

The top ten things you should know about the PRIIPs Regulation

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An overview of the Regulation on key information documents (KID) for packaged retail and insurance-based investment products (the "[PRIIPs Regulation](#)") which comes into force 31 December 2016.

Action for firms

At this stage, PRIIPs product manufacturers should:

- draft KIDs for baskets of products;
- implement automation for the production of KIDs; and
- consider engagement with ESMA in relation to Level 3.

Introduction

On 9 December 2014, the Regulation on key information documents for packaged retail and insurance-based investment products (the “[PRIIPs Regulation](#)”) was published in the Official Journal. It will apply from 31 December 2016. References below to “Articles” are to the PRIIPs Regulation unless otherwise specified.

The PRIIPs Regulation is part of a wider package of EU reforms aimed at enhancing investor protection and improving confidence in financial markets. The PRIIPs Regulation aims to place retail structured products and other packaged products providing the same economic exposure to investors on a level playing field by increasing their transparency and comparability. In addition, it will apply a common EU standard for the format and content of pre-contractual information to be given to retail clients thus allowing investors to better understand the nature, risks and costs associated with each product, easily compare products, and therefore make an informed decision about their investments.

The PRIIPs Regulation is the result of long deliberations between the Council of the EU and the European Parliament (see the initial proposal by the European Commission on 3 July 2012 (the “[Original Proposal](#)”) and the political agreement reached by the parties on 1 April 2014 (the “[Political Agreement](#)”). Significant areas of tension on the PRIIPs Regulation have been product scope, allocation of responsibility between product manufacturers and distributors and product manufacturers’ liability.

On 30 June 2016, the European Commission adopted a delegated act introducing regulatory technical standards (“[RTS](#)”) and [annexes](#) which specify the content and underlying methodology of the KID. It is now subject to review by the European Parliament and Council (for 2 months with a further 1 month extension if necessary).

This note will look at the key provisions of the PRIIPs Regulation and how it will impact the origination, marketing and sale of retail products across the EU.

1 Which products are covered by the PRIIPs Regulation?

The PRIIPs Regulation applies to investments, where, regardless of the legal form of the investment, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor (Article 4(1)).

This includes structured products (whatever the underlying legal form), insurance-based investments (including unit-linked and “with” profit products) and investment funds.

In scope (Article 2(1))

- structured deposits
- derivatives
- structured notes (including those issued SPVs)
- alternative investment funds (AIFs)
- insurance-based investment products (defined in Article 4(2))
- UCITS (transitional period of 3 years)
- structured deposits as well as saving products that are structured as having an income stream on retirement but not officially recognised as a pension product

Outside Scope (Article 2(2))

- classes of non-life insurance products (see [Annex 1 of Directive 2009/138/EC](#)).
 - life insurance contracts payable only on death, injury, illness or infirmity
 - deposits other than structured deposits (defined in [point \(43\) of Article 4\(1\) of Directive 2014/65/EU](#))
 - securities (referred to in [points \(b\) to \(g\), \(i\) and \(j\) of Article 1\(2\) of Directive 2003/71/EC](#))
 - occupational pension schemes (within the scope of [Directive 2003/41/EC](#) of the EU Parliament and of the Council or [Directive 2009/138/EC](#))
 - individual pension products for which the employer is required by law to contribute and where the
-

In scope (Article 2(1))

- certain instruments issued by special purpose vehicles

Outside Scope (Article 2(2))

- employee has no choice of pension provider (the Commission will decide after four years whether to continue with this exclusion)
 - pension products which have primary purpose of providing investor with income on retirement
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There is still a level of uncertainty around whether certain other products are within scope of the PRIIPs Regulation.

It is intended that the PRIIPs Regulation will be reviewed by the EU Commission by 31 December 2018 (Article 33(1)), in particular, to consider whether current exempt products (e.g. UCITS) or any new product innovations need to be included. It is likely that going forward more investment products will be brought within the PRIIPs Regulation.

2 Who is responsible for producing and updating the KID?

The PRIIPs Regulation places the obligation to produce a KID solely on the PRIIP manufacturer (Article 5(1)). A PRIIP manufacturer is defined as (i) any entity that manufactures PRIIPs (Article 4(4)(a)); or (ii) any entity that makes changes to an existing PRIIP including, but not limited to, altering its risk and reward profile or the costs associated with an investment in a PRIIP (Article 4(4)(b)). These will typically be fund managers, insurance undertakings, banks or investment firms (Recital 12).

