

ESAs' PRIIPs consultation

On 16 December 2021, ICMA submitted its [response](#) to the ESAs' [call for evidence](#) on the European Commission mandate regarding the PRIIPs Regulation. Much of the response reiterated prior ICMA positions.

Focus mainly on scope: ICMA's response was from the perspective the mainstream primary international bond (Eurobond) markets. In this respect, ICMA's PRIIPs focus has mainly been on PRIIPs regime scope rather than KID content/production – as threshold concerns relating to KID purpose and related liability¹ have meant that KIDs are not generally produced in the mainstream bond context. (ICMA is only aware of one KID seemingly have been produced in the margins of the mainstream Eurobond context since the PRIIPs Regulation came into effect in January 2018.)

Official issuers: The response noted that any extension of PRIIPs scope to issuers with certain EEA-related official status and non-profit entities with certain EEA official recognition (as defined in Prospectus Regulation Articles 1.2(b)/(d)/(e)) would likely, as for other areas of the bond markets, curtail retail supply – and it is unclear how this would benefit retail investors.

Product scope: The response noted that product scope of the PRIIPs Regulation is not entirely clear, compounded by extraneous and inconsistent official public statements.² This could be clarified by identifying granular product features that would not of themselves render a product “packaged” under PRIIPs – as the ESAs attempted to do with their [2019 Supervisory Statement](#) (see further below) and as the UK FCA proposed in its recent [Consultation Paper CP21/23](#) that ICMA [responded](#) to (as reported at page 31 of the [Fourth Quarter 2020 edition](#) of this Quarterly Report). However, such a granular approach to regulatory guidance can give rise to extended complex debate about individual granular features. It can also be more challenging in terms of future-proofing for new product structures – eg regarding sustainability-linked bonds that were only just coming into existence at the time the 2019 Supervisory Statement was finalised and that are not included among its list of coupon step-up events (issuer ratings downgrade, change of control event, tax or regulatory event). It is therefore challenging to be able to determine an exhaustive, definitive list of granular features that should not render a product “packaged” under PRIIPs. In this respect, ICMA has previously proposed an alternative, conceptual, approach to product scope guidance.³ The most effective approach would be to amend the definition of a PRIIP in the PRIIPs Regulation itself – with the response suggesting the specific wording in this respect.

ESAs' 2019 Supervisory Statement: The response noted that the 2019 Supervisory Statement was 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 have endured 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. In this respect, the impact in the mainstream bond space of the guidance contained in the 2019 Supervisory Statement has been limited by the Statement's unavoidably informal, non-binding nature: it potentially addresses liability to regulatory enforcement under administrative law (to the extent followed in practice by EEA national regulators) but has no scope to address liability to investors under civil law.

The limited substantive scope of the 2019 Supervisory Statement has also been a factor. As it is challenging to determine an exhaustive, definitive list of features that should not render a product “packaged” under PRIIPs, it is difficult to comment exhaustively on potential omissions from the substantive scope of the 2019 Supervisory Statement. The response

however cited three specific examples of product features falling outside the 2019 Supervisory Statement despite involving no “intercession” (as contemplated under Recital 6 of the PRIIPs Regulation):

- bonds with make-whole provisions, as the 2019 Supervisory Statement notes only that NPV make-whole bonds (which are the common/market standard form) with a discount rate calculation mechanism known in advance (the meaning of which may depend on the particular drafting of a make-whole clause and the level of discretion drafted into it) “could be considered as a separate case”;⁴
- sustainability-linked bonds (as noted under “product scope” above); and
- coupon caps and non-zero floors.

Retail scope: The response noted that, broadly speaking, stakeholders are currently comfortable that, combined with some appropriate legending, the avoidance by issuer-controlled parties of retail-specific marketing and of direct retail access facilitation (such as admission to a direct retail trading platform) should not be reasonably seen as “making available” – bearing in mind also that the absence of a KID amounts to a statutory prohibition on retail sales by anyone of in-scope products. That said, it would be helpful for the retail scope of the Regulation to be explicitly aligned with the approach to exemptions under the Prospectus Regulation (such as those related to minimum denominations and to offers addressed solely to qualified investors).

Taxonomy of PRIIPs: The response noted that a classification of products that could then link to standardised, generic market-wide product information sounds superficially attractive. However, this might face the same challenges as those encountered in attempting to define the general product scope of PRIIPs. As ICMA's current focus is on clarifying mainstream bonds as being outside the product scope of the PRIIPs Regulation, it seems pointless to expend effort attempting to elaborate a taxonomy of product grouping/buckets within this space.

Standardised KID disclosures: The response agreed that the current degree of standardisation of the KID is detrimental to the proper understanding and comparison of certain types of PRIIPs. It is only meaningful to compare like with like. (Cars and motorbikes are both motor vehicles, but of limited comparability nonetheless.) Whilst this is intuitive, it may be a question to be answered by a consumer testing exercise (comparing understanding rates for less standardised KIDs and/or KIDs for narrower, more comparable product groups).

Next steps: The ESAs' issued the call for evidence further to a European Commission request for advice regarding its preparation of legislative proposals implementing aspects of the Commission's retail investment strategy. (ICMA [responded](#) to the Commission's [consultation](#) on a retail investment strategy for Europe, as reported at pages 29-31 of the [Fourth Quarter 2020 edition](#) of this Quarterly Report.) However, the above aspects that ICMA responded to were included in the call for evidence at the ESAs' own initiative, to further advise the Commission beyond its formal mandate. It is consequently unclear how much Commission interest there may be regarding such aspects. ICMA will continue to engage on this topic, including by seeking to participate in a stakeholder event the ESAs plan to hold in the first quarter of 2022, ahead of the ESAs' 30 April 2022 deadline to deliver their advice to the Commission.



Contact: Ruari Ewing
ruari.ewing@icmagroup.org

1. See #12-#15 in ICMA's September 2018 [response](#) to a UK FCA Call for Input on PRIIPs.

2. See #3-#4 in ICMA's September 2018 response.

3. See #7 in ICMA's September 2018 response.

4. The European Commission acknowledged, in the context of its Capital Markets Recovery Package [proposal](#), the absence of a clear rule that a make-whole clause does not of itself make simple corporate bonds into PRIIPs.