

Comments

Review of the PRIIPs Regulation in the context of Retail Investment Strategy Proposal of the European Commission

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I. General assessment

On 24 May 2023, the European Commission published a draft for the amendment of the PRIIPs Regulation (PRIIPs Draft) within the framework of its Retail Investment Strategy (RIS). The German Banking Industry Committee (GBIC) welcomes the intention of the European Commission to also revise the PRIIPs Regulation within the framework of the RIS. In doing so, some of the **existing weaknesses of the regulatory requirements are to be eliminated** so that the Key Information Documents (KIDs) can form a **better basis for the investment decisions of retail investors**.

In its draft regulation, the European Commission proposed some **positive changes**, such as the **priority of the electronic provision of KIDs** (this creates a synchronisation with MiFID II) or **the exemption for bonds with a make-whole clause to be out of scope of application of the PRIIPs Regulation**.

Nevertheless, we would have liked the European Commission to propose **further improvements in order** to strengthen **confidence in the capital markets** and thus promote **investments by retail investors in particular**. For example, the **European Supervisory Authorities (ESAs)** had proposed **several further improvements** in their final report for the PRIIPs review¹, **which were not** taken into account in the PRIIPs Draft. Overall, the proposals in the PRIIPs Draft are not very concrete and it would be desirable not to outsource too much to the level 2. **Improvements** are therefore urgently needed in the further legislative process.

In order to achieve the goal pursued with the PRIIPs review of significantly improving KIDs, further points in particular should be introduced into the upcoming legislative process (there are already **concrete recommendations from the ESAs** on many aspects, see under II. 2.).

II. Evaluation in detail

1.) Amendments proposed by the European Commission

We comment as follows on the main amendments proposed by the European Commission:

a) Exemption for bonds with a make-whole clause (Article 4(1) PRIIPs Draft)

GBIC welcomes the proposal to exclude bonds with a make-whole clause from the scope of application of the PRIIPs Regulation by supplementing the definition of PRIIP products in Article 4(1) of the PRIIPs Regulation. This will make PRIIPs available again for retail investors, which is currently not the case and leads to many client complaints. In addition, the proposed modification will create a parallel to the product governance exemption under MiFID II.

b) Omission of the warning (Article 8(3)(b) PRIIPs Regulation)

The proposed omission of the warning by deleting the current provision in Article 8(3)(b) PRIIPs Regulation is supported by GBIC.

¹ ESAs: Call for advice on PRIIPs: ESA advice on the review of the PRIIPs Regulation (JC 2022 20) of 29 April 2022.

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c) Definition of electronic format (Article 4(7a) PRIIPs Draft)

In principle, GBIC welcomes the proposal to give priority to the provision of the KID in electronic format according to Article 14(1) sentence 2 PRIIPs Draft.

However, in our opinion the provision of KIDs via website should continue to be possible and should be explicitly included in Article 4(7a) PRIIPs Draft as a permissible medium analogous to the current Article 14(2)(c) PRIIPs Regulation. We are not aware of any problems that would argue in favour of abandoning this form of provision with the new regulation. The proposed definition of "electronic format" only permits provision by means of a durable medium other than paper (see new definition of electronic format in Article 4(7a) PRIIPs Draft). Provision via a website, as is implemented in many cases today, is not envisaged for in the newly proposed definition of electronic format.

However, in some places in the newly proposed Article 14 PRIIPs Regulation, the provision via website is mentioned, so that we assume that this form of provision is not to be excluded. For example, Article 14(2) PRIIPs Draft provides for the optional possibility of making the KID available in electronic format by means of an interactive tool. However, an interactive tool does not generally meet the requirements of a durable medium as required under the definition of Article 4(7a) PRIIPs Regulation. The possibility of a link solution with the corresponding indication to download and save the KID, which is further provided in Article 14(2c) PRIIPs Draft, also suggests that the provision of the KID via a website should continue to be possible. Likewise, Article 14(5) PRIIPs Regulation contains an obligation to inform the retail investor of the address of the website (URL) and the location on the website where the KID can be found. Taking into account the currently functioning system of providing the KID via a website and the presumptive ratio of Article 14 PRIIPs Draft after which this type of provision is to be considered to be sufficient within the meaning of the PRIIPs Regulation, the proposed definition of "electronic format" or its reference in Article 14(1) sentence 2 PRIIPs Draft (see wording "provided in electronic form") should be expanded or supplemented accordingly.

