

## ADVICE TO ESMA

### Own initiative report on product intervention under MiFIR

#### I. Executive summary

At its meeting of 10-11 November 2016, the SMSG decided to draft an own initiative report on product intervention measures, which Member States and ESMA will be able to take under MiFIR. The goal of this own initiative report is to (1) give the SMSG's opinion on two important legal questions relating to MiFIR product intervention; (2) summarize national measures already taken before entry into force of MiFIR; and (3) indicate issues where intervention by ESMA is considered useful.

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#### 1. Legal questions

The first legal question regards the **scope of application** of the MiFIR product intervention measures. ESMA recently issued an opinion stating that the product intervention powers of ESMA and the NCAs under MiFIR only apply to products marketed and distributed by credit institutions and investment firms and will therefore not reach fund management companies which distribute units in investment funds directly. The SMSG is, however, of the opinion that MiFIR also offers arguments for a broader interpretation allowing to apply the MiFIR product intervention rules to all financial institutions marketing or distributing the products targeted by a product intervention measure. The SMSG nevertheless agrees with ESMA that it would be best if the Commission would explicitly confirm ESMA's and the NCAs' product intervention powers in relation to all possible distributors.

The second legal question is whether **pre-MiFIR national product intervention measures** should be **grandfathered** upon entry into force of MiFIR. The SMSG is of the opinion that such product intervention measures can in any event be upheld to the extent (i) the MiFIR conditions have been respected or (ii) market participants have voluntarily committed to abstain from certain product offerings or practices. If conditions equivalent to the MiFIR requirements have not been respected in regard of pre-MiFIR product intervention measures, the SMSG is of the opinion that these measures should not be automatically grandfathered upon entry into force of MiFIR, and that national regulators should, upon entry into force of MiFIR, review such measures to assess their compatibility with the MiFIR requirements.

#### 2. National measures

The SMSG has gathered information from 20 Member States and Norway. Of those, 9 Member States and Norway have taken or intend to take one or more product intervention measures, resulting in 12 actual measures and 3 proposals, reviewed for purposes of this SMSG report.

Of these measures 3 are voluntary (Belgian moratorium, German measure, Italian warnings); the other measures are, either *de jure* or *de facto*, binding for market participants.

The product intervention measures can be classified in 4 categories: a ban on the sale of certain products, a ban on certain product features, a ban on the marketing of certain products and extra information or warnings in respect of certain products.

Two approaches can be distinguished with regard to the scope of the product intervention measures: certain Member States have taken product-specific measures (e.g. against CoCo's, binary options or CFDs), whereas other Member State measures target a range of (complex) products.

With regard to the scope of protection, most measures aim at protecting retail investors. Only Malta has taken a measure which affects both retail and professional investors (maximum leverage of complex products, including CFDs). The Netherlands, on the other hand, are considering to take a measure targeting only a subgroup of the retail investors, i.e. "consumers" (natural persons acting outside the scope of their business or profession to whom a financial institution provides a financial service).

Other differences relate to the procedure leading to adoption, including the question whether and how a stakeholder consultation and a proportionality test has preceded the product intervention measure.

### 3. Need for intervention by ESMA at this stage

Even though this report reveals that there are a lot of differences in measures taken by Member States, the SMSG is of the opinion that ESMA should consider the effect and effectiveness of (i) new MiFID II investor protection measures, such as product governance, and (ii) Member States product intervention measures, before taking more intrusive EU product intervention initiatives.

Nevertheless, ESMA should closely follow up on Member States' product intervention measures and continuously assess whether there is a case for EU intervention. In this respect, the SMSG expresses a specific concern in relation to CFDs and binary options.

Moreover, there are a number of issues where the SMSG advises ESMA to take immediate action upon entry into force of MiFIR. The SMSG advises ESMA to:

- ensure, upon the entry into force of MiFIR, that existing Member State actions are justified and proportionate, and to take action if needed (art. 43 (2) MiFIR);
- take measures to streamline the procedure leading to adoption of a national product intervention measure, by giving guidance on, for instance, the features of the consultation process or the proportionality test;
- give guidance on the content and format of Member States' notification obligation to other NCA's and ESMA on the details and context of any prohibition or restriction (art. 42 (3));
- keep a publicly available and up to date register of all national product intervention measures.

## II. Background

### 1. Legal Background

The Markets in Financial Instruments Regulation (EU) N° 600/2014 (MiFIR) has attributed new product intervention competences to ESMA:

- (i) The MiFIR explicitly allows Member States' competent authorities, upon certain conditions, to prohibit or restrict the marketing, distribution or sale of certain financial instruments or financial instruments with certain specified features; or a type of financial activity or practice in or from their Member State (art. 42 MiFIR). ESMA should in such circumstances perform a facilitation and coordination role and ensure that action taken by a competent authority is justified and proportionate and that, where appropriate, a consistent approach is taken by competent authorities (art. 43 MiFIR). The “comply or explain” approach applies in this matter: ESMA can give an opinion on whether it deems action by the competent authority appropriate; if the competent authority does not comply with such opinion, it should immediately publish on its website a notice fully explaining its reasons (art. 43 MiFIR).
- (ii) Moreover, ESMA itself can temporarily prohibit or restrict in the Union the marketing, distribution or sale of certain financial instruments or financial instruments with certain specified features; or a type of financial activity or practice (art. 40 (1)). ESMA can however only do so if the following conditions are met:
- (a) the proposed action addresses a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system in the Union;
  - (b) regulatory requirements under Union law that are applicable to the relevant financial instrument or activity do not address the threat;
  - (c) a competent authority or competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address the threat.

Where a competent authority or competent authorities have taken a measure under Article 42, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 43.

A Commission Regulation further details the “criteria and factors to be taken into account in applying product intervention powers” (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)).

## 2. Goal of this own initiative report

The goal of this own initiative report is to:

- (i) Give the Stakeholder Group's opinion on two important legal questions relating to product intervention:
  - a. If a Member State or ESMA issue a product intervention measure under MiFIR, who should comply with the intervention measure?
  - b. Can national product intervention measures which have been taken before the entry into force of MiFIR be upheld afterwards? Under what conditions?
- (ii) Summarize national measures already taken before MiFIR has entered into force;
- (iii) Report on the national measures taken so far:
  - a. Types of measures  
(ban, or other - softer – restrictions, such as warnings, marketing restrictions, ...)
  - b. Duration of the measures
  - c. Goal of the measures

- d. Beneficiaries of the measures  
(e.g. only retail investors, or more general scope of protection)
  - e. Binding measures or voluntary participation by the industry (or self-regulation by the sector)
  - f. National procedures preceding the introduction of a product intervention measure
    - i. stakeholder consultation?  
(How long? What stakeholders? Via sector organisations or open to everyone?)
    - ii. proportionality test  
(Are less disruptive alternatives considered?)
  - g. Enforcement
    - i. How does the supervisor monitor the market to detect detriment?
    - ii. What sanctions apply in case of breach of the product intervention measures?
  - h. Success factor – does the measure reach its goal?
- (iv) Indicate issues where intervention by ESMA is considered useful in order to:
- a. Promote supervisory convergence (e.g. by sharing best practices);
  - b. Facilitate and coordinate national measures, ensuring that action taken by competent authorities is justified and proportionate and that, where appropriate, a consistent approach is taken by competent authorities;
  - c. Take EU-level product intervention measures.

