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So where are we now...?

An FAQ on where things stand on PRIIPs KIDs for UCITS

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Contents

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1. The PRIIPs KID for UCITS – where are we now ?

The PRIIPs KiD

The EU's PRIIPs Regulation introduced a mandatory key information document (PRIIPs KID) for packaged retail and insurance-based investment products that are made available to retail investors.

The PRIIPs KID is a three-page A4 information document which gives key facts to investors – its form and content as well as how it must distributed to investors are all highly prescribed.

Responsibility for preparing the PRIIPs KID lies with the 'PRIIP manufacturer'.

For a UCITS, this is highly likely to be the UCITS management company or authorised fund manager (together referred to in this note as the "UCITS ManCo" for simplicity).

Where do things stand at the moment?

The PRIIPs Regulation includes a number of areas where supplementary measures concerning the PRIIPs KID were needed - these are set out in the Commission Delegated Regulation on the presentation and context of the PRIIPs KID (the Delegated Regulation).

Changes to the Delegated Regulation have been under review by the Joint Committee of the European Supervisory Authorities (the Joint Committee) whose most recent consultation proposed changes to address issues identified since the introduction of PRIIPs KIDs and to make changes in advance of the PRIIPs KID requirements being applied to UCITS.

Ordinarily, this would lead to the publication of a Final Report, setting out the proposed changes which the Joint Committee had agreed to submit to the European Commission (the Commission) and which the Commission would then be expected to endorse and adopt.

However, in this case, the Joint Committee reported in July 2020 that it was unable to reach the required level of agreement on the proposals (although the Boards of ESMA and the EBA had voted in favour, the Board of EIOPA was unable to reach a qualified majority) and so the Joint Committee was not in a position formally to submit its advice to the Commission. As a result, its Final Report was published in draft only (i.e., not approved).

In December 2020, the Commission wrote to the Chairs of each ESA requesting that they agree the draft RTS by 29 January 2021, failing which the Commission would take whatever steps it felt necessary to unblock the impasse.

In response to that letter, on 3 February 2021, the ESAs confirmed that they had agreed the draft RTS (in the same terms as those rejected in July 2020) and submitted these to the Commission in the form of an approved Final Report.

2. What happens next?

As the Joint Committee noted in its consultation paper, not all the concerns about the contents of the PRIIPs KID that have been raised to date can be resolved through changes to the Delegated Regulation. Some would require policy aspects of the PRIIPs Regulation itself to be rewritten – see below – and this can only be done by the Council of the EU and the European Parliament.

One of the main reasons why the draft technical advice (or RTS) that came out of this consultation originally failed to gain the approval of the Joint Committee was that those who voted against in July 2020 generally argued that a partial revision of the PRIIPs Delegated Regulation is not appropriate at this stage, given that the Commission is to undertake a comprehensive review of the PRIIPs Regulation itself.

This review will include, among other things:

- a survey of how the PRIIPs KID comprehension alert (i.e., the statement “You are about to purchase a product that is not simple and may be difficult to understand”, which PRIIPs KIDs must include where applicable) is operating
- a survey of the practical application of the Regulation, taking into account market developments since its publication
- consumer testing
- assessing whether to extend the UCITS exemption (or, possibly now more likely, whether the UCITS KIID could be considered equivalent to the PRIIPs KID) and
- considering whether to extend the PRIIPs Regulation to cover other financial products.

If changes to the text of the PRIIPs Regulation itself are to be made, the Commission’s proposals at the end of its review would be the obvious starting point to set that particular ball rolling.

The Commission’s review was originally meant to have been completed by the end of 2019 but, because of delays and the COVID-19 pandemic, the timing has slipped and it is thought that the outcome of the review will not now be known until sometime in 2021 at the earliest.

One further point to bear in mind is that the Final Report (June 2020) of the European Commission’s High Level Forum on the Capital Markets Union invites the Commission to review the PRIIPs Regulation “as soon as possible, and in sufficient time to avoid a conflict with the expiry of the exemption for UCITS” in order to address issues regarding the “intelligibility and comparability of information and the coherence with MIFID information rules, in particular for performance and cost disclosures”. The extent of the pressure this will exert on the review process is, as yet, unclear. We will, of course, be following this development and its implications for the PRIIPs KID carefully.

