

University of Groningen

## Key Information Documents about complex financial products for consumers

de Jager, Carien

*Published in:*  
Journal of European Consumer and Market Law

**IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.**

*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2019

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*  
de Jager, C. (2019). Key Information Documents about complex financial products for consumers: something new under the sun? The evolution of mandatory information documents and policy in the EU. *Journal of European Consumer and Market Law*, 8(6), 238-243.

### Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

### Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

*Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.*

---

## Comment & Analysis

---

Carien de Jager\*

# Key Information Documents about Financial Products: Something New Under the Sun? The Evolution of Mandatory Information Documents and Policy in the EU

### I. Introduction

A recent study concluded that around 60% of sales of complex financial products in the European Union may be deemed unsuitable for consumers.<sup>1</sup> The ‘*Woekerpolis*’ and ‘*Effectenlease*’ scandals in the Netherlands and the Lehman certificate case in Germany are just three of many examples of financial products which caused trouble for retail investors.<sup>2</sup> In its efforts to prevent these kinds of practices and restore trust in the financial markets, the European legislator introduced investor protection legislation in three forms: (i) product information; (ii) service quality requirements (e.g. conduct of business rules) and (iii) product regulation.<sup>3</sup>

This article focuses on the first building block of investor protection since the European legislator relies heavily on information disclosure by financial institutions.<sup>4</sup> In January

2018 it introduced the Key Information Document (KID).<sup>5</sup> A KID is a short document aimed at informing consumers about the main features of complex investment products, known as Packaged Retail and Insurance-based Investment Products (PRIIPs). A KID must be made available on the PRIIP manufacturer’s website and provided to consumers by the adviser or seller of financial products before a binding agreement is made.<sup>6</sup> The two main objectives of KIDs with regard to consumers are: 1) to improve the comprehensibility of financial products and 2) to improve the comparability of financial products.<sup>7</sup>

However, information documents for financial products are not a new phenomenon. They have existed at a European level for more than 30 years.<sup>8</sup> The aim of this article is therefore to investigate the way in which information documents for complex financial products have developed at a European level and to highlight potential causes of their ineffectiveness. To this end the article provides an overview of the development of these documents and their policy. In the literature, the effectiveness of information documents for financial products is highly debated based on insights from Behavioural Finance.<sup>9</sup> However the development of information documents and their policy also shed an interesting light on the effectiveness of these documents, more specifically the KID, and highlights potential causes for their limited effectiveness which is important given the aims of these documents, among which an adequate level of investor protection.

This paper focuses first on the recently introduced Key Information Document (Section Two). Section three describes the evolution of European information documents up to the recently introduced KID. Section four analyses the evolution

---

\* Assistant Professor at the department of Private Law and Notary Law, University of Groningen, The Netherlands. E-mail address: c.e.de.jager@rug.nl.

1 Commission, ‘Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament of the Council on key information documents for investment products’ COM (2012) 187 final <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012SC0187>> accessed 11 November 2019, 22.

2 The Dutch investment products allowed retail investors to purchase securities with borrowed money (*Effectenlease*) and life insurances (*Woekerpolis*). For *Effectenlease*, see for example Dutch Supreme Court’s case HR 5 June 2009, ECLI:NL:HR:2009:BH2815. Investors who invested in Lehmann certificates were mostly pensioners who thought they had made a safe investment. In reality, they had purchased derivative financial products whose value was tied to various stock indexes. See Olha O Cherednychenko, ‘Fundamental Rights, European Private Law, and Financial Services’ in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 192-193; Christian Hofmann, ‘Central bank collateral and the Lehmann collapse’ [2011] 4(1) Capital Markets Law Journal 456-469. On the mis-selling of financial products to consumers in the EU see e.g. Eilis Ferran, ‘Regulatory Lessons from the Payment Insurance Mis-selling Scandal in the UK’ [2012] 13 European Business Organization Law Review 249; Niamh Moloney, ‘The Investor Model Underlying the EU’s Investor Protection Regime: Consumer or Investors?’ [2012] 13 European Business Organization Law Review 176.

3 Veerle Colaert, ‘Building Blocks of Investor Protection: All-embracing Regulation Tightens its Grip’ [2017] 6 EuCML 229-244; Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments [2014] OJ L 173/349 (MiFID Directive); Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers [2011] OJ L 174/1. About the role of disclosure: Niamh Moloney, ‘Regulating the Retail Markets’ in Niamh Moloney, Eilis Ferran & Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press 2015). Moloney makes a distinction between the regulatory tools of disclosure, distribution and product intervention.

4 Niamh Moloney, *How To Protect Investors* (Cambridge University Press 2010) 53; Carien E de Jager, *Consumentenbescherming door informatie. Een analyse van 30 jaar beleid voor korte precontractuele informatiedocumenten over complexe financiële producten in Europa, Engeland, Nederland en Duitsland* [‘Protecting consumers in the financial markets by means of information disclosure’] (Boom Juridische Uitgevers 2018) 37-66.