### III. Legal questions relating to product intervention

#### 1. If a Member State or ESMA issue a product intervention measure under MiFIR, who should comply with the measure?

ESMA issued an opinion on 12 January 2017 on the “Impact of the exclusion of fund management companies from the scope of the MiFIR Intervention Powers” (ESMA50-1215332076-23).

ESMA is of the opinion that the product intervention powers of ESMA and the NCA’s under MiFIR only apply to products marketed and distributed by credit institutions and investment firms and that a product intervention measure under MiFIR will therefore not reach fund management companies which distribute units in investment funds directly. The opinion concludes that “ESMA believes that the EU institutions should address the risk of arbitrage between MiFID firms and fund management companies. In particular, in addition to the powers available under MiFIR, NCAs and ESMA should have the powers to apply restrictions/prohibition directly to fund management companies.”

The SMSG is, however, not convinced that this opinion gives the only possible interpretation of the MiFIR.

Art. 1 (1), e) of the MiFIR mentions with respect to “subject matter and scope” that the MiFIR “establishes uniform requirements in relation to ...” product intervention powers of competent authorities, ESMA and EBA and powers of ESMA on position management controls and position limits”.

Art. 1 (2) does state that “[t]his Regulation applies to investment firms, authorised under Directive 2014/65/EU and credit institutions authorised under Directive 2013/36/EU of the European Parliament and of the Council when providing investment services and/or performing investment activities and to market operators including any trading venues they operate.

ESMA’s opinion seems to be based on this general formulation of the scope of application of MiFIR.

**There are, nevertheless, good arguments to interpret the MiFIR product intervention measures in a wider manner. From such a wider interpretation one could infer a legislative intent to apply MiFIR product intervention measures to all institutions marketing or distributing the products** targeted by a product intervention measure and not only to credit institutions and investment firms:

1. The product intervention measures (art. 39-42, recital 29) do not refer to *distributors* at all, they only refer to the marketing, distribution or sale of *products*.
2. The investment service “executing of orders on behalf of clients” explicitly includes the conclusion of agreements to sell financial instruments issued by an investment firm or a credit institution at the moment of their issuance (art. 4 (1) 5° MiFID). An ‘investment firm’ means ‘*any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis*’ (art. 4 (1) 1° MiFID). In principle, fund management companies engaging in direct selling of units are therefore investment firms, and subject to MiFIR.

MiFID applies an exemption to UCITS companies (art. 2 (1) i)). This means that, even though these undertakings are investment firms, the MiFID provisions do not apply. No such exemption however features in the MiFIR. There is no reason to extend the MiFID exemption to the MiFIR (which is also a level 1 Regulation).

It is true that art. 1 (2) MiFIR states that the MiFIR applies to investment funds “authorized” under MiFID II. It would, however, be nonsensical that non-authorised investment firms and credit institutions would not be covered by the MiFIR product intervention measures.

3. In case of doubt a measure should be interpreted in function of its purpose. The investor protection purpose of the product intervention measures would obviously be undermined if the narrow interpretation of the competences of the authorities would be followed.
4. A comparison with the PRIIPs Regulation and the powers given to EIOPA in this respect (the wording is exactly the same as in MiFIR) is also revealing: no such limitation to a certain category of distributors applies. Art. 2 (1) of the PRIIPs Regulation states that “(t)his Regulation shall apply to PRIIP manufacturers and persons advising on, or selling, PRIIPs.” It seems illogic to target all distributors in the PRIIPs product intervention powers, but not in the MiFIR product intervention powers.
5. Finally, MiFIR also explicitly refers to national authorities’ product intervention powers. It is unlikely that national authorities would limit the scope of application of their intervention powers to credit institutions and investment firms (that is in any event not what is happening today).

The SMSG is of the opinion that this broader interpretation of the MiFIR product intervention powers is also legally sound. In case of doubt, a measure should be interpreted in accordance with the goals of the measure. As indicated above, the goal of the product intervention measures is to increase investor protection, which pleads in favour of the broad interpretation.

Nevertheless, in order to clarify this interpretation and provide investors, issuers and distributors with an unambiguous framework, it would obviously be best if the Commission would explicitly confirm ESMA’s and the national authorities’ product intervention powers in relation to all possible distributors.

## 2. Can national product intervention measures which have been taken before the entry into force of MiFIR be upheld afterwards? Under what conditions?

From an academic perspective, this question would first require an answer to the question whether pre-MiFIR, MS were actually allowed to take such measures without breaching the maximum harmonization character of the MiFID I conduct of business rules. Some Member States did not take binding product intervention measures as there was doubt whether such measures would be compatible with the maximum harmonization character of MiFID I (the supervisor would go beyond the mere supervision of the maximally harmonized conduct of business rules). In this interpretation, product intervention measures would only be possible if the procedure of article 4 was followed (notification to the Commission).

Other Member States however did not make such considerations. The maximum harmonization character of MiFID I conduct of business rules would not be a problem if product intervention measures are considered out of the scope of harmonization of MiFID I and therefore left for the Member States to regulate.

From a practical perspective, no Member States today seem to have notified product intervention measures, indicating that Member States who have product intervention measures seem to agree that they are out of the scope of harmonization of MiFID I.

**From a practical perspective, the SMSG therefore advises that the current product intervention measures can in any event be upheld to the extent the MiFIR conditions have been respected or (ii) market participants have voluntarily committed to abstain from certain product offerings or practices.<sup>1</sup>**

**If conditions equivalent to the MiFIR requirements have not been respected for binding pre-MiFIR product intervention measures, the SMSG deems it undesirable that these measures would be grandfathered after the entry into force of MiFIR. The SMSG is of the opinion that national regulators should, upon entry into force of MiFIR, review such measures in accordance with the MiFIR requirements.**

This obviously does not necessarily mean that any pre-MiFIR measure should be abolished. It may for example mean that the NCA would have to ascertain that the pre-MiFIR measure is proportional in accordance with art. 42 (2) c) MiFIR, if this had not been ascertained before the measure was introduced. It may also mean that the NCA should fulfill the condition to notify all other competent authorities and ESMA (art. 42 (3)), post factum upon entry into force of MiFIR.

In this respect it should be noted that, ESMA has the competence to intervene in order to ensure “that action taken by a competent authority is justified and proportionate and that, where appropriate, a consistent approach is taken by competent authorities” (art. 43 MiFIR). The SMSG is of the opinion that ESMA should use this competence to review Member States’ pre-MiFIR measures that are left unchanged upon entry into force of MiFIR.

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<sup>1</sup> The Belgian moratorium and the German measure are examples of such voluntary commitments by market participants (see more information in the Annex).

## IV. Measures taken in the different Member States

The SMSG has gathered information on national product intervention measures from 20 Member States and Norway (see Annex, updated until 10 May 2017). Of those, 9 Member States and Norway have taken or intend to take certain measures (some of those Member States took more than one measure). This results in **12 actual measures and 3 proposals** (NL, MA2, UK2 - the numbers behind the Land-Codes correspond to the numbering of the measures in the Annex to this report).

