

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 30 July 2019

on the product intervention measures relating to contracts for differences proposed by the Komisja Nadzoru Finansowego of Poland

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. In particular, 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.

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).

- (3) The Komisja Nadzoru Finansowego of Poland (KNF) notified ESMA on 28 June 2019 of its intention to take product intervention measures under Article 42 of that Regulation (national measures). Upon request from ESMA, the KNF provided further information on the content of its notification.
- (4) The national measures consist of a permanent restriction on the marketing, distribution or sale of contracts for differences (CFDs) to retail clients in or from Poland.
- (5) ESMA has taken product intervention measures restricting the marketing, distribution or sale to retail clients of CFDs in Decisions (EU) 2018/796 ⁽³⁾, (EU) 2018/1636 ⁽⁴⁾, (EU) 2019/155 ⁽⁵⁾ and (EU) 2019/679 ⁽⁶⁾.
- (6) The first of these Decisions took effect on 1 August 2018. In accordance with Article 40(6) of Regulation (EU) No 600/2014, ESMA must review a temporary product intervention measure at appropriate intervals and at least every three months. These measures have been amended once and renewed three times. If they are not renewed again, the currently applicable measures in ESMA Decision (EU) 2019/679 (ESMA's measures) will automatically expire at the end of the day on 31 July 2019.
- (7) The KNF notified ESMA that the national measures are the same as ESMA's measures at national level, except that the national measures: (i) in the case of services provided from Poland in another Member State, would only apply in the absence of a related product intervention measure applicable to those services in the host Member State (reduced territorial scope); and (ii) in the case of services provided in Poland, would enable a new category of experienced clients to have lower initial margin requirements for two of the five types of underlying in ESMA's measures (lower margin requirements for experienced clients). The national measures are expected to take effect on 1 August 2019.
- (8) The KNF notified ESMA that it has complied with the conditions in Article 42 of Regulation (EU) No 600/2014, including that it has assessed the relevance of all the factors and criteria listed in Article 21 of Commission Delegated Regulation (EU) 2017/567 ⁽⁷⁾ and taken into consideration all those that are relevant. In particular, the KNF notified ESMA that it shares the reasoning given in ESMA's measures on the existence of a significant

³ 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).

⁴ European Securities and Markets Authority Decision (EU) 2018/1636 of 23 October 2018 renewing and amending the temporary restriction in Decision (EU) 2018/796 on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 272, 31.10.2018, p. 62).

⁵ European Securities and Markets Authority Decision (EU) 2019/155 of 23 January 2019 renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 27, 31.1.2019, p. 36).

⁶ European Securities and Markets Authority Decision (EU) 2019/679 of 17 April 2019 renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 114, 30.4.2019, p. 22).

⁷ 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 regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions (OJ L 87, 31.3.2017, p. 90).

investor protection concern, as relevant to Poland and the conditions in Article 42 of Regulation (EU) No 600/2014.

- (9) The national measures differ from ESMA's measures in respect of the reduced territorial scope and the lower margin requirements for experienced clients, which the KNF explained arose following a consultation with interested stakeholders in Poland, NCAs and from the KNF's analysis of data from Polish CFD providers since the introduction of ESMA's measures.
- (10) With regard to the reduced territorial scope, the KNF clarified that this would not concern services provided in third countries by CFD providers authorised in Poland. In respect of those services, the national measures would apply regardless of whether a related product intervention measure is applicable in the third country.
- (11) In respect of the lower margin requirements, the KNF observed (i) a decrease in the number of active accounts of retail clients; (ii) a significant decrease in the trading volume by retail clients; and (iii) a decrease in the number of transactions carried out by retail clients. Surveys conducted by the KNF and by a Polish association of investment firms indicate that many Polish clients opened an account with a broker registered outside of the Union and that this was driven by the ability to access higher leverage. The KNF has concerns that such investors are not protected by the requirements of Regulation (EU) 600/2014 or Directive 2014/65/EU of the European Parliament and of the Council ⁽⁸⁾ and have to operate in a foreign legal system, which may not provide equivalent protection.
- (12) Furthermore, the KNF observed that professional clients on request are not subject to ESMA's measures and many Polish clients cannot obtain that status. Part II.1 of Annex II of Directive 2014/65/EU sets out the criteria for treating retail clients as professional clients on request. In particular, Part II.1 provides that a retail client may be treated as a professional client if it meets two of three criteria. One of these criteria is that the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500 000. The KNF considers that many clients resident in Poland cannot meet this criterion.
- (13) As a result, the KNF proposes to subdivide the definition of a retail client by including a new category of 'experienced client' in its national measures. For experienced clients only, the national measures provide a lower initial margin requirement for the first two types of underlying referred to in points (a) and (b) of Annex 1 of ESMA's measures, which are (i) main currency pairs; and (ii) other currency pairs, main equity indices and gold. In particular, instead of the initial margin percentages of 3,33% and 5% used in ESMA's measures for these two types of underlying, the national measures propose an initial margin requirement of 1%.