5 Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2014] OJ L 352/1. The legislator explicitly mentions in Recital 5 of the Regulation that effectively regulated sales processes for financial products are equally important and that the Regulation is complementary to measures on distribution in MiFID Directive (n 3) and Directive 2016/97 of the European Parliament and of the Council on insurance distribution [2016] OJ L 26/19 (Insurance Distribution Directive), which replaced the relevant provisions in the previously binding Directive 2002/92/EC of the European Parliament and of the Council on insurance mediation [2002] OJ L 9/3. For an overview: Annamaria Lusardi & Olivia S Mitchell, ‘The Economic Importance of Financial Literacy: Theory and Evidence’ [2014] 52(1) Journal of Economic Literature 5-44.

6 Article 5(1) and Article 13(1) Regulation 1286/2014 (n 5).

7 Commission (n 1), 26-27.

8 The first European information document, the Prospectus, was introduced in 1985 (see Section 3.1).

9 E.g. with respect to the KID: Veerle Colaert, ‘The Regulation of PRIIPs: Great Ambitions, Insurmountable Challenges’ [2016] 2(2) Journal of Financial Regulation 203-224; Carien E de Jager, ‘Who are you, investor: Mr. Spock, Captain Kirk or somewhere in between? A Behavioural Finance exploration and suggestions for better informing investors about complex investment products through information disclosure’ in Ilse Samoy & Marco BM Loos (eds), *Information and Notification Duties* (Intersentia 2015) 101-122. See also n 79.

of information documents in the EU and looks at potential problems with them. Based on that analysis, it answers the question of whether KIDs are as successful at protecting investors as the EU legislator intends, primarily based on the development of its predecessors and policy. Finally, Section five concludes that KIDs are nothing new under the sun, despite the fact that regulation and policy on information documents for financial products have changed over the years. Taking into account the development of previous information documents, it is extremely doubtful that KIDs are an effective tool for investor protection.

## II. Key Information Documents

Packaged Retail Investment and Insurance Products (PRIIPs) are at the core of the European retail investment market. They are investment products which have in common that they have a layered structure and that banks typically offer them to consumers in order to enable them to save for a specific item, such as a house or their children's education.<sup>10</sup> Taken together, these products are worth 10 trillion euros in European financial markets.<sup>11</sup> However, they are also very complex for consumers to understand.<sup>12</sup>

PRIIPs are packaged retail investment products and insurance-based investment products. They can take two forms: a PRIP or an insurance-based investment product. A PRIP is a packaged product where 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 that are not directly purchased by the retail investor.<sup>13</sup> An insurance-based investment product is an insurance product that offers a maturity or surrender value where that value is wholly or partially exposed, directly or indirectly, to market fluctuations.<sup>14</sup> Examples of PRIIPs are investment funds, life insurance policies with an investment component, structured products and structured deposits.<sup>15</sup>

PRIIP manufacturers are obliged to draw up a KID and publish it on their website before a product can be sold to consumers.<sup>16</sup> Consumers must receive the KID before a binding agreement is made.<sup>17</sup> A KID is highly standardized in order to facilitate its comparability.<sup>18</sup> Each document therefore has the same structure and an almost identical layout. KIDs must provide key information about amongst others the risks, returns, and the costs.<sup>19</sup> The information in the KID must be accurate, fair and not misleading.<sup>20</sup> A KID should be short, with a maximum of three sides of A4-sized paper when printed.<sup>21</sup>

## III. The evolution of information documents for financial products: from Prospectus (1985) to KID (2018)

Before the introduction of the KID in 2018 there were other information documents for financial products. These are the Prospectus (1985), the Simplified Prospectus with a Recommendation (2004) and the Key Investor Information Document (2009 and 2010).<sup>22</sup> The following five aspects will be addressed in the description and analysis of the information documents and their policy:

- The **causes** underlying the introduction of an information document: e. g. existing problems.
- The **goals** of the information document: e. g. investor protection or improving competition between financial institutions.<sup>23</sup>

- The **nature of the regulation**: e. g. whether or not the document is highly standardized, whether it involves open or closed norms, how many rules apply to the document, and whether it is hard law (legally binding) or soft law (not legally binding).
- The kind of **investor** the legislator had in mind.
- The **evaluation of legislation** before or after the introduction of the document.

### 1. The Prospectus (1985)

The Prospectus, the first European information document for financial products, entered into force in 1985.<sup>24</sup> The adoption of this Directive was prompted by the different laws with regard to UCITS in the Member States.<sup>25</sup> UCITS is an acronym for Undertakings for Collective Investment in Transferable Securities, with the object of collective investment in transferable securities or in other liquid financial assets of capital raised from the public and which operate on the

10 Commission, 'Green Paper on Retail Financial Services in the Single Market' COM (2007) 226 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007DC0226>> accessed 11 November 2019, 4.

