OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 27 September 2019

on the product intervention measures relating to contracts for differences proposed by the Cyprus Securities and Exchange Commission of Cyprus

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 Cyprus Securities and Exchange Commission (CySEC) of Cyprus notified ESMA on 29 August 2019 of its intention to take product intervention measures under Article 42 of that Regulation (national measures). Upon request from ESMA, CySEC 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 Cyprus.

(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. Since they were not renewed again, the latest applicable measures in ESMA Decision (EU) 2019/679 (ESMA's measures) expired at the end of the day on 31 July 2019.

(7) CySEC notified ESMA that the national measures are the same as ESMA's measures at national level except that the national measures: (i) do not apply to CFD providers that are credit institutions authorised under Directive 2013/36/EU of the European Parliament and of the Council ([7]) (credit institutions); (ii) vary the level of protection provided to retail clients that are resident of other Member States in which a product intervention measure relating to CFDs applies; and (iii) include minor amendments to the standard risk warnings. The national measures are expected to take effect on 2 October 2019.

(8) On 18 July 2019, CySEC published a Circular ([8]) (CySEC Circular) to inform CFD providers authorised by CySEC that it is highly unlikely that they would be considered to comply with existing rules under the national law implementing MiFID in respect of the need to act honestly and professionally when providing investment services if they do not apply the national measures of other Member States where applicable or the content of ESMA's measures. The CySEC Circular stated that CFD providers must continue to apply

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[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] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L176, 27.6.2013, p. 338).
[8] https://www.cysec.gov.cy/CMSPages/GetFile.aspx?guid=0cf90dad-c5ce-48d1-8cda-08c629319f4a.

ESMA's measures, even following their expiry, until the national measures of CySEC apply.

(9) CySEC 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 ([9]) and taken into consideration all those that are relevant. In particular, CySEC notified ESMA that it shares the reasoning given in ESMA's measures on the existence of a significant investor protection concern, as relevant to Cyprus and the conditions in Article 42 of Regulation (EU) No 600/2014.

(10) CySEC explained that the national measures do not cover credit institutions because the Central Bank of Cyprus (CBC) is the NCA responsible for taking a product intervention measure prohibiting the marketing, distribution or sale of CFDs to retail clients by credit institutions in or from Cyprus. CySEC explained that it informed the CBC of the national measures and encouraged the CBC to take the same measures in respect of credit institutions.

(11) With regard to the variable level of protection, CySEC stated that where CFD providers authorised by CySEC market, distribute or sell CFDs to a resident of another Member State in which product intervention measures relating to CFDs apply, its national measures adapt so that they replicate those other measures. In all other cases, the Cyprus national measures have the content otherwise described in this Opinion. These other cases include where CFD providers authorised by CySEC market, distribute or sell CFDs to a resident of Cyprus, a resident of a Member State where national product intervention measures relating to CFDs do not apply or a resident of a third country. They also include where CFD providers other than credit institutions authorised by an NCA of another Member State market, distribute or sell CFDs from that Member State in Cyprus.

(12) Concerning this variable level of protection, CySEC considers that, in practice, it may be too burdensome for CFD providers to determine which product intervention measures apply in cross-border situations. Particularly when national measures differ in respect of their content, CFD providers would need to assess on a case-by-case basis whether they must apply the national measures of CySEC or the national measures of another Member State. For this reason, the national measures include the variable level of protection.

(13) With regard to the standard risk warnings in ESMA's measures, the national measures replace the reference to the specific percentage range of retail investor accounts that lose money with a reference to, for the durable medium and webpage standard risk warning and for the abbreviated standard risk warning, 'the vast majority of retail investor accounts' and, for the reduced character standard risk warning, 'CFD-retail clients

[9] 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).

accounts generally lose money'. CySEC considers that this warning reflects the risk of trading in CFDs in a manner equivalent to ESMA's measures. In addition, CySEC explained that the percentage range in ESMA's measures or another specific percentage may change over time and that continuously monitoring its accuracy might be challenging considering the permanent nature of the measures.

(14) The proposed national measures were notified by CySEC one month after ESMA's measures expired and will take effect two months after that date. Nevertheless, CySEC informed ESMA that it considers that the risk of unrestricted contracts for differences being offered again to retail clients during that time period would be very limited, taking into account its own monitoring activities, the content of the CySEC Circular and that there are already national measures of other Member States in place.

(15) Furthermore, CySEC shares the reasons given in ESMA's measures that the existing applicable regulatory requirements under Union law, which have not changed since the adoption of ESMA's measures, do not address the concern. CySEC also considers that improved supervision or enforcement of the existing requirements would not better address the concern identified. In particular, CySEC 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' ([10]), the 'Opinion on structured complex products – good practices for product governance arrangements' ([11]) and the 'Joint Position of the European Supervisory Authorities on manufacturers' product oversight and governance processes' ([12]). Nonetheless, CySEC considers that the significant investor protection concern continues to exist.

(16) Moreover, CySEC 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, CySEC 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. CySEC 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.

