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OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 10 July 2023

on the product intervention measures relating to contracts for differences (CFDs) and other high-risk products proposed by the Spanish Comisión Nacional del Mercado de Valores (CNMV)

Having regard to Article 43(2) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 ([1]),

Having regard to Article 44(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ([2]),

THE EUROPEAN SECURITIES AND MARKETS AUTHORITY BOARD OF SUPERVISORS HAS ADOPTED THIS OPINION:

1. Introduction and legal basis

1. National competent authorities (NCAs) may take product intervention measures in accordance with Article 42 of Regulation (EU) No 600/2014. At least one month before a measure is intended to take effect, an NCA must notify all other NCAs and the European Securities and Markets Authority (ESMA) of the details of its proposed measure and the related evidence, unless there is an exceptional case where it is necessary to take urgent action.

2. In accordance with Article 43 of Regulation (EU) No 600/2014, ESMA performs a facilitation and coordination role in relation to such product intervention measures taken by NCAs. After receiving notification from an NCA of its proposed measure, ESMA must adopt an opinion on whether it is justified and proportionate. If ESMA considers that the taking of a measure by other NCAs is necessary, it must state this in its opinion.

3. The Spanish Comisión Nacional del Mercado de Valores (CNMV) notified ESMA on 12 May 2023 of its intention to take product intervention measures under Article 42 of that Regulation

[1] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).
[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(national measures). Prior to the notification, the CNMV published a consultation paper ([3]) setting forth the rationale for the national measures.

4. The national measures set out in more detail below consist of two parts.

5. The first part establishes a prohibition of advertising communications on CFDs aimed at retail clients, including a prohibition of related sponsorship of events or organisations and brand advertising, such as the use of public figures by the firms marketing CFDs. There is an exception for cases in which the sponsorship or brand advertising does not intend to offer such products or services, in particular where such products or services only account for a small part of the offers on the website of the firm when compared with its general activity. Finally, it establishes a series of restrictions on the remuneration policies and the rules for cash deposits by customers.

6. The second part establishes specific intervention measures on the marketing, sale and distribution to retail clients of certain 'other leveraged products', such as certain futures and options, defined for the purpose of the proposed measures as financial instruments whose maximum amount at risk at the time of subscription is either unknown or is greater than the amount initially invested (for the purpose of this Opinion, 'other high-risk products'). The scope excludes for example turbo products where the total amount at risk is equal to the amount invested. These specific intervention measures are designed with reference to the 'initial margin protection' and 'margin close-out protection' included in the measures on CFDs in ESMA's Decision of 2018 ([4]) and in the intervention measures on CFDs already taken by the CNMV in the CNMV Resolution of 27 June 2019 (the 2019 CFD Resolution). The CNMV has notified ESMA that under its proposed measures: (i) providers of these other high risk products will be required to close one or more of a retail client's open positions when the value of the positions is reduced to half the initial margin, i.e. the same account-level mechanism as under the existing CFD measures; and (ii) these other high risk products will be subject to the same initial margin protection as in the existing CFD measures with one exception: if the trading venue requires a lower amount of initial margin for a product with an underlying other than crypto-assets than required under the existing CFD measures, this lower amount of initial margin can be used.

7. In both instances, the measures only apply to entities authorised to provide investment services in Spain, regardless of the origin of the investment firm and whether it has a branch in Spain. If the relevant instrument's underlying, however, is a crypto-asset that is not considered a financial instrument under Directive 2014/65/EU of the European Parliament and of the Council ([5]), the measures also apply to firms authorised in Spain providing services in other Member States.

[3] The consultation paper can be downloaded at CP_comercializacion CFD (cnmv.es).
[4] European Securities and Markets Authority Decision (EU) 2018/796 of 22 May 2018 to temporarily restrict contracts for differences in the Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council (OJ L 136, 1.6.2018, p. 50).
[5] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

8. For the purpose of the proposed measures, CFDs are defined as contracts for differences in accordance with the definition contained in the 2019 CFD Resolution. This definition is in line with the definition used by ESMA in its CFD measures.

9. Aside from the prohibition on directly or indirectly providing a retail client with a payment, monetary or excluded non-monetary benefit in relation to the marketing, distribution or sale of a CFD, neither ESMA nor any other NCA (save for BaFin and its recent measures on futures with additional payment obligations) has yet taken any of the proposed product intervention measures. The proposed marketing restrictions go beyond the ones taken first by ESMA in 2018 and subsequently by all NCAs.

10. The CNMV informed ESMA that the national measures are expected to take effect on 20 July 2023.

2. The CNMV's justification of the product intervention measures

11. The CNMV notified ESMA that it has complied with the conditions set out in Article 42 of Regulation (EU) No 600/2014, including that it has assessed the relevance of all factors and criteria listed in Article 21 of Commission Delegated Regulation (EU) 2017/567 ([6]) and that it has taken them into consideration where relevant.

The restrictions applying to CFDs and related services

12. The CNMV national measures will prohibit the marketing, distribution and sale of CFDs and related services by means of advertising communications aimed at retail investors in Spain.

13. The prohibited marketing communications include, inter alia, the:

    a) Redirecting to a website that offers CFDs or related services;

    b) Sending of a contact form, an application download, or any other kind of tool intended to put the client in touch with investment service providers that offer CFDs or related services;

    c) Offering of training, technical seminars, courses or sessions whenever such offers are related to CFDs or related services, including training demo accounts or tools for retail investors or which encourage using these, whenever such offers are free or have a token charge, either if they are promoted or held by the regulated entities or by related or affiliated parties.