11 Commission, 'Key Information Documents (KIDs) for packaged retail investment and insurance products – Frequently Asked Questions' (15 April 2014) <[https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/consumer-financial-services/key-information-documents-packaged-retail-and-insurance-based-investment-products-priips\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/consumer-financial-services/key-information-documents-packaged-retail-and-insurance-based-investment-products-priips_en)> accessed 22 August 2019.

12 On low levels of financial literacy of consumers see e. g. OECD, *OECD/INFE International Survey of Adult Financial Literacy Competencies* (2016) <<https://www.oecd.org/daf/fin/financial-education/OECD-INFE-International-Survey-of-Adult-Financial-Literacy-Competencies.pdf>> accessed 28 August 2019, 19; European Parliament, 'Consumer Protection Aspects of Financial Services' (IP/A/IMCO/ST/2013-07, February 2014) 95.

13 Article 4(1) Regulation 1286/2014 (n 5).

14 Article 4(2) Regulation 1286/2014 (n 5).

15 Recital 6 Regulation 1286/2014 (n 5).

16 Articles 5(1), 13 and 14 Regulation 1286/2014 (n 5).

17 Articles 6(1), Art. 13 and 14, Regulation 1286/2014 (n 5).

18 E. g. Article 6(4) Regulation 1286/2014 (n 5).

19 See in more detail Article 8 Regulation 1286/2014 (n 5).

20 Article 6(1) Regulation 1286/2014 (n 5).

21 Article 6(4) Regulation 1286/2014 (n 5).

22 These would respectively be the following legal acts: Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [1985] OJ L 375/3; Directive 2001/107/EC of the European Parliament and of the Council amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses [2001] OJ L 41/20; Directive 2009/65/EC of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L 302/32 and Commission Regulation (EU) No 583/2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website [2010] OJ L 176/1.

23 See more in general about the goals of mandatory disclosure Luca Enriques & Sergio Gilotta, 'Disclosure and Financial Market Regulation' in Niamh Moloney, Eilis Ferran & Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press 2015) 513-521.

24 Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [1985] OJ L 375/3. This article will not discuss in detail the prospectus obligation for public offers of securities but only the prospectus for UCITS, since public offers of securities do not fall under the scope of PRIIPs. See for the rules regarding the prospectus for public offers of securities Regulation 2017/1129 [2017] OJ L 168/12. The summary prospectus for these products has been replaced by a standardized information document that will be modelled after the PRIIPs KID but will be substantially longer, namely of up to 7 A4 pages (Article 7(3)).

25 Recital 1 Directive 85/611/EEC (n 24).

principle of risk-spreading.<sup>26</sup> Different laws in the Member States were assumed to distort the conditions of competition and the associated protection for investors.<sup>27</sup> The main goal of the Directive was therefore to coordinate national laws in order to improve competition between UCITS at EU level, to create more effective protection for investors, and to facilitate cross-border trade in UCITS.<sup>28</sup>

The Prospectus was subject to very few rules, which were not specific.<sup>29</sup> As a consequence, financial institutions had considerable freedom when drafting the Prospectus. The rules focused on the content of the information, such as the name of the fund and the date when the unit trust had been established.<sup>30</sup> The Directive contained no rules regarding the layout of the Prospectus, such as a maximum number of pages or the use of colours.

The legislator pays no attention in the Directive to the document's target audience: the investor. It is therefore not clear whether the document was aimed at consumers or also at professional investors. The wording of the Directive suggests that the legislator had a rational investor in mind because according to Article 28(1) of the Directive:

*'A prospectus must include the information necessary for investors to be able to make an informed judgement of the investment proposed to them.'*

Given this lack of attention to investors and to how the Prospectus could most helpfully inform them about financial products, it is probably unsurprising that no research was conducted into matters such as investor preferences or whether investors wanted a Prospectus.

## 2. The Simplified Prospectus (2004)

In 2004 a new UCITS Directive containing new rules regarding UCITS entered into force.<sup>31</sup> In addition to the existing Prospectus, a new type of prospectus for UCITS – the Simplified Prospectus – was introduced. According to the European legislator, the previous UCITS Directive had contributed significantly to the achievement of the single market.<sup>32</sup> However, the introduction of a Simplified Prospectus was seen as desirable among other things in order to take account of developments in information technology.<sup>33</sup> It also became clear that the existing Prospectus was unsatisfactory. More specifically, it did not meet the needs of the average investor.<sup>34</sup> The goal of the Simplified Prospectus was therefore to introduce an investor-friendly information document that was clear, concise and easily understandable.<sup>35</sup>

As in the previous Directive, there were relatively few articles regarding the Simplified Prospectus. The only standardization was the list of subjects on which the Simplified Prospectus had to provide information.<sup>36</sup> As with the Prospectus, the rules focused on the content of the Simplified Prospectus. In general, the rules regarding the Simplified Prospectus were open norms that had to be interpreted by financial institutions. The rules regarding the Simplified Prospectus were part of a Directive and therefore legally binding (hard law).

