	Comments Template for Joint Consultation Paper concerning amendments to the PRIIPs KID (JC 2018 60)	Deadline 6 December 2018 23:55 CET
Name of Company:	Invest Europe	
Disclosure of comments:	Please indicate if your comments should be treated as confidential:	Public
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General Comments	The Public Affairs Executive ('PAE') of Invest Europe, the association representing the European private equity, venture capital and infrastructure investment industry appreciates the opportunity to respond to this Consultation on the draft regulatory technical standards ("RTS") of the Key Information Document (KID). *Private equity features* Private equity funds are typically structured as limited partnerships with a contractually limited life. They have in the vast majority of cases a term of ten years with an option to extend, normally by two years. The closed-ended and partnership interests that form the private equity fund are not	

intended to be transferred or traded. However, they can be transferred to another investor with the consent of the GP although this does not occur frequently over the term of a fund.

As private equity funds invest in unlisted, private companies, these are not subject to frequent (e.g. daily) valuations and therefore do not have a readily ascertainable market price. Private equity firms will typically hold investments between four to six years at which time they will look to sell, or ‘exit’, their stake, either on the stock market, to a corporate buyer or to another investor.

Most importantly, private equity managers primarily market their funds to institutional investors, such as pension funds, sovereign wealth funds, insurance companies, family offices, university endowments and government agencies/development funds. Given these funds will typically only have these types of institutional investors, most of these will therefore be outside the scope of the PRIIPs Regulation.

There will however be some instances, in particular for venture capital, where prospective investors in the fund will include high-net worth and/or sophisticated individuals. For those funds that do engage with such investors, they would typically only represent a very small proportion of the fund’s investor base and these would be distributed under private placement regimes when possible. It is a key feature of private placement regimes both within the EEA and internationally that there should be no general solicitation of investors or general advertising of the product. A private equity firm will therefore typically not make any marketing materials relating to its funds generally available on its website.

Furthermore, many of the investors in the asset class that are classified as retail under MiFID will have significant experience of investing in these funds and are not by any standard average or typical retail investors (as described in the European Commission's Explanatory Memorandum dated 3 July 2012). However, they will not typically meet the MiFID II definition of a professional client and therefore fall into the category of retail investors for whom a KID is required.

The reason for this is that MiFID “professional upon request” tests are calibrated for MiFID investment services provided in relation to liquid assets such as traded shares. We have made many representations on the inappropriateness of the MiFID professional client definition over the years. The tests are extremely difficult to satisfy in the case of individuals (regardless of their wealth, sophistication or experience) who invest in long-term private equity funds and who have relevant experience in business (e.g. entrepreneurs) rather than, necessarily, financial services. For example, even for very large institutional investors the number of funds invested in over a 12-month period would be typically be in single figures as opposed to the number of deals made in liquid assets.

Impact of the KID on the private equity industry

From these investors' perspective, the immediate result of the introduction of the KID Regulation has been a limitation of their investment opportunities, as fund managers often chose not to market their funds to them any longer due to the burden of producing a KID for only a few investors, and this despite these investors' experience and sophistication. This seems to be a clearly unintended consequence of the legislation.

Meanwhile, the KID Regulation also had an impact on the ability of venture capital funds – which typically receive a more significant amount of capital from this type of investor – to channel the capital held by these investors (which are often successful entrepreneurs themselves) towards the EU innovative economy. This ultimately affects the attractiveness of the EuVECA passport that first acknowledged in EU law the value of these investors and allowed fund managers to market to them at EU level.

Proposed solutions

Taking into consideration this is not the objective of the proposed review, we would like to stress to the ESAs there are two relatively straightforward ways to mitigate this issue without giving rise to investor protection concerns:

- **exempting sophisticated investors, as defined in EuVECA, from the scope of the PRIIPs Regulation**

All prospective investors, including semi-professional investors, are provided with considerable amounts of information on the fund and the fund manager and carry out their own due diligence prior to making an investment. In addition, as part of their investment, they are required to acknowledge that they understand the risks involved in making that investment. We do not consider that there will be any increase in investor protection should such investors receive a KID, over and above the information they would already have been receiving.

- **consider that a PRIIP should be viewed as "made available" to retail investors within the EEA only where the PRIIP is widely distributed**

The requirement to produce a KID should not apply where a manager distributes a fund on a private placement basis or, more generally, when marketing materials are distributed to fewer than 150 retail investors per EEA member state. This would be consistent with the general perception – and the way rules have been set up - that the PRIIPs regulation is targeted at mass-market retail distribution and would be in line with the thresholds set in the Prospectus Regulation.

For example, the PRIIPs Regulation (Article 5(1) and Article 9) requires the KID to be published on the manufacturer's website. This publication requirement gives the impression that the manufacturer is always soliciting retail investors generally, potentially drawing certain investors to asset classes that are not suitable to them. In a private equity context, the private placement memorandum and other marketing materials will on the contrary be distributed on a confidential basis to a limited number of investors only – typically high net worth individuals within the EEA (such as strategic partners in a particular industry sector.