The KID is not a client-specific but a product-specific document, so that the provision by the distributor via the manufacturer's website is also appropriate for this reason. In addition, the website facilitates the manufacturer's obligation to update (Article 10 PRIIPs Regulation).

d) Introduction of a dashboard ("At a glance" or "Product at a glance" (Article 8(3)(aa) PRIIPs Draft)

With regard to the proposal to implement an introductory overview (so called dashboard) at the beginning of the KID (Article 8(3)(aa) PRIIPs Draft), the question arises whether a summary presentation of the most important information in the KIDs is actually that useful. That seems to be redundant. Information that the client can easily find in the KID, which is only three pages long, is reproduced only. This additional section should be dispensed. While an introductory summary is useful for long documents, the added value of an introductory overview in such a short information sheet as the KID is not apparent to us.

In this context, it should also be considered that many manufacturers already have problems complying with the 3-page-limit. Due to the proposed additions concerning not only the dashboard but also the new information on sustainability (see section e)), it will hardly be possible to comply with the 3-page-limit in the future. In this respect, either the proposed amendment should be dispensed, current content of the KIDs should be omitted (e.g. the section on costs or instead of the current scope a reference to the ex-ante

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cost disclosure, insofar the PRIIP is a financial instrument within the meaning of MIFID II; see below under II. 2. d)) or the 3-page-limit should be abandoned.

However, in case that a dashboard is considered necessary, the product disclosures should be presented in a single table under a single heading, i.e. the disclosures under Article 8(3)(a) PRIIPs Regulation should be combined with the disclosures under the new Article 8(3)(aa) PRIIPs Draft. The new product disclosures currently placed in Article 8(3)(aa), for which a separate heading is provided, should therefore be integrated into the existing paragraph 3(a). This would result in a product disclosure being placed at the beginning of the KID as is currently the case, i.e. the already existing table with the heading "Product" could be expanded to include the new disclosures and the heading could in future instead read, for example, "Product at a glance". However, the maximum number of pages would then have to be increased to 4 pages. If none of these proposals is accepted, only a very abbreviated presentation of the necessary information in the dashboard will be possible.

e) Harmonisation of sustainability disclosures under MiFID II and PRIIPs Regulation (Article 8(3)(ga), PRIIPs Draft)

The draft of the European Commission provides a new provision in Article 8(3) PRIIPs Regulation in lit. ga), by which a sustainability section is to be added to the KID. This section is to provide information on two sustainability criteria. This deviates in terms of content from the sustainability preferences that the advisors are required to meet under Article 54 and Article 2 No. 7 Delegated Regulation (EU) 2017/565 when providing the investment service of investment advice.

In addition, the proposed regulation leads to unequal treatment of PRIIPs that are subject to the Disclosure Regulation (SFDR - Regulation (EU) 2019/2088) and such products that are excluded from the scope of the SFDR. Article 8(3)(ga) PRIIPs Draft provides for a section on sustainability disclosures for those products only for which there is an obligation under the SFDR to provide any pre-contractual information. Such an obligation to disclose exists exclusively for financial products within the meaning of Article 2 No. 12 SFDR. Because the group of products subjected to the PRIIPs Regulation is in part wider, this means that the proposed amendment does not apply to some products (e.g. structured products) because they are not financial products within the scope of the SFDR. This leads to unequal treatment of PRIIPs products and may cause misunderstandings among retail investors. Thus, products that are not subject to the SFDR may also be suitable for investors with sustainability preferences. Since the comparability of products is the primary objective of the PRIIPs Regulation, it is imperative to avoid statements that lead to unequal treatment.