14. The following activities are excluded from the scope of the measures:

[6] Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regards to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions (OJ L 87, 31.3.2017, p. 90).

a) The provision of information related to CFDs or related services in response to a request made upon the sole initiative of the client. The investment service provider will be responsible for keeping the relevant records (mail, emails, telephone records, etc.) that demonstrate that the initial request was made by the client.

b) The provision of information required to contract CFDs or related services that are subject to the measures, or to perform a transaction regarding CFDs, such as the pre-contractual and contractual information or the information or warnings regarding the characteristics and risks of CFDs or related services offered that are provided to investors in compliance with the information obligations, via any means, including the website of the firm. Likewise and without prejudice to compliance with Article 44 of Commission Delegated Regulation (EU) 2017/565 ([7]), the following will be excluded for not being considered advertising communications: legal information sent to clients or published on the website regarding objective data on CFDs (for example, product fact sheets) that does not include subjective elements.

15. Moreover, the national measures will prohibit any event or organisation sponsorship operation and brand advertising, including the use of public figures, whenever their purpose or effect is to directly or indirectly advertise CFDs or related services. The exception is when such sponsorship or brand advertising does not intend to offer such products or services, in particular, when such products or services only account for a small part of the offers on the website of the firm when compared with its general activity.

16. Lastly, the national measures will prohibit the following marketing practices in relation to CFDs or related services:

a) Rewards to customers who provide new retail customers;

b) Remuneration to one's own marketing network or those of third parties, dedicated to acquiring and marketing that is determined, either directly or indirectly, partially or totally, based on the number of clients acquired, the cash deposits by clients, the deposits by the entity providing the investment service, or the losses by clients and, in general, any type of remuneration that may come into conflict with the interests of the clients;

c) The use and remuneration of collaborators to train new potential clients without these clients having accredited knowledge and experience;

[7] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 87, 31.3.2017, p. 1).

d) The use of own call centres, or of those operated by third parties, which contact clients or possible clients to promote the provision of investment services regarding the instruments that are subject to the restriction;

e) The use of software in which the remuneration of the software providers is determined, either directly or indirectly, partially or totally, based on the cash deposits of clients, or deposits of the distributor or losses of clients;

f) The acceptance of credit card payments for cash deposits.

Restrictions applying to other high-risk products

17. The national measures would also subject the marketing, distribution and sale to retail clients of other high-risk products to the following conditions:

    a) The provider of the instrument provides initial margin protection by requiring the customer to pay the initial margin. The initial margin is the lower of: (1) the amount which corresponds to the type of underlying asset from those indicated in the 2019 CFD Resolution; (2) the amount required by the trading venue in which the instrument is traded. Notwithstanding the foregoing, if the underlying asset is a crypto-asset that is not considered a financial instrument under Directive 2014/65/EU, the amount of the margin may not be below that under point (1) above:

    b) The provider of the instrument will provide margin close-out protection to the retail customer. This means that the provider will close one or more open derivative instruments of a retail customer under the most advantageous conditions for the customer, whenever the sum of the funds in the operating account of these instruments and the net unrealised gains of all open derivative instruments associated with that account fall below half the total initial margin provided for all those open instruments. The closing of the position will not take place before reaching the said threshold and the customer being informed.

18. The CNMV explained that, aside from the option of the initial margin being the amount demanded by the trading venue (unless the instrument has a crypto-asset as underlying), these two conditions are the same as 'initial margin protection' and 'margin close-out protection' imposed by the ESMA CFD measures in ESMA Decision (EU) 2018/796 ([8]).

Significant Investor Protection Concerns

19. For the reasons given in ESMA Decision (EU) 2018/796, CFDs give rise to significant investor protection concerns. Consequently, ESMA, the CNMV and other NCAs adopted in 2018 and

[8] European Securities and Markets Authority Decision (EU) 2018/796 of 22 May 2018 to temporarily restrict contracts for differences in the Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council (OJ L 136, 1.6.2018, p. 50).

2019 various measures imposing restrictions on the marketing, distribution and sale of CFDs. Following the adoption of those measures, the CNMV reported the following significant investor protection concerns observed in Spain:

a) Although these restrictions still apply in Spain, analyses carried out by the CNMV show that large numbers of retail investors continue to trade CFDs and continue to suffer losses from doing so. CFDs are complex and high-risk products accessible to a wide range of retail clients without sufficient financial knowledge. CFD trading is marketed through aggressive advertising campaigns that, at times, involve third parties who are not authorised to provide financial services. Sales staff is frequently incentivised to market CFD trading in particularly aggressive ways, sometimes on a mass scale through call centres, and applying methods that allow for circumventing existing restrictions. As a result, clients keep trading CFDs and suffering significant and recurring losses;

b) Based on the situation described, the CNMV has concluded that despite the measures adopted in 2019, CFDs continue giving rise to significant investor protection concerns in Spain. The CNMV therefore considers it necessary to further restrict the marketing, distribution and sale of CFDs to retail clients in Spain;

c) Part two of the measures addresses other instruments, generally characterised by their leverage, in which the maximum amount at risk is not known at the time the contract is entered into or where the risk of loss is greater than the amount initially invested. The CNMV has observed that a similar percentage of retail investors suffer losses with those instruments as with CFDs. Considering that the marketing of these instruments is currently not as prominent as in the case of CFDs and that it is limited to a small number of investment firms, the CNMV is proposing to apply to these instruments two of the measures established for CFDs in the ESMA Decision (EU) 2018/796 and the 2019 CFD Resolution, namely the initial margin protection and the margin close-out protection.