(For the consequences of delay in the Joint Committee agreeing draft RTS as far as they affect the inclusion of past performance information in the PRIIPs KID, see also Q.5 below.)

3. What does this mean for my UCITS? ...and for my NURS?

What does this mean for my UCITS?

As far as UCITS are concerned, Article 32(1) of the PRIIPs Regulation initially exempted UCITS from being required to prepare a PRIIPs KID until 31 December 2019. This date, though, has been put back and, as things stand, the exemption is due to expire on **31 December 2021**. Some observers, though, think that, because it has taken so long to agree draft RTS, the Commission may allow one further - very likely, final - six month extension.

This means that, as it stands now, a PRIIPs KID will need to be produced for all UCITS being sold to retail investors from **1 January 2022**.

What is clear from the PRIIPs Regulation is that a PRIIPs KID is required when marketing to **retail** investors. This could therefore mean that managers with UCITS targeted only at **professional** investors could potentially decide not to provide, or even produce, a PRIIPs KID at all. Indeed, for UCITS manufacturers who have tagged their investor type as "professional" only in their EMT, query whether the production of a PRIIPs KID would run counter to the messaging of who the target market is for the UCITS in question. How this aspect of the transition will play out is still unclear, but it highlights the challenges of merging two separate set of rules together as one.

What does this mean for my NURS?

Article 32(2) of the PRIIPs Regulation extends the UCITS exemption referred to above to other (i.e., non-UCITS) funds where these are sold to retail investors and are already required to provide them with the information contained in the UCITS KIID – for example a UK NURS - or potentially now to UK UCITS.

As a result

- until **31 December 2021**, a NURS has the choice of providing either a PRIIPs KID or a NURS Key Investor Information document (NURS KII) containing the information required at COLL 4.7.2R
- from **1 January 2022**, the option of providing a NURS KII falls away, such that a PRIIPs KID will need to be provided to all new retail investors.

4. Will I have to provide both a UCITS KIID and a PRIIPs KID?

Between now and **31 December 2021**, when the exemption period is currently due to end, a UCITS must continue to provide a KIID to investors in the form prescribed by a Commission Regulation made under the UCITS Directive (the UCITS KIID requirement).

As things stand, no proposals have been tabled to 'switch off' the UCITS KIID requirement and, as discussed in Q.5 below, legislative time for making such a change is limited.

Strictly speaking, this means that (unless the PRIIPs exemption for UCITS is extended) from **1 January 2022**, a UCITS will be required to prepare both a PRIIPs KID **and** a UCITS KIID.

We do, though, expect the UCITS KIID requirement to be switched off at some stage, at least as far as retail investors are concerned, and the Commission is expected to table proposals to this end "in due course".

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5. Will I be able to include past performance?

What's the problem?

The PRIIPs regime seeks to enshrine the principle of "comparability" between very different products including (as evidenced in its name) both "investment" and "insurance-based" products.

- Investment products such as UCITS and AIFs are typically sold on the basis of past performance (with appropriate disclaimers) and forward-looking statements are anathema (and actively prohibited in some jurisdictions).
- Insurance products, on the other hand, are often – to put it simplistically - sold on the basis of projected returns based on an actuarial assessment of the past and the probability of future events.

These are possibly irreconcilable ends of the PRIIPs spectrum but the search for the Holy Grail of comparability across that spectrum has led to persistent unrest between the two camps and was at the heart of the Joint Committee's recent consultation.

To recap:

- the PRIIPs Regulation requires PRIIP manufacturers to include "appropriate performance scenarios" in different market conditions and information about the assumptions made to produce these scenarios while
- the Delegated Regulation requires that performance scenarios should only be forward looking (i.e., covering only a stress scenario, an unfavourable scenario, a moderate scenario and a favourable scenario, with no apparent allowance for the inclusion of historic performance data).

