

EC Public consultation on a retail investment strategy for Europe

ICMA RESPONSES

(Extracted from submitted response form)

General questions

Question 1.2 Are the existing limitations justified, or might they unduly hinder retail investor participation in capital markets?

No, they unduly hinder retail investor participation

EU regulation has been one incentive behind the reduced availability of international bonds to direct retail investor participation (initially with the introduction of the prospectus regime and then the convoluted retail summary requirements introduced in its 2010 review, and notably recently with the PRIIPs and MiFID2 product governance regimes). See further:

- the end of #41 on p.61 of ICMA's May 2015 response to the Commission's Prospectus Directive review consultation (<http://www.icmagroup.org/assets/documents/Regulatory/Prospectuses-Offerings-and-Listings/ICMA-response-to-EC-PD-consultation---FINAL---1-May-2015.pdf>) noting ICMA "aware that some issuers who might have previously prepared a base prospectus with the flexibility to make non-exempt offers of securities might choose to prepare a base prospectus that only allows exempt offers to be made, in order to avoid the additional burden imposed by [the then current summary requirements]. This of course reduces the number of issuers able to offer securities to retail investors in Europe.";
- p.29 of the 2018Q2 edition of the ICMA Quarterly Report (https://www.icmagroup.org/assets/documents/Regulatory/Quarterly_Reports/ICMA-Quarterly-Report-Second-Quarter-2018.pdf);
- p.36 of the 2018Q4 edition of the ICMA Quarterly Report (https://www.icmagroup.org/assets/documents/Regulatory/Quarterly_Reports/ICMA-Quarterly-Report-Fourth-Quarter-2018.pdf); and
- ICMA's December 2019 report "MiFID II/R and the bond markets: the second year" (<https://www.icmagroup.org/assets/documents/Regulatory/MiFID-Review/MiFID-II-R-and-the-bond-markets-the-second-year-201219.pdf>) reference (at p.7) noting that PRIIPs has "led many issuers to refuse to produce a KID and instead restrict placement of newly issued bonds to non-retail investors in the EEA" and that MiFID2 product governance has also "caused many EU-originated issues to curtail altogether placement of bonds to retail investors" and so overall having "a reduction in retail access to the bond markets"; and more generally
- #91-#103 at pp.16-19 of ICMA's 2015 CMU green paper response (<https://www.icmagroup.org/assets/documents/Regulatory/CMU/ICMA-CMU-GP-response-30-April-2015.pdf>) and #64 at pp.14-15 of ICMA's 2017 CMU mid-term review response (<https://www.icmagroup.org/assets/documents/Regulatory/CMU/ICMACMU-MTR-response-10.03.2017.pdf>).

Implementing certain alleviations (especially on product governance and PRIIPs, following on the 2017 Prospectus Regulation's attempt to improve the prospectus regime's 2010 retail summary requirements), may help improve direct retail access over time (beginning with more knowledgeable and wealthier investors). However, many corporate borrowers have got used to seeking funding away from EEA retail investors and so administrative burden alleviations will not necessarily cause

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mass retail bond markets to return to Europe. (EEA government bonds tend to be exempt from many EU regulations in any case.)

It seems however that the EU's policy focus in terms of retail investor participation in capital markets (e.g. notably under the CMU initiative) is anyway more on shares, funds/UCITS and structured products.

Question 1.3 Are there any retail investment products that retail investors are prevented from buying in the EU due to constraints linked to existing existing EU regulation?

Yes

See response to Question 1.2.

Digital innovation

Question 3.3 Should the information available in various pre-contractual disclosure documents be machine-readable?

Yes

However, machine readability requirements (whether in the context of the ESAP or otherwise) should be open to, and not restrictive of, various submission IT/machine-readable formats/solutions – though there are difficulties around the European Single Electronic Format (ESEF – involving inline XBRL tagging) and particular care is needed not to indirectly force either (i) the standardisation of financial instrument terms or (ii) subjective/simplistic (and so potentially misleading) summarising/labelling of complex financial instrument terms.

Question 3.5 Might there be a need for stricter enforcement of rules on online advertising to protect against possible mis-selling of retail investment products?

