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# Brexit & financial services

**Securities: PRIIPs**



## Introduction

Since 1 January 2018, Regulation (EU) No.1286/2014 on key information documents for packaged retail and insurance-based investment products (“**the EU PRIIPs Regulation**”)<sup>1</sup> applied throughout the EEA, including in the UK (where it was directly applicable). The EU PRIIPs Regulation introduced a standardised disclosure document, called a “Key Information Document” (“**KID**”), which must be provided when packaged investment or insurance-based investment products are sold to retail investors in the EEA.

The EU PRIIPS Regulation continued to apply to relevant investments in the UK during the implementation period. When this implementation period came to an end on 31 December 2020, the EU PRIIPS Regulation was transposed (“on-shored”) into domestic law by the PRIIPS (Amendment) (EU Exit) Regulations 2019/403.<sup>2</sup>

Although the government does not, at this stage, intend to implement any large-scale amendments to the PRIIPS framework that will apply to UK investors, in contrast to EU investors, s.38 of the Financial Services Act 2021 (which came into force on 29 April 2021) contains three specific amendments to the UK PRIIPS framework.<sup>3</sup>

<sup>1</sup> [www.eur-lex.europa.eu/legal-content/EN/TXT/DF/?uri=CELEX:32014R1286&from=EN](http://www.eur-lex.europa.eu/legal-content/EN/TXT/DF/?uri=CELEX:32014R1286&from=EN)

<sup>2</sup> [www.legislation.gov.uk/ukxi/2019/403/pdfs/ukxi\\_20190403\\_en.pdf](http://www.legislation.gov.uk/ukxi/2019/403/pdfs/ukxi_20190403_en.pdf) (See also the explanatory memorandum at: [www.legislation.gov.uk/ukxi/2019/403/pdfs/ukxiem\\_20190403\\_en.pdf](http://www.legislation.gov.uk/ukxi/2019/403/pdfs/ukxiem_20190403_en.pdf))

<sup>3</sup> [www.legislation.gov.uk/ukpga/2021/22/pdfs/ukpga\\_20210022\\_en.pdf](http://www.legislation.gov.uk/ukpga/2021/22/pdfs/ukpga_20210022_en.pdf)

## Key features of the EU PRIIPS Regulation

The objective of the EU PRIIPS Regulation is to make it easier for retail investors to understand and compare similar financial products by requiring key information to be disclosed in a standardised way. The intention is that by improving and standardising pre-contractual disclosure, retail investors will be able to make better informed investment decisions. The centre piece of the EU PRIIPS Regulation is the KID.

Article 1 of the EU PRIIPS Regulation states:

*"This Regulation lays down uniform rules on the format and content of the key information document to be drawn up by PRIIP manufacturers and on the provision of the key information document to retail investors in order to enable retail investors to understand and compare the key features and risks of the PRIIP."*

A "PRIIP" may be either:

- A "PRIIP", defined as "an investment ... where, regardless of the legal form of the investment, the amount payable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor"; or
- An "insurance-based investment product", which is defined as "an insurance product which offers a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations."

Recital (6) to the EU PRIIPs Regulation explains that the type of products which are covered by the Regulation include (but are not limited to) investment funds, life insurance policies with an investment element, structured products and structured deposits. There are certain specific exclusions (see Article 2) and UCITS are exempt from the application of the Regulation until 31 December 2021 (see Article 32).<sup>4</sup>

The Regulation imposes obligations on those who make PRIIPs and on those who advise on or sell them:

- The PRIIP manufacturer is required to draw up the KID in accordance with requirements of the EU PRIIPs Regulation and to publish the document on its website: see Articles 5-12.
- A person advising on or selling a PRIIP is required to provide retail investors with the KID in good time, and in accordance with the requirements of the EU PRIIPs Regulation: see Articles 13-14.

The contents of the KID itself is prescribed by Article 3 of the EU PRIIPs Regulation and by further, detailed regulatory technical standards (see below). Article 11 of the EU PRIIPs Regulation provides that a PRIIP manufacturer which produces a KID which is misleading, inaccurate, or inconsistent with the relevant parts of the legally binding pre-contractual and contractual documents or with the requirements laid down in Article 8 of the Regulation may incur civil liability in accordance with national law.