Though the PRIIP manufacturer may delegate the responsibility to produce a KID where it is impractical for them to do so (Recital 12), at this stage is not clear in what circumstances that would be appropriate. In addition, the PRIIP manufacturer will be responsible for reviewing the KID in order to ensure that the information it contains is up to date (Article 10(1)).

The obligation on the PRIIP manufacturer to produce a KID and publish it on their website arises “before a PRIIP is made available to retail investors” (Article 5(1)). However, it is the responsibility of persons “advising on, or selling, PRIIPs” to provide the KID to investors which will usually, in the case of retail structured products, be a distributor/intermediary rather than the PRIIP manufacturer. The result is that PRIIP manufacturers could be exposed to potential liabilities in the event that their products are sold by distributors to retail investors without their knowledge and therefore without a KID, or potentially when changes to the KID have not been communicated to the investor.

The RTS make clear that a PRIIP manufacturer should review the information contained in the KID every time there is a change that significantly affects, or is likely to affect significantly, the information contained in the KID and, at least every twelve months following the date of the initial publication of the KID. When it is concluded, following such review, that a change needs to be made, the KID shall be revised without undue delay (Articles 15 and 16 RTS).

3 What is the format of the KID?

The PRIIPs Regulation requires that the KID shall:

- be accurate, fair, clear and not misleading (Article 6(1));
- be a stand-alone document (clearly separate from marketing materials) (Article 6(2));

- be a maximum of 3 sides of A4 paper when printed (Article 6(4));
- be presented so it is easy to read, using characters of readable size and written in a concise manner (Article 6(4)(a));
- be written in language that is clear, succinct and comprehensible (Article 6(4)(c));
- be clearly titled at the top of the first page “Key Information Document” (Article 8(1));
- contain an explanatory statement directly underneath the title which states:
“This document provides you with key information about this investment product. It is not marketing material. The information is required by law to help you understand the nature, risks, costs, potential gains and losses of this product and to help you compare it with other products” (Article 8(2)).
- state the name of the PRIIP, the identity, contact details and the competent authority of the PRIIP manufacturer and the date of the document (Article 8(3)(a)); and
- where applicable, contain a comprehension alert which shall read:
“You are about to purchase a product that is not simple and may be difficult to understand” (Article 8(3)(b)).

4 What information does the KID need to include?

The form and content of the KID are highly prescribed. In addition to a section describing the PRIIP in question, the KID must contain a summary risk indicator, performance scenarios and a summary cost indicator, which must be calculated on the basis of methodologies prescribed in detail in the annexes to the RTS.

Annex I to the RTS contains a template specifying the form of the KID.

Key Information Document

Purpose

This document provides you with key information about this investment product. It is not marketing material. The information is required by law to help you understand the nature, risks, costs, potential gains and losses of this product and to help you compare it with other products.

[Alert (where applicable)] **You are about to purchase a product that is not simple and may be difficult to understand**

Product

[Name of Product] [Name of PRIIP manufacturer] [where applicable ISIN] [website for PRIIP manufacturer] Call [telephone number] for more information [Competent Authority of the PRIIP Manufacturer in relation the PRIIP] [date of production of the KID]

What is this product?

Type

Objectives

Intended retail investor

Insurance benefits

What are the risks and what could I get in return?

Risk Indicator

Description of the risk-reward profile
Summary Risk Indicator

SRI template and narratives as set out in Annex III on possible maximum loss: can I lose all invested capital? Do I bear the risk of incurring additional financial commitments or obligations? Is there capital protection against market risk?

Performance Scenarios

Performance Scenario templates and narratives as set out in Annex V including where applicable information on conditions for returns to retail investors or built-in performance caps, and statement that the tax legislation of the retail investor's home Member State may have an impact on actual payout

What happens if [PRIIP Manufacturer] is unable to pay out?

Information on whether there is a guarantee scheme, the name of the guarantor or investor compensation scheme operator, including the risks covered and those not covered.

What are the costs?

Costs over time Template and narratives according to Annex VIII

Composition of Costs Template and **narratives according to Annex VII**

Narratives on information to be included on other distribution costs

How long should I hold it and can I take money out early?