Moreover, according to the Draft of the European Commission only two pieces of information on sustainability are to be included in the KID, whereas the client can choose between three (mostly completely different) product groups that take sustainability-related aspects into account (see Article 2 No. 7 lit. (a) to (c) Delegated Regulation (EU) 2017/565). The clients will therefore **not** find the sustainability-related aspects in the KID. This is not appropriate.

In order to avoid a contradictory approach in the investment service of investment advice and the KID, the information on sustainability in the KIDs must be based on the existing MiFID II-requirements in Article 2 No. 7 Delegated Regulation (EU) 2017/565.

Furthermore, the implementation of any sustainability-related aspects is only feasible if the maximum number of pages of the KID is to be extended to 4 pages or if other information is omitted that retail investors

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receive by other means. This applies in particular to the cost information in the KIDs, which is already included in the ex-ante cost information according to MiFID II. The KID-capacity of only 3 pages is not sufficient to implement a new section on sustainability aspects.

Finally, it should be clarified that sustainability disclosures are only required for products that may be suitable for investors with sustainability preferences and not for products that are not suitable for investors with sustainability preferences. For those, a brief information that the product does not pursue sustainability objectives should be sufficient.

**f) Amendments with regard to the updating of KIDs
(Art. 10 (2) (b) PRIIPs Draft)**

The proposed amendment in Article 10(2)(b) PRIIPs Draft is neither comprehensible nor appropriate with regard to the current requirements for the provision of KIDs and the ratio of the PRIIPs Regulation. Pursuant to Article 6(1) sentence 1 PRIIPs Regulation, the KID is pre-contractual information which has to be provided to retail investors in good time before those retail investors are bound by any contract or offer relating to that PRIIP (Article 13(1) PRIIPs Regulation). A PRIIP that is not or no longer offered to retail investors can also no longer be acquired by retail investors, so that there is no longer any need for publication/provision or revision of the KID. We therefore propose not to amend Article 10(2)(b) PRIIPs Regulation as proposed and to take into account that PRIIPs which are not (or no longer) offered to retail investors do not require a KID when taking measures at level 2.

**g) Separation of responsibilities between manufacturers and distributors required in
Article 14(2) to (4) PRIIPs Draft²**

Article 14 PRIIPs Draft contains proposals in paragraphs 2 to 4 that fail to recognise the fundamentally different responsibilities of the product manufacturer and the person advising on or selling a PRIIP. According to the PRIIPs Regulation, the manufacturer is responsible for the drawing up and content of the KID and the investment advisor/distributor is responsible for providing the KID drawn up and published by the manufacturer. These different responsibilities have to be taken seriously in proposals for digitalisation. Article 14 PRIIPs Regulation is directed exclusively at the investment advisor/distributor and should only contain regulations that can be fulfilled and implemented by those.

h) Making the KID available in electronic format (Article 14(1) PRIIPs Draft)

The proposal that the KID should also be provided electronically as a matter of priority in the future is very positive. GBIC supports the amendment to Article 14(1) PRIIPs Regulation (with the exception of the definition of electronic format, which needs to be adapted; see above. II. 1. c)). On the one hand, the priority takes into account the increasing digitalisation and, on the other hand, helps to save enormous amounts of resources if the documents only have to be provided in paper form at the client's request and, if necessary, sent by post (sustainability).

Finally, the amendment achieves a synchronisation with the provision of information according to MiFID II, which are also primarily provided electronically. At present, clients do not understand why some documents

² The numbering mentioned here refers to the English version of the draft of the European Commission; the German version of the draft begins with paragraph 2 in Article 14 and consequently has a different numbering.

