

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 24 June 2019

on the product intervention measure relating to binary options proposed by the Bundesanstalt für Finanzdienstleistungsaufsicht of Germany

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 Bundesanstalt für Finanzdienstleistungsaufsicht of Germany (BaFin) notified ESMA on 3 May 2019 of its intention to take a product intervention measure under Article 42 of that Regulation (national measure). Upon request from ESMA, BaFin provided further information on the content of its notification.
- (4) The national measure consists of a permanent prohibition on the marketing, distribution or sale of binary options to retail clients in or from Germany.
- (5) ESMA has taken product intervention measures prohibiting the marketing, distribution or sale to retail clients of binary options in Decisions (EU) 2018/795 ⁽³⁾, (EU) 2018/1466 ⁽⁴⁾, (EU) 2018/2064 ⁽⁵⁾ and (EU) 2019/509 ⁽⁶⁾.
- (6) The first of these Decisions took effect on 2 July 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 measure in ESMA Decision (EU) 2019/509 (ESMA's measure) will automatically expire at the end of the day on 1 July 2019.
- (7) BaFin informed ESMA that the national measure is the same as ESMA's measure at national level, with the difference that the national measure would not expressly exclude the binary options referred to in Article 1(3)(a) of ESMA's measure. The national measure is expected to take effect on 2 July 2019.
- (8) BaFin 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, BaFin notified ESMA that it shares the reasoning given in ESMA's measure on the existence of a significant investor protection concern, as relevant to Germany and the conditions in Article 42 of Regulation (EU) No 600/2014.
- (9) Although the national measure would not expressly exclude the binary options referred to in Article 1(3)(a) of ESMA's measure due to national constraints, BaFin informed ESMA

³ European Securities and Markets Authority Decision (EU) 2018/795 of 22 May 2018 to temporarily prohibit the marketing, distribution or sale of binary options to retail clients 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. 31).

⁴ European Securities and Markets Authority Decision (EU) 2018/1466 of 21 September 2018 renewing and amending the temporary prohibition in Decision (EU) 2018/795 on the marketing, distribution or sale of binary options to retail clients (OJ L 245, 1.10.2018, p. 17).

⁵ European Securities and Markets Authority Decision (EU) 2018/2064 of 14 December 2018 renewing and amending the temporary prohibition in Decision (EU) 2018/795 on the marketing, distribution or sale of binary options to retail clients (OJ L 329, 27.12.2018, p. 27).

⁶ European Securities and Markets Authority Decision (EU) 2019/509 of 22 March 2019 renewing the temporary prohibition on the marketing, distribution or sale of binary options to retail clients (OJ L 85, 27.3.2019, p.19).

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).

that it considers those products not to be in scope of the national measure and that it will ensure through its supervisory and enforcement activities that the national measure is not applied to those products.

- (10) Furthermore, BaFin shares the reasons given in ESMA's measure that the existing applicable regulatory requirements under Union law, which have not changed since the adoption of ESMA's measure, do not address the concern. BaFin also considers that improved supervision or enforcement of the existing requirements would not better address the concern identified. In particular, BaFin informed ESMA that it has taken into account the supervisory and enforcement experiences of other NCAs as referred to in ESMA's measure 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, BaFin considers that the significant investor protection concern continues to exist.
- (11) Moreover, BaFin shares the analysis on proportionality in ESMA's measure and, in particular, has concluded that the national measure is 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 BaFin considers that, as the national measure is the same as ESMA's measure, with the exception of expressly excluding the binary options referred to in Article 1(3)(a) of ESMA's measure, any one-off costs that may be incurred by product providers to comply with the national measure are likely to be minimal.
- (12) BaFin considers that the national measure does not have a discriminatory effect on services or activities provided from another Member State as the measure provides 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.
- (13) Since the national measure is the same as ESMA's measure, with the exception of expressly excluding the binary options referred to in Article 1(3)(a) of ESMA's measure, ESMA's measure is binding in all Member States and, on the expiry of ESMA's measure, other NCAs plan to take similar national measures, BaFin considers that other Member States are not significantly affected by its measure. BaFin has also notified ESMA and the other NCAs of the national measure not less than one month before it is intended to take effect.

⁸ ESMA/2014/146.

⁹ ESMA/2014/332.

¹⁰ JC-2013-77.

- (14) BaFin considers that the national measure does not pose a serious threat to the orderly functioning and integrity of the national physical agricultural market. In particular, the BaFin considers that the national measure is the same as ESMA's measure, with the exception of expressly excluding the binary options referred to in Article 1(3)(a) of ESMA's measure, 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) 2018/795, (EU) 2018/1466, (EU) 2018/2064 or (EU) 2019/509.

2. Whether the national measure is justified and proportionate

- (15) The significant investor protection concern raised by the offer of binary options to retail clients led to the adoption of ESMA Decisions (EU) 2018/795, (EU) 2018/1466, (EU) 2018/2064 and (EU) 2019/509. However, ESMA's measures are temporary. According to the information provided by BaFin, 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.
- (16) Unlike ESMA's measure, the national measure would not expressly exclude the binary options referred to in Article 1(3)(a) of ESMA's measure. However, ESMA has taken into account the reasons provided by BaFin that those products are not considered to be in scope of the national measure and considers that BaFin will be in a position to ensure that the national measure is not applied to those products through its supervisory and enforcement activities.
- (17) Based on this information as well as the reasons for ESMA's measure referred to by BaFin, ESMA is satisfied that the national measure is justified and proportionate.

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

- (18) For the reasons explained in ESMA's measures, the significant investor protection concern raised by the offer of binary options 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 measure, 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 measure. Therefore, it is essential that NCAs take concerted action to address this risk.

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).

4. Conclusion

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

- (a) the national measure is 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 measure.

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

Done at Paris, 24 June 2019

For the Board of Supervisors

Steven Maijor

The Chair