Recommended [required minimum] holding period: [x]

Information on whether one can disinvest before maturity, the conditions on this, and applicable fees and penalties if any. Information on the consequences of cashing-in before the end of the term or before the end of the recommended holding period

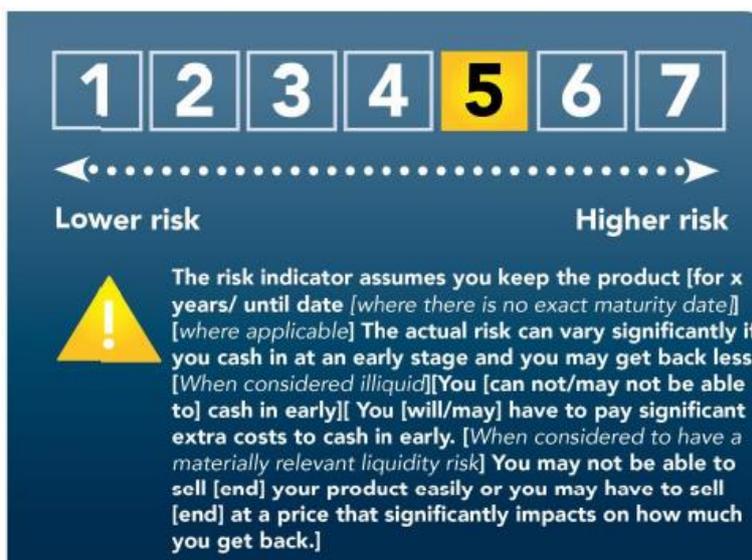
How can I complain?

Other relevant information

Presentation of risk in the KID

PRIIP manufacturers are required to allocate a risk measure based on market risk and credit risk using a prescribed methodology set out in the annexes to the RTS. For the purposes of determining market risk, PRIIPs are divided into 4 categories. A PRIIP should also be allocated a credit risk measure (CRM) on a scale ranging from 1 to 6. Derivatives, for example, automatically fall into category 1.

The overall risk measure must then be reflected in a standard form summary risk indicator with seven risk classes. The risk section of the KID should also include certain standard narratives e.g. to warn of currency risk, where relevant.



Performance scenario section of the KID

The KID must either include a table showing unfavourable, moderate and favourable performance scenarios in respect of the PRIIP or for futures, call options and put options traded on a regulated market, performance scenarios should be presented in a pay-off structuring graph.

Example presentation of performance scenarios

Investment □		1 years	[3] years	[5] years (Recommended holding period)
Unfavourable scenario	What you might get back after costs	□	□	□
	Average return each year	□	□	□
Moderate scenario	What you might get back after costs	□	□	□
	Average return each year	□	□	□
Favourable scenario	What you might get back after costs	□	□	□
	Average return each year	□	□	□

Costs section of the KID

The KID must disclose the impact of total costs and a breakdown of the different types of costs applicable to the PRIIP. This includes:

- one-off costs (e.g. entry and exit costs)
- ongoing costs (including portfolio transaction costs), and
- incidental costs (e.g. performance fees).

Costs should be presented in two tables, one showing the costs over time and the other showing the composition of those costs.

Presentation of costs over time

Investment [€10 000] Scenarios	If you cash in after [1] year	If you cash in after [recommend [at the recommended holding period/2] holding period]	If you cash in after [recommend [at the recommended holding period/2] holding period]
Total costs	[]	[]	[]
Impact on return (RIY) per year	[]%	[]%	[]%

5 Can the KID cross-refer to other documents?

Yes, a KID may cross-refer to relevant documents (e.g. a prospectus) but only where the material directly relates to information required under the PRIIPs Regulation. The KID must not contain any cross-references to marketing material (Article 6(2)).

Where the PRIIP offers the retail investor several options for investments and the information required for each underlying investment option cannot be provided within a single, concise, stand-alone document, the KID must provide at least a generic description of the underlying investment options and state clearly where and how more detailed pre-contractual information can be found (Article 6(3)).

6 When must a KID be provided to a retail investor?

The obligation to provide the retail investor with the KID falls on the person ‘advising on or selling’ the PRIIP and must be given in good time before the investor is bound by any contract or offer relating to the PRIIP (Article 13(1)).