[10] ESMA/2014/146.
[11] ESMA/2014/332.
[12] JC-2013-77.

(17) CySEC considers that it has properly consulted the NCAs in other Member States that may be significantly affected by the national measures. In particular, the NCA of each Member State was consulted on the national measures. CySEC received responses from two NCAs ([13]). Only SI-ATVP raised concerns on the national measures, which related to the initial amendments proposed for the standard risk warning. Following SI-ATVP's comments, CySEC revised the proposed risk warning so that the national measures now refer to the 'vast majority' (instead of the 'majority' as initially proposed) of retail investor accounts lose money when trading CFDs.

(18) CySEC notified ESMA and the other NCAs of the national measures not less than one month before they are intended to take effect.

(19) CySEC 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, CySEC 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 ([14]). None of those bodies raised any objections to ESMA Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 or (EU) 2019/679.

2. Whether the national measures are justified and proportionate

(20) 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 were temporary and have expired. According to the information provided by CySEC, 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 differences described above, ESMA has taken into account the reasons for ESMA's measures referred to by CySEC as well as the additional information and reasons given by CySEC.

(21) As stated in ESMA's Opinion on CySEC's national product intervention measure relating to binary options ([15]), where there is a division of competences under Regulation (EU) No 600/2014 between NCAs in the same Member State, those NCAs are under an obligation to closely cooperate for the purposes of that Regulation, including in respect of product intervention measures. Nonetheless, ESMA has taken into account the necessity of the

[13] Bundesanstalt für Finanzdienstleistungsaufsicht (DE-BaFin) of Germany and the Securities Market Agency (SI-ATVP) of Slovenia.
[14] 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).
[15] Opinion of the European Securities and Markets Authority of 28 June 2019 on the product intervention measure relating to binary options proposed by the Cyprus Securities and Exchange Commission of Cyprus (ESMA35-43-1981).

national measures to promptly address the significant investor protection concern identified by CySEC as well as the relevance of CySEC's supervisory experience, according to which, prior to ESMA's temporary product intervention measures, CFDs were principally offered to retail clients in Cyprus by providers which would be captured by the national measures.

(22) In respect of the variable level of protection, CFD providers authorised in Cyprus would be required to apply different levels of protection depending on whichever national measures relating to CFDs may be applicable in another Member State. This means that where the other Member State has taken a less stringent measure, retail clients that are residents of that Member State dealing with CFD providers authorised by CySEC 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.

(23) In respect of the proposed amendments to the standard risk warnings, ESMA notes that its measures have been used as the basis for the national measures of other NCAs. ESMA encourages NCAs to take measures that use a common Union risk warning to avoid costs for CFD providers that would have to adjust the relevant risk warnings when offering CFDs in or from Member States where the NCA has applied national measures with differences in the standard risk warnings. Nonetheless, taking into account that the proposed risk warnings are substantially the same as those in ESMA's measures and that the standard risk warnings are, in any event, only to be used in exceptional cases where a provider has not provided an open CFD connected to a retail client CFD trading account in the last 12-month calculation period, ESMA considers that the proposed risk warnings in the national measures sufficiently inform retail investors about the risks related to trading in CFDs. ESMA has also taken into account that the differences in the standard risk warnings are aligned with the differences in the standard risk warnings of the national measures of the Financial Market Authority of Austria and of the Financial Conduct Authority of the UK ([16]).

(24) With regard to the planned date of taking effect of the national measures, ESMA has taken into account the duration of the time gap between the expiry of ESMA's measures and the taking effect of the national measures, the CySEC Circular and the capacity of CySEC to adequately monitor the market during that period and act as necessary.

[16] See, in particular, paragraph 20 of the Opinion of the European Securities and Markets Authority of 3 May 2019 on the product intervention measures relating to contracts for differences proposed by the Financial Market Authority of Austria (ESMA35-43-1906) and paragraph 30 of the Opinion of the European Securities and Markets Authority of 24 June 2019 on the product intervention measures relating to contracts for differences proposed by the Financial Conduct Authority of the United Kingdom (ESMA35-43-1961).

(25) Based on this information, ESMA is not satisfied that the national measures are justified and proportionate insofar as they propose a variable level of protection.

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

(26) 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. After 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.

(27) Furthermore, in order to avoid the risk of regulatory arbitrage related to credit institutions being able to market, distribute or sell CFDs to retail clients in or from Cyprus and address the relevant significant investor protection concern, ESMA considers it essential that the CBC, in close cooperation with CySEC, takes measures at least as stringent as ESMA's measures in respect of the marketing, distribution or sale of CFDs to retail clients by credit institutions in or from Cyprus.

4. Conclusion

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

(a) the national measures are justified and proportionate except for the variable level of protection;

(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; and

(c) it is necessary for the CBC to take product intervention measures that are at least as stringent as ESMA's measures in respect of the marketing, distribution or sale of CFDs by credit institutions in or from Cyprus.

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

Done at Paris, 27 September 2019

For the Board of Supervisors

Steven Maijoor

The Chair