Of these measures 3 are **voluntary**, in the sense that market participants can voluntarily commit to abstain from certain product offerings or practices but also have the choice not to commit (BE1, DE1, IT). The other measures are, either *de jure* or *de facto*, **binding**.

The product intervention measures taken or proposed to be taken can be classified in **four categories**:

1. A ban on the sale of certain products to retail customers (BE2, UK1, DE2)
  - Belgium introduced a ban on the sale of life settlements, products derived from virtual currencies and products derived from unusual products (BE2)
  - The UK introduced a ban on the sale of CoCo's and CoCo-funds (UK1).
  - Germany introduced a ban on the sale of CFD's (DE2)
2. A ban on certain product features
  - A limit on the level of complexity (BE1, FR1)
  - Leverage limits (ML2, PL, UK2)
  - Minimum denomination of credit-linked notes (DE1)
3. A ban on marketing of certain products to certain investors
  - A ban on all types of marketing to retail investors (NL, UK1, DE2)
  - On-line marketing (BE3, FR2)
4. Warning / information (FR1, ML1, UK, NO)

With regard to **products in scope** of the product intervention measures, two approaches can be distinguished.

Certain Member States have taken product-specific measures, against:

- CFDs (BE3, DE2, ML1 and UK1)
- Binary options (BE3)
- Life settlements, products derived from virtual currencies, products derived from unusual products (BE2)
- Credit-linked notes (DE1)
- Forex (ML1)
- CoCos and CoCo-funds (UK1)

Other Member State measures target a range of (complex) products, often including one or more of the specific products mentioned above (BE1, FR1, FR2, IT, ML2, NL, UK1, NO).

The **scope of protection** of almost all product intervention measures is limited to retail investors. Only Malta has taken a measure with respect to the maximum leverage of complex products (including CFDs), which affects both retail and professional investors. The Netherlands, on the other hand, are considering to take a measure targeting only a subgroup of the retail investors, i.e. “consumers” (natural persons acting outside the scope of their business or profession to whom a financial institution provides a financial service).

Other differences relate to the **procedure leading to adoption**. Some Member States have consulted stakeholders before having adopted a measure, others have not. Between the Member States having consulted stakeholders, there are differences in scope (only representative organisations or open to all) and duration of the consultation (17 days to several months). Furthermore, some Member States did not explicitly perform a proportionality test, whereas other Member States take this proportionality test very seriously and have indeed reduced the impact of proposed measures for proportionality reasons (e.g. DE1).

## V. Need for intervention by ESMA?

When reading the preparatory texts of national product intervention measures, it becomes clear that Member States very often take advantage of knowledge built up in other Member States (e.g. Germany, Malta and the Netherlands each refer to studies on the financial effect of CFDs for retail investors, performed by the French, Irish and UK authorities). They moreover also often refer to measures taken in other Member States (see e.g. Belgium, Germany, the Netherlands, Malta, the UK). Member States’ product intervention measures therefore do not operate in a void and do take into account pre-existing measures in other Member States.

Still, there are today a lot of differences in measures taken by Member States. Some measures seem to relate to specific problems in a specific Member State, whereas for other measures this is less clear. Those differences, if not justified by a Member State-specific problem, may create an uneven playing field, detrimental to the internal market.

In general, in order to respect the proportionality principle, the **SMSG is of the opinion that ESMA should consider the effect and effectiveness of (i) new MiFID II investor protection measures**, such as product governance, **and (ii) Member States product intervention measures** before taking more intrusive EU product intervention initiatives. An EU product intervention should be a measure of last resort, when other investor protection measures fail to produce the desired effect. MiFID II introduces important new investor protection measures, including product governance measures, which should reduce the need for product intervention measures. Moreover, many Member States only recently took a national product intervention measure and the effect on the market is still to be evaluated.

Nevertheless, ESMA should closely follow up on Member States’ product intervention measures and **continuously assess whether there is a case for EU intervention**. In this respect, the SMSG expresses a specific concern in relation to CFDs and binary options.



Moreover, there are a number of **issues where the SMSG advises ESMA to take immediate action**. The SMSG advises ESMA to:

- **ensure**, upon the entry into force of MiFIR, **that existing Member State actions are justified and proportionate**, and to take action if needed (art. 43 (2) MiFIR). As indicated in section III.2, the SMSG is of the opinion that existing Member States measures should not be automatically grandfathered. Instead, Member States should, upon entry into force of MiFIR, review their existing measures to ensure that they do not contravene MiFIR. If Member States would fail to take such action, ESMA should take action on the basis of art. 43 (2) MiFIR.
- **take measures to streamline the procedure leading to adoption of a national product intervention measure**, by giving guidance on, for instance, the features of the consultation process or the proportionality test.

Although MiFIR does not require NCA's to organize a public consultation prior to adopting a measure, ESMA can still issue "best practices" recommending such a public consultation (except in case of urgency) and give guidance on how to organize such public consultation. ESMA can do so in the context of its general competences to enhance supervisory convergence. Especially the duration of such consultation period varies significantly between Member States. Whereas in a smaller market a shorter consultation period may be justified, a minimum consultation period allowing stakeholders to take notice of an intended measure and to formulate an answer, seems useful. Many Member States have consultation periods of one month. This could be introduced as a minimum standard or best practice.

With respect to the proportionality test, it seems useful to ask stakeholders as part of the consultation process whether they see less intrusive alternatives to the proposed measure, with substantially the same effect.

- **give guidance on the content and format of Member States' notification obligation to other NCA's and ESMA** on the details and context of any prohibition or restriction (art. 42 (3)), so that all NCA's notify the same type of information in an easily comparable manner. ESMA could for instance provide a standardized format.
- **to keep a publicly available and up to date register of all national product intervention measures**. This will not only help Member States and stakeholders to find information on existing measures in other Member States, but may also inspire NCA's and facilitate greater convergence between national measures.

Adopted on 16 June 2017

[signed]

Rüdiger Veil

Chair

Securities and Markets Stakeholder Group

## ANNEX: Overview of pre-MiFIR Member State product intervention measures

### 1. AUSTRIA

No measures have been implemented in Austria so far. The problems with dangerous products, which were seen by other member states like in Germany with Bonitätsanleihen or in Belgium with OTC-derivatives, are not seen on the Austrian capital market. Hence, the Austrian Financial Authority (FMA) has not seen a necessity and decided not to intervene until now.

So far, only organisational arrangements have been taken in Austria, e.g. internal assignments of competences and processes on FMA level, but no regulatory or legislative steps.