In contrast to the previous UCITS Directive, the legislator paid more attention to the receiver of the Simplified Prospectus as it stated that the document must be easily understandable by the 'average investor'. It also emphasized that the document should be helpful to them: investor-friendly, clear, concise and easily understandable.<sup>37</sup> Nevertheless, the legislator did not explain what precisely is meant by 'average investor'. For example, it is not clear whether the legislator had consumers (retail investors) or professional investors in mind.

Other questions also remain unanswered, such as how the Simplified Prospectus could be made understandable and clear to investors. The cause of this ambiguity is probably the lack of consumer research or evaluation of the legislation prior to the introduction of the Simplified Prospectus.<sup>38</sup> At least some rationality is assumed given that the legislator expects that information could help investors to make an informed judgement.<sup>39</sup>

In order to ensure the effectiveness of the Simplified Prospectus, the legislator considered it appropriate to clarify the contents and presentation of some of the information elements that had to be included in the Simplified Prospectus.<sup>40</sup> A not legally binding Recommendation, amended in 2004, aimed to achieve a common interpretation of the Directive, to ensure effective investor protection and enhance investor confidence.<sup>41</sup> According to the Recommendation, the Simplified Prospectus should be easily understandable by 'the average retail investor'.<sup>42</sup> For the first time the European legislator emphasized the need for research to improve the comprehensibility of information.<sup>43</sup>

## 3. The Key Investor Information Document (2009 and 2010)

A few years after the introduction of the Simplified Prospectus, the European Commission evaluated the effectiveness of the UCITS Directive, including the Simplified Prospectus. The European Commission organized, among other things, workshops and expert meetings.<sup>44</sup> The Commission con-

26 Article 1 Directive 2009/65/EC of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L 302/32.

27 Ibid.

28 Recital 2 Directive 85/611/EEC (n 24).

29 Articles 27-33 Directive 85/611/EEC (n 24).

30 Ibid and Schedule A in Annex to the Directive 85/611/EEC (n 24).

31 Directive 2001/107/EC of the European Parliament and of the Council amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses [2001] OJ L 41/20.

32 Recital 1 *ibid.*

33 Recital 15 *ibid.*

34 Commission, 'Proposal for a European Parliament and Council Directive amending Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses' COM (1998) 451 final, 9 <<https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vi8rm2yhgzzyz>> accessed 11 November 2019.

35 Recital 15 Directive 2001/107/EC (n 31).

36 Schedule C to Annex I *ibid.*

37 E.g. Article 28(1) and Recital 15 Directive 2001/107/EC (n 31).

38 No sources have been found in conducting this research that would contradict this finding.

39 Article 28(1) Directive 2001/107/EC (n 31).

40 Commission, Recommendation of 27 April 2004 on some contents of the simplified prospectus as provided for in Schedule C of Annex I to Council Directive 85/611/EEC [2004] OJ L 144/42 (hereinafter: Recommendation), Recital 2.

41 Recitals 1-3 and 9 Recommendation (n 40).

42 Recital 1 Recommendation (n 40).

43 Recital 11 Recommendation (n 40).

44 E.g. the analysis presented in a Green Paper draws on a report of an expert group and discussions with Member States, CESR members (n 55) and market participants: Commission, 'Green Paper on the enhancement of the EU framework for investment funds' COM (2005) 314 final (hereinafter: Green Paper 2005) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0314&from=EN>> and a response of the European Parliament to the Green Paper prepared by rapporteur Wolf Klinz: European Parliament, 'Report on asset management' [2006] 2037(INI) <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2006-0106&language=EN>> accessed 11 November 2019.

cluded firstly that the UCITS Directive had proved an important first step towards integrated and competitive European markets for investment funds.<sup>45</sup> However, because the market was dominated by funds of suboptimal size, it seemed that the sector's potential was not fully exploited.<sup>46</sup> As a result, the industry did not benefit fully from economies of scale, reducing net returns to end-investors.<sup>47</sup>

More specifically, it appeared that the Simplified Prospectus had never lived up to expectations.<sup>48</sup> For example, it did not help investors to make sound investment decisions.<sup>49</sup> In most cases, the Simplified Prospectus was too long and not understood by investors.<sup>50</sup> Furthermore, divergent implementation and 'gold-plating' led to different requirements regarding the Simplified Prospectus and a considerable overhead for the fund industry.<sup>51</sup> The Recommendation was also largely ignored.<sup>52</sup> These problems led to the introduction of a new UCITS Directive in 2009 and the replacement of the Simplified Prospectus by the Key Investor Information Document (KIID).<sup>53</sup> To harmonize the content of the KIID, a Regulation was introduced containing more specific rules regarding the KIID.<sup>54</sup> The details on content and format were developed further by the Committee of European Securities Regulators (CESR) in a number of Guidelines.<sup>55</sup>

The goals of the KIID are formulated differently in different policy documents.<sup>56</sup> All in all, the KIID should improve the comprehensibility and comparability of UCITS for investors. It is also designed to save costs for industry, improve competition between funds, and reduce barriers to cross-border trade in UCITS.

