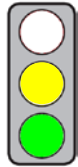


KEY ISSUES

Objective of the Regulation: The regulation is intended to improve investor protection for retail investors and create a level playing field for investment product manufacturers.

Parties affected: Consumers and other retail investors; banks, insurance companies and other manufacturers; sellers of investment products.



Pros: Uniform key information documents can strengthen investor protection and prevent distortions of competition.

Cons: (1) Legal uncertainty is created by the inconsistencies between the PRIIPs Regulation and the proposed Directive on Alternative Dispute Resolution and due to the fact that the rules regarding compensation are extremely vague.

(2) The key information documents apply exclusively to packaged investment products, which creates new distortions of competition.

CONTENT

Title

Proposal COM (2012) 352 dated 3 July 2012 for a **Regulation** of the European Parliament and of the Council on **key information documents for investment products**

Brief Summary

► Background and Objectives

- According to the Commission, retail investors within the EU often face “confusing and overly-complex information” about investment products. As a consequence, they can have difficulties assessing the “risks and costs” of such products, purchase “unsuitable products” and suffer losses. (Explanatory memorandum, p. 2)
- Thus the Commission wants to establish “uniform rules on investment product disclosures for retail investors” (Explanatory memorandum, p. 5).
- The Commission specifies three objectives (Explanatory memorandum, pp. 2 and 5):
 - enhancing the transparency of investment products for retail investors;
 - strengthening the confidence of retail investors; and
 - creating a level playing field between investment product manufacturers.

► Definitions

The Regulation shall apply to “investment products” manufactured by “investment product manufacturers”, sold by “persons selling” and purchased by “retail investors”.

– “Investment products” (packaged retail investment products, PRIIPs) are investments in “packaged” form that are subject to an “investment risk”.

- An “investment risk” exists if the amount payable is contingent on fluctuations in the performance of one or more underlying assets or reference values, except for interest rates (Art. 4 lit. a, explanatory memorandum p. 8, recital 6)

- “Packaged” refers to investment products in which the investor does not invest “directly” but with which investment product manufacturers combine, wrap or bundle together different assets.

According to the Commission, packaged investment products include (Explanatory memorandum, p. 8, recital 7) the following:

- Closed and open investment funds, including harmonised European investment funds (UCITS, see [cep PolicyBrief](#) concerning COM (2008) 458)
- Insurance products with an investment character, such as unit-linked life insurances
- Structured financial products (such as warrants) packaged in the form of insurances, securities or banking products
- Financial products whose value is derived from reference values such as equity prices or exchange rates (derivatives)

The following products are not considered to be packaged investment products (Art. 2 subparagraph. 2, explanatory memorandum p. 7):

- Insurance products with or without a fixed surrender value; the surrender value is the amount that an insured person receives on prematurely terminating the insurance policy
- Deposits which are determined by an interest rate such as EURIBOR or LIBOR
- Directly held shares or corporate bonds
- Occupational pension schemes
- Securities for which no dividends are paid and which are issued by Member States, their local authorities, the ECB or the national central banks, such as sovereign bonds.

- “Investment product manufacturers” are in particular insurance companies and credit institutions which manufacture investment products or make changes to an existing product – e.g. by altering the risk profile (Art. 4 lit. b).
- “Persons selling” include both distributors who sell the investment products to retail investors and investment product manufacturers (Recital 19).
- “Retail investors” are
 - private investors and
 - institutional and commercial investors, but not banks, insurance companies or any other “professional” investors (Art. 4 lit. c).

► **Key information document (KID)**

- The investment product manufacturer shall draw up a key information document for every manufactured investment product (Art. 5). The key information document is a stand-alone document and must be brief, accurate, “easy to read”, “not misleading” and avoid the use of jargon and technical terms (Art. 6 para. 1-3).
- The key information document must have the following standardised structure (Art. 8 para. 1, 2 and 4):