### 2. BELGIUM

#### **Measure 1**

<u>Member State</u>	<u>Belgium</u>
<u>Type of measure</u> <i>(ban, or other - softer – restrictions, such as warnings, marketing restrictions, ...)</i>	Voluntary commitment not to distribute to retail investors any structured products that are considered "particularly complex" on the basis of criteria set out by the FSMA
<u>Goal of the measure</u>	Reduce the complexity of products offered to retail investors
<u>Supervising Authority</u>	FSMA (Financial Services and Markets Authority)
<u>Reference + link</u>	Moratorium on the distribution of particularly complex structured products (FSMA/2011_02, 20 June 2011) <a href="http://www.fsma.be/en/Article/nipic/nipic.aspx">http://www.fsma.be/en/Article/nipic/nipic.aspx</a>
<u>Legal basis</u>	Art. 30bis, 1° of the Act of 2 August 2002 on Supervision of the Financial Markets
<u>Duration</u>	Unlimited (until a binding regulation will have been promulgated)
<u>Beneficiary of the measure</u>	Retail investors
<u>Binding or voluntary</u>	Industry participants voluntarily agree to accede to the Moratorium. Once they have agreed, they are contractually bound. The FSMA publishes a list on its website of those financial institutions that have voluntarily signed the moratorium.
<u>Procedure preceding introduction</u>	

<p>i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)</p>	<p>The moratorium was meant to constitute the first step in a process intended to increase the traceability of retail investment products. The second step should have been a public consultation held by the FSMA, to allow all interested parties to express their views on a new regime for the distribution of structured products to retail investors. Based on the results of the consultation, the FSMA intended, in a third step, to draw up a regulation promulgating the new regime.</p> <p>Until today, however, the second and third step have not been taken. Other, more punctual product intervention measures have however been taken.</p>
<p>ii. Has the proportionality of the measure been discussed and demonstrated? How?</p>	<p>The voluntary moratorium has been introduced as a first step. Although proportionality has not explicitly been considered, this step by step approach seems to implicitly indicate a concern for proportionality.</p>
<p><u>Enforcement</u></p>	
<p>i. How does the supervisor monitor the market to detect breaches?</p>	<p>Marketing documentation on complex products should be submitted to the FSMA before offering such products to the public, so that compliance with the moratorium can be verified. Distributors should also disclose the value of the derivative and of the savings components to the FSMA prior to their distribution. The FSMA monitors compliance with the criteria by reviewing prospectuses and via the product information it receives.</p>
<p>ii. What sanctions apply in case of breach?</p>	<p>In the event of a failure to comply with the moratorium, the name of the distributor may be struck from the list.</p>
<p><u>Success factor</u> – does the measure reach its goal?</p>	<p>Yes. Virtually all industry participants have agreed to the Moratorium. Compliance is very high. The complexity of products offered to retail investors has significantly reduced.</p>

**Measure 2**

<p><u>Member State</u></p>	<p><u>Belgium</u></p>
<p><u>Type of measure</u></p>	<p>Prohibition to sell “life settlements”; products derived from virtual currency; and financial products (including life insurance products and investment funds) derived from unusual products, such as art, antiques, old wine or whisky, to retail clients.</p>

<i>(ban, or other - softer – restrictions, such as warnings, marketing restrictions, ...)</i>	
<u>Goal of the measure</u>	Protect retail investors against certain products considered extremely risky, complex or unusual.
<u>Supervising Authority</u>	FSMA
<u>Reference + link</u>	FSMA regulation on the prohibition of commercialization of certain financial products to retail clients (endorsed by Royal Decree of 24 April 2014, Belgian Official Gazette 20 May 2014, 40095), <a href="http://www.fsma.be/en/RSS/Article/press/div/2014/2014-05-21_finprod.aspx">http://www.fsma.be/en/RSS/Article/press/div/2014/2014-05-21_finprod.aspx</a>
<u>Legal basis</u>	Art. 30bis of the Act of 2 August 2002 on Financial Supervision
<u>Duration</u>	Unlimited
<u>Beneficiary of the measure</u>	Retail clients
<u>Binding or voluntary</u>	Binding
<u>Procedure preceding introduction</u>	
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	Prior to the adoption of this measure, the “Raad voor het Verbruik” (a council composed of an equal number of consumer and industry representatives) gave its advice on the proposed measure.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	
<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	

ii. What sanctions apply in case of breach?	Art. 36 <i>juncto</i> art. 36bis of the Act of 2 August 2002 on Supervision of the Financial Markets: an order to refrain from or to pose a certain act; the issuance of a warning; the appointment of a special commissioner; the replacement of the directors or the managing partners; the suspension or prohibition of some or all business activities; the imposition of an penalty or a fine; or (in extreme cases) the revocation of the license.
<u>Success factor</u> – does the measure reach its goal?	Even before the introduction of the prohibition, these products were not frequently offered to retail clients.

### Measure 3

<u>Member State</u>	<u>Belgium</u>
<u>Type of measure</u> ( <i>ban, or other - softer – restrictions, such as warnings, marketing restrictions, ...</i> )	Prohibition of commercializing certain products towards consumers via electronic trading platforms.  The prohibition relates to binary options, derivatives with a duration of less than one hour and derivatives with a leverage effect (such as CFD's and rolling spot forex contracts), which have not been admitted to trading on a regulated market or an MTF.
<u>Goal of the measure</u>	Protect consumers against certain products considered risky and complex products.
<u>Supervising Authority</u>	FSMA
<u>Reference + link</u>	FSMA regulation framing the commercialization of certain financial derivatives towards consumers (endorsed by Royal Decree of 21 July 2016, Belgian Official Gazette 8 August 2016, 47883), <a href="http://www.fsma.be/en/Site/Repository/press/div/2016/08-08_banning.aspx">http://www.fsma.be/en/Site/Repository/press/div/2016/08-08_banning.aspx</a>
<u>Legal basis</u>	Art. 30bis of the Act of 2 August 2002 on Financial Supervision
<u>Duration</u>	Unlimited
<u>Beneficiary of the measure</u>	Consumers (i.e. natural persons acting outside the scope of their business or profession)

<u>Binding or voluntary</u>	Binding
<u>Procedure preceding introduction</u>	
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	Prior to the adoption of this measure, the “Raad voor het Verbruik” (a council composed of an equal number of consumer and industry representatives) gave its advice on the proposed measure.  The FSMA also held a public consultation, open to everyone, from 8 to 25 January 2016 via publication of the proposed measure on its website.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	
<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	
ii. What sanctions apply in case of breach?	Art. 36 <i>juncto</i> art. 36bis of the Act of 2 August 2002 on Supervision of the Financial Markets: an order to refrain from or to pose a certain act; the issuance of a warning; the appointment of a special commissioner; the replacement of the directors or the managing partners; the suspension or prohibition of some or all business activities; the imposition of an penalty or a fine; or (in extreme cases) the revocation of the license.
<u>Success factor</u> – does the measure reach its goal?	[Too early to say].

### **3. BULGARIA**

No product intervention measures have been taken.

### **4. CROATIA**

[No information]

### **5. CZECH REPUBLIC**

[No information]

## **6. CYPRUS**

[No information]

## **7. DENMARK**

No product intervention measures have been taken.

## **8. ESTONIA**

[No information]

## **9. FINLAND**

No product intervention measures have been taken.