⁸ 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).

- (14) For these purposes, the KNF defines an experienced client as a retail client that meets the following requirements:
- (a) the client is resident in Poland;
 - (b) the client must have the requisite experience; and
 - (c) the client must have knowledge of derivatives.
- (15) The requisite experience means that the client carried out any of the following activities over the last 24 months:
- (a) opening at least 10 transactions in CFDs with a nominal value of at least the equivalent in Polish zloty of EUR 50 000 each within the quarter in at least four quarters;
 - (b) opening at least 50 transactions in CFDs with a nominal value of at least the equivalent in Polish zloty of EUR 10 000 each within the quarter in at least four quarters; or
 - (c) opening at least 40 transactions in CFDs within the quarter in at least four quarters, where the total nominal value of all opened transactions for the 24 months period under assessment is at least the equivalent in Polish zloty of EUR 2 000 000.
- (16) Knowledge of derivatives for the purposes of the categorisation means any of the following:
- (a) the client holds appropriate professional certificates (CFA, FRM, PRM, ACI, Investment Advisor (DI), Securities Broker (MPW, etc.) or completion of a specialist field of study;
 - (b) the client completed at least 50 hours of training in the last 12 months in the area of derivatives, including CFDs, to be confirmed either by the relevant certificates or confirmation issued by the relevant organiser of the training or , in each case provided that the organizer of the training has verified the client's knowledge before any such certificate or confirmation is issued; or
 - (c) at least one year of work experience at a position which requires professional knowledge of transactions regarding CFDs or other derivatives.
- (17) The national measure would require that any request from a retail client to a CFD provider for categorisation as an experienced client is made in writing. Furthermore, CFD providers must review at least annually the compliance of the experienced client with the relevant requirements and keep records of such reviews.

- (18) In relation to the existing applicable regulatory requirements under Union law, which have not changed since the adoption of ESMA's measures, the KNF shares the reasons given in ESMA's measures that they do not address the significant investor protection concern. The KNF also considers that improved supervision or enforcement of the existing requirements would not better address the concern identified. In particular, the KNF informed ESMA that it has taken into account the supervisory and enforcement experiences of other NCAs as referred to in ESMA's measures and that its supervisory practices take into account the relevant guidance provided by ESMA, including the 'Opinion on MiFID practices for firms selling complex products' ⁽⁹⁾, the 'Opinion on structured complex products – good practices for product governance arrangements' ⁽¹⁰⁾ and the 'Joint Position of the European Supervisory Authorities on manufacturers' product oversight and governance processes' ⁽¹¹⁾. To clarify the existing regulatory requirements, the KNF published in May 2016 'Guidelines for providing brokerage services on the OTC derivatives market'. The guidelines have applied since 30 September 2016 and are addressed to investment firms and credit institutions providing brokerage services in Poland. Nonetheless, the KNF considers that the significant investor protection concern continues to exist.
- (19) Moreover, insofar as the national measures are the same as ESMA's measures, the KNF shares the analysis on proportionality in ESMA's measures and, in particular, has concluded that the national measures are proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants. In the case of one-off costs, the KNF considers that, to the extent that the national measures are the same as ESMA's measures, any one-off costs that may be incurred by product providers to comply with the national measures are likely to be minimal.
- (20) In respect of the reduced territorial scope, the KNF considers that, in practice, it may be too burdensome for CFD providers to determine which product intervention measures apply in the cross-border provision of services. Particularly when national measures differ, CFD providers would need to assess on a case-by-case basis which measure applies. For this reason, the national measures include the reduced territorial scope.
- (21) In respect of the lower margin requirements for experienced clients, the KNF had particular regard to Article 42(2)(c) of Regulation (EU) No 600/2014, which requires the assessment of proportionality for a national product intervention measure to take into account the nature of the risks identified, the level of sophistication of investors concerned and the likely effect of the action on relevant investors and market participants. The KNF considers that retail clients with particular knowledge and experience could be provided with lower protection enabling them to access higher leverage. The KNF limited the lower margin requirements for experienced clients to the first two underlying asset types from

