

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 26 March 2019

on the product intervention measures relating to contracts for differences proposed by the Authority for the Financial Markets of the Netherlands

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 Authority for the Financial Markets of the Netherlands (AFM) notified ESMA on 21 February 2019 of its intention to take product intervention measures under Article 42 of that Regulation (national measures).
- (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 the Netherlands.
- (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⁾ and (EU) 2019/155 ⁽⁵⁾.
- (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 twice. If they are not renewed again, the currently applicable measures in ESMA Decision (EU) 2019/155 (ESMA's measures) will automatically expire at the end of the day on 30 April 2019.
- (7) The AFM notified ESMA that the national measures are the same as ESMA's measures at national level. The national measures are expected to take effect on 19 April 2019.
- (8) The AFM 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 ⁽⁶⁾ and taken into consideration all those that are relevant. In particular, the AFM notified ESMA that it shares the reasoning given in ESMA's measures on the existence of a significant investor protection concern, as relevant to the Netherlands and the conditions in Article 42 of Regulation (EU) No 600/2014.
- (9) Furthermore, the AFM 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. The AFM also considers that improved supervision or enforcement of the existing requirements would not better address the concern identified. In particular, the AFM informed ESMA that it has taken into account the supervisory and enforcement experiences of other NCAs as referred to

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 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).

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' ⁽⁷⁾, the 'Opinion on structured complex products – good practices for product governance arrangements' ⁽⁸⁾ and the 'Joint Position of the European Supervisory Authorities on manufacturers' product oversight and governance processes' ⁽⁹⁾. Nonetheless, the AFM considers that the significant investor protection concern continues to exist.

- (10) Moreover, the AFM 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 AFM considers that, as 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.
- (11) The AFM 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.
- (12) Since the national measures are the same as ESMA's measures, ESMA's measures are binding in all Member States and, on the expiry of ESMA's measures, other NCAs plan to take similar national measures, the AFM considers that other Member States are not significantly affected by its measures. The AFM has also notified ESMA and the other NCAs of the national measures not less than one month before they are intended to take effect.
- (13) The AFM 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 AFM considers that the national measures are the same as ESMA's measures 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 ⁽¹⁰⁾. None of those bodies raised any objections to ESMA Decisions (EU) 2018/796, (EU) 2018/1636 or (EU) 2019/155.

2. Whether the national measures are justified and proportionate

- (14) The significant investor protection concern raised by the offer of CFDs to retail clients led to the adoption of ESMA's Decisions (EU) 2018/796, (EU) 2018/1636 and (EU) 2019/155.

⁷ ESMA/2014/146.

⁸ ESMA/2014/332.

⁹ JC-2013-77.

¹⁰ 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).

However, ESMA's measures are temporary. According to the information provided by the AFM, 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.

- (15) As the national measures are the same as ESMA's measures, ESMA has taken into account the reasons for ESMA's measures referred to by the AFM as well as the additional information and reasons given by the AFM. Based on this information, ESMA is satisfied that the national measures are justified and proportionate.

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

- (16) 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

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

- (a) the national measures are justified and proportionate; 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, 26 March 2019

For the Board of Supervisors
Steven Maijor
The Chair