

## PRIIPs FRAMEWORK

### When is a PRIIP « made available » to retail investors? Selling restrictions – Suggested language

The following abbreviations are used in this document:

- **KID**: Key information document;
- **PRIIPs**: Regulation (EU) n° 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products.

#### DISCLAIMER

Readers are reminded that the suggested language appearing in this document draw only on discussions conducted within the AMAFI Committee which includes members who, in their professional activity, are particularly concerned by the question raised herein. Its sole purpose is to share with members and beyond the standard practice established in relation to that question under the new PRIIPs regulation. This document has not been communicated, for prior approval, to AMF. The elements contained herein must be treated with care at all times. Under no circumstances may AMAFI be held liable for its content.

PRIIPs requires any person who provides retail investors with investment products whose performance depends on underlying assets (PRIIP) to prepare a key information document (KID) for those investors.

Two conditions must be cumulatively met in order to fall within the scope of PRIIPs:

- ✓ The financial instrument must be a “*packaged retail and insurance-based investment product*” and,
- ✓ It must be “*made available to retail investors*”.

If the notions of “*packaged retail and insurance-based investment product*” and “*retail investor*” are defined in Article 4 of PRIIPs, what is meant by the words “*made available*” is not.

Some products which, due to their characteristics, are likely to fall within the scope of the products covered by PRIIPs are, in compliance with the issuer’s wish, exclusively issued for the benefit of, and subscribed by, investors other than retail investors and then, they are admitted to trading on a regulated market (RM) or on a multilateral trading facility (MTF). For such products, it is essential to clarify what is meant by “*made available to retail investors*”.

Indeed, the question, in that case, is to determine whether the mere fact that such products are admitted to trading on a RM or a MTF, in spite of the fact that they are issued solely for the benefit of investors other than retail investors and subscribed exclusively by such investors (other than retail investors), may lead to the conclusion that these products are “*made available*” to retail investors and as a result, fall within the scope of PRIIPs.

It must be considered - no detailed analysis of the applicable regulations being necessary for that purpose - that the European Supervisory Authorities (ESAs) have given a clear answer to that question in a Questions & Answers (Q&A) Document on the PRIIPs KID<sup>1</sup>. Here are the relevant Question and Answer.

**2. Is a KID always required when an investment product is listed on a regulated market?**

*A manufacturer is not required to draw up a KID for a product listed on a regulated market when they have defined the product as meant only for non-retail investors.*

This “Question and Answer” confirms, without any ambiguity, that as soon as it can be established that the product concerned was conceived exclusively for the benefit of investors other than retail investors, the fact that the product is admitted to trading on a regulated market is not sufficient to make such product fall within the scope of PRIIPs and make its producer (the issuer) subject of the obligation to establish a KID. It should be noted that the above Answer from the ESAs concerns the impact of the admission to trading on a regulated market. It is nevertheless reasonable to consider that this Answer would even more so stand in the case of a listing on a MTF.

This is precisely the case of the products mentioned above which are issued solely for the benefit of, and subscribed exclusively, in the context of private placement, by qualified investors, *i.e.* investors other than retail investors.

For issuers to be able to demonstrate that the issuance of such products fits in the context envisaged by the ESAs in the Question and Answer referred to above, AMAFI suggests in two Annexes to this document some language containing selling restrictions to be inserted in three documents used in the offer process relating to such products, *i.e.*:

- The offer documentation (**Annex 1**)
- The Euronext notice<sup>2</sup> (**Annex 2**)
- The Euroclear France notice<sup>3</sup> (**Annex 2**).



<sup>1</sup>Questions and answers (Q&A) on the PRIIPs KID - 20.11.2017 / JC201749 (see question 2, p.4).

<sup>2</sup> For the RM of Euronext Paris, Article 6.3 (6303) of the Euronext Rule Book (Book I: Harmonised rules) refers to the notice issued by the Relevant Euronext Market Undertaking in relation to the date on which the admission to listing of Securities shall become effective, the Market of Reference, any conditions and other particulars in respect of the admission to listing of the relevant Securities. For Euronext Access (Paris), Article 2.7 of the Euronext Access Rules refers to the notice of admission published by Euronext before the date planned for the first trading, containing certain information on the profile of the company, the calendar and the characteristics of the operation as well as technical information necessary to the trading.

<sup>3</sup> Information issued by an issuer in relation to a financial operation which is circulated by Euroclear France to its affiliates at the issuer's request.

## Annex 1

### **Suggested language containing selling restrictions to be inserted in the offer documentation**

#### **Warning**

*The Bonds<sup>4</sup> may not be offered or sold or otherwise made available to retail investors (no Key Information Document under PRIIPS Regulation will be prepared).*

#### **Prohibition of sales to European Economic Area retail investors**

No action has been undertaken or will be undertaken to make available any Bonds to any retail investor in the European Economic Area. For the purposes of this provision:

(a) The expression "retail investor" means a person who is one (or more) of the following:

- (i) a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU (as amended, "MiFID II"); or
- (ii) a customer within the meaning of Directive 2002/92/EC (as amended, the "Insurance Mediation Directive"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or
- (iii) a person who is not a "qualified investor" as defined in the Prospectus Directive 2003/71/EC;

(b) The expression "offer" includes the communication in any form and by any means of sufficient information on the terms of the offer and the Bonds to be offered so as to enable an investor to decide to purchase or subscribe the Bonds.

Consequently no Key Information Document required by Regulation (EU) No 1286/2014 (as amended, the "PRIIPs Regulation") for offering or selling the Bonds or otherwise making them available to retail investors in the EEA has been prepared and therefore offering or selling the Bonds or otherwise making them available to any retail investor in the EEA may be unlawful under the PRIIPS Regulation.

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<sup>4</sup> This defined term must correspond to that used in the offer documentation to define the financial instrument at stake. If another term is used, that term must be used in the suggested language appearing in this Annex.

## Annex 2

### **Suggested language containing selling restrictions to be inserted respectively in the Euronext and the Euroclear France notices**

[Issuer Name]

[Issuer Name] will issue on [Issue date] a [Instrument and maturity] (ISIN code: [x]) (the “Bonds<sup>5</sup>”).

The Bonds were only offered via a private placement and were not offered to any retail investor in the European Economic Area and shall not be made available to retail investors. For the purposes of this provision, the expression "retail investor" means a person who is one (or more) of the following: (i) a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU (as amended, "MiFID II"); or (ii) a customer within the meaning of Directive 2002/92/EC as amended, where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or (iii) not a qualified investor as defined in the Directive 2003/71/EC as amended.

No Key Information Document under Regulation 1286/2014/EU (as amended) has been nor will be prepared in connection with the Bonds.



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<sup>5</sup> This defined term must correspond to that used in the offer documentation to define the financial instrument at stake. If another term is used, that term must be used in the suggested language appearing in this Annex.