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are provided electronically when placing orders or giving investment advice, while others are provided in paper form. The proposed harmonisation would eliminate this problem, which is very welcome.

i) Personalisation (Article 14(2) and (3) PRIIPs Draft)

We are very critical of the possibility of offering customised KIDs for several reasons.

The original idea of implementing the KID was to present a wide variety of investment products for retail investors on 3 pages in a standardised format and to make them comparable. Depending on the parameters entered for the same PRIIP, this could result in considerably different KIDs. The differences would not be comprehensible for retail investors. A client's option for customization opens up the risk that retail investors being unaware of the differences (different products and/or cost components of the individual investment products including investment certificate, fund, structured bond or insurance PRIIP) will end up with less comparability. The legislator's aim has been to implement a KID in order to be able to compare products with each other. This comparability is not possible with personal and voluntary customization.

Furthermore, it should be noted that both the content of the KID and the drawing up of the KID itself are the responsibility of the product manufacturer. The investment advisor/distributor does not have the data on which the KID-calculations are based, nor is the content of the KID his responsibility. The PRIIPs Draft mixes up responsibilities. In addition, we refer to our comment on the European Single Access Point (ESAP)³, in which we oppose a machine-readable format of the KIDs.

Due to the possibility of personalisation, client-specific KIDs result in a significantly higher effort for archiving and referencing. It is impossible for the investment advisor/distributor to archive the KID generated by the client in-house. With the large number of PRIIPs on offer, the storage capacity required for this is multiplied.

In order to ensure retail investors continue to have access to PRIIPs from the date of their issuance, care would have to be taken in the further detailing that the request of the distributor for an automatically generated KID continues to be successfully answered without the transmission of client-specific conditions and that in this case a KID with standard conditions is made available. The ex ante-cost information according to MiFID II already ensures today that the client is shown the effects of his costs in detail on the basis of individual conditions. Client-specific KIDs are only an additional offer that can be used by the client via a separate deep link if he is interested. We do not believe that the envisaged simulation and configuration options will really meet with client's demand. Already today, clients making their own investment decisions ("self-deciders") in particular do not use the KIDs to select the PRIIPs they purchase.

Therefore, the proposal for personalisation in Article 14(2) and (3) should be omitted. However, insofar as this proposal is retained, it is necessary that this amendment retained optional.

Article 14(3) lit. c) PRIIPs Draft should also be deleted in the case of an optional retaining. Accessibility requirements for products and services are generally regulated in the EU Accessibility Act (EAA).

³ Available under <https://die-dk.de/themen/stellungnahmen/european-single-access-point/>.

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j) Layering (Article 14(4) PRIIPs Draft)

We cannot see the added value of the proposed layering format compared to a proven electronic format (e.g. PDF). From the manufacturers' point of view, this also increases liability risks.

Furthermore, should clients still prefer the paper form, it is questionable how the information provided by layering becomes visible to these clients. In this case, an extension of the number of pages according to Article 6(4) sentence 1 PRIIPs Regulation would be necessary in order to generate a multi-layered KID as paper print. Moreover, there is a risk that embedded content could obscure other relevant content when displayed and that this could give rise to civil law risks in the print version (e.g. in the context of a suitability statement). In our view, there are concerns with regard to the technical reliability of such a format. The display of a KID in a single document "in PDF format" appears to be much more reliable than the provision of a visualised layering interface. It is again misunderstood that the investment advisor/distributor is responsible for the provision of the KID only and not for its drawing up and design.