Key information document	
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 of this investment product and the risks of investing in it. You are advised to read it so that you can take an informed decision about whether to invest.	
Name of the investment product and identity of the investment product manufacturer	
Section title	Obligatory content of responses
What is the investment?	<ul style="list-style-type: none"> - The type of the investment product - The objectives of the investment product - The term of the investment product - Performance scenarios, if relevant
Could I lose money?	<ul style="list-style-type: none"> - Is loss of capital possible? - Are there any guarantees or capital protection provided? - Is there coverage through a compensation or guarantee scheme?
What is it for?	<ul style="list-style-type: none"> - Recommended minimum holding period - Liquidity profile of the investment product - Conditions for any disinvestments
What are the risks and what might I get back?	<ul style="list-style-type: none"> - Risk and reward profile of the investment product - “Summary indicator” of the risk and reward profile - Warnings regarding specific risks
What are the costs?	<ul style="list-style-type: none"> - “Summary indicator” of all direct and indirect costs
How has it developed so far?	<ul style="list-style-type: none"> - Performance scenarios if relevant
For pension products: What might I get when I retire?	<ul style="list-style-type: none"> - Projections of possible future outcomes

- The Commission may prescribe details on the content and structure through delegated legal acts (Art. 8 (5)). This applies in particular to the structure of the indicators contained in the key information document.
- Additional information should be included in the key information document only “where it is necessary” for the retail investor to take an “informed investment decision” (Art. 8 (3)).
- Marketing communications shall not include any statement that is contradictory to the information contained in the key information document. It must indicate that a key information document is available. (Art. 9)
- The investment product manufacturer must review regularly the information contained in the key information document and revise the document where the review indicates that changes need to be made (Art. 10 (1)). The Commission may lay down detailed rules for this through delegated acts (Art. 10 (2)).

► **Provision of the key information document**

- The person selling an investment product must provide the retail investor with the key information document free of charge and “in good time” before the conclusion of a transaction (Art. 12 (1), Art. 13).
- In the case of transactions using a means of distance communication, a person selling an investment product may provide the retail investor with the key information document “immediately after” the conclusion of the transaction where it was impossible to provide it beforehand document is and the retail investor has been informed of this fact (Art. 12 (2)).
- The Commission specifies details on the time limit for the provision of the key information document in legal acts (Art. 12 (4)).

- ▶ **Damage claims under civil law, burden of proof in favour of retail investors**
 - The investment product manufacturer is held liable for damages for any loss caused to the retail investor through the use of a key information document that did not comply with the requirements of the Regulation (Art. 11 (1)).
 - If the retail investor demonstrates loss resulting from the use of the information contained in the key information document, the investment product manufacturer has to prove that the key information document was drawn up in compliance with the Regulation (burden of proof, Art. 11 (2)).
- ▶ **Arbitration procedures**

The retail investor may initiate arbitration procedures if laid down in national law. Manufacturers and the sellers of investment products must participate if pursuant to national law (Art. 15)

 - such a procedure results in decisions which are “not binding”,
 - the limitation period for bringing the dispute before a court and the period of prescription of the claim are suspended for the duration of the procedure,
 - the procedures are free of charge or at “moderate” cost, and
 - in exceptional cases “interim measures” are possible to regulate the legal dispute.
- ▶ **Entry into force of the Regulation’s applicability**
 - The Regulation becomes applicable two years following the Regulation’s entry into force (Art. 26 (2)).
 - Companies which manage UCIT investment funds and persons selling UCIT shares are exempted from the Regulation within a period of five years following the Regulation’s entry into force (Art. 24).

Changes to the Status quo

Existing disclosures on investment products for retail investors at EU level have until now mainly been product-specific rather than applicable to different products. Moreover, disclosures mainly depend on the sales channel, i.e. on who is emitting or selling an investment product. According to the UCITS Directive (2009/65/EC, see [cep PolicyBrief](#)), UCIT investment funds must already provide “essential information for investors”.

Statement on Subsidiarity by the Commission

Uniform investor protection rules and a level playing field for investment product manufacturers and those selling packaged investment products can only be achieved at EU level.

Policy Context

In 2007 the ECOFIN Council called for a harmonisation of the various different EU rules regarding retail investment products. Thereupon, the Commission published a Communication in April 2009 [COM(2009) 204, see [cep PolicyBrief](#)], in which it requested more sustainable framework conditions for the sale of investment products and product information. The Regulation is part of a package of legislative proposals for investor protection. The package also includes the UCIT-V Directive on the activities of depositories [COM (2012) 350] and the “IMD 2” Directive on insurance mediation [COM (2012) 360]. The MIFID-II Directive on the sale of other financial products also regulates investor protection. [COM (2011) 656, see [cep PolicyBrief](#)]. In November 2011, the Commission published a Directive Proposal on alternative dispute resolution for consumer disputes [COM (2011) 793].