[No response]

MiFID product governance rules (Article 16.3 of MiFID2 and articles 9-10 of Delegated Directive EU/2017/593) do not regulate marketing communication, so it is unclear what is being referred to. The question seems academic in the context of international bonds, given the limited involvement of retail investors as previously noted.

Question 3.6 Would you see a need for further EU coordination /harmonisation of national rules on online advertising and marketing of investment products?

No

In the context of international bonds, Article 22 of the Prospectus Regulation (EU/2017/1129) already regulates advertisements at the European level (including in terms of not being inaccurate or misleading).

Disclosure requirements

Question 4.1 Do you consider that pre-contractual disclosure documentation for retail investments, in cases where no Key Information Document is provided, enables adequate understanding of:

<i>The nature and functioning of the product</i>	<i>4 (rather agree)</i>
<i>The costs associated with the product</i>	<i>Don't know - No opinion - Not applicable</i>
<i>The expected returns under different market conditions</i>	<i>4 (rather agree)</i>
<i>The risks associated with the product</i>	<i>4 (rather agree)</i>

Offers of bonds to retail investors in the EEA are, under the Prospectus Regulation, subject to prior publication of a prospectus (accompanied by a summary) that must include the necessary information material to an investment decision - notably the bond terms and the risk of the issuer failing to honour such terms (e.g. because it is insolvent). (Vanilla bonds merely pay interest and arguably involve no costs as such.) Comparison of different products is only meaningful to the extent such products have comparable features and may otherwise result in potentially misleading disclosure (as press commentary of the PRIIPs regime has suggested).

Question 4.2 Please assess the different elements for each of the following pieces of legislation:
Question 4.2.1 PRIIPs Key Information Document

<i>Question 4.2.1 a) PRIIPs: Is the pre-contractual information provided to retail investors for each of the elements below sufficiently understandable and reliable so as to help them take retail investment decisions? Please assess the level of understandability:</i>		<i>1 (very low)</i>
<i>Question 4.2.1 b) PRIIPs: Is the pre-contractual information provided to retail investors for each of the elements below so as to help them take retail investment decisions? sufficiently reliable Please assess the level of reliability:</i>	<i>PRIIPs Key Information Document (as a whole)</i>	<i>1 (very low)</i>
<i>Question 4.2.1 c) PRIIPs: Is the amount of information provided for each of the elements below insufficient, adequate, or excessive?</i>		<i>1 (insufficient)</i>

A short document like the PRIIPs KID seems highly unlikely to be able to disclose the necessary information material to an investment decision and in this respect risks being intrinsically misleading. (ESMA's 2014 speech ESMA/2014/1265 notes the KID's purpose as being inter alia to "contain sufficient information to allow consumers to make an informed investment decision".) (In this respect one should consider what information could, without any doubt at all, be eliminated from approved prospectuses without breaching the Prospectus Regulation requirement to include the necessary information material to an investment decision.)

It is worth recalling in this respect that KIDs were initially designed for the UCITS fund context, where KID disclosure arguably relates more to an investment mandate than to specific investment exposures (unlike the bond context).

Rather the purpose of a short disclosure document such as the PRIIPs KID should be "a quick first point of comparison before seeking more detailed information (in the case of the more sophisticated) or as a good introduction to the [relevant product] and a means of arming themselves with questions to ask a financial advisor (for the least sophisticated)". Such a KID purpose was something the Commission's 2009 UCITS Disclosure Testing Research Report noted "consumers at all levels of financial sophistication and investment experience felt that they would benefit from using". This would also be consistent with behavioural psychology evidence suggesting that disclosure is ineffective in the hands of many retail investors (the more sophisticated

being a minority) because they either do not read long-form disclosure or misunderstand short-form disclosure.

Consistently with the above, the Prospectus Regulation currently requires for public offers of retail bonds a summary that “provides the key information that investors need in order to understand the nature and the risks of the issuer, the guarantor and the securities that are being offered or admitted to trading on a regulated market, and that is to be read together with the other parts of the prospectus to aid investors when considering whether to invest in such securities.” (The Regulation also sets out requirements as to the summary’s specific content, length and clarity.)

Question 4.6 Should pre-contractual documentation for retail investments enable as far as possible a clear comparison between different investment products, including those offered by different financial entities (for example, with one product originating from the insurance sector and another from the investment funds sectors)?

