

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 Magyar Nemzeti Bank of Hungary

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 Magyar Nemzeti Bank of Hungary (MNB) 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 MNB 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 Hungary.
- (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 MNB notified ESMA that the national measures are the same as ESMA's measures at national level, with the difference that the national measures will take the form of individual decrees addressed to all providers authorised in Hungary which market, distribute or sell CFDs in or from Hungary. The national measures are expected to take effect on 1 August 2019.
- (8) The MNB 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 MNB notified ESMA that it shares the reasoning given in ESMA's measures on the existence of a significant investor protection concern, as relevant to Hungary and the conditions in Article 42 of Regulation (EU) No 600/2014.
- (9) The MNB proposes to take the national measures in the form of individual decrees rather than an act of general application. The MNB explained that this is due to its inability 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 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).

take acts of general application unless it receives a specific empowerment through national legislation. The MNB explained that it has not received such an empowerment in relation to the product intervention powers in Article 42 of Regulation (EU) No 600/2014. Furthermore, the MNB observed that the number of providers authorised in Hungary that currently offer CFDs is very limited and the MNB will closely monitor the activity of those providers as well as issue new individual decrees for any provider already authorised in Hungary which will start to market, distribute or sell CFDs as well as for any new provider that applies for authorisation in Hungary.

- (10) The MNB informed ESMA that the national measures would not apply to CFD providers authorised in other Member States providing services in Hungary either with or without a Hungarian branch or a tied agent. However, the MNB will closely monitor the activity of those providers. In the light of this and the fact that most NCAs plan to take national product intervention measures that are the same as ESMA's measures, the MNB considers that the risk that unrestricted CFDs will be marketed, distributed or sold to Hungarian retail clients is low.
- (11) In relation to the existing applicable regulatory requirements under Union law, which have not changed since the adoption of ESMA's measures, the MNB shares the reasons given in ESMA's measures that they do not address the significant investor protection concern. The MNB also considers that improved supervision or enforcement of the existing requirements would not better address the concern identified. In particular, the MNB 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' ⁽⁸⁾, the 'Opinion on structured complex products – good practices for product governance arrangements' ⁽⁹⁾ and the 'Joint Position of the European Supervisory Authorities on manufacturers' product oversight and governance processes' ⁽¹⁰⁾. Nonetheless, the MNB considers that the significant investor protection concern continues to exist.
- (12) Moreover, the MNB 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 MNB considers that, as the national measures are the same as ESMA's measures except for the difference described above, any one-off costs that may be incurred by product providers to comply with the national measures are likely to be minimal.

⁸ ESMA/2014/146.

⁹ ESMA/2014/332.

¹⁰ JC-2013-77.

- (13) The MNB considers that the national measures do not have a discriminatory effect on services or activities provided from another Member State as the measures would not apply to CFD providers authorised in other Member States which provide services in Hungary.
- (14) Since the national measures are the same as ESMA's measures except for the difference described above, 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 MNB considers that other Member States are not significantly affected by its measures. Furthermore, the MNB informed ESMA that, based on the available data, Hungarian CFD providers have very limited cross-border activity.
- (15) The MNB 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 MNB considers that the national measures are the same as ESMA's measures, except for the difference 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 ⁽¹¹⁾. 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

- (16) 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 MNB, 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.
- (17) ESMA has taken into account the reasons for ESMA's measures referred to by the MNB as well as the additional information and reasons given by the MNB. In particular, ESMA has taken into account that the national measures have the same content as ESMA's measures. Insofar as those individual acts apply to all providers currently authorised in Hungary which market, distribute or sell CFDs, ESMA considers that the national measures adequately protect retail clients when dealing with those providers.
- (18) However, unlike ESMA's measures, the national measures would not take the form of an act of general application but of individual decrees. ESMA notes that Article 42 of Regulation (EU) No 600/2014 empowers NCAs to take national product intervention measures which can be of general application and that this provision is directly applicable

¹¹ 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).

in Member States. ESMA considers that the national measures would not ensure an effective level of protection of retail clients in Hungary because CFD providers established in other Member States offering services in Hungary either with or without a branch or through a tied agent may be subject to no or a less stringent level of protection, depending on whether and what national product intervention measures have been adopted in those other Member States that apply to those providers.

- (19) To achieve a common level of protection of retail clients in Hungary and address the significant investor protection concern identified by the MNB, ESMA considers it necessary for the national product intervention measures to apply in respect of the marketing, distribution or sale of CFDs in and from Hungary, regardless of whether this is carried out by a CFD provider authorised in Hungary or in another Member State. Therefore, ESMA is not satisfied that the national measures are justified and proportionate.

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

- (20) 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

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

- (a) insofar as the national measures apply to all providers currently authorised in Hungary which market, distribute or sell CFDs, the national measures adequately protect retail clients when dealing with those providers. However, for the reasons set out in paragraphs 18 and 19 of this opinion, the national measures are not 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, 30 July 2019

For the Board of Supervisors
Steven Maijor
The Chair