## **10. FRANCE**

### ***Measure 1***

<b><u>Member State</u></b>	<b><u>France</u></b>
<b><u>Type of measure</u></b>	Supervisory Authority Guideline (“Position”), hereinafter referred to as “the Position”.  The Position caps the level of complexity of structured products and funds that may be offered through a public offering.  (A similar position was adopted by the French prudential Authority – the ACPR – for insurance products.)
<b><u>Supervising Authority</u></b>	AMF ( <i>Autorité des marchés financiers</i> )
<b><u>Reference + link</u></b>	“ <i>La commercialisation des instruments financiers complexes</i> ” – DOC-2010-05 (in French only) <a href="http://amf-france.org/Reglementation/Doctrine/Doctrine-list/Doctrine.html?docId=workspace%3A%2F%2FspacesStore%2F8f1c7f9a-90bc-4afa-94cf-4b5db749a747&amp;category=IV+-+Commercialisation+-+Relation+client">http://amf-france.org/Reglementation/Doctrine/Doctrine-list/Doctrine.html?docId=workspace%3A%2F%2FspacesStore%2F8f1c7f9a-90bc-4afa-94cf-4b5db749a747&amp;category=IV+-+Commercialisation+-+Relation+client</a>

<u>Legal basis</u>	Articles L. 533-11 à L. 533-13 et L. 541-8-1 of the French monetary and financial Code ( <i>Code monétaire et financier</i> ) ; Articles 314-10, 314-18, 314-33 à 314-36, 325-5 of the AMF General Regulations ( <i>règlement général de l'AMF</i> )
<u>Duration</u>	Unlimited
<u>Scope</u>	Retail investors The Position only concerns instruments that are: <ul style="list-style-type: none"> <li>• distributed via public offerings</li> <li>• not 90% capital guaranteed (at maturity for the AMF position; during the entire lifetime of the product for the ACPR)</li> </ul>
<u>Binding or voluntary</u>	Binding
<u>Procedure preceding introduction</u>	
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	The first version of the Position, issued in 2010, was preceded by a public consultation. The consultation also included a consultation of the main industry associations. In addition the two AMF stakeholder consultative committees on markets and investor protection were also consulted.  The updated version issued on January 2017 which includes new requirements on indices (see-through complexity assessment) was only submitted to the investor protection consultative committee. (The markets consultative committee was not consulted). The update was not preceded by a public consultation.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	Informal discussions on the updated version gave rise to animated exchanges between the AMF and the industry.  The AMF argued that index complexity should be limited and the number of underlying mechanisms should be capped.  Industry stakeholders expressed concerns that the new AMF position and its complexity assessment methodology could negatively affect the ability to incorporate investor protection mechanisms (such as volatility filters).



	<p>The industry also highlighted the risk that the new Position could make it very difficult to propose indices on sustainable investments or on small caps where such protective filters are most needed. To this end, as an alternative to the updated rule, the industry had proposed a industry code of conduct for indices but this proposal was not taken up by the AMF.</p>
<u>Enforcement</u>	
<p>i. How does the supervisor monitor the market to detect breaches?</p>	<p>Marketing documentation on all products giving rise to a public offering in France must be submitted to the French AMF prior the offering.</p> <p>In its verifications of structured products or funds, the AMF includes a specific review of the product complexity (which includes a complexity scoring)</p> <p>The AMF monitors compliance with its Position by reviewing prospectuses prior to approval and also through the marketing product information it screens.</p>
<p>ii. What sanctions apply in case of breach?</p>	<p>Though the position itself is not an AMF rule, failure to comply with it could entail, indirectly, AMF sanctions for non-compliance with other rules (such as those applying to the public solicitation and the requirement to provide investors with an information which is fair, clear and non misleading).</p>
<p><u>Success factor</u> – does the measure reach its goal?</p>	<p>Since its publication in 2010, the AMF guideline has contributed to an improvement in products’ intelligibility.</p> <p>The Position and its updated version have been adopted within a MIFID1 framework. Their approach on the MIFID1 categorisation of investors.</p> <p>Therefore, the complexity limitations of the Positions are the same for all retail investors.</p> <p>In the discussions that preceded the adoption by the AMF of the 2016 revised position, the industry advocated for an alternative approach that would anticipate MIFID2 and incorporate a consideration of the actual level of knowledge and experience of investors (e.g. mass retail vs. educated and sophisticated). The industry also advocated for the need to</p>

	reconcile complexity control with a legitimate product diversification.
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## Measure 2

<u>Member State</u>	<u>France</u>
<u>Type of measure</u>	<p>Prohibition of electronic publicity targeted to retail clients and relating to highly speculative and risky financial contracts.</p> <p>The measure was created to ban such publicity for binary bets, CFDs and foreign exchange products. The AMF however finally decided to use more generic definitions and apply the measure to categories of financial contracts with any of the following characteristics:</p> <ul style="list-style-type: none"> <li>- depending on whether a condition specified in the contract is met or not, they give rise upon the contract's expiry either to the payment of a predetermined gain or the partial or total loss of the amount invested;</li> <li>- they give rise to the payment of a positive or negative differential between the price of an underlying asset or basket of assets at the time the contract has been entered into and the price at which the position is closed out, and can oblige the client to pay an amount greater than the amount invested at the time the contract has been entered into;</li> <li>- their underlying asset is a currency or basket of currencies.</li> </ul>
<u>Supervising Authority</u>	AMF ( <i>Autorité des marchés financiers</i> )
<u>Reference + link</u>	Règlement général de l'AMF (le « RGAMF »), Order of 27 February 2017, Official Journal of 7 March 2017, article 314-31-1, <a href="http://www.amf-france.org/en_US/Reglementation/Reglement-general-et-instructions/RG-mode-d-emploi.html?langSwitch=true">http://www.amf-france.org/en_US/Reglementation/Reglement-general-et-instructions/RG-mode-d-emploi.html?langSwitch=true</a>
<u>Legal basis</u>	Article L. 533-12-7 of the Monetary and Financial Code ( <i>Code monétaire et financier</i> ), introduced by the "Loi Sapin", Law n° 2016-1691 of 9 December 2016, Official Journal of 10 December 2016.
<u>Duration</u>	Unlimited

<u>Scope</u>	Retail clients – electronic publicity
<u>Binding or voluntary</u>	Binding
<u>Procedure preceding introduction</u>	
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	Yes. From 1 August 2016 – 30 September 2016. Public consultation, open to all.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	
<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	
ii. What sanctions apply in case of breach?	
<u>Success factor</u> – does the measure reach its goal?	