Legislative Procedure

03 July 2012	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Internal market
Committees of the European Parliament:	Economic and Monetary Affairs (in charge), rapporteur: Pervenche Berès (S&D Group, F); Legal Affairs; Civil Liberties, Justice and Home Affairs
Committees of the German Bundestag:	Finance (in charge); Consumer Protection, EU Affairs
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 114 TFEU
Form of legislative competence:	Shared competence (Art. 4 (1) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Uniform key information documents for all packaged retail investment products can in principle strengthen investor protection and avoid distortion of competition. However, they should also be prescribed for non-packaged retail investment products, for if the information requirements for non-packaged retail investment products remain in existence, the retail investor will be confronted with different information in future as well. The existing vertical regulation approach provides for different disclosures, depending on the sales channel and type of investment product. This restricts the capability of investors to take informed investment decisions. Moreover, this approach leads to distortion of competition, since investment product manufacturers are subject to disclosures which vary in strictness and thus entail different costs. The existing approach also strengthens the incentive for investment product manufacturers to design and sell investment products in order to ensure that the costs relating to disclosures are kept as low as possible. This regulation arbitrage is imposed on the investor.

New competitive distortions are also created by the fact that the regulations on civil compensation are not in line with those of the key investor information on UCIT products (Directive 2009/65/EC, see [cepPolicyBrief](#)).

Moreover, in the case of alternative dispute resolution, synchronisation is necessary. **The PRIIPs Regulation and the proposed Directives on alternative dispute resolution [COM (2011) 793] differ** in several issues. **This leads to uncertainty as regards the future legal situation.** The latter of the two leaves it to the Member States to stipulate whether or not participation in alternative dispute resolutions is mandatory for companies. The PRIIPs Directive, however, prescribes compulsory participation. The fact that compulsory participation does not apply to UCIT investment funds for the time being, as they are exempted from the Regulation for five years, distorts competition.

Apart from that, key information documents do not allow for a comparison of all investment products. On the contrary, they disclose the differences between investment products and in fact enable the investor to identify comparable investment products. There is also the risk that investors see key information documents as a substitute for a more thorough analysis of the investment product or as a consultation; however, the documents cannot reflect the individual situation of each investor.

Furthermore, **the validity of the indicators on the risk profiles and the costs of investment products** in the key information document **is limited**. The different risk and cost factors cannot be bundled into specific, comparable indicators that apply to different products. In addition, the costs relating to investment products **often cannot be reflected validly**. Due to their different investment horizons alone – shorter in the case of investment funds and longer in the case of pension scheme products – they are hardly comparable.

The regulations on damage compensation under civil law are extraordinarily vague and therefore incorporate substantial legal uncertainty. For it is not specified when a key information document is “easily understandable” or when it is deemed “jargon”. Not even a substantiation in the form of delegated acts is provided. This lack of clarity makes it more difficult for investment product manufacturers to draw up lawful key information documents. It is to be expected that such uncertainty generates higher costs, which the manufacturers pass on to the investors.

Legal Assessment

Competence

The Regulation is correctly based on Art. 114 TFEU (internal market).

Subsidiarity

Principally unproblematic. However, with regard to the rules on out-of-court settlement, the EU should limit itself to matters of cross-border content (see [cepPolicyBrief](#) on the action plan for e-commerce).

Proportionality

Depends on the shaping of the delegated legal act.

Compatibility with EU Law

Unproblematic.

Conclusion

Uniform key information documents can strengthen investor protection and help prevent distortion of competition. However, they should be prescribed for non-packaged investment products as well; this would further improve investor protection and prevent new distortion of competition. Legal uncertainty is created because the PRIIPs Regulation and the proposed Directives on alternative dispute resolution [COM (2011) 793] differ and because the compensation rules are very vague. The validity of the “summary indicators” in the key information documents on the risk profile and the costs of investment products is limited.