The degree of complexity, transparency and the specific features of CFDs and other high-risk products

20. The CNMV considers that CFDs are particularly complex financial instruments characterised by their high risk, leverage and high short-term volatility. CFDs are traded bilaterally with the provider applying its own conditions and commissions. Moreover, the distribution of CFDs usually targets a mass retail market, despite these products being considered inappropriate for most retail clients by the CNMV and ESMA. In addition, CFD providers often require clients to acknowledge that the reference prices used to determine the value of CFDs may differ from the price available on the respective market where the underlying is traded, making it difficult for retail clients to check and verify the accuracy of the reference price.

21. The CNMV notes that another complexity arises from the use of stop-loss orders. This product feature may give retail clients the misleading impression that a stop-loss order guarantees execution at the set price (the stop-loss level). However, stop-loss orders do not guarantee a

level of protection but a 'market order' being triggered when the CFD price reaches the price set by the client. Accordingly, the price received by the client (execution price) can be different from the price at which the stop-loss was set. While stop-losses are not unique to CFDs, leverage increases the sensitivity of an investor's margin to price movements of the underlying increasing the risk of sudden losses. Traditional trading controls such as stop-losses are therefore insufficient to manage investor protection concerns.

22. Moreover, the CNMV notes that another key complexity associated with CFDs may arise from the relevant underlying market. For instance, with FX trading, clients speculate on one currency against another. If neither of these currencies is the currency used by the client to open a CFD position, any return received by the client will be dependent on the movement of these three currencies. This suggests that a deep knowledge of all the currencies involved is required to successfully navigate the complexities of such currency trading. Retail clients do not normally have such knowledge.

23. The CNMV considers that the high level of complexity, poor degree of transparency, nature of the risks and type of underlying confirm that significant investor protection concerns exist in respect of CFDs.

24. The CNMV additionally considers that other high-risk products within the scope of the measure are also complex financial instruments characterised by their high risk and volatility, sharing many of the same features as CFDs. They too are therefore inappropriate for a large majority of retail clients who do not have the knowledge required to properly understand the risks of those products. In addition, the leverage generally associated with these products can lead retail clients to experience rapid losses that may exceed the initial amount invested.

The size of potential detrimental consequences and the degree of disparity between the expected return and the risk of loss

25. The CNMV informed ESMA that a large part of CFD distribution in Spain is carried out by entities authorised in Spain as well as by branches or agents of firms authorised in other Member States. However, firms authorised in other Member States acting under the freedom to provide services also comprise a relevant portion of the market participants.

26. According to the information available from entities reporting to the CNMV (Spanish and European institutions established in Spain), retail unlisted derivative trading in Spain in 2021 (i.e. the volume of retail trades over the year) amounted to 192 billion EUR, representing close to 60% of all derivatives traded by retail investors, and a 26% increase compared to those traded in 2020. Of this total, the largest share was CFD trading, amounting to 155 billion EUR, a 37% increase when compared with 2020 (114 billion EUR). The vast majority of CFD trading is carried out by investment firms, which brokered 154 billion EUR, in comparison to credit institutions, which only brokered around 1 billion EUR.

27. The CNMV reported that the eight entities with the highest CFD trading volume account for almost 99% of the total volume traded among those reporting to the CNMV. These firms report

over 60,000 retail clients. CFD trading for retail clients is their most relevant activity in terms of revenue.

28. To have updated information on the results obtained by clients, as well as on the costs incurred, the CNMV requested information on the activity in 2021 of the eight entities, including specific information on the results obtained by clients, the cash allocated to this activity and the positions held. The main conclusion from the analysis of the data is that, overall, clients suffer losses within a short period of time. Average client losses within each firm in 2021 ranged on average from -1,649 to -7,269 EUR per client. In aggregate, retail clients' losses amounted to 70 million EUR in 2021.

29. The CNMV also noted that firms authorised in other Member States do not submit regular information to the CNMV, as it is not their supervisor. Hence, information provided by the CNMV on the activity of those entities in Spain is limited and refers to 2020. Based on this information, the estimated number of Spanish retail clients is even greater than the number of clients dealing with entities reporting to the CNMV. The net income of entities not established in Spain exceeds 100 million EUR.

30. According to an analysis carried out by the CNMV on the percentage of retail clients incurring losses, based on the content of the warnings included on firms' websites, a high percentage of retail clients continues to suffer losses, exceeding 70% in the vast majority of the entities that are most active, in some cases even approaching 90%.

31. Hence, despite the restrictive measures on the marketing, distribution and sale of CFDs adopted in 2018, CFDs remain the most traded derivative product among retail clients. According to the CNMV, the figures on losses confirm that there are still significant investor protection concerns in respect of CFDs and that there is still a lack of protection of retail investors, in particular with respect to the marketing of these high-risk products.

32. The CNMV also reported that, with respect to other high-risk products, distribution is concentrated even more with a few entities, mainly ones with a local presence. In 2021, unlisted derivatives trading other than CFDs amounted to 37 billion EUR, and listed derivatives (none of them CFDs) amounted to 119 billion EUR. Supervisory actions carried out by the CNMV found that retail clients trading other high-risk products lost money in similar percentages as with CFDs.

The type of clients involved in CFDs and other high-risk products

33. CFDs and other high-risk products are marketed, distributed or sold to both retail and professional clients. However, retail clients do not normally possess the experience, knowledge and expertise to make informed investment decisions and to properly assess the risks attached to those products.

34. The CNMV observed that the trading of such instruments through online platforms, mobile apps and social networks, which facilitate their mass and remote distribution, allowed some entities to establish their business models almost exclusively on CFDs or other high-risk derivative

products marketed to retail clients, often aggressively and without informing clients about the characteristics and risks of such instruments.

35. The CNMV also observed that, despite the intervention measures previously adopted in Spain and repeated warnings, as well as the public communication of measures adopted by some firms as a result of the CNMV's supervisory actions in collaboration with other national competent authorities, according to the information available from firms reporting to the CNMV (Spanish and EU firms established in Spain), CFDs continue to be the main derivative product marketed to retail clients.