## 11. GERMANY

### Measure 1

<u>Member State</u>	<u>Germany</u>
<u>Type of measure</u>	Voluntary commitment not to issue credit-linked notes (CLN) with a denomination of less than 10.000 € and further not to distribute to retail investors credit-linked notes with complex structures. Features seen as giving rise to concerns included complexity, pricing and naming.
<u>Supervising Authority</u>	BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht)
<u>Reference + link</u>	<a href="https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Pressemitteilung/2016/pm_161216_bonitaetsanleihen_branche.html">https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Pressemitteilung/2016/pm_161216_bonitaetsanleihen_branche.html</a>
<u>Legal basis</u>	Voluntary as a less onerous and more proportionate measure compared to a ban of a wide variety of products under sec. 4b Securities Trading Act (§ 4b Wertpapierhandelsgesetz - Produktintervention)
<u>Duration</u>	Unlimited (review of efficacy six months after application date Dec 16 <sup>th</sup> , 2016)
<u>Scope</u>	Mainly Retail investors (distribution), but limitations on issuance affect market as a whole
<u>Binding or voluntary</u>	Industry participants voluntarily agree to accede to the Moratorium.
<u>Procedure preceding introduction</u>	In March 2016, BaFin initiated a survey on CLN in retail Markets. In July 2016, the plan to ban such products was announced by BaFin together with draft of its proposed General Administrative Act, including the reasoning. Consultation followed. In December BaFin suspended its planned ban after industry has presented its self-commitment.  Responses to the proposal were not published by BaFin nor has BaFin provided a feedback statement.
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	Consultation open to the public (1 month). Consultation and reasoning is required under German administrative law, sec. 28 VwVfG.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	During consultation, proportionality of the proposed ban was discussed. The scope of the ban was an issue as it would have prohibited the marketing, distribution and sale of a wide range of credit-linked notes to retail clients without looking at individual features of the issue. Solution now found is more differentiating, i.e. between single name and basket CLN.

<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	Issuers and distributors are supervised by BaFin.
ii. What sanctions apply in case of breach?	In the event of non-compliance with the industry's self-commitment, BaFin may address non-compliant party with an individual administrative act; if market failure would occur, a general administrative act would be issued. If a market participant would not comply with such act, sanctions under sec 39 para 2 (2b), (6) WpHG (up to 500.000 Euro) would apply. Contravention would probably also be a reliability issue for directors of the contravening entity
<u>Success factor</u> – does the measure reach its goal?	As the signees of the commitment include all major associations and indirectly all issuers of retail CLN, and BaFin will monitor compliance, the latter is expected to be very high.  Up to now, all market participants comply with the terms of the self-commitment.

## Measure 2

<u>Member State</u>	<u>Germany</u>
<u>Type of measure</u> ( <i>ban, or other - softer – restrictions, such as warnings, marketing restrictions, ...</i> )	Prohibition of the marketing, distribution and sale of financial contracts for difference ("CFDs") within the meaning of section 2 (2) no. 3 of the German Securities Trading Act (Wertpapierhandelsgesetz, WpHG) to retail clients insofar as the CFD may give rise to an additional payments obligation (Margin Call). Published on 8 May 2017.
<u>Goal of the measure</u>	Protection of retail investors
<u>Supervising Authority</u>	BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht)
<u>Reference + link</u>	<a href="https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Verfuegung/vf_170508_allgvmf_cfd_wa_en.html">https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Verfuegung/vf_170508_allgvmf_cfd_wa_en.html</a>
<u>Legal basis</u>	Sec. 4b (1) no. 1 (a) and (2) of the WpHG
<u>Duration</u>	Unlimited. BaFin reserves the right to revoke the General Administrative Act "in particular in order to be able to prevent this product intervention measure from contradicting any future

	uniform regulation of CFDs at the European level. In addition, reservation of revocation should allow any changes in the market situation to be responded to.”
<u>Beneficiary of the measure</u>	Retail clients within the meaning of sec. 31a (3) WpHG
<u>Binding or voluntary</u>	Binding
<u>Procedure preceding introduction</u>	Consultation on the draft General Administrative Act (published on 8 December 2016) pursuant to section 28 (1) of the VwVfG. The draft followed an extensive review of the market environment. According to BaFin, the intended General Administrative Act is based on (1) the observations made by BaFin and other European supervisory authorities that CFD distributors target almost exclusively retail clients and that these clients mostly lose the funds they invest; (2) on the ESMA and EBA warnings in this regard and (3) on the example of restrictions on CFD trading that have been passed by various Member States and in the United States.
iii. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	Public consultation as required under German administrative law, sec. 28 VwVfG (Verwaltungsverfahrensgesetz – German Administrative Procedure Act). The consultation was conducted in writing and a consultation period of more than one month was granted, a time frame that can be considered reasonable in accordance with the interpretation of sec. 28 VwVfG. The consultation was open to everyone. In total, BaFin received 30 responses during the formal consultation procedure. The submissions came from CFD providers, citizens, lawyers and stakeholders. Of the 30 petitioners (participants, stakeholders and other third parties), 11 were in favour of the measure, 17 were against it and 2 merely had enquiries. Of the 11 CFD providers as well as 1 providers' association which participated in the consultation procedure, 4 were in favour of the measure while the other 8 were against it.
iv. Has the proportionality of the measure been discussed and demonstrated? How?	The General Administrative Act contains an extensive section on proportionality, assessing the suitability, necessity and appropriateness of the envisaged measure. Its consequences on retail investors, issuers and distributors are given due consideration. BaFin especially highlights the following points: <ul style="list-style-type: none"> <li>- The elimination from CFDs of the additional payments obligation is a suitable way of countering retail investors' incalculable risk of loss. As a result, the complexity of calculating potential losses is significantly reduced.</li> </ul>

	<ul style="list-style-type: none"> <li>- The General Administrative act does not constitute a complete product ban: The restriction pertains to the marketing, distribution and sale of CFDs to retail investors where the CFDs establish an obligation on the part of the retail investor to make additional payments. CFDs without an additional payments obligation, on the other hand, may continue to be marketed, distributed and sold to retail investors. Access to CFDs for retail clients within the meaning of section 31a (3) of the WpHG is therefore not blocked completely.</li> <li>- Furthermore, the Act does not pertain to professional clients, a classification that according to sec. 31a (7) WpHG can also be obtained by retail clients.</li> <li>- To allow for business model and process adaptations, an implementation period of 3 months (until 10 August 2017) will be granted.</li> </ul>
<u>Enforcement</u>	
iii. How does the supervisor monitor the market to detect breaches?	Issuers and distributors are supervised by BaFin.
iv. What sanctions apply in case of breach?	BaFin is empowered to issue sanctions under sec. 39 paras 2 (2b), 6 WpHG (up to 500.000 EUR). Contraventions would probably also be a liability issue for directors of the contravening entity.
<u>Success factor</u> – does the measure reach its goal?	[Too early to say]

## **12. GREECE**

No product intervention measures have been taken.

## **13. HUNGARY**

Hungary did not take product intervention measures, although the Central Bank of Hungary (MNB) has introduced product governance measures (definition of target market) pre-MiFID II in respect of retail products (Recommendation N° 13/2016 of the National Bank of Hungary. (XII.19.)

<http://www.mnb.hu/letoltes/13-2016-pog-ajanlas.pdf>, on the basis of Act CXXXIX of 2013 on the National Bank of Hungary).

#### **14. IRELAND**

The Central Bank of Ireland has conducted a number of thematic reviews of particular products including CFD's, pension annuities, health insurance products and, most recently, tracker mortgages.