Yes

Only "as far as possible" - Comparison of different products is only meaningful to the extent such products have comparable features and may otherwise result in potentially misleading disclosure (as press commentary of the PRIIPs regime has suggested).

Question 4.10 What should be the maximum length of the PRIIPs Key Information Document, or a similar pre-contractual disclosure document, in terms of number of words?

If (as per ESMA's speech cited in response to Q.4.2.1) the purpose of the PRIIPs KID is to disclose the necessary information material to an investment decision (the same test as for a prospectus under the Prospectus Regulation), then it is not possible to define a word limit that is sure not to risk the KID being intrinsically misleading. (In this respect one should consider what information could, without any doubt at all, be eliminated from approved prospectuses without breaching the Prospectus Regulation requirement to include the necessary information material to an investment decision).

If the purpose of the PRIIPs KID were clearly defined (as per the UCITS report cited in response to Q.4.2.1) to be “a quick first point of comparison before seeking more detailed information (in the case of the more sophisticated) or as a good introduction to the [relevant product] and a means of arming themselves with questions to ask a financial advisor (for the least sophisticated)”, then a length cap similar to what is currently in force might well be workable (though any specific number of words would still likely be relatively arbitrary). This approach should also address "information overload" concerns as investors access information channels calibrated to their individual capacity. (And see further reference to the Prospectus Regulation summary in the response to Q.4.2.1.)

Question 4.13 How important is it that information documents be translated into the official language of the place of distribution?

[No response]

A more pertinent question perhaps might be whether any local language translations should be the responsibility of an entity selling/distributing a product within a particular EEA Member State rather than the product 'manufacturer'. Bearing in mind that some products such as bonds trade independently of their issuer, manufacturer responsibility for translation seems more likely to incentivise fragmentation of product availability within Europe.

The PRIIPs Regulation

Question 5.1 Has the PRIIPs Regulation met the following core objectives:

<i>a) Improving the level of understanding that retail investors have of retail investment products:</i>	No
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Press commentary of the PRIIPs regime has suggested PRIIPs KIDs involve potentially misleading disclosure, with investors having been warned not to rely on them.

Comparison of different products is only meaningful to the extent such products have comparable features and may otherwise result in potentially misleading disclosure (as press commentary of the PRIIPs regime has suggested).

However, the PRIIPs KID seeks to enable investors to compare different products with non-comparable features. Furthermore, a short document like the PRIIPs KID seems highly unlikely to be able to disclose the necessary information material to an investment decision and in this respect risks being intrinsically misleading. (ESMA's 2014 speech ESMA/2014/1265 notes the KID's purpose as being inter alia to "contain sufficient information to allow consumers to make an informed investment decision"). It is worth again recalling in this respect that KIDs were initially designed for the UCITS fund context, where KID disclosure arguably relates more to an investment mandate than to specific investment exposures (unlike the bond context).

<i>b) Improving the ability of retail investors to compare different retail investment products, both within and among different product types:</i>	No
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See response to question 5.1 a).

<i>d) Enabling retail investors to correctly identify and choose the investment products that are suitable for them, based on their individual sustainability preferences, financial situation, investment objectives and needs and risk tolerance:</i>	No
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See response to question 5.1 a).

Question 5.2.1 What could be done to improve the access to PRIIPs KIDs and PEPP KIDs?

[No response]

ICMA's response to the Commission's ESAP consultation noted it may be prudent to await the outcome of the EU's PRIIPs review before including PRIIPs information within the ESAP, given the extensive public comment on the risk of PRIIPs KIDs being intrinsically misleading. (See Question 7(13) in <https://www.icmagroup.org/assets/documents/Regulatory/Primary-Markets/EC-ESAP-CP-ICMA-response-020321.pdf>)

Question 5.3 Should the PRIIPs KID be simplified, and if so, how (while still fulfilling its purpose of providing uniform rules on the content of a KID which shall be accurate, fair, clear, and not misleading)?

[No response]

Simplifying the KID by limiting it to purely factual information would reduce the risk of it being misleading, provided its purpose is also clarified as noted in the response to Question 4.2.1.

Question 5.4 Can you point to any inconsistencies or discrepancies in the actual implementation of the PRIIPs Regulation across PRIIPs manufacturers, distributors, and across Member States?

