

## **ESMA STATEMENT**

### **European Parliament Committee on Petitions**

Petitions 0502/2016, 0503/2016 and 0506/2016

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Provision of online services in complex financial instruments through aggressive marketing by a number of Cypriot firms has been a matter of concern for ESMA and several national supervisors over the last 2 years. ESMA is therefore grateful for the opportunity offered by the Petition Committee to provide its views on this important dossier. It is indeed essential to have a good understanding of the tasks and responsibilities of the various actors involved under the current legal framework.

EU bodies, whether the European Commission or ESMA, have no powers to directly intervene in the individual cases brought forward by the petitioners:

- It is the National regulator (CySEC) who remains in charge of authorization, supervision and enforcement of Iron FX;
- It is for the national financial ombudsman and ultimately Cypriot Courts to solve disputes between individual investors and Iron-FX.

### **Why is this a matter of interest to ESMA?**

Under its founding regulation, ESMA is tasked with the objective to contribute to consistent, efficient and effective supervision; ESMA is also tasked with fostering investor protection.

- A number of host national supervisors turned to ESMA to seek coordinated action at ESMA level due to serious concerns raised by aggressive marketing of firms operating online from Cyprus and offering complex financial products to retail investors in their jurisdictions without adequate investment advice.
- Over the last 2 years ESMA has also received complaints from more than 500 retail investors alleging breaches of mainly MiFID requirements by Iron-FX. These contained also complaints of failure of the national regulator to supervise and enforce some MiFID requirements.

### **What has ESMA done?**

ESMA looked at this issue from three perspectives:

- First, ESMA established a Joint Group of supervisors, comprising CySEC and several host supervisors, under ESMA's chairmanship, to advise on and scrutinize CySEC's

actions in relation to nine "priority firms" including Iron-FX. This supervisory convergence work was launched in July 2015, resulted in a series of on-site inspections by CySEC over the summer 2015 and ensuing sanctions by the CySEC's Board at eight firms, totalling more than 2 million EUR in fines and a license withdrawal. Similar actions have subsequently been applied to another group of 15 Cyprus-based investment firms, with a similar business model, leading also to sanctions by the CySEC's Board of more than 900 000 EUR in total and to another withdrawal of license.

- Second, on the regulatory side, ESMA has established in July 2015 a dedicated Task Force on these complex products: CFDs, binary options, rolling spot forex and other speculative products. This resulted in a number of clarifications (in the form of Q&As) to firms of the requirements under MiFID and two warnings to investors, the latest warning being issued in July 2016. Ongoing sharing of good supervisory practices continues to take place in this Task-Force.
- Third, based on complaints received and allegations made therein, ESMA engaged in a series of bilateral requests for information addressed to CySEC. These requests also related to findings and recommendations made in the Cypriot General Auditor's report.

This correspondence, as the work of the Joint Group, is confidential. However, all complainants, among whom the petitioners, received regular updates from ESMA.

### **What are the next steps contemplated?**

The bilateral correspondence between ESMA and CySEC, together with the work of the Joint Group, provided meaningful factual information to determine whether further action from ESMA would be needed, and if so, what tool(s) at ESMA's disposal would prove most effective. As expressed in its public statement of 29 June 2017, ESMA remains concerned that the supervisory convergence tools used so far may not be sufficiently effective to ensure that the risks to consumers are sufficiently controlled or reduced (please see <https://www.esma.europa.eu/press-news/esma-news/esma-issues-statement-preparatory-work-in-relation-cfds-binary-options-and>).

One possible tool would be a formal investigation under Article 17 of ESMA's founding regulation. However, ESMA does not consider that this tool would offer the most effective outcome. In particular, and contrary to expectations expressed by one of the petitioners, there is no possibility for ESMA to ultimately adopt a decision addressed to Iron-FX under Article 17(6), as the alleged breaches relate to provisions of Directive 2004/39/EC on markets in financial instruments (MiFID), and as also explained in recital 29, this last resort power is limited to circumstances in which Union law is directly applicable to financial market participants by virtue of Union regulations (not directives).



Another tool to address investor protection risks in relation to CFDs, rolling spot forex and binary options would be for ESMA to prepare for making use of its future power to restrict or ban certain products under Article 40 of the new MiFIR framework. With this perspective, and as indicated in its June 2017 Statement, ESMA is in the process of discussing the possible use and possible content of any such measures, and how they could be applied. Any intervention measures under Article 40 of MiFIR must be approved by the ESMA Board of Supervisors and can only come into effect from 3 January 2018 at the earliest, when the new regime becomes applicable.