The Bank conducted a themed inspection of the CFD market in Ireland and warned consumers in November 2015 that they need to be fully aware of the high-risk and complex nature of CFDs before making investment decisions. The Bank opined that CFDs were "unsuitable for investors with a low-risk appetite due to the volatile nature of the CFD market, coupled with the potential for a consumer to lose more than the initial investment". This warning was repeated in July 2016, and the ESMA's warning on the same subject was published. [http://www.centralbank.ie/press-area/press-releases/Pages/StatementonContractsforDifference\(CFDs\),binaryoptionsandotherspeculativeproducts.aspx](http://www.centralbank.ie/press-area/press-releases/Pages/StatementonContractsforDifference(CFDs),binaryoptionsandotherspeculativeproducts.aspx)

Although no specific product intervention regulations exist (other than the general powers set out above), the Central Bank will be the relevant authority for the product intervention powers under MiFIR and the PRIIPs Regulation when introduced.

#### **15. ITALY**

<b><u>Member State</u></b>	<b><u>Italy</u></b>
<b><u>Type of measure</u></b>	The Italian NCA (CONSOB) explicitly recommends financial intermediaries against offering complex financial products to retail investors.
<b><u>Supervising Authority</u></b>	CONSOB ('Commissione Nazionale per le Società e la Borsa', the Italian authority on financial markets)
<b><u>Reference + link</u></b>	Notice on the distribution of complex financial products to retail customers – 'Comunicazione sulla distribuzione di prodotti finanziari complessi ai clienti retail' (0097996/14, 22th December 2014). <a href="http://www.consob.it/documenti/bollettino2014/c0097996.pdf">www.consob.it/documenti/bollettino2014/c0097996.pdf</a>
<b><u>Legal basis</u></b>	Article 6 of the Italian Financial Code (Testo Unico della Finanza, dlgs 58/1998) and articles 40 and 42 of the CONSOB implementing regulation concerning financial intermediaries.
<b><u>Duration</u></b>	Unlimited.
<b><u>Scope</u></b>	Retail investors.
<b><u>Binding or voluntary</u></b>	Not binding. The above reported CONSOB notice is a soft law act. It belongs to the category of CONSOB guidelines and opinions.



<u>Procedure preceding introduction</u>	
<p>i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)</p>	<p>A consultation took place from May 28, 2014 to July 21, 2014. The consultation was open to all interested parties, including (but not limited to) industry associations.</p> <p>Individual contributions to the consultation are publicly available on CONSOB website:  <a href="http://www.consob.it/web/area-pubblica/osservazioni-al-documento-di-consultazione-del-23-dicembre-2014">http://www.consob.it/web/area-pubblica/osservazioni-al-documento-di-consultazione-del-23-dicembre-2014</a></p> <p>A summary of the contributions to the consultation is also available (in Italian):  <a href="http://www.consob.it/documents/46180/46181/esiti-consultazione.pdf/6b346de4-9c59-40e0-b87d-c6d1550462d2">http://www.consob.it/documents/46180/46181/esiti-consultazione.pdf/6b346de4-9c59-40e0-b87d-c6d1550462d2</a></p>
<p>ii. Has the proportionality of the measure been discussed and demonstrated? How?</p>	<p>Several participants to the consultation raised the question of proportionality of the measure. CONSOB replied that complex financial products are difficult to understand for retail investors and consequently the complexity of the instruments should be carefully addressed to avoid investors are exposed to risks that they are not aware of.</p>
<u>Enforcement</u>	
<p>i. How does the supervisor monitor the market to detect breaches?</p>	<p>CONSOB surveillance action takes place through on-site inspections and remote inspections (e.g., ad hoc inquiries). Consequently CONSOB monitors the compliance with the above reported notice through such surveillance actions. The notice explicitly states that the decisions taken by intermediaries with respect to the issues dealt with in the notice will contribute – via a risk-based approach – to guide CONSOB surveillance action.</p>
<p>ii. What sanctions apply in case of breach?</p>	<p>Although the notice itself is not a CONSOB rule, failure to comply with it could entail, indirectly, CONSOB sanctions for non-compliance with more general rules (such as those applying to the relationship with retail customers).</p>
<u>Success factor</u> – does the measure reach its goal?	<p>The level of compliance seems to be high, at least based on publicly available information.</p>

## 16. LATVIA

[No information]

## 17. LITHUANIA

[No information]

## 18. LUXEMBOURG

No product intervention measures have been taken.

## 19. MALTA

### **Measure 1**

<u>Member State</u>	<u>Malta</u>
<u>Type of measure</u> <i>(ban, or other - softer – restrictions, such as warnings, marketing restrictions, ...)</i>	<p>Specific licensing requirements for investment firms offering online <b>forex trading</b> to retail investors.</p> <p>These requirements include the obligation to display, at all times and in a prominent place on the homepage of its website, and on any promotional or advertising material, the following <b>warnings</b>:</p> <ul style="list-style-type: none"><li>(i) a warning on the riskiness of engaging in forex trading; and</li><li>(ii) a warning that trading in forex instruments runs the risk of losing the entire sum invested;</li><li>(iii) any other warning or disclosure required under the relevant rules or regulations.</li></ul> <p>The Malta Financial Services Authority (MFSA) recently proposed to subject the online business models offering <b>CFDs</b> to the same requirements.</p>
<u>Goal of the measure</u>	Ensure enhanced consumer protection and awareness of the risks involved
<u>Supervising Authority</u>	Malta Financial Services Authority (MFSA)
<u>Reference + link</u>	Notice to applicants for a Category 2 or Category 3 Investment Services Licence that would like to carry out online forex trading in terms of the Investment Services Act, Cap. 370 (Online Forex 30.07.2015); and

	<p>Proposed policy as applicable to online business models distributing or intending to distribute contracts for difference (cfd) and/or rolling spot forex contracts under the markets in financial instruments directive (MiFID) regime [MFSA ref: 12/2016]</p> <p><a href="http://www.mfsa.com.mt/pages/announcements.aspx?id=10">http://www.mfsa.com.mt/pages/announcements.aspx?id=10</a></p>
<u>Legal basis</u>	
<u>Duration</u>	Unlimited
<u>Beneficiary of the measure</u>	Retail clients
<u>Binding or voluntary</u>	Binding
<u>Procedure preceding introduction</u>	
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	Yes: one month (from 17 October to 18 November 2016); open to everyone.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	
<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	
ii. What sanctions apply in case of breach?	
<u>Success factor</u> – does the measure reach its goal?	The MFSA has carried out a survey with a view to assess whether existing firms were in line with the relative requirements in the abovementioned areas. From the replies

	<p>submitted to this survey, the MFSA is aware that the majority of existing firms are not in line with the all and/or certain key requirements of the public notice.</p> <p>MFSA is proposing a six (6) month transitory period to be granted to all <i>firms</i> licensed before the 30th July, 2015 so that these come in line with the requirements of the public notice issued on the said date</p>
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## Measure 2