⁹ ESMA/2014/146.

¹⁰ ESMA/2014/332.

¹¹ JC-2013-77.

ESMA's measures because these were the most popularly traded CFDs by Polish retail clients in 2017 and 2018. The KNF considers that lowering the margin requirements for these two underlying asset types would enable experienced clients resident in Poland to trade using higher leverage with CFD providers authorised in Poland to provide services while continuing to apply higher initial margin requirements for other underlying asset types that have greater inherent risks, such as CFDs on cryptocurrencies. The KNF also considers that the lower initial margin requirements will disincentivise those clients from trading with CFD providers from third countries where there may be a lower level of protection to that provided under Regulation (EU) No 600/2014 and Directive 2014/65/EU.

- (22) The KNF considers that the national measures do not have a discriminatory effect on services or activities provided from another Member State as the measures provide for equal treatment of the marketing, distribution or sale of the products regardless of the Member State from which those services or activities are carried out.
- (23) The KNF considers that it has properly consulted competent authorities in other Member States that may be significantly affected by the national measure. In particular, the NCA of each Member State was consulted on the national measure. The KNF received responses from four NCAs ⁽¹²⁾.
- (24) The responses from BaFin, the FMA and the AFM expressed appreciation for the fact that the higher leverage limits available to experienced clients would only be available to Polish clients. The response from BaFin also requested that the differences in the territorial scope of application of the national measures also includes tied agents, which the KNF incorporated.
- (25) The AFM raised concerns that different national product intervention measures can be difficult to supervise in cross-border cases and could lead to additional costs for CFD providers.
- (26) The response from the FCA expressed concerns that the 1% initial margin requirements proposed by the KNF is not proportionate to the risks. The FCA commented that leverage limits encourage retail clients to lower their total exposure, thereby reducing client losses and that, in its own national measures, the FCA maintained a headline leverage limit of 30:1 in line with ESMA's measures. The FCA also explained that its own analysis did not evidence that more experienced or wealthy clients lose less money when trading at higher leverage, compared to less experienced clients trading at lower leverage, and that it did not receive any feedback or evidence as part of its consultation suggesting that this was the case.

¹² Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) in Germany, Financial Market Authority (FMA) of Austria, de Autoriteit Financiële Markten (AFM) in the Netherlands and Financial Conduct Authority (FCA) of the United Kingdom.

- (27) The KNF notified ESMA and the other NCAs of the national measures not less than one month before they are intended to take effect.
- (28) The KNF considers that the national measures do not pose a serious threat to the orderly functioning and integrity of the national physical agricultural market. In particular, the KNF considers that the national measures are the same as ESMA's measures except for the differences described above and that ESMA consulted the national public bodies competent for the oversight, administration and regulation of physical agricultural markets under Council Regulation (EC) No 1234/2007 ⁽¹³⁾. None of those bodies raised any objections to ESMA Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 or (EU) 2019/679. The KNF also consulted the relevant agricultural body in Poland on its national measures and that body did not raise any objections.