The stance taken by the Joint Committee, though, has been less straightforward:

- in November 2018, its consultation paper proposed the inclusion of "information on past performance in the PRIIPs KID whenever it is available" (though without proposing changes to the requirement for the inclusion of the methodology as to how future performance scenarios must be generated)
- the resultant Final Report then confirmed that, in light of feedback to the consultation paper, the Joint Committee would not be proposing to introduce past performance (at least for the time being)
- its most recent consultation paper, of October 2019, though, set out proposals for including past performance in the PRIIPs KID for certain types of PRIIPs (including UCITS, AIFs and unit-linked insurance-based investment products) **alongside** future performance scenarios.

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Where did the Joint Committee come out?

In its Final Report, published in February 2021, the Joint Committee has tried to find a way round the tension between (a) its preference for including past performance information and (b) the intention of the PRIIPs Regulation that performance scenarios, rather than past performance, should be included, by proposing a 'second best' approach.

The Joint Committee's compromise, then, proposes publishing past performance information separate from the PRIIPs KID but referring to this disclosure in the 'Other relevant information' section of the PRIIPs KID.

Nevertheless, the ESAs also strongly recommended the inclusion of past performance information within the main contents of the KID. One consequence of this, though, would be the KID would need to be four pages long – since the PRIIPs Regulation sets a three-page limit for a KID, the Regulation itself would need to be amended.

What's been the fund management industry's reaction?

Pretty critical, for the most part. **Although there's been support for the recent indication of the direction of travel towards allowing some indication or reference to past performance in the draft RTS, it is an uneasy compromise which pleases no-one.**

In April 2020, (so before the latest development), the European Fund and Asset Management Association (EFAMA), for example, issued a statement in which it:

- argued strongly that the Joint Committee should reassess the reliance it places on projected performance scenarios in its proposals and
- called for an urgent review of the PRIIPs Regulation itself should it not be possible to introduce appropriate flexibility for UCITS/ AIFs KIDs to display past performance through changes to the Delegated Regulation.

The key issue, as EFAMA flags up, is whether the Commission will accept the case **against** pursuing comparability between PRIIPs of differing types "at any cost" and **for** the inclusion of past performance, which EFAMA regards as of "paramount" importance.

What happens next?

At the moment, it remains far from certain where the Joint Committee's Final Report will leave things.

What is clear, though, is that the impasse is continuing to hold up the overall process and delay further the decision as to whether changes will be needed to the PRIIPs Regulation itself - meanwhile the status quo continues and the UCITS exemption remains set to expire on **31 December 2021**.

However, although the Commission urged the Joint Committee to finalise the draft RTS, there is nothing to show that the Commission would necessarily have accepted the compromise contained in the draft Final Report (which the Joint Committee was close to agreeing) as this comes down generally in favour of including past performance information as part of the PRIIPs KID.

With the UCITS exemption due to run out in under 11 months, if the requirement to provide a KIID is to be 'switched off' in good time, this will need changes to the Commission Regulation under the UCITS Directive, which specifies what the KIID must contain - and legislative time to bring these changes about is already very limited ... and getting more so.

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6. So, how different are the UCITS KIID and the PRIIPs KID?

While there are certainly similarities between the UCITS and PRIIPs regimes, there are also some key differences that need to be considered when creating PRIIPs KIDs.

Some notable similarities include:

- the content of the UCITS KIID should be "**fair clear and not misleading**" while, for PRIIPs, ongoing reviews must, in general, verify that the information in the KID remains "**accurate, fair, clear and not misleading**."
- both regimes require (at a minimum) an **annual review** and update. However, while the UCITS KIID regime imposes a regulatory deadline by which documents need to be updated, the PRIIPs regime does not require that a PRIIPs KID must be updated at, or by, a set date each year. In practice, a PRIIPs KID should be revised every 12 months following the date of its initial publication or 12 months from its last revision.
- a **material change** to information in both a KIID and PRIIPs KID warrants an update out with the annual review. Revisions to a UCITS KIID should be made "promptly", those to a PRIIPs KID should be made "without undue delay".