KIIDs are highly standardized through a large number of very specific rules. For example, the information that must be included is closely specified, the Regulation prescribes standard titles and passages that must be included, and the Regulation is clear about the length of the KIID (not exceeding two or three A4 pages, depending on the financial product).<sup>57</sup> In addition, the non-binding CESR Guidelines go into more detail and contain, among other things, standard calculations, a template, and guidelines for layout and clear language.<sup>58</sup>

Investors are the target audience for KIIDs. Although not specifically named in the Directive or Regulation, some formulations suggest that the EU legislator has retail investors in mind.<sup>59</sup> The legislator seems to believe that retail investors make better decisions if they are provided with information about financial products.<sup>60</sup> Therefore the legislature assumes at least some level of rationality in investor behaviour.

#### 4. The Key Information Document (2018)

Besides the KIID for UCITS, since 2018 the PRIIPs Regulation has required product manufacturers in the EU to create, maintain and distribute a Key Information Document.<sup>61</sup> The PRIIPs Regulation provides a temporary exception for investment companies and persons advising on, or selling, UCITS from the obligation to produce and provide a PRIIPs KID. As things stand, this exception ceases to apply on 31 December 2019.<sup>62</sup> However, a discussion about this exception as well as revision of the PRIIPs Regulation to deal with a number of shortcomings is still going on.<sup>63</sup>

There were three key problems with information documents which gave rise to the introduction of the KID.<sup>64</sup> Firstly, the mandatory information was not sufficiently easy to understand because it was, among other things, too long and confusing, and it contained jargon. Secondly, information documents often did not help consumers to compare different

products. Thirdly, mandatory information was not made available to investors in a timely fashion.

Again, the goals the EU legislator seeks to reach through the document are formulated differently in different policy documents. According to the Regulation and the Impact Assessment, the goals are to improve the comprehensibility and comparability of financial products, thereby rebuilding the trust of retail investors in financial markets, and to create a more level regulatory playing field while tackling potential barriers to the single market.<sup>65</sup>

45 Green Paper 2005 (n 44), 3.

46 Ibid.

47 Ibid.

48 Commission, 'Commission Staff Working Document – Accompanying the White Paper on Enhancing the Single Market Framework for Investment Funds, Impact Assessment' COM (2006) 686 final.

49 Commission, 'White Paper on enhancing the single market framework for investment funds' COM (2006) 686 final (hereinafter: White Paper 2006).

50 White Paper 2006 (n 49), 6.

51 Ibid.

52 Ibid.

53 Directive 2009/65/EC (n 26).

54 Commission Regulation (EU) No 583/2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website [2010] OJ L 176/1.

55 CESR was an independent committee with the role, inter alia, of acting as an advisory group to assist the European Commission. On 1 January 2011, the CESR was replaced by the European Securities and Markets Authority (ESMA). CESR, 'CESR's guidelines on the methodology for calculation of the ongoing charges figure in the Key Information Document' [2010] CESR/10-674 <[https://www.esma.europa.eu/sites/default/files/library/2015/11/10\\_674.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/10_674.pdf)> accessed 11 November 2019; CESR, 'CESR's guidelines on the methodology for the calculation of the synthetic risk and reward indicator in the Key Investor Information Document' [2010] CESR/10-673 <[https://www.esma.europa.eu/sites/default/files/library/2015/11/10\\_673.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/10_673.pdf)> accessed 11 November 2019; CESR, 'CESR's template for the Key Investor Information document. Guidelines' [2010] CESR/10-1321 <[https://www.esma.europa.eu/sites/default/files/library/2015/11/10\\_1321.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/10_1321.pdf)> accessed 11 November 2019; CESR, 'CESR's guide to clear language and layout for the Key Investor Information document' [2010] CESR/10-1320 <[https://www.esma.europa.eu/sites/default/files/library/2015/11/10\\_1320.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/10_1320.pdf)> accessed 11 November 2019.

56 Directive 2009/65/EC (n 26), Regulation 583/2010 (n 54), Commission, 'Proposal for a Directive of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)' COM (2008) 458 final, 30.