36. In particular, the CNMV observed that the percentage of retail clients who suffer losses investing in CFDs and other high-risk products remains very high (close to 75% in both CFDs and other high-risk products).

The degree of transparency

37. The CNMV commonly observed that CFDs and other derivatives are marketed in a way to prompt the client to believe to have invested directly in the underlying. This is especially true for derivative products with shares, indices, cryptos or commodities as underlying. The risks of the derivative nature of the product are often not adequately disclosed to the client.

38. The CNMV also observed that this lack of transparency also applies to the information on costs and charges. Retail clients typically find it difficult to understand and assess the performance expected from CFDs after transaction fees. Transaction fees in CFDs are normally applied to the full notional value of the trade and investors consequently incur higher transaction fees relative to their invested funds at higher levels of leverage. Transaction fees are usually deducted from the initial margin deposited by the client and high leverage can lead to a situation in which the client, at the time of opening CFDs, observes a significant loss on their trading account due to the application of high transaction fees. Since transaction fees at higher leverage will erode more of the client's initial margin, clients will be required to earn more money from the trade itself to make a profit. This lowers the client's chances of making a profit net of transaction fees, exposing clients to a greater risk of loss.

39. The CNMV notes that in addition to transaction fees, spreads and various other financing costs and charges may be applied. These include commissions (a general commission or a commission on each trade, or on opening and closing a CFD account) and/or account management fees. Financing charges are also usually applied to keep a CFD open, such as daily or overnight charges, to which a mark-up can also be added. The number and complexity of the various costs and charges and their impact on clients' trading performance contribute to the lack of sufficient transparency in relation to CFDs to enable a retail client to make an informed investment decision.

Other particular features of CFDs and other high-risk products

40. The CNMV informed ESMA that an important feature of CFDs and other products within the scope of the measures is their ability to operate on leverage. Leverage can increase profits for clients, but it can also increase losses. For retail clients, leverage may increase the probability

of larger losses to a greater extent than the probability of larger gains. Leverage affects an investment's performance by increasing the impact of transaction fees incurred by retail clients. ESMA's Decision (EU) 2018/796 restricted the leverage on CFDs. However, there are similar concerns regarding other products for which the maximum amount at risk is not known at the time of entering into the contract, or where there is a risk of losing more than the amount initially invested.

41. The CNMV considers that one risk related to trading these products is linked to the interaction of high leverage and the practice of automatic margin close-out. Under commonly applied contractual terms, leveraged derivatives providers are granted the discretion to close-out a client's account once the client's net equity reaches a specified percentage of the initial margin that the client is required to pay to open a position. The interaction between high leverage and automatic margin close-out is that it increases the probability of a client's position being closed automatically by the provider in a short timeframe or of a client having to post additional margin in the hope of turning around a losing position. High leverage increases the probability of the client having insufficient margin to support open positions, making the positions sensitive to small fluctuations in the price of the underlying.

42. According to the CNMV, trading at high leverage levels also increases the impact of 'gapping' during periods of significant market volatility. Gapping occurs when there is a sudden movement in the price of the underlying. The risks related to such events are exacerbated by high leverage. If gapping occurs, the client on the losing side may be unable to close an open position at their preferred price and it can result in significant client losses when trading at high leverage. The high levels of leverage offered to retail clients, the volatility of certain underlying assets, together with the application of transaction costs which have an impact on the investment's performance, can result in rapid changes to a client's investment position. This results in the client having to take swift action to manage the risk exposure by posting additional margin to avoid the position being automatically closed out. In such instances, high leverage can lead to large losses for retail clients over a very short time span and exacerbates the risk that clients will lose more than the funds paid to trade the leveraged product.

43. Consequently, the CNMV concludes that the above factors confirm that significant investor protection concerns exist in respect of CFDs and other leveraged derivatives within the scope of the measure.

The selling practices associated with CFDs and other high-risk products

44. The CNMV recently identified a high level of advertising activity aimed at the general public in Spain, mainly through electronic media such as e-mails, advertisements through banners or social media, with images and messages giving a misleading impression that the complex products being marketed are suitable, perhaps simple, for retail investors.

45. The CNMV has observed that advertising campaigns are often aggressive and do not warn about the unsuitability of the product for retail clients in general. Moreover, campaigns are fast, ephemeral and focused on the local market, which is reached using local media, targeting tools and social media. The CNMV considers that this fact makes it difficult to identify and control

the campaigns even for the local monitoring teams and, in the case of cross-border provision of services, home NCA supervision teams can easily experience a lack of resources devoted to properly controlling these campaigns, in which language barriers may also be relevant.

46. In addition to those advertising campaigns, the CNMV has found that it is relatively common for CFD providers to market their CFDs indirectly by means of brand advertising and sponsorship. Those sponsorships are usually addressed to the general public, not only the target market, as can be seen in the case of football team sponsors and those of other general public organizations or events. These branding actions include the usage of public figures, both in the general media and social media, and are quite frequently aimed at indirectly marketing CFDs. Thus, the CNMV proposes to ban this marketing of CFDs except when proven that the advertising sponsor or brand has no intention of offering CFDs or related services. Such selling practices will, in particular, not be subject to the prohibition when it is proven that such products or services are only a very small part of the firm's offering when compared with its general activity. On the contrary, it is not permitted if those products are a significant part of the business of the investment firm.