However, although there are some obvious parallels to be drawn between content and layout of a UCITS KIID and that of a PRIIPs KID, due to the retail investor focus (and additional disclosure requirements), a PRIIPs KID is afforded an additional page (a three page maximum, rather than the two pages permitted for a UCITS KIID). This extra page allows for the additional disclosures required under the PRIIPs Regulation, in particular, regarding **Performance** and **Costs and Charges**.

- **Performance**

As mentioned above, key feature of the UCITS KIID is the use of past performance. This section of the KIID is backward-looking, displaying up to 10 years' past performance history together with a risk warning as to its limited value as a guide to future performance.

By contrast, the performance to be displayed in a PRIIPs KID is forward-looking and projected performance returns (monetary value and %) based on historic data and using the product's recommended holding period should be calculated and displayed in four different scenarios: stress, unfavourable, moderate and favourable.

- **Costs & Charges**

While the "Composition of costs" section of the PRIIPs KID includes similar information to the "Charges" table in a UCITS KIID, inclusion of **portfolio transaction costs** for PRIIPs KIDs is a significant additional data point.

Costs are also presented differently in the PRIIPs KID as "**Reduction in yield**" by emphasising the impact that the total costs an investor will pay may have on investment return in a "**Costs over time**" table.

7. What difference has Brexit made?

A new UK PRIIPs regime

After Brexit, the UK retained PRIIPs Regulation requirements as part of an "onshored" regime. Existing requirements **have** continued to apply (although changes have been made to ensure the regime operates effectively under the UK's regime). Powers and responsibilities that are currently with EU authorities have passed to UK authorities.

In particular, before the UK's transition period ended on 31 December 2020, legislation was passed so that the exemption allowing UCITS not to produce a PRIIPs KID until 31 December 2021 was contained in domestic law.

This, though, does not mean that the UK's PRIIPs regime will now remain identical to that of the EU.

As had been previously flagged in a policy statement, on 29 April 2021, HM Government passed the Financial Services Act 2021 (the Act), which set out changes to the onshored PRIIPs regime.

These include:

- enabling the FCA to clarify the scope of the PRIIPs Regulation – although the definition of a PRIIP does not change, this move addresses ambiguities in relation to whether certain types of investment product, such as corporate bonds, are in scope
- replacing the term 'performance scenario' in the PRIIPs Regulation with 'information on performance' – this allows HM Treasury to determine what "performance information" should be disclosed, with enough flexibility to allow past performance if thought desirable
- giving power to HM Treasury to extend the UCITS exemption beyond 31 December 2021 by up to five years. This allows time to consider how best to bring about the transition to whatever domestic successor to a UCITS KIID results from the planned review of the UK framework for investment product disclosure.

Acting on the powers given to it under the Act, on 1 June 2021, Treasury announced that it would extend the UCITS exemption in the UK to 31 December 2026. However, HM Treasury is to undertake a wholesale review of the disclosure regime for UK retail investors and if this results in changes being made to the UK's PRIIPs regime before the end of 2026, Treasury has confirmed that it would 'ensure a smooth transition to the new regime for all retail investment product providers, including those marketing UCITS funds'.

What does this mean for cross border UCITS?

Since 31 December 2020, the UK's temporary permission regime (TPR) has allowed EU UCITS which had been marketed to retail investors in the UK prior to the end of the transition period to continue to market on the same basis while they apply to the FCA for recognition under the UK's new "Overseas Fund Regime" (OFR). The OFR for retail funds (introduced under the Financial Services Act 2021 alongside that for Money Market Funds) allows relevant overseas funds, such as EU UCITS, to market in the UK provided that HM Treasury has deemed both their jurisdiction of domicile and the fund type to be 'equivalent' to the regime in the UK.

HM Treasury's announcement (see above) of a five year extension of the UCITS exemption may, though, have one unwelcome consequence.