The use of layering should therefore - as suggested - be made optional and by no means mandatory.

k) Obligation to provide information on the website through which the KID is provided (Article 14(5) PRIIPs Draft)

It should be clarified that Article 14(5) PRIIPs Draft only refers to cases where the KID is made available to retail investors via a website (see our comment on the extension of the definition of electronic format above under II. 1. c)).

l) KIDs on the website of the investment advisor/distributor (Article 14(6) PRIIPs Draft)

A deletion of Article 14(6) PRIIPs Draft is mandatory in our view. The KID is not to be published on the website of the investment advisor/distributor, but on the website of the product manufacturer only. An additional publication obligation on the website of the investment advisor/distributor is not appropriate and not necessary. It is sufficient if the PRIIP manufacturer makes the KID available on its website and the distributor or retail investors have access to that. There is no need for any change in practice. Moreover, it would lead to an unnecessary and unsustainable duplication of data. With regard to the new download option on the website of the investment advisor/distributor, it should be noted that a KID is only required as pre-contractual information until the purchase is concluded (Article 13(1) PRIIPs Regulation). In this context, the proposed obligation for the manufacturer to provide previous versions of the KID to retail investors (Article 14(6) sentence 2 PRIIPs Draft) is also incomprehensible in our view. The manufacturer usually has no contact with retail investors, so that it is not known which version of the KID the retail investor receives from the distributor.

To avoid unnecessary duplication of information, it is necessary to synchronize the different European regulations, in particular the regulation on ESAP.

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2.) Aspects that should be introduced in the further legislative process

In their final report on the review of the PRIIPs Regulation⁴, the ESAs had proposed **several further improvements that were not** taken up in the draft of the European Commission. In our view, the following points should be introduced into the further legislative process:

a. Facilitation of the provision of KIDs for savings plans (Article 13(4) PRIIPs Regulation)

In the case of savings plans, clients must currently be provided with an up-to-date KID every time there is a significant change to the KID. Even for two large providers in the German market, this requirement affects **over ten million savings plans** and generates **very high costs**.

For clients, the repeated information on already known products causes the much criticised "**information overload**". In the aforementioned final report, the ESAs proposed a **simplification of the information obligation**, according to which the clients would be provided with a one-time link via which they could call up the respective current KID.⁵ Unfortunately, the proposal does not take up this recommendation.

The modification recommended by the ESAs should definitely be adopted to reduce the much lamented information overload.

b. Limitation of the information obligation to retail clients

Currently, **professional clients** purchasing UCITS funds also receive a KID, although they **must only be made available to retail clients** on a mandatory basis.⁶ The background is that the UCITS Directive (Directive 2009/65/EC) still contains an information obligation concerning professional clients which can be fulfilled by providing KIDs. This is in common practice.

It is necessary that the information requirements are limited to retail clients and that the legal coexistence of Key Information Documents (KIDs) and Key Investor Information Documents (KIIDs), which are no longer used in practice, is ended (reduction of unnecessary bureaucracy). This requires the deletion of Articles 78 to 82a of the UCITS Directive (this is possible as the UCITS Directive is also being revised as part of the Retail Investment Strategy).

c. Restriction of the scope of application of the PRIIPs Regulation to investment products

The PRIIPs Regulation currently also covers **hedging products** such as OTC derivatives. These are individual bilateral contracts that have a real economic background and, for example, hedge payment flows from projects or generally serve to control asset-liability management. The provisions tailored to

⁴ ESAs: Call for advice on PRIIPs: ESA advice on the review of the PRIIPs Regulation (JC 2022 20) of 29 April 2022.

⁵ Specifically, the ESAs had proposed the following rule to replace the current requirement in Article 13(4) PRIIPs Regulation:

"Where successive transactions regarding the same PRIIP are carried out on behalf of a retail investor in accordance with instructions given by that retail investor to the person selling the PRIIP prior to the first transaction, the obligation to provide a key information document under paragraph 1 shall apply only to the first transaction, and to provide a detailed description where the revised key information document in accordance with Article 10 can be found. Additionally, prior to an additional subscription, the latest revised version of the key information document shall be provided to the retail investor upon request."

⁶ The 7th recital of the PRIIPs Regulation reads in part as follows: *"Investment funds designed for institutional investors are also excluded from the scope of this Regulation as they are not intended for sale to retail investors."*

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investment products do **not** fit to these products (e.g. clients must be informed about the risk of loss of the investment amount - with OTC derivatives there is no initial investment amount).