57 Respectively Chapters 3-5, Articles 4(3), 6 and 37 Regulation 583/2010 (n 54).

58 See n 55.

59 E.g. Recital 59 and Article 78(5) Directive 2009/65/EG (n 26).

60 Recital 59 Directive 2009/65/EG (n 26).

61 Regulation 1286/2014 (n 5).

62 Joint Consultation Paper concerning amendments to the PRIIPs KID. Draft amendments to Commission Delegated Regulation (EU) 2017/653 on key information documents (KID) for packaged retail and insurance-based investment products (PRIIPs) (8 November 2018) 5 <<https://eba.europa.eu/sites/default/documents/files/documents/10180/2441671/9b1ed91b-eea6-477f-8501-e6b0b3a96eba/Joint%20Consultation%20Paper%20on%20targeted%20amendments%20to%20PRIIPs%20KID%20%28JC%202018%206....pdf?retry=1>> accessed 11 November 2019.

63 E.g. letter of Steven Maijoor (Chair European Securities and Markets Authority), Andrea Enria (Chairperson European Banking Authority) and Gabriel Bernardino (Chair European Insurance and Occupational Pensions Authority) to Director General Financial Services and Capital Markets Union of the European Commission of 1 October 2018 (JC 2018 55) <<https://esas-joint-committee.europa.eu/Publications/Letters/JC%202018%2055%20Joint%20letter%20to%20EC%20on%20PRIIPs.pdf>> accessed 11 November 2019; Final Report following joint consultation paper concerning amendments to the PRIIPs KID of 8 February 2019, JC 2019 6.2 <[https://eiopa.europa.eu/Publications/Reports/2019-02-08%20Final\\_Report\\_PRIIPs\\_KID\\_targeted\\_amendments%20%28JC%202019%206.2%29.pdf](https://eiopa.europa.eu/Publications/Reports/2019-02-08%20Final_Report_PRIIPs_KID_targeted_amendments%20%28JC%202019%206.2%29.pdf)> accessed 11 November 2019.

64 Regulation 1286/2014 and Commission (n 1), 13-21.

65 Ibid, 26-27.

Many legally binding rules are applicable to the KID. These rules are very detailed. For example, the Regulation prescribes the exact wording of a number of passages and titles, as well as layout aspects.<sup>66</sup> Many open norms are concretized.<sup>67</sup> To facilitate the implementation of, and compliance with, the PRIIPs Regulation a set of non-legally binding Guidelines was introduced.<sup>68</sup> These mainly provide an explanation of some of the concepts used in the Regulation. Furthermore, Regulation 2017/653 contains legally binding regulatory technical standards with regard to the presentation, content, review and revision of the KID.<sup>69</sup> According to this Regulation, PRIIP manufacturers are obliged to present the KID by means of a template. The Regulation also prescribes, among other things, the methodology for the presentation of the risks and performance scenarios.

More so than in the past, the focus of the EU legislator is on retail investors and their interests. The EU legislator recognizes that consumer behaviour is not always rational.<sup>70</sup> The EU legislator has tried to translate the information needs of investors into rules.<sup>71</sup> Nevertheless, the EU legislator does not go into detail about the 'shortcomings' of investors, how the KID could respond to this or potential differences between investors.<sup>72</sup> One exception is worth mentioning. If a product is difficult to understand, is not simple or if the investment's pay-off takes advantage of a retail investor's behavioural biases, the KID must contain a comprehension alert.<sup>73</sup>

The European Commission commissioned two research institutions *ex ante* to undertake consumer testing of various ways of presenting information about PRIIPs.<sup>74</sup> The goal of the study was to assess which particular KID format would best help consumers compare, understand and select products for their investment needs. Unfortunately, this was an artificial endeavour since the study did not test investor decisions based on the KID in a real-life setting. The report also lacks a description of the literature on consumer decision-making about financial products.

#### IV. The development of information documents at EU-level

##### 1. Information documents have changed over the years

The introduction of the information documents described above is mostly linked to investor protection and European and economic interests, for example tackling potential barriers to the single market. Other drivers are recent developments, such as the evolution of information technologies. Time and again, information documents did not seem to solve these problems because they did not improve the comprehensibility and comparability of financial products for consumers or they did not succeed in harmonizing the rules. This would ultimately prompt the EU legislator to introduce a new information document as 'the answer' to better informing investors. Unfortunately, that document would also fail to meet expectations and a new document would be introduced.

The goals that the EU legislator seeks to achieve by means of an information document are formulated differently in different policy documents. In general, information documents have one or more of the following aims: protecting investors, protecting the interests of financial institutions (e.g. reducing costs) and protecting economic and European interests. The aim of improving the comprehensibility and comparability of financial products for consumers has become more prominent in recent years.