The RTS provide some further clarity on how the ‘in good time’ requirement should be interpreted. Article 17 RTS suggests that:

- the meaning of “in good time” is case specific and depends on the knowledge and experience of the particular retail investor;
- where a KID is provided in respect of a particularly complex PRIIPs, the retail investor may require additional time to consider its contents; and
- the urgency of the situation (eg where a retail investor wants to buy a PRIIP at a particular price) may also be a relevant factor.

The KID may be provided after the conclusion of a transaction, provided that all of the following conditions are met: (i) the investor chooses (on his own initiative) to contact the seller of the PRIIP and conclude the transaction using a means of distance communication; (ii) the provision of the KID in good time before the investor is bound by any contract or offer relating to the PRIIP is not possible; (iii) the investor has been informed of this and given the option to delay the transaction so as to have time to read the KID; and (iv) the investor consents to receiving the KID without undue delay after the conclusion of the transaction (Article 13(3)(a-d)).

7 In what medium must the KID be provided?

The KID must be provided to a retail investor free of charge either on paper, or another durable medium other than paper where it is appropriate and the investor has been given a choice and has chosen the other medium (Article 14(1) – (4)). A website can be used provided: (i) the provision of the KID on a website is appropriate in the context of the business with the retail investor; (ii) the investor has been given a choice between information on paper or on a website and there is evidence of the investor choosing the latter; (iii) the investor has been notified electronically, or in writing, of the website address and where on the website to locate the information; (iv) the KID remains accessible on the website so that the investor is able to download and store for such a period of time as required. Investors must be informed of their right to request a paper copy free of charge (Article 14(3)).

8 Who has liability for the KID?

The civil liability of a PRIIP manufacturer is limited to circumstances where an investor has incurred loss as a result of the KID being misleading, inaccurate or inconsistent with the relevant parts of legally binding pre-contractual and contractual documents or with the information required under Article 8 of the PRIIPs Regulation (Article 11(1)). Therefore, the broad liability provision and the reverse burden of proof that was laid out in the Original Proposal have been removed. However, given the limitations on the length of the KID, it is likely that PRIIP manufacturers will rely on further documentation to give investors full disclosure. This may give rise to liability in circumstances where there is a mismatch between information contained in the KID and that in the additional documentation (i.e. a prospectus) which turns out to be the cause of the loss. In addition, without any clear definition of “pre-contractual” documents, it may be left open for this to include marketing materials which would also be a cause of concern for PRIIP manufacturers. Care will need to be taken in the drafting of a KID and when cross-referring to other materials to limit any such risk.

9 How will the regime apply to UCITS?

The UCITS IV ([Directive 2009/65/EC](#)) introduced a mandatory key investor information document designed specifically for UCITS. Although UCITS fall within the scope of the PRIIPs Regulation, in order to allow the UCITS IV regime to take hold, UCITS will be exempt from the PRIIPs Regulation until 31 December 2018. After the expiry of the transitional period, and in the absence of any extension to the period, UCITS will become subject to the PRIIPs Regulation (Article 32).

10 Does the PRIIPs Regulation include any product intervention powers and is there a transitional period?

Yes. The PRIIPs Regulation gives national regulators powers to prohibit or restrict the marketing, sale or distribution of certain PRIIPs where there is a threat to investors or to the orderly functioning of the financial markets within a Member State. In addition, EIOPA shall have the power to temporarily, prohibit or restrict the marketing, distribution or sale of certain PRIIPs, where:

- there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets (Article 16(2)(a));
- existing regulatory requirements do not address the threat (Article 16(2)(b)); and
- competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address the threat (Article 16(2)(c)).

These product intervention powers should reflect the powers conferred on ESMA and EBA under MiFID 2 so as to ensure that such mechanisms for intervention can be applied for all investment products irrespective of their legal form.

For more information on regulation of the sale and production of retail products please see our Simmons & Simmons [PRIIPs Microsite](#).

This document is provided for information purposes only and does not constitute legal advice. Professional legal advice should be obtained before taking or refraining from any action as a result of the contents of this document.

Key Papers

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| 17 November 2014 | ESA Discussion Paper on Key Information Documents for PRIIPs (JC/DP/2014/02) |
| 17 February 2015 | JAC response to ESA Discussion Paper on Key Information Documents for PRIIPs |
| 30 June 2016 | Delegated act introducing RTS and annexes adopted by the European Commission |

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