As the PRIIPs regime was clearly designed for mass-market retail products, and given the unintended consequences of other interpretations, we think it would be reasonable to interpret the concept of a PRIIP being "made available" to retail investors consistently with either or both of the

	concepts referred to above, and that this might reasonably be addressed through Q&A without necessarily requiring an amendment to the underlying legislation.	
Q1	We disagree with the assumption that past performance should necessarily be seen as relevant, even in cases where it is available. Using past performance to project future returns can lead to fundamentally misleading results, especially when the product is not exposed to volatility risk. The more the ability of the fund manager depends on factors that are not related to such performance, the higher the chance past performance would not give the investor a proper estimation of the risk he or she faces. In a private equity context, past performance would for example not take into consideration the nature of the underlying portfolio of businesses in previous funds managed by the same fund manager that may differ from the investment strategy of the fund currently being raised. A manager may set up a private equity fund with a slightly different investment focus. This is especially the case in the fast evolving arena of venture investing where opportunities to create businesses in some sectors arise because of technological developments that make it possible to invest in areas that even a short time ago would not have existed and where no track record exists. None of these factors will appear in the KID, despite playing an important role in determining the risk features of a manager's new fund compared to the previous one. It is also the case that the very long time between one fund being raised and the next means that other factors impacting the performance of previous funds could have changed during that time (e.g. market environment, stage in the economic cycle, evolution of the fund management team). Relying too heavily on past performance information also carries the danger of over-emphasizing temporary depressed market conditions previous private equity funds have been exposed to at one stage of their lifetime, as well as being too optimistic during periods of market booms that are no longer indicative of a later exit environment.	
Q2	Yes. As noted by the ESAs in p. 12 of the paper "actual past performance does not exist for some types of PRIIPs". This is in particular the case for any closed-ended, illiquid product at the beginning of their life. As we explained in our general comments, private equity funds are	

	structured as limited partnerships with a contractually limited life of ten to twelve years. The ultimate performance of these funds can only be properly assessed at the end of the life of the fund when all the holdings the fund has taken in companies have been divested, and when the investors received the dividends of its long-term investment.	
Q3	While this may be appropriate for funds sharing characteristics with UCITS, ESAs should be careful not to base the approach currently used in the KII for other types of funds. As we mentioned in our response to Question 2, it is important for the KID to make a clear distinction between liquid and illiquid products. In a private equity context, where there are no or very limited redemption rights, the only meaningful performance is the one at the end of the holding period. Any other representation may not be indicative of the nature of the product. While private equity funds are able to calculate a net asset value (generally on a quarterly basis) based on the fair valuation of assets under accounting standards, this must not be confused with market prices that are readily available for traded securities as asset valuations for private equity investments take time to prepare and are not calculated daily. In addition, private equity funds by nature are not traded and market data is therefore not available.	
Q4	No. As we mentioned above, the specific features of private equity funds mean that the risk analysis that is carried out in practice is very different from that of tradeable securities. It is worth the ESAs taking into account that the PRIIPs legislation was first and foremost designed for asset classes that have readily available data. As such, artificially applying historical market data to private equity funds, where such data does not exist, will necessarily lead to results that will not correspond to the realities of the investment.	
Q5		
Q6	We support the idea of including a more prominent statement in the initial paragraph that would make it clearer that scenarios are based on simulations. However, we do not believe that proposed amendments to the narrative resolve the fundamental issue that for some PRIIPs, such as private equity ones, the calculation of expected performance from the outset of the fund is not a norm. This is due to the fact that it is impossible to establish all	

	the factors and assumptions at the outset of a fund that could be used to construct a probabilistic outcome given the long term and illiquid nature of the funds and investments. For these KIDs, there should at least be the possibility of providing a commentary in this section explaining why the narrative explanations may not apply in this case. Furthermore, it may be worth providing additional elements, such as the fact that the presentation of the performance scenarios makes no differentiation between an investment and a commitment. Overall, and with respect to both the risk and performance scenario calculations, we find that it is not possible to explain risks in sufficient detail in the KID itself. Our experience is that this forces firms to add additional information in covering emails or in footnotes to the KID in order to make the investor aware of the real risk of the product. There should be more space to provide additional qualitative information on the assumptions used in the calculations.	
Q7	As explained above, we believe that the methodology behind the analysis is flawed and that the suggested changes, such as the extension the historical period, will not solve the fundamental problem behind the approach.	
Q8	On top of the comments made above, we would like to stress that the requirement to present data over 1, 5 and 10 years remains meaningless given the way the private equity investment cycle operates and the fact that there are no (or sometimes very limited) redemption rights. The impact on performance if an investor sells their participation in a closed-end fund before the end of the life of the fund would, as a result, be difficult to quantify, as for any closed-ended products.	
Q9	We do not have any views on points 1, 2 and 4 of this section, as they are not relevant in a private equity context. Regarding point 3 (narratives for the Summary Risk Indicator), we support the idea of providing additional explanatory text to the Summary Risk Indicator (SRI), as it is likely to be misleading when it is based on data from growth stage of a cycle (as research by various trade bodies, including the AIC, has demonstrated).	

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Q10	The impact on performance if an investor sells their participation in a closed-end fund before the end of the life of the fund would, as a result, be difficult to quantify, as for any closed-ended products.	
Q11	We fully share the view of the ESMA Securities Markets Stakeholder Group that the current exemption of UCITS funds and certain AIFs from PRIIPs should be extended at least until the review of the level 1 PRIIPs Regulation has been fully completed.	
Q12		
Q13		