For this reason, **through Q&A** the ESAs have already had to **amend** the statutory requirements on the content of KIDs for OTC derivatives in order to avoid **misleading information**.⁷

To avoid KIDs with misleading content due to inappropriate regulatory requirements, the scope of application of the PRIIPs Regulation should be limited to investment products. Thus, products for hedging should be excluded from the scope of application.

d. In the alternative: Exemption for FX contracts with real economic background (synchronisation with MiFID II)

In case the legislator does not limit the scope of application to investment products only (see c. above), it should in any case clarified for FX contracts with real economic background that these do not fall within the scope of application of the PRIIPs Regulation.

An explicit clarification that FX contracts with real economic background are not in the scope of the PRIIPs Regulation would achieve a synchronisation with MiFID II. Pursuant to Article 10 of Delegated Regulation (EU) 2017/565 there is an explicit exemption for these products.

Furthermore, this clarification contributes to the synchronisation of the requirements under MiFID II and PRIIPs Regulation, which is one of the main objectives of the RIS.

e. Harmonisation of product costs according to MiFID II and PRIIPs Regulation

The fact that product costs are calculated differently under MiFID II and the PRIIPs regime causes major practical problems. Among other things, there is a difference in the treatment of inducements. While product costs under the PRIIPs Regulation include inducements, inducements under MiFID II are part of service costs, so MiFID II product costs have to be disclosed without inducements.

This means clients are given different information about the product costs of one and the same product (if it is both a PRIIP and a financial instrument in terms of MiFID II) even if both information sheets base their calculations on the same investment amount of €10,000. In an example provided by a large German bank, the same product was shown to have product costs of €246.28 or 1.38% p.a. based on an investment of €10,000 when calculated under the PRIIPs Regulation and product costs of €111.27 or 0.56% p.a. based on the same investment amount but calculated in accordance with MiFID II.

This discrepancy, which has to be explained to investors and which they find difficult to understand, results from a lack of consistency in the rules governing the calculation of costs. In future, care should be taken when developing legislation to ensure greater consistency between thematically related legislative projects. This applies particularly to the upcoming reviews of MiFID II and the PRIIPs Regulation, but also to the current legislative process in the area of sustainability.

The aim should be to ensure that uniformly defined terms are used in all legislative texts and that interplay between regimes is taken into account.

⁷ ESAs: Questions and answers (Q&A) on the PRIIPs Key Information Document (KID)(JC 2017 49) dated 21 December 2022, p. 46 f.

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As regards the relationship between the PRIIPs Regulation and its Delegated Regulation, on the one hand, and MiFID II on the other, one way of achieving greater consistency would be to dispense with the presentation of costs in the KID if the product in question is a financial instrument in terms of MiFID II. This would avoid discrepancies while nevertheless informing the client about costs by way of the MiFID II requirements.

f. Removal of implicit transaction costs

The implicit transaction costs are not methodologically suitable for a comparison of products and their implicit nature is not comprehensible for retail investors. For this reason, they have already been deleted from the cost cap of the "pan-European pension product" (PEPP) (Article 12 Delegated Regulation (EU) 2021/473). This should in any case be taken into account in the subsequent revision of the Level 2 regulations. We would welcome a reference to this in the recitals.

3.) General problem: implementation period is too short

Moreover, the **implementation period is far too short**: the new requirements are to come into force just **18 months** after publication. At the same time, the ESAs are to submit a proposal for the amended Level 2 requirements within **12 months**. Subsequently, the European Commission will prepare an official draft regulation. On the basis of this timetable, it is already clear that the amended Level 2 requirements will **not be available in time**, even though the manufacturers are absolutely dependent for the drawing up of the new KIDs. The timetable proposed by the European Commission will not work.

The implementation period for manufacturers must therefore only begin after the important detailed specifications for the drawing up of the new KIDs at level 2 have been established. We consider a period of 24 months to be appropriate for the implementation period.