There is a clear development in the rules regarding information documents at an EU level, which could be summarized as follows: from fewer rules to more rules, from general rules to a high-level of standardization, from rules solely about document content to rules about layout as well, from many open norms to more concrete norms or explanations in non-binding guidelines and from directives to regulations directly applicable in the Member States.<sup>75</sup>

When the Prospectus was introduced, the EU legislator did not pay attention to the target audience of the new document. When introducing the Simplified Prospectus, the EU legislator seems to have had a rational investor in mind who is able to make good decisions based on the information in the Simplified Prospectus. With the introduction of the KID, the legislator recognizes that investors are not always rational.

When the Prospectus was introduced, it seemed that no research was conducted before or after its introduction. Over time, the EU legislator has recognized the importance of research into the effectiveness of information documents. Recently, prior to the introduction of the KIID and the KID, consumer research was conducted to find out which way of presenting information is most suitable for investors.

Reasons	Objectives	Regulation	Investor	Evaluation
<ul style="list-style-type: none"> <li>Investor protection</li> <li>European and economic interests</li> <li>Problems with existing regulation (e.g. harmonizing) or existing document (e.g. not helpful for investors).</li> <li>Other developments (e.g. information technologies)</li> </ul>	<ul style="list-style-type: none"> <li>Differs from one policy document to the next</li> <li>Initially the focus was on European and economic goals, recently the focus is on investor protection: making financial products understandable and comparable for consumers.</li> </ul>	<ul style="list-style-type: none"> <li>From fewer rules to more rules</li> <li>From general rules to high-level standardization</li> <li>From rules solely about document content to more rules about the layout</li> <li>From many open norms to more concrete norms or explanations in non-legally binding guidelines</li> <li>From directives to regulations directly applicable in the Member States</li> </ul>	<ul style="list-style-type: none"> <li>From no attention to more attention to the investor</li> <li>From rational investor to acknowledging irrational behaviour</li> <li>Consumer (sometimes not clear)</li> </ul>	<ul style="list-style-type: none"> <li>Since 2009 research prior to introduction of a document</li> </ul>

66 E.g. Articles 6(4) and 8 Regulation 1286/2014 (n 5).

67 E.g. Recital 18 Regulation 1286/2014 (n 5).

68 Commission, Guidelines on the application of Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) (Communication 2017/C 218/02) [2017] OJ C 218/11.

69 Commission Delegated Regulation (EU) 2017/653 on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2017] OJ L 100/1.

70 Recital 17 Regulation 1286/2014 (n 5).

71 E.g. (n 5).

72 E.g. de Jager (n 4), Chapter 7.

73 Recital 18 and Article 8(3)(b) Regulation 1286/2014 (n 5).

74 Commission, 'Consumer testing study of the possible new format and content for retail disclosures of packaged retail and insurance-based investment products. MARKT/2014/060/G for the implementation of the Framework Contract n# EAHC-2011-CP-01. Final Report' (2015) <[https://ec.europa.eu/info/sites/info/files/consumer-testing-study-2015\\_en.pdf](https://ec.europa.eu/info/sites/info/files/consumer-testing-study-2015_en.pdf)> accessed 11 November 2019.

75 Colaert also signals that new information documents increasingly put the emphasis on the need for short, comprehensible and comparable product information, Colaert (n 3), 231.

## 2. The KID: concluding remarks

Although the legislation has changed over the years, the KID is in fact nothing new and the EU legislator should therefore not rely too much on this new legislation for a number of reasons. Firstly, the KID turned out to be simply a link in a chain that has existed for more than 30 years. This is because the EU legislator has been introducing information documents throughout that period. Some years later, however, these documents proved ineffective at achieving the goals that the EU legislator had envisaged. For example, the documents failed to increase investor comprehension or the comparability of financial products because they were too long or too difficult to understand. This would then prompt the legislator to introduce a new information document, again designed to solve these problems and improve the comprehensibility and comparability of financial products. However, time and again, as each new document proved ineffective, the legislator would propose a new document and so on. Viewed in this light, the KID is simply another document in the chain. Given the evolution of information documents in past decades, it is very likely that problems will soon arise with the KID and that the legislator will conclude that it is not as effective as expected.

The description of the evolution of information documents based on the five aspects highlights a number of reasons why they did not function as expected. Firstly, in the absence of concrete objectives, it is not really possible to evaluate how well an information document is functioning. The legislator therefore needs to be clear about the objectives that an information document should pursue. As with previous documents, this is not the case with the KID.

Secondly, research into pre-contractual information documents has been very scarce to date and has serious limitations.<sup>76</sup> Before 2009 there was no European research as to how information documents can help investors. Since then, and prior to the introduction of the KIID and the KID, there have been studies on which form of presentation makes the different components of these documents most understandable and comparable for investors.<sup>77</sup> However, there is a lack of research into how these documents operate in practice, how investment decisions are made based on this information, and how investors' decision strategies influence the investment decision. Research of this nature, for example taking into account the mental shortcuts (so-called heuristics<sup>78</sup>) that investors use, needs to be carried out in order to obtain a clear picture of how information documents function. Without this research the objectives formulated by the EU legislator for the KID cannot be properly substantiated.