2. Whether the national measures are justified and proportionate

- (29) The significant investor protection concern raised by the offer of CFDs to retail clients led to the adoption of ESMA Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 and (EU) 2019/679. However, ESMA's measures are temporary. According to the information provided by the KNF, the significant investor protection concern raised by these products continues to exist at national level and needs to be addressed on a longer-term basis to avoid the detrimental consequences that would arise from their unrestricted offer to retail clients. As the national measures are the same as ESMA's measures except for the reduced territorial scope and lower margin requirements, ESMA has taken into account the reasons for ESMA's measures referred to by the KNF as well as the additional information and reasons given by the KNF.
- (30) KNF's reason for proposing lower margin requirements for experienced clients is to disincentivise retail clients resident in Poland from trading with third-country firms instead of firms authorised in Poland. ESMA is aware that clients may on their own initiative contact third-country firms and that some third-country firms are actively approaching Union clients or that some CFD providers in the Union are marketing the possibility for retail clients to move their accounts to an intra-group third-country entity. This has led to some retail clients opening accounts with third-country firms which could provide them with access to higher leverage. ESMA has published a statement ⁽¹⁴⁾ that warns CFD providers against non-compliant behaviour. ESMA and NCAs will monitor the issues set out in the statement and will consider whether further action is required.

¹³ Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1).

¹⁴ Statement of ESMA on the application of product intervention measures under Article 40 and 42 of Regulation (EU) No 600/2014 (MiFIR) by CFD providers (ESMA35-36-1743).

- (31) However, ESMA does not consider that lowering margin requirements for experienced clients is appropriate. Excessive leverage was one of the major causes for consumer detriment that led to ESMA's measures.
- (32) Furthermore, Directive 2014/65/EU differentiates between retail clients and professional clients and lays down criteria that must be met for a retail client to become a professional client on request. When taking its measures, ESMA concluded that ESMA's measures should apply in respect of all retail clients. As confirmed by the KNF in its own analysis, there is no evidence that a specific subset of retail clients lose less money or lose less frequently when trading CFDs. Moreover, the KNF has not provided any evidence that a specific subset of retail clients differ systematically in their investment needs or risk tolerance. As such, ESMA has neither received evidence to support lower margin requirements for experienced clients in general nor for a specific sub-set of retail clients.
- (33) In respect of the reduced territorial scope of application of the national measures, CFD providers authorised in Poland would be required to apply different levels of protection depending on whichever national measures may be applicable in a host country. This means that where the host country has taken a less stringent measure, retail clients in that host country dealing with CFD providers authorised in Poland are less protected. ESMA considers that it is necessary for NCAs to take national product intervention measures that ensure an effective protection of retail clients regardless of their location.
- (34) Based on this information, ESMA is not satisfied that the national measures are justified and proportionate insofar as they propose a reduced territorial scope and lower margin requirements for experienced clients.

3. Whether the taking of a measure by other competent authorities is necessary

- (35) For the reasons explained in ESMA's measures, the significant investor protection concern raised by the offer of CFDs to retail clients is a cross-border issue. As evidenced by practices to date, product providers are able to offer these products through online trading accounts and passport their services throughout the Union. To effectively address the significant investor protection concern and avoid the risk of regulatory arbitrage, it is essential that product providers cannot exploit differences in treatment by NCAs across Member States. On the expiry of ESMA's measures, product providers may again seek to offer such products in or from a Member State that has not taken a measure at least as stringent as ESMA's measures. Therefore, it is essential that NCAs take concerted action to address this risk.

4. Conclusion

(36) In conclusion, ESMA is of the opinion that:

- (a) the national measures are justified and proportionate except for:
 - (i) the reduced territorial scope; and
 - (ii) the lower margin requirements for experienced clients; and
- (b) it is necessary for the NCAs of other Member States to take product intervention measures that are at least as stringent as ESMA's measures.

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

Done at Paris, 30 July 2019

For the Board of Supervisors

Steven Maijor

The Chair