not overridden by more specific policy terms or endorsements, the effect was to exclude all financial services activities including GI intermediation. An example of this is:

Exclusion that excluded GI intermediation

'Any regulated activities as defined in the Financial Services and Markets Act 2000, as amended from time to time...

...arising from Insurance and Investment Services regardless of whether or not such Insurance and Investment Services are in contravention of or breach FSA 86 or FSMA.'

3.29 Where we encountered such exclusions, we drew them to the attention of firms. The firms then obtained endorsements from the product provider to ensure that the policy provided appropriate cover for GI intermediation, as originally intended. There were 48 policies that included out-of-date language when referring to financial service regulators. This ranged from reference to the 'FSA' rather than 'FCA' to, at the most extreme, reference to the 'DTI' as the insurance regulator and the 'General Insurance Standards Council' (GISC). The DTI ceased to be responsible for GI regulation in 1998 and GISC for conduct self-regulation in 2005. In addition, the policies of one product provider include a Y2K compliance clause.

4. Actions required and next steps

Firms in the review

- 4.1** We have already engaged with the firms in the review:
- Where we had concerns as to whether the limits of indemnity and excesses on their policies were compliant with MIPRU. The firms have amended their policies where necessary.
 - Where policies contained exclusions that were drafted so widely as to remove all cover, the firms were contacted and they proactively sought to have their policies amended to reflect the original intent behind the mis-worded exclusion.
- 4.2** However, many of the policies of these firms still contain concerning features, such as relating to inappropriate financial sub-limits for FOS awards and out-of-date references to regulatory bodies.
- 4.3** Feedback is being provided to firms where we had concerns about the policy terms being wholly compliant with what is required under MIPRU. This includes firms:
- Ensuring that action is taken to remove inaccuracies from their policies
 - Ensuring the policy provides the cover required for FOS awards and ARs
 - Reviewing whether the effect of exclusions in their policy (of the type considered in this report) is to provide less than the full cover for their intermediation activities, as required by MIPRU.
- 4.4** Where we have found issues with the PII in place, we are considering whether there is a need for further regulatory action. Where we find such issues in future, we will also consider the need for additional actions, having regard to the fact that we have highlighted this area and these issues via the publication of our findings following this piece of work.

Other GI intermediaries

- 4.5** We expect GI intermediaries that were not included in our work to review their policies in the light of the findings set out in this report, engaging the assistance of the third-party intermediaries that place their PII as appropriate. In performing this review, we would expect firms to ensure that the policy meets the requirements in MIPRU 3 including that:
- they have limits of indemnity which comply with the '10% of annual revenue up to £30m of cover' requirement

- the sterling limits in their policies meet, when bought or renewed, the minimum Euro limits in MIPRU 3.2.7R (especially in the light of the changes in the exchange rate that have taken place since the referendum on membership of the EU)
 - the policy excesses, supported by additional capital where required, do not exceed that permitted by MIPRU
 - the policy provides adequate cover for FOS awards
 - the policy does not contain exclusions that have been inaccurately drafted (for example, as to remove all cover from the policy)
 - the policy does provide cover for ARs (if the firm has them)
 - the policy does not contain exclusions, the effect of which is to provide less than the full cover for the firm's intermediation activities, as required by MIPRU; and
 - the policy does not contain out-of-date references to regulatory bodies, and other matters, such as Y2K compliance
- 4.6** PII policies should not contain inaccuracies, errors or exclusions that serve to create gaps or omissions in the required cover. Policies should be reviewed carefully, including at each subsequent renewal, to ensure that they remain compliant, are free of inaccuracies, and provide cover for claims arising from any of the activities of the intermediary.

Product providers

- 4.7** We would expect insurers and MGAs that provide PII in this area to review their products in the light of the findings in this report to see if they are consistent with the needs of those intermediaries to whom they are providing cover, including their cover with the relevant MIPRU requirements.

Industry engagement by the FCA

- 4.8** Further to the publication of this report we will engage with relevant stakeholders in the GI industry, including through the appropriate trade bodies, to discuss the findings and provide additional clarity around our expectations. This will ensure that there is a clear understanding of our findings and what actions need to be taken to address the identified issues.

Financial Conduct Authority



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