As things stand - and assuming that, as expected, the EU decides only to extend the exemption by another six months - it is quite possible that, after 1 July 2022, (a) EU UCITS marketing into the UK and (b) UK UCITS marketing into the EU (to the extent possible under AIFMD) will need to provide both a PRIIPs KID (for their EU investors) and a UCITS KIID (for their UK investors).

No doubt, the clarity that is missing at the moment will be provided between now and the July 2022 deadline – hopefully with plenty of time to allow managers to make any necessary changes. We will be keeping this under close scrutiny and will be reporting any developments on our website.

8. What do I need to be doing now?

The main preparations to transition to PRIIPs KIDs will be:

- **Continue to monitor developments**

Close monitoring of the outcomes of the ongoing review of PRIIPs KID requirements described above will be needed, in particular with regard to performance scenarios, and any proposed UK divergence from the EU PRIIPs requirements.

Given that the ongoing review should be complete in the next few months, we expect that it will not be immediately necessary to take further action yet, but this should not be left too long.

- **Form a PRIIPs KID project team and build a transition project plan**

A practical first step will be to form a project team to manage the transition from UCITS KIIDs to PRIIPs KIDs. There should be appropriate oversight of the team by the board of the UCITS ManCo. The transition project plan will need to ensure that each aspect of the transition is managed and delivered on time – see Q.9, below on factors that need to be built into the transition plan and Q.10 below as to how Simmons & Simmons can help you.

- **Allocate resources**

This team will need to decide whether to prepare the PRIIPs KIDs in-house and/or to use external providers either to produce them on an ongoing basis or to assist with the transition. There will be a significant cost involved in switching to PRIIPs KIDs and future budgeting will be essential.

- **Build or purchase technology**

Technology builds will be needed to meet the transition to the PRIIPs KID. Some firms may look to build this technology, but we expect most firms to use a third-party service provider.

Identifying an appropriate provider is important, in particular given the FCA's increased focus on operational resilience for the technology supporting a firm's business services.

- **Consider distribution arrangements**

UCITS ManCos will want to take appropriate steps to ensure that investors are provided with a PRIIPs KID by the end distributor. This may include imposing a contractual obligation on distributors so an assessment of current distribution agreements may be necessary.

9. When do I need to have done this by?

With the exemption referred to in Q.3 above due to expire on 31 December 2021, UCITS will have to provide PRIIPs KIDs from **1 January 2022**.

The transition process should therefore be started in good time ahead of this date so that documents are ready for use in the distribution chain from **1 January 2022**.

The transition timeline should factor in the following (amongst other things):

- size of product suites (i.e., how many documents need to be factored into the transition?)
- Decisions taken on outsourcing v insourcing and allowing for an RfP if the former
- sufficient time to acquire the required data/content, both numerical and textual (albeit it remains unclear at the moment exactly what the final content requirements may be)
- whether third parties are involved in bespoke aspects of the process (eg for calculation purposes)
- whether PRIIPs KIDs will need to be provided in foreign languages - this could vastly increase the size of the suite of PRIIPs KIDs and time may need to be factored in to obtain the necessary translations
- dissemination – ensure the resulting PRIIPs KIDs can be pushed out to relevant distribution partners and data providers.

10. How can Simmons & Simmons help?

The **Simmons KIID/KID generation service** has been operating since 2011 and has served a range of clients with over 10,000 UCITS KIIDs in multiple languages. We have also assisted clients with their various PRIIPs requirements since 2017.

With **experience** and **knowledge** of the legal and compliance requirements as well as the data management process, Simmons is extremely well placed to assist you **manage the transition process to PRIIPs KIDs** from start to finish, whether as part of, or leading, your transition project or as your partner for meeting your longer term ongoing PRIIPs KID requirements.

Whether you require assistance with the management of your PRIIPs project (transition or ongoing), a service to lead or feed into your PRIIPs project team, onboarding data for PRIIPs KID production or regulatory support and guidance, Simmons & Simmons is there to help ensure a timely execution of your PRIIPs project plan on time and within budget.

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