In addition, the EU PRIIPS Regulation provides that:

- Both the European Insurance and Occupational Pensions Authority ("EIOPA") and national competent authorities have a wide range of market monitoring and product intervention powers with respect to "insurance based investment products": see Articles 15-18.
- Without prejudice to the supervisory powers of the national competent authorities and the right of Member States to impose criminal sanctions, Member States are required to lay down rules establishing effective, proportionate and dissuasive administrative sanctions for infringements of the EU PRIIPs Regulation: see Articles 22-29.

The EU PRIIPs Regulation is supplemented by two further EU regulations:

- The Commission Delegated Regulation (EU) No.2016/1904, which sets out the criteria and factors which the EIOPA and national competent authorities should take into account when exercising their product intervention powers.<sup>5</sup>
- The Commission Delegated Regulation (EU) 2017/653, which lays down regulatory technical standards ("RTSs") with regard to the presentation, content review and revision of KIDs and the conditions for fulfilling the requirement to provide such documents.<sup>6</sup>

Following a review and consultation exercise, in February 2021, the European Supervisory Authorities (ESAs) submitted draft Regulatory Technical Standards (RTS) on amendments to the KID to the European Commission.<sup>7</sup> The draft RTS are now subject to adoption by the European Commission – if adopted, the RTS would be subject to non-objection by the European Parliament and the Council of the European Union.

## The law applicable in the UK Post-Brexit

The current position is as follows:

- The EU PRIIPs Regulation (and relevant EU delegated legislation) continue to apply to UK firms manufacturing PRIIPs for, or selling PRIIPs to, EEA retail investors.
- The EU PRIIPs Regulation (and relevant EU delegated legislation) no longer applies to firms (in the UK or elsewhere) that manufacture, advise on, or sell PRIIPs to UK retail investors. However, such firms will need to comply with the UK "on-shored" version of the EU PRIIPs Regulation, namely the PRIIPs (Amendment) (EU Exit) Regulations 2019/403 ("the UK PRIIPs Regulations").<sup>8</sup>

4 As amended by the Commission Delegated Regulation (EU) 2019/1866 of 3 July 2019 ([www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1866](http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1866)).

5 [www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1904&from=GA](http://www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1904&from=GA)

6 [www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0653&from=EN](http://www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0653&from=EN)

7 [www.esma.europa.eu/press-news/esma-news/eiopa%E2%80%99s-board-supervisors-agrees-changes-priips-key-information-document](http://www.esma.europa.eu/press-news/esma-news/eiopa%E2%80%99s-board-supervisors-agrees-changes-priips-key-information-document)

8 [www.legislation.gov.uk/uk/si/2019/403/pdfs/ukSI\\_20190403\\_en.pdf](http://www.legislation.gov.uk/uk/si/2019/403/pdfs/ukSI_20190403_en.pdf)

## The UK PRIIPs Regulations

When the government published the UK PRIIPs Regulations, it explained that its intention was that any changes resulting from the UK PRIIPs Regulations would be minimal. As stated on the government's website:<sup>9</sup>

*"... It is not intended to make policy changes, other than to reflect the UK's new position outside the EU, and to smooth the transition..."*

*... the policy approach set out in the PRIIPs legislation will not change after the UK has left the EU...*

*... The changes for firms resulting from the SI are expected to be minimal... The UK PRIIPs regime introduced by the SI will be operationally equivalent to the EU PRIIPs regime on exit day, so that firms manufacturing or advising on PRIIPs for sale to UK investors continue to be subject to the same obligations as they are currently."*

Turning to the detail, a number of specific points should be noted:

- a. Exemption of sovereign issuers:** The EU PRIIPS Regulation does not apply to certain securities which are also outside the scope of the Prospectus Directive, such as non-equity securities issued or granted by sovereigns and certain public sector entities, and shares issued by central banks: see Article 2. The UK PRIIPS Regulations contain the same exemption. However, they also extend the exemption, so that all such securities issued or granted by any sovereign or public sector body in any country (not just a Member State) are exempt from the scope of the UK PRIIPs Regulations.
- b. Transfer of functions:** The EU PRIIPS Regulation assigns functions to a number of EU authorities. The UK PRIIPs Regulations generally transfer the functions of the European Securities and Markets Authority ("ESMA") and EIOPA to the UK FCA and transfer the functions of the Commission to HM Treasury. The UK PRIIPS Regulations further provide that the FCA may develop RTSs (in place of the European Supervisory Authorities).
- c. Information sharing and co-operation:** The UK PRIIPs Regulations remove the obligations on UK authorities to cooperate and share information with EU authorities. However, the explanatory memorandum states that: *"... UK authorities will be able to continue to cooperate and share information with EEA authorities, in the same way as they can with authorities outside the EEA, based on the existing domestic framework provisions for cooperation and information sharing under the Financial Services and Markets Act 2000 (c.8), which allow for this on a discretionary basis..."*
- d. Minor changes in the content of the KID:** Under the UK PRIIPs Regulations are some very minor changes to the content of the KID. For example, under the UK PRIIPS Regulations, the requirement to specify the competent authority of the PRIIP manufacturer is deleted: see Article 7(2) of the UK PRIIPs Regulations.