Yes

Uncertainty on the product scope of the PRIIPs regime (see #3-5 of ICMA September 2018 response - <https://www.icmagroup.org/assets/documents/Regulatory/Primary-Markets/FCA-CFI---ICMA-Resp-2018-09-v3-280918.pdf>) has continued, despite ESMA's notable efforts to address this problem.

The October 2019 Joint ESA Supervisory Statement (JC-2019-64) is a helpful step in the right direction to reassure the markets that vanilla bonds are indeed out of scope of the PRIIPs Regulation. However, differing views (and so uncertainty) endure in the market as to what may be interpreted as 'packaged' or not, with significant ongoing reluctance to make vanilla bonds directly available to EEA retail investors.

Should the European Commission feel that EEA retail investors should be generally able to directly invest in vanilla bonds, then it would need to ensure the PRIIPs legislation itself is clearly understood to exclude vanilla bonds (though there are also other disincentives to retail supply - notably under the Prospectus Regulation and MiFID product governance). ICMA would be happy to assist in developing workable options for the European Commission to achieve this, including (if it so wishes) without having to adopt any view on individual product features.

Question.5.6 What is in your experience as a product manufacturer, the cost of manufacturing:

5.6 a) A single PRIIPs KID (cost in € per individual product)

[No response]

From a vanilla bond issuer perspective, the challenge is not so much the logistical cost of producing a KID but rather the risk of being misleading (which can have a huge cost for issuers in terms of investor compensation and reputational damage).

Question 5.8 Which factors of preparing, maintaining, and distributing the KID are the most costly?

Other

See response to question 5.6 a).

Suitability and appropriateness assessment

Question 6.9 Does the target market determination process (at the level of both manufacturers and distributors) need to be improved or clarified?

[No response]

The issue is rather that product governance should not apply to commoditised funding products such as Eurobonds.

ICMA's May 2020 response to the Commission's MiFID consultation (<https://www.icmagroup.org/assets/documents/Regulatory/MiFID-Review/MiFID-review-CP-ICMA-response-2020-05-15-180520.pdf>) noted that the product governance regime is conceptually flawed regarding commoditised funding products such as Eurobonds that are not “designed” as a “service” for investor “clients”. Rather, bonds have been in existence for decades as a “product” for corporate and other borrowers to seek funding from the markets. Furthermore, the regime has in practice (in combination particularly with the PRIIPs regime and also partly with the EU prospectus regime’s retail disclosure requirements) further diminished borrowers’ appetite to offer to retail investors.

The EU’s capital market recovery package (CMRP / Directive EU/2021/338) is no longer expected to have an impact, to the extent it seems the co-legislators' intention seems to have been for operation on a narrower basis than the legal text suggests. (See further p.25 of the 2021Q3 edition of the ICMA Quarterly Report -

https://www.icmagroup.org/assets/documents/Regulatory/Quarterly_Reports/ICMA-Quarterly-Report-Third-Quarter-2021.pdf.)

Reviewing the framework for investor categorisation

Question 7.1 What would you consider the most appropriate approach for ensuring more appropriate client categorisation?

<i>Introduction of an additional client category (semi-professional) of investors</i>	No
<i>Adjusting the definition of professional investors on request</i>	Yes

As noted at Question 42.1 of ICMA's May 2020 response to the Commission's MiFID consultation (<https://www.icmagroup.org/assets/documents/Regulatory/MiFID-Review/MiFID-review-CP-ICMA-response-2020-05-15-180520.pdf>), if the legislator would prefer to increase direct access for retail investors that have some distinct knowledge and means, then it may be simpler (to avoid a significant and potentially disincentivising repapering consequence that might accompany the creation of an entirely new category) to adjust the existing threshold tests for professional status on request. In this respect, different thresholds in terms of financial means could be specific to certain products (though an investible portfolio measure seems more robust than an income-based test) and knowledge/experience could be based on recognised third party certification (as an alternative option to the existing intermediary trading history assessment mechanism). Whatever approach is ultimately taken, an appropriate grandfathering period should be allowed for any pre-existing classifications.

Question 7.2 How might the following criteria be amended for professional investors upon request?

