In 2012, the European Commission published a proposal for a regulation requiring a uniform disclosure document for packaged retail investment products (PRIPs). The legislative proposal was part of the Commission’s wider efforts to improve investor protection in the sale of retail investment products which included proposals for revisions to both the Markets in Financial Instruments Directive and the Insurance Mediation Directive (the revised directives being known as MiFID II and IMD 2 respectively).

Further to extensive lobbying and amendment of the legislative proposal by the EU trilogue parties, (including the last minute addition of an “I” to the products formerly known as PRIPs) the European Parliament adopted the Regulation on key information documents (KIDs) for packaged retail and insurance-based investment products (PRIIPs) (the Regulation) on 15 April 2014. The outcome from the final round of negotiations by the trilogue parties is that insurance investment products are in; and (most) pensions and directly held shares and bonds are out. It is expected that the Council of the EU will adopt the Regulation later this year and that national regulators will be required to apply its terms from mid-2016.

What is a PRIIP?
In order to determine precisely who will be affected by the Regulation it is important to understand exactly the Regulation means by a PRIIP.

The Regulation defines a PRIIP as any product which meets the definition of “packaged retail investment product” and “insurance-based investment product” which are respectively defined as follows:

- “packaged retail investment product” is an investment “where the amount repayable to the 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 investor”
- “insurance-based investment product” is an “insurance product which offers a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations”.

Based on this definition, therefore, a PRIIP must meet both of the above definitions. Having reviewed the recitals to the Regulation however, and having followed the Regulation’s journey through the trilogue negotiations since 2012, it is clear that the “and” in the PRIIP definition is incorrect and that it should be an “or” (or at least an “and/or”) as the Regulation is intended to apply to some packaged retail investment products that are not insurance based and vice versa. It remains to be seen if this is purely nit-picking or if it will have more serious repercussions in due course.

By way of example, the following products, in the retail market, will be PRIIPs:

- investment funds (including, following a five-year transitional period, UCITs)
- insurance investment products (such as unit-linked or with-profits policies)
- structured products (deposits and securities).

Due to the wide range of products that will be in scope, it is perhaps more helpful to note that the following products will definitely not be PRIIPs:

- general insurance and protection based life insurance policies (having no surrender value)
- deposits exposed only to an interest rate and other products which carry no investment risk
- shares and bonds held directly
- pensions.
Are the KIDs alright?

UCITS
As mentioned above, whilst UCITs would meet the definition of a PRIIP, there is an existing requirement (in the UCITs Directive (2009/65/EC)) for Key Investor Information Documents (UCITs KIID) in respect of UCITs which are largely identical to KIDs. As such, the Regulation allows UCITs providers a transitional period of 5 years (from enforcement) during which they will be exempt from its terms. The Regulation provides for a review, on the fourth anniversary of its enforcement, of whether to extend the transitional period or whether steps can be taken to replace the UCITs KIID with the KID. Hopefully the cost and disturbance factors will be taken into account if the disclosure regime is to be changed again.

Pensions
One of the key questions which accompanied the legislative progression of the Regulation was whether, and if so to what extent, pension products would be included within the definition of PRIIPs. It is now known that pensions (both occupational and personal) are excluded from the scope, according to the Regulation’s recitals, in “consideration of their peculiarities and objectives”. This exclusion is limited to pensions which are primarily designed to provide retirement income, which accounts for the majority of the UK pensions market, but may mean some products described as “pensions” in other member states will be subject to the rules.

The KID
In order to promote consistency and clarity of language, the Regulation sets out mandatory rules for the form and content of the KID.

Responsibility for producing and distributing a KID
The obligation to produce the KID falls on the “manufacturer” of the PRIIP. This includes the PRIIP provider and any entity which changes the PRIIP (including changes to the costs or creating a new PRIIP out of combinations of PRIIPs). This definition has been created to provide for situations in which the PRIIP provider does not have final control of all details of the issued product, for example when the product is issued and priced by an adviser).

There is no apparent prohibition on the outsourcing of this function, but such outsourcing will not excuse the manufacturer from legal responsibility for compliance of the KID with the Regulation.

The KID must be created prior to the PRIIP being made available to retail investors and must be published on the firm’s website. Although not a requirement, the Regulation expressly permits local regulators to require sight of the KID prior to the PRIIP being marketed in that country.