<u>Member State</u>	<u>Malta</u>
<u>Type of measure</u> <i>(ban, or other - softer – restrictions, such as warnings, marketing restrictions, ...)</i>	<p><b>(PROPOSAL)</b> The Malta Financial Services Authority (MFSA) is proposing measures with respect to <b>complex speculative products</b>:</p> <p>(a) existing and newly licensed firms are required to <b>set the leverage limits for retail and professional clients to a maximum of 1:50</b>. This leverage limit shall be applicable across all platforms as made available to retail and professional clients on the firm's website(s).</p> <p>(b) for existing firms, the leverage limits policy proposal, is to come into effect within six (6) months from the date of the publication of the updated policy.</p>
<u>Goal of the measure</u>	Investor protection
<u>Supervising Authority</u>	Malta Financial Services Authority (MFSA)
<u>Reference + link</u>	<p>Proposed policy as applicable to online business models distributing or intending to distribute contracts for difference (cfd) and/or rolling spot forex contracts under the markets in financial instruments directive (MiFID) regime [MFSA ref: 12/2016]</p> <p><a href="http://www.mfsa.com.mt/pages/announcements.aspx?id=10">http://www.mfsa.com.mt/pages/announcements.aspx?id=10</a></p>
<u>Legal basis</u>	
<u>Duration</u>	Unlimited
<u>Beneficiary of the measure</u>	<p>Retail and professional clients</p> <p>Retail clients are invariably being subject to increased conduct risk by being exposed to high leverage levels. The MFSA is also concerned with the leverage limits offered to professional</p>

	clients, which at times verge on the high side. As a result, the MFSA has decided to also include professional clients in its policy proposal.
<u>Binding or voluntary</u>	Binding
<u>Procedure preceding introduction</u>	
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	Yes: one month (from 17 October to 18 November 2016); open to everyone.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	
<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	
ii. What sanctions apply in case of breach?	
<u>Success factor</u> – does the measure reach its goal?	

## 20. The NETHERLANDS

<u>Member State</u>	<u>The Netherlands</u>
<u>Type of measure</u> <i>(ban, or other - softer – restrictions, such as warnings, marketing restrictions, ...)</i>	(Draft of a) Ban on advertising for certain risky products
<u>Goal of the measure</u>	<p>Investor protection.</p> <p>Draft legislative change, which will allow the Dutch conduct supervisor (Autoriteit Financiële Markten, AFM) to prohibit advertising for certain financial products, such as binary options, targeted to consumers in the Netherlands.</p> <p>The AFM can only takes measures in relation to products which have one of the following features:</p> <ul style="list-style-type: none"> <li>a) The expected or realized return is not in a reasonable proportion to the financial risk for the consumer</li> <li>b) The financial risk for the consumer is bigger than his initial stake in the product</li> <li>c) The product leads or can lead to a conflict of interest, where the product can be detrimental to the interests of the consumer</li> <li>d) The characteristics and functioning of the product are so complex that it cannot be assumed that the average consumer is able to take an informed decision on whether or not to buy this product, even after the consumer has consulted information on the characteristics and functioning of this product.</li> </ul> <p>These products are considered to be in principle unsuitable for consumers, as they are inherently risky, speculative or too complex. If consumers acquire these products, they can suffer considerable and (for consumers) unforeseeable losses in a very short time.</p>
<u>Supervising Authority</u>	AFM (Autoriteit Financiële Markten)
<u>Reference + link</u>	Draft Decree to adapt the Decree on Conduct Supervision for Financial undertakings in respect of the introduction of rules dealing with advertisements targeted to consumers in the Netherlands with respect of risky financial products ( <a href="https://www.internetconsultatie.nl/reclame_risicovolle_financiele_producten">https://www.internetconsultatie.nl/reclame_risicovolle_financiele_producten</a> )

<u>Legal basis</u>	Idem
<u>Duration</u>	Unlimited duration
<u>Beneficiary of the measure</u>	Consumers (natural persons acting outside the scope of their business or profession to whom a financial institution provides a financial service, see article 1.1 WFT – Law on Financial Supervision)
<u>Binding or voluntary</u>	Binding
<u>Procedure preceding introduction</u>	
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	Yes: one month (from 20 February to 20 March 2017). Public consultation open to everyone. Reactions are published if the person / institution that has reacted has agreed to this.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	
<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	
ii. What sanctions apply in case of breach?	
<u>Success factor</u> – does the measure reach its goal?	Not yet in force, just a proposal

## 21. POLAND

<u>Member State</u>	<b>Poland</b>
<u>Type of measure</u> (ban, or other - softer – restrictions, such as warnings, marketing restrictions, ...)	Leverage restriction for retail clients. Original proposal: maximum 1:50. Polish parliament modified it to 1:100 and passed the legislation on the 4th of December 2014 (came into effect on 16 July 2015).
<u>Goal of the measure</u>	Protection of the interests of retail clients.
<u>Supervising Authority</u>	<i>Komisja Nadzoru Finansowego</i> – KNF (Polish Financial Supervision Authority)
<u>Reference + link</u>	<a href="https://www.knf.gov.pl/Images/wytyczne%20OTC_24.05.2016_tcm75-43962.pdf">https://www.knf.gov.pl/Images/wytyczne%20OTC_24.05.2016_tcm75-43962.pdf</a>
<u>Legal basis</u>	Art. 4 of Act on Financial Market Supervision.  In Poland, KNF product intervention powers derive from general supervisory competence to ensure proper functioning of financial markets. Guidelines are interpretation of current general legislation which introduce specific obligations on market participators. KNF has also power to participate in legislation process regarding financial markets.
<u>Duration</u>	Permanent (unless revoked or changed by KNF)
<u>Beneficiary of the measure</u>	Retail investors
<u>Binding or voluntary</u>	<i>De facto</i> binding. Polish Financial Supervision Authority ( <i>Komisja Nadzoru Finansowego</i> , KNF) has the power to enact soft laws such as recommendations, guidelines and statements. These acts are not a sources of law in Poland in the meaning of the Constitution of the Republic of Poland, but in fact not following soft laws may be equal to infringing upon the actual law. In certain instances the acts of soft law may be understood as interpretation of statutory laws. More importantly, these acts of soft law, even absent their binding force by virtue of law, derive their <i>de facto</i> legal character from the authority of the enacting body (the KNF).
<u>Procedure preceding introduction</u>	



<p>i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)</p>	<p>Guidelines were subject of public consultation from the 22th December, 2015 to the 1st of February, 2016.</p> <p>Leverage limit was introduced during the legislative process in Polish Parliament. Parliamentary Committee of Civic Platform (PO) submitted an amendment to the Act amending the Act on Trading in Financial Instruments which set security deposits for retail clients on at least 2% level. In the Senate, the limit was lowered to 1%. Legislation formally proposed by Members of Parliament (Groups of MPs) or Parliamentary Committees are not the subject to mandatory public consultation.</p>
<p>ii. Has the proportionality of the measure been discussed and demonstrated? How?</p>	<p>The Senate justified the lowering of the leverage limit from 1:50 to 1:100 by the proportional interest of retail clients and investment firms. The substantiation of this amendment pointed out that the 1:50 leverage limit along with retail client protection could increase the operational cost of investment firms.</p>
<p><u>Enforcement</u></p>	
<p>i. How does the supervisor monitor the market to detect breaches?</p>	<p>The KNF monitoring of the market has a permanent character. After the 30<sup>th</sup> of September 2016 investment firms must comply with the Guidelines regarding OTC derivatives investment services.</p>
<p>ii. What sanctions apply in case of breach?</p>	<p>The KNF has the power to withdraw or limit the scope of authorization to provide brokerage services in case of:</p> <ul style="