<p>a) The client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters.</p>	<p>Other criteria to measure a client's experience</p>	<p>Knowledge/experience could be based on recognised third party certification (as an alternative option to the existing intermediary trading history assessment mechanism).</p>
<p>b) The size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments exceeds EUR 500,000.</p>	<p>[No response]</p>	<p>Different thresholds in terms of financial means could be specific to certain products (though an investible portfolio measure seems more robust than an income-based test).</p>
<p>c) The client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.</p>	<p>Other criteria to measure a client's financial knowledge</p>	<p>Knowledge/experience could be based on recognised third party certification (as an alternative option to the existing mechanism).</p>
<p>d) Clients need to qualify for 2 out of the existing 3 criteria to qualify as professional investors. Should there be an additional fourth criterion, and if so, which one?</p>	<p>Relevant certified education or training that allows to understand financial instruments, markets and their related risks</p>	

Inducements and quality of advice

Question 8.1 How effective do you consider the following measures to/would be in protecting retail investors against receiving biased advice due to potential conflicts of interest?

<p>Introducing a ban on all forms of inducements for every retail investment product across the Union</p>	<p>1 (not at all effective)</p>
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If an inducement ban prohibited issuers of bonds from retaining underwriting banks from marketing their bonds even where no investor advisory service is being provided, that could have a materially adverse impact on the availability of bonds to European investors (and on the ability of real economy borrowers to fund themselves).

Where the MiFID entity retained and remunerated by a borrower is not providing (on an unsegregated basis) investment advice' or 'portfolio management' services to investor 'clients' regarding the bonds concerned, characterising underwriter remuneration as banned inducements

would be unnecessary from an investor protection perspective (as well as well as being damaging to Europe's real economy).

See further questions 49 and 50 in ICMA's May 2020 response to the Commission's MiFID consultation (<https://www.icmagroup.org/assets/documents/Regulatory/MiFID-Review/MiFID-review-CP-ICMA-response-2020-05-15-180520.pdf>).

Question 8.2 If all forms of inducement were banned for every retail investment product across the Union:

a) what impacts would this have on the availability of advice for retail investors? Please explain your answer:	See response to question 8.1.
b) what impacts would this have on the quality of advice for retail investors? Please explain your answer:	See response to question 8.1.
c) what impacts would this have on the way in which retail investors would invest in financial instruments? Please explain your answer:	See response to question 8.1.
d) what impacts would this have on how much retail investors would invest in financial instruments? Please explain your answer:	See response to question 8.1.

Question 8.3 Do the current rules on advice and inducements ensure sufficient protection for retail investors from receiving poor advice due to potential conflicts of interest:

<i>In the case of investment products distributed under the MiFID II framework?</i>	Yes
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Where the MiFID entity retained and remunerated by a borrower is not providing (on an unsegregated basis) investment advice' or 'portfolio management' services to investor 'clients' regarding the bonds concerned, characterising underwriter remuneration as banned inducements would be unnecessary from an investor protection perspective (as well as well as being damaging to Europe's real economy). This is, in the context of syndicated public offerings, because:

- it is unclear what investor-facing 'client' service involved;
- of the apparent ESMA acknowledgement of no investor-facing 'client' service / need for further analysis; and
- underwriter remuneration is unrelated to investor outcomes.

See further questions 50 in ICMA's May 2020 response to the Commission's MiFID consultation (<https://www.icmagroup.org/assets/documents/Regulatory/MiFID-Review/MiFID-review-CP-ICMA-response-2020-05-15-180520.pdf>).

Other issues

Question 13. Are there any other issues that have not been raised in this questionnaire that you think would be relevant to the future retail investments strategy? Please explain your answer:

Whilst seeking stakeholder views on the existing conditions can be helpful, it is challenging to engage with multiple choice questions (with can often be too generic or too narrow). Furthermore many stakeholders may not have strong views regarding existing conditions, but may well have strong views on future changes - in this respect Involving stakeholders in the EU decision-making

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process would be best served by consulting on the Commission's actual policy proposals. (Subsequently consulting on legislative drafting intended to give effect to policy conclusions could also be technically very valuable, albeit likely to be relevant mainly to a narrower pool of expert stakeholders - lawyers notably.)