## Section 38 of the Financial Services Act 2021

In July 2020, the government issued a short policy statement,<sup>10</sup> which provided an update on HM Treasury's proposed approach to bringing forward three specific amendments to the UK PRIIPs Regulation *"to avoid consumer harm and provide the appropriate certainty to industry once the UK ceases to be bound by the EU regime."*

The three proposed changes were:

- a. An amendment enabling the FCA to clarify the scope of the PRIIPs Regulation through their rules.** The policy statement explains that: *"There is currently significant uncertainty in industry as to the precise scope of PRIIPs, such as with respect to corporate bonds. There is evidence that where industry is uncertain about the applicability of PRIIPs to an investment product, retail issuance of that product has decreased. This may have reduced consumer choice and could mean that retail investors currently holding such products find it harder to exit their investment. HM Treasury proposes an amendment which delegates a power to the FCA to clarify the scope of PRIIPs through their rules. This would enable the FCA to address existing, and potentially future, ambiguities in relation to certain types of investment product. The definition of a PRIIP will remain unchanged."*
- b. An amendment to replace "performance scenario" with appropriate "information on performance" in the UK PRIIPs Regulation:** The policy statement explains that: *"The PRIIPs Regulation obligates PRIIPs manufacturers to include performance scenarios in the KID. The methodology for calculating these scenarios is set out in the PRIIPs RTS, and has been criticised for producing misleading performance scenarios across a wide range of products. This is believed to be due, at least in part, to the prescribed methodology in the PRIIPs RTS relying on past performance to project future performance in a way that generates procyclicality. HM Treasury proposes an amendment to replace the term 'performance scenario' with 'appropriate information on performance' in the PRIIPs Regulation. The FCA will then be able to amend the RTS to clarify what information on performance should be provided in the KID."*
- c. An amendment enabling HM Treasury to further extend the exemption currently in place for UCITS funds:** The policy statement explains that: *"UCITS funds are exempted from the requirements of the PRIIPs Regulation until 31 December 2021. Until that date, instead of a KID, UCITS funds must produce a Key Investor Information Document (KIID) as per the requirements of the UCITS Directive. The government currently considers that the existing rules for UCITS disclosure are satisfactory. HM Treasury proposes an amendment which delegates a power to the Treasury to further extend the exemption for UCITS for up to a maximum of five years. This will enable HMT to consider the most appropriate timing for the transition of UCITS funds into any domestic successor that may result from the planned review of the UK framework for investment product disclosure, and bring forward a Statutory Instrument to amend the exemption date in the PRIIPs Regulation as necessary."*

The necessary legislative provisions to make these amendments to the UK PRIIPs Regulation are now set out in s.38 of the Financial Services Act 2021, which came into force on 29 April 2021.<sup>11</sup>

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<sup>9</sup> [www.gov.uk/government/publications/draft-packaged-retail-and-insurance-based-investment-products-amendment-eu-exit-regulations-2019/package-retail-and-insurance-based-investment-products-amendment-eu-exit-regulations-2019-explanatory-information](http://www.gov.uk/government/publications/draft-packaged-retail-and-insurance-based-investment-products-amendment-eu-exit-regulations-2019/package-retail-and-insurance-based-investment-products-amendment-eu-exit-regulations-2019-explanatory-information)

<sup>10</sup> [www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/905542/Policy\\_Statement\\_-\\_PRIIPs\\_July\\_2020\\_HMT\\_Template.pdf](http://www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/905542/Policy_Statement_-_PRIIPs_July_2020_HMT_Template.pdf)

<sup>11</sup> [www.legislation.gov.uk/ukpga/2021/22/pdfs/ukpga\\_20210022\\_en.pdf](http://www.legislation.gov.uk/ukpga/2021/22/pdfs/ukpga_20210022_en.pdf)



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