Thirdly, it is conspicuous that the European legislator has looked for the cause of the document's ineffectiveness in the document itself. As a result, the documents have become shorter and more standardized. However, the long and rather unsuccessful history of information documents suggests that the solution should be sought in the document's target group: investors. Studies show that consumers are not generally motivated to immerse themselves in financial matters.<sup>79</sup> They also frequently lack the knowledge and skills to understand financial products.<sup>80</sup> The heuristics mentioned earlier can produce a situation in which exactly the same information is

interpreted differently by different investors.<sup>81</sup> It is a good thing that the EU legislator's picture of investors – as people who can display irrational behaviour and who have limitations – has since been shown to reflect reality. However, the EU legislator does not then proceed on the basis of that picture. Nor is it clear how the picture that the EU legislator has of consumers is translated into regulations for the KID. What is more, an information document always in some sense presupposes a degree of rationality. This is because of the assumption that information will make financial products comprehensible and comparable. This assumption seems to be out of step with the EU legislator's recognition that investors can display irrational behaviour. The question then still remains of whether such a degree of rationality is realistic given who the investors currently are. All in all, greater clarity is needed about how investors' irrational behaviour should be translated into regulations for the KID and which consequences it has for mandatory information such as the KID.

To conclude, the EU legislator needs to reconsider the use of information documents like the KID as policy instruments. Unless this happens, and unless improvements are made regarding the points discussed above, the KID will be nothing new under the sun despite being relied on – unjustifiably – as a tool for investor protection. This is not in the interests of investors, nor of a smoothly operating economy. ■

76 In preparation of this contribution only two studies of investors making a decision on the basis of a short information document about financial products were found, neither of which were conducted by the EU legislator. These studies are: Torsten Walther, 'Key investor documents and their consequences on investor behavior' [2015] 85(2) *Journal of Business Economics* 129-156 (which looked at the comprehensibility of the KIID compared with the Prospectus) and John Beshears, James J Choi, David Laibson & Brigitte C Madrian, 'How does Simplified Disclosure Affect Individuals' Mutual Fund Choices?' (2009) NBER Working Paper Series No 14859 (which looked at the American Prospectus and a summary of the prospectus).

77 Commission (n 74).

78 E.g. Frank H Easterbrook & Daniel R Fischel, 'Mandatory Disclosure and the Protection of Investors' [1984] 70 *Virginia Law Review* 1335; Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' [2005] 32 *Journal of Law and Society* 349-370. W Fred van Raaij, *Understanding Consumer Financial Behavior. Money Management in an Age of Financial Illiteracy* (Palgrave Macmillan 2016); de Jager (n 4), Chapter 8.

79 Financial Services Authority, 'Informed decisions? How consumers use Key Features: a synthesis of research on the use of product information at the point of sale' (2000) 26; Millward Brown/Centrum, 'Evaluatie van de Financiële Bijsluiter. Resultaten van onderzoek onder consumenten, intermediairs en aanbieders' (2004) 23 <<https://docplayer.nl/2767106-Evaluatie-van-de-financiele-bijsluiter-resultaten-van-onderzoek-onder-consumenten-intermediairs-en-aanbieders.html>> accessed 11 November 2019; Reg van Steen, Julie Visser & Adriaan Eecen, 'De effectiviteit van de Financiële Bijsluiter. Resultaten van onderzoek onder consumenten' (2009) 15 <[file:///C:/Users/Gebbruiker/Downloads/blg-12291%20\(5\).pdf](file:///C:/Users/Gebbruiker/Downloads/blg-12291%20(5).pdf)> accessed 11 November 2019; W Fred van Raaij, *Understanding Consumer Financial Behavior. Money Management in an Age of Financial Illiteracy* (Palgrave Macmillan 2016) 15; Mark Muraven & Roy F Baumeister, 'Self-Regulation and Depletion of Limited Resources: Does Self-Control Resemble a Muscle?' [2000] 126(2) *Psychological Bulletin* 247-259.

80 For an overview of financial literacy research: Annamaria Lusardi & Olivia S Mitchell, 'Financial Literacy around the World: An Overview' (2011) NBER Working Paper Series No 17107.

81 E.g. Angelo Capuano & Ian Ramsay, 'What Causes Suboptimal Financial Behaviour? An Exploration of Financial Literacy, Social Influence and Behavioural Economics' (2011) University of Melbourne Legal Studies Research Paper No. 540 <<http://dx.doi.org/10.2139/ssrn.1793502>>; de Jager (n 4), Chapter 8.