47. The CNMV considers that advertising campaigns aimed at a mass audience may generally give a misleading impression that the complex products being marketed are cheap and suitable for inexperienced investors, thus aggravating the situation and the eventual damage. Specifically, the following practices have been identified by the CNMV in the Spanish market:

    - Advertising communications that are misleading for inexperienced investors, along with the existence of relevant corporate and brand advertising targeting the general public using celebrities or sponsorships of popular sports clubs and events. By definition, these practices indiscriminately target the general public, giving the impression that the complex products being marketed are suitable for retail investors. The supervisory actions carried out by the CNMV show that clients often do not properly understand the nature of the product and risk at the time of investment, but instead follow social or emotional factors (the image of success and credibility given by large companies, sports clubs and celebrities) disseminated on the internet. In addition, expressions such as the following were identified: "safe and easy money", "play now for free", "you only need €200 to get a second salary", "multiply your income every day without any prior knowledge", "divorced woman from Madrid earns €800 every day by doing this";

    - The dissemination of advertising campaigns is frequently followed by direct telephone calls on behalf of the firm to clients with little or no experience with such products who have shown interest based on such inappropriate advertising, with equally misleading information, offers of benefits or gifts forbidden in CFD marketing, no proper assessment of the compatibility of the product with the client's knowledge and experience, as well as unacknowledged and unauthorised provision of advisory or discretionary investment management services that would require a suitability assessment among other controls. The first calls are sometimes followed by strong pressure to invest more and more money with the threat of otherwise losing the investment made and difficulties withdrawing funds. This pressure to invest includes encouraging retail clients to make deposits through credit cards, which can increase the possible leverage, which may lead clients to end up losing more than their equity and incurring debts. For this reason, the acceptance of cash deposits using credit cards is limited under the proposed measures;

- Initial marketing communications do not adequately inform about the true nature of the product, the specific service offered and its associated risks.

48. Moreover, the CNMV observed that it is common for clients to encounter firms and start evaluating the possibility of trading without a prior appropriateness assessment. This assessment is usually delayed until the moment just prior to starting operations. This is the case when using webinars, demo accounts or training sessions focused on CFDs, a common feature of marketing and sales techniques adopted by the CFD industry. Thus, new clients are often recruited by offering free training sessions and webinars without any prior appropriateness assessment, which should be carried out for all potential clients.

Existing Union law regulatory requirements do not sufficiently address the risks

49. The CNMV believes that existing regulatory requirements applicable to CFDs and other high-risk products, including product governance, appropriateness and disclosure requirements, do not sufficiently address the threats posed to retail clients by these products for the reasons set out in this section.

50. Despite the resources of the CNMV, ESMA and other NCAs devoted to monitoring and supervising activities of firms in Spain, the CNMV considers that aggressive and indiscriminate marketing and circumvention of regulations continue to take place, leading in many cases to widespread losses among retail clients. The CNMV has found that the regulation and supervision of this activity alone is insufficient to achieve appropriate investor protection, therefore leading to the need for additional restrictive measures, particularly in the advertising area, since advertising is a key part of the distribution of the product. Despite the existence of these regulatory requirements, the CNMV found evidence demonstrating that retail clients are still losing money with CFDs. As required under Article 42(2)(b) of Regulation (EU) 600/2014, the CNMV has considered whether existing regulatory requirements applicable to the relevant financial instrument or activity address the threat. The applicable existing regulatory requirements are set out in Directive 2014/65/EU, Regulation (EU) No 600/2014 and the existing CFD product intervention measures set forth in the 2019 CFD Resolution. The CNMV considers that the following requirements are particularly relevant to this measure:

i. The requirement to provide appropriate information to clients in Article 24(3) and (4) of Directive 2014/65/EU;

ii. The suitability and appropriateness requirements in Article 25(2) and (3) of Directive 2014/65/EU;

iii. The product governance requirements in Articles 16(3) and 24(2) of Directive 2014/65/EU;

iv. The remuneration practices and incentives for commercial staff of product providers in Article 24(10) of Directive 2014/65/EU;

v. The restriction included in the 2019 CFD Resolution on the provision of a payment, monetary or excluded non-monetary benefit to retail clients.

51. The requirements to provide appropriate information to clients have been detailed in Directive 2014/65/EU. Article 24(3) requires investment firms to ensure that all information, including marketing communications, addressed to clients or potential clients is fair, clear and not misleading, and Article 24(4) requires investment firms to furnish appropriate information in good time to clients and potential clients, notably including guidance on and warnings of the risks associated with investing.

52. However, the CNMV considers that compliance with those disclosure-based rules has proven to be insufficient. After an initial decrease in the distribution of CFDs to retail clients after ESMA's and the CNMV's decisions of 2018 and 2019, the distribution is steadily rising at present in Spain. In addition, CFD retail investors keep suffering significant losses with their investments. As previously pointed out, 75% of retail clients lose when investing in CFDs (some distributors even reaching 90%) proving that, even when investment firms comply with the legal requirement to provide information and disclose risks of the product to the client, CFDs are still difficult to understand for retail clients and average retail investors are probably not aware of the risks involved in this product due to this complexity. Moreover, improvements in the quality of information on CFDs do not modify the intrinsic complex and high-risk nature of this instrument.

53. The CNMV observed that suitability requirements have been strengthened in Directive 2014/65/EU by requiring the delivery of a suitability report to the client and refining the suitability assessment. Article 25(2) of Directive 2014/65/EU requires CFD providers to obtain the necessary information regarding the knowledge and experience of clients or potential clients, their financial situation and their investment objectives, including their risk tolerance. However, suitability requirements are only applicable to the provision of investment advice and portfolio management services. The distribution of CFDs to retail clients in Spain is carried out mainly under RTO services. Thus, the suitability assessment is usually irrelevant in relation to CFD trading, with the current regulation on this subject not adequately addressing the investor protection concerns.