In general, the KID must be provided to retail investors by the PRIIP distributor (i.e. adviser, or the manufacturer if selling direct) “in good time” before there is a binding agreement in respect of the product. In the case of distance sales where the investor has contacted the distributor on his own initiative (subject to the distributor providing specific information regarding the KID) the KID may be provided “without undue delay” after concluding the product sale.

KIDs can be provided to investors on paper or, where the context of the transaction supports it, some other durable medium or via a website. The Regulation is clear that when selling PRIIPs face-to-face, paper should be the default option.

Form and content of the KID
As expected from legislation concerned with clarity and consistency of documentation, a large part of the Regulation is concerned with the form and content of the KID. Some of the key requirements are:

- KIDs must set out the key information in a manner that is “fair, clear and not misleading”
- It must be a stand-alone document, separate from marketing materials, unless the range of investment options means that all information cannot be provided in a single concise document (in which case it must clearly signpost where the additional information can be found)
- A KID must be no more than 3 sides of A4 paper, and this requirement cannot be circumvented by using small-print as the text must be easy to read using readable sized characters
- Brevity is a key focus of the Regulation and as such the information should be restricted to what investors need and be communicated in a style that facilitates comprehension
- The KID must promote comparability of the PRIIP

The following contents and sections are mandatory for each KID:
- A prescribed explanatory statement concerning the purpose of the KID
- Identifying information concerning the manufacturer and its regulator
- A comprehension alert for complex products (which includes derivatives and structured products under the current MiFID regime)
- Information describing the PRIIP headed “What is this product?” (including type, objectives, target consumer, details of any insurance benefits and term)
- A section headed “What are the risks and what could I get in return?” setting out the risk-reward profile using prescribed information
- Details of guarantee schemes or other cover under the heading “What happens if the PRIIP manufacturer is unable to pay out?”
- A section called “What are the costs?”
- Details on recommended holding periods and early encashment consequences headed “How long should I hold it and can I take money out early?”
- Complaint redress information
- A section for detailing other information documents required from the investor entitled “Other relevant information”.

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Are the KIDs alright?

**Further guidance**
In addition to the above mandatory contents, the Regulation provides for the publication of technical standards by the European Supervisory Authorities (EBA, EIOPA and ESMA) which provide further detail on the presentation and contents of the KID.

Whilst there has not been a specific statement from the FCA since the passing of the Regulation, the FCA Business Plan for 2014/15 does include a commitment from the FCA to work with the ESAs on the development of the technical standards. In addition, the FCA makes clear reference to creating a template KID for guidance purposes and this should assist firms in complying with some of the rules on form.

**Compliance provisions**
The Regulation contains specific provisions related to the enforcement of its terms.

**Civil liability**
A PRIIP manufacturer should take care to adhere to the specific contents requirements in Article 8 of the Regulation as in the event of investor losses resulting from non-compliance it will be liable for damages. Other than Article 8 and misleading/inaccurate statements, the Regulation provides that the PRIIP manufacturer shall not incur civil liability in respect of the KID.

**Product Intervention**
The harmonising aim of the Regulation is apparent from the power granted to EIOPA to temporarily intervene in the promotion or sale of insurance-based investment products in the EU. This is consistent with the powers granted to other ESAs under MiFID II in respect of specific non-insurance investments.

In a further measure aimed at achieving consistent powers in respect of PRIIPs and MiFID products, the Regulation gives national regulators the power to prohibit or restrict the promotion, distribution or sale of insurance-based investment products.

**PRIIPS, MiFID II AND IMD II**
As mentioned above, the Regulation has been accompanied on its legislative journey by MiFID II and IMD II. The agreed text for MiFID II was published at the same time as the Regulation and contains provisions amending the Insurance Mediation Directive (IMD) by adding investor protection provisions in respect of insurance-based investment products. The aim is to ensure that insurance-based investments are subject to an equivalent regime to other investments under the MiFID regime.

IMD II contains a range of changes to the way insurance products, including investment-based insurance products, are sold and is expected to be voted in by the Parliament later this year (click here for background on IMD2 and click here to read our recent commentary on the regulation of insurance investment products on Out-Law.)

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