54. Regarding appropriateness, the CNMV notes that CFDs are complex financial products and, therefore, subject to the appropriateness test, in which the firm must assess whether clients have adequate knowledge and experience to comprehend the characteristics and risks of the instrument and, thus, whether it is appropriate for them. However, even in case the appropriateness test shows that CFDs are not appropriate for the client, or if the client does not provide information that permits an assessment of the appropriateness, this does not prevent such retail client from trading in CFDs. Therefore, although the appropriateness rules are a useful tool, they do not prevent the investor protection concerns stemming from CFD trading.

55. The CNMV has considered the potential impact of the product governance rules set out in Articles 16(3) and 24(2) of Directive 2014/65/EU, that require providers and distributors of CFDs to ensure that the instruments are designed to meet the needs of the identified target market. In addition, the strategy for distribution of the products should be compatible with the identified target market and the providers must take reasonable steps to ensure that the financial instruments are distributed to the identified target market, while periodically review the identification of the target market and the performance of the product.

56. The CNMV considers, like ESMA and other NCAs, that CFDs are complex products, generally not appropriate for retail investors. The supervision of the compliance with product governance rules requires individual monitoring of the target market by each firm that provides CFDs and the group of clients whose needs, characteristics and objectives are not compatible with the instrument.

57. The CNMV notes that distribution of CFDs to retail investors in Spain has steadily increased in the past few years, and that retail investors keep incurring losses. In its supervisory actions the CNMV has identified the offering of training courses and webinars to retail clients without sufficient knowledge and experience, without a previous assessment of the appropriateness of the product for the client or a warning that CFDs are generally not an appropriate product for retail clients. Therefore, the CNMV considers that the regulation on product governance and its improved supervision do not sufficiently address the investor protection concerns regarding the distribution of CFDs. In particular, the CNMV considers that prohibiting the advertising of CFDs to the general public can prevent these products from reaching a target market for which they are not designed and, therefore, to which they should not be distributed, thereby improving the protection of retail investors.

58. Article 24(10) of Directive 2014/65/EU establishes that an investment firm shall ensure that it does not remunerate or assess the performance of its staff in any way that comes into conflict with its duty to act in the best interest of its clients, in particular not making any arrangement that may provide an incentive to its staff to recommend a particular financial instrument to a retail client whenever the investment firm could offer a different financial instrument which would better meet the needs of the client.

59. The supervisory and monitoring actions carried out by the CNMV have shown how, despite this restriction being in force, there has been widespread use of remuneration systems for the commercial network, employees and third parties, often without authorisation to do so, pushing aggressive retail client transactions, sometimes on a massive scale through call centers, in breach of the rules of conduct on the duties of informing and acting in the best interest of the clients. In particular, existing obligations have not prevented entities from continuing to distribute CFDs by means of practices that should specifically be addressed as the use of third parties (affiliates), often not authorised to provide investment services or to market such services, or in-house staff dedicated to call centers that aggressively recruit new clients where, among others, the training of commercial staff is often insufficient, and the application of remuneration and benefits for this commercial staff encouraging them to act in a particularly aggressive way, which generates a highly relevant conflict of interest between these and retail clients.

60. Consequently, the CNMV considers that, although useful, in view of the CFD distribution practices identified in Spain, the existing regulatory requirements would benefit from additional specification through measures providing further detail on particular remuneration practices that should not be permitted.

61. The intervention measures established by ESMA in 2018 and CNMV in 2019 include the prohibition to provide to retail clients any payment, monetary or excluded non-monetary benefits. In its considerations, ESMA indicates that a common feature of marketing and sales techniques formerly adopted by the CFD industry was offering trading (monetary and non-monetary) benefits, such as bonuses to attract and encourage retail clients to invest in CFDs, the offer of gifts (for example holidays, cars, electronic goods), trading tutorials or reduced costs (for example lower spreads or fees). Both ESMA and CNMV define excluded non-monetary benefits as any non-monetary benefit other than, insofar as they relate to CFDs, information and research tools.

62. In the case of training benefits, the CNMV has identified that it is a common practice among distributors of CFDs to offer these non-monetary benefits, typically targeted to attract and incentivise trading by retail clients for which this instrument is not appropriate, making them believe that investing in CFDs is easy, without a previous assessment of the client or a warning that CFDs are generally not an appropriate product for retail clients.

63. However, even though the restriction of training tutorials is mentioned in the measures set up by ESMA, the CNMV considers that there is a need to clarify that the general offer of free training, the use of demo accounts and webinars, is not permitted. It is also not permitted to use and remunerate collaborators to train new potential clients lacking accredited knowledge and experience.

64. The CNMV considers that some of these points also apply to other high-risk products as in the case of information to clients, suitability and appropriateness, product governance, and remuneration practices. However, as these other high-risk products are not currently widespread among retail investors, as in the case of CFDs, and as their offer is limited to a reduced number of investment firms offering these to retail clients, the CNMV considers that, at this stage, similar restrictions are not needed. However, it should be noted that a high percentage of retail investors incur losses similar to those regarding CFDs.

65. Notwithstanding the foregoing, the CNMV notes that currently there is no specific rule of conduct regarding the margin level applicable to retail investors trading other high-risk products, apart from the general prudential rules related to the duty to promote a sound and effective management and coverage of risks. Thus, it is possible for firms offering these products to reduce the margin required from their retail clients at their sole discretion, thus allowing for higher leverage than that applied by trading venues. Furthermore, when this higher leverage is permitted, a minimum price movement can lead to closing the position, thus to the immediate materialization of losses for those retail clients. This combined situation increases the possibility of experiencing high losses in a very short period, even higher than the initial investment. The CNMV has identified cases such as those described above in its supervisory practices, making it necessary for them to be addressed. Therefore, the CNMV considers that,

for the time being, the following measures for instruments, whose maximum amount at risk is not known at the time of subscription or whose risk of loss is greater than the amount of the initial financial contribution, should be established:

(a) The provider of the instrument requires the customer to pay the initial margin, understood as the corresponding lower margin according to the type of underlying asset from the 2019 CFD Resolution, and the amount demanded by the trading venue in which the instrument is traded;

(b) The product provider provides margin close-out protection to the retail client, understood as that established in the CNMV's 2019 Decision on CFDs.

66. These measures are directly analogous to two of the five measures regarding CFDs established by ESMA in 2018 and by the CNMV in 2019. As the use of high-risk products is not as widespread as CFDs among retail clients, the CNMV has considered that, for the time being, it is not necessary to extend all the provisions regarding CFDs – in this Decision and in the 2019 CFD Resolution – to other high-risk products.

67. In case of the initial margin protection and instruments listed on trading venues, the CNMV considers that trading venues carry out thorough analyses for the calculation of sound and fair margins required from clients, allowing for a probabilistic cover of the risk incurred. Thus, the measure limits the leverage of instruments on the scope to the greater of (i) the 2019 CFD Resolution; and (ii) that established by the trading venue.

68. However, the CNMV considers that high-risk products with crypto-assets as an underlying raise separate and additional significant concerns. In particular, crypto-assets are a relatively immature asset class that poses major risks for investors. ESMA and other regulators have repeatedly warned of the risks involved with investing in crypto-assets, among others, due to their high volatility that can be boosted when using leverage. It is typical for retail clients not to fully understand the risks involved, requiring clients to react in very short time periods. As a result, the CNMV considers that the current regulation – as the 2019 CFD Resolution only refers to CFDs – and an improvement in supervision would not sufficiently address this investor protection concern. Due to the specific characteristics of crypto-assets, the current regulation or improvements in supervision do not properly address the investor protection concerns. Therefore, specific measures are needed so that in the case of instruments with crypto-assets as underlying, the maximum leverage is that established in the 2019 CFD Resolution.

Improved supervision or enforcement would not better address the issue

69. As noted above, the CNMV considers that improved supervision or enforcement of existing rules and product intervention measures cannot appropriately protect retail clients from the risks of CFDs or other high-risk products.

Proportionality

70. The CNMV states that its measures are necessary and proportionate to address the investor protection concerns identified. It is expected that the measures will avoid retail clients being

steered by inappropriate marketing techniques to CFD trading. The CNMV also expects that the measures will enhance retail clients' awareness of the risks related to CFDs. The benefits obtained by firms offering such products are the flipside of costs and losses of clients.

71. As for other high-risk products, the CNMV considers that the proposed measures address the investor protection concerns identified without prohibiting the marketing, sale and distribution of these products by establishing appropriate limits on leverage and a close-out protection mechanism that provides consistency, clarity and adequate protection to retail investors.

Consultation of competent authorities in other relevant Member States

72. Several investment firms that offer CFDs or other high-risk products in Spain are authorised in another Member State. The measures may therefore have an impact on other NCAs due to their responsibility as home country supervisors. The CNMV informed the Investor Protection and Intermediaries Standing Committee (IPISC) members on 3 November 2022 of the possible additional measures and asked ESMA and other NCAs for their views in the IPISC session of 23 November 2022. Furthermore, the CNMV sent a prenotification to ESMA on 1 December 2022 informing ESMA of the launch of the public consultation on the measures. In addition, the proposed product intervention measures were put forward at ESMA's CFD task force meeting held on 10 January 2023. Bilateral meetings with other competent authorities, with CySEC among them, were also held. The CNMV has considered the feedback received from ESMA and NCAs when taking its decision.

Discriminatory effect on services or activities provided from another Member States

73. The CNMV does not consider the national measures to have a discriminatory effect on services or activities provided from another Member States (including indirect discriminatory effects) because the national measures provide for equal treatment of the marketing, distribution or sale of the products regardless of the Member State from which those activities are carried out.

Consultation with public bodies competent for the oversight, administration and regulation of physical agricultural markets

74. In the CNMV's opinion, the marketing, distribution and sale of CFDs and other high-risk products to retail clients within the scope of the measure do not pose a serious threat to the orderly functioning and integrity of the physical agricultural market. The activity in Spanish retail financial markets in instruments whose underlying are agricultural commodities is minimal. Therefore, there is no need for a formal consultation of the competent public body for the oversight, administration and regulation of physical agricultural markets.

Timely Notification

75. The CNMV notified ESMA and the other NCAs of the national measures not less than one month before the measures are intended to take effect.

3. ESMA's assessment of the national measures' justification and proportionality

76. In its assessment of the justification and proportionality of the proposed national measures, ESMA has taken into account (i) the reasons provided by the CNMV in its notification of the national measures; (ii) the CNMV's consultation paper, including the accompanying cost-benefit-analysis and the analysis of data provided on significant losses incurred by Spanish retail clients when investing in the products subject to the national measures; (iii) the complexity of CFDs and other high-risk products; (iv) the lack of transparency in their pricing; (v) the selling practices relating to these products; and (vi) the CNMV's assessment of the relevant markets in Spain and their evolution.

77. The additional measures on CFDs and related services proposed by the CNMV (part 1 of the proposal) go beyond the CFD measures adopted by ESMA and subsequently by other NCAs. Based on the explanations given by the CNMV, while those measures have been beneficial, CFDs and related services are still aggressively marketed in Spain, and retail investors continue to incur significant losses from CFD trading.

78. The CNMV's proposed measures relating to other high-risk products (part 2 of the proposal) extend aspects of the existing CFD product intervention measures to other high-risk products whose maximum amount at risk is unknown at the time of subscription or greater than the amount invested. Such extension follows national product intervention measures taken by other NCAs to address significant potential detriment to retail investors in their own national markets arising from specific national market developments. The extension reflects the fact that investor protection concerns also arise from other financial instruments with features common to CFDs, including the significant costs and risks to retail investors associated with high leverage or products whose maximum amount at risk is unknown or exceeds the amount invested. In particular, the CNMV has found that Spanish retail clients incur significant losses when investing in certain other high-risk products and that the significant investor protection concerns are broadly the same as those relating to CFDs.

79. The 2019 CFD Resolution (first introduced by ESMA in ESMA Decision (EU) 2018/796) included a 'negative balance protection' measure in recognition of the severe risk of investor detriment from a market gapping event for CFDs as a leveraged product whose maximum amount at risk is unknown (e.g. for a short CFD, the maximum amount at risk is unlimited) or exceeds the amount invested. The CNMV's proposed new measures do not go as far as introducing a 'negative balance protection' measure. Instead, they mitigate the investor protection risk of negative balances by applying the following elements of the 2019 CFD resolution: (i) margin close-out protection and (ii) initial margin protection, for high-risk products in scope that are not subject to margin requirements on a trading venue, and for any high-risk products in scope that have crypto-assets as their underlying. These proposed measures, taken together, are aimed to ensure that retail investors' positions on these high-risk products are closed out on an account basis in a consistent, clear and prudent way in line with the existing CFDs measures.

80. However, the national measures also enable a lower amount of initial margin than that required under the existing CFD measures for a product subject to lower margin requirements of a

trading venue. In this respect, the CNMV notes that its measures are designed to address the current possibility that firms reduce the margin required from their retail clients to allow for higher leverage than that applied by trading venues. The CNMV also takes into account that margin requirements by trading venues are already designed to mitigate the risk of negative balances through gapping events according to risk management tools by the trading venue calibrated to the particular instrument in question.

81. In ESMA's view, as noted in ESMA Decision (EU) 2018/796, exposure to crypto-assets in particular poses major risks for investors, including inherent difficulties in arriving at a valuation and a very high level of uncertainty around market price movements. In the ESMA Decision, ESMA acknowledged that certain other leveraged products are similar to CFDs. ESMA and the NCAs would therefore monitor whether detrimental consequences for retail clients like those observed in relation to CFDs would arise in respect of those other products. In relation to crypto-assets, as also noted in the ESMA Decision, crypto-assets pose major risks for investors, including inherent difficulties in arriving at a valuation and a very high level of uncertainty around market price movements.

82. While plainly extending the initial margin protection used for CFDs to these instruments could provide retail investors with a clear, simple set of leverage limits across broadly similar leveraged products, ESMA understands that the CNMV needs to balance this against the effectiveness of existing margining practices by trading venues calibrated to the particular features of a given instrument. The CNMV's assessment is that such margining practices are effective except in the case of high-risk products that have crypto-assets as their underlying.

83. Furthermore, in relation to CFDs, the CNMV does not propose a full prohibition of the marketing, distribution and sale, but would still permit their distribution and sale, provided that those activities comply with the additional restrictions proposed in the measures which the CNMV considers to be necessary on top of the 2019 CFD Resolution. In relation to the other high-risk products, the CNMV does not propose to prohibit their marketing, distribution or sale to retail clients altogether. Instead, the CNMV proposes to apply targeted protections relating to products that pose an especially high level of risk to retail investors. It has therefore not just opted for the most stringent product intervention measures but has duly taken into account proportionality considerations.

84. The proposed national measures would only apply in Spain, save for where the underlying is a crypto-asset. This means that they would not apply to the marketing, distribution or sale of CFDs and other high-risk products by providers authorised in Spain to retail clients in other Member States. ESMA is of the view that retail clients should generally be effectively protected regardless of their location. However, ESMA has considered that the national measures aim to address the specific concerns identified by the CNMV in respect of the retail market in Spain. Furthermore, ESMA has considered the capacity of the CNMV to continue to closely monitor the market and the activity of CFD and other high-risk products providers.

85. As the CNMV national measures are new and their regulatory impact remains to be seen, ESMA considers it important that the CNMV keeps the measures under review to ensure that

they continue capturing all of the financial instruments giving rise to the significant investor protection concerns observed by the CNMV.

86. Lastly, ESMA considers the part of the proposed marketing restrictions preventing the offering of training, technical seminars, courses or sessions to retail investors already captured by the scope of the existing 2019 CFD Resolution. Those measures include a prohibition on directly or indirectly providing a retail client with a payment, monetary or excluded non-monetary benefit in relation to the marketing, distribution or sale of a CFD. In this respect, ESMA already provided a positive opinion on this element of the proposed national measure in its earlier opinion dated 24 June 2019 ([9]).

4. Conclusion

87. For the above-mentioned reasons, ESMA is of the opinion that the national measures are justified and proportionate.

88. As to whether the measures should be considered by other national competent authorities, ESMA is of the opinion that insufficient evidence has been gathered to make such determination at this time. However, ESMA encourages national competent authorities to monitor the marketing, sale and distribution of CFDs and the impact of other high-risk products in their national markets to assess whether similar risks for retail investors as those identified by the CNMV exist.

89. This opinion will be published on ESMA's website in accordance with Article 43(2) of Regulation (EU) No 600/2014.

Done at Paris, 10 July 2023

For the Board of Supervisors

Verena Ross
Chair

[*Signed*]

[9] Opinion of the European Securities and Markets Authority of 24 June 2019 on the product intervention measures relating to contract for differences proposed by Comisión Nacional del Mercado de Valores of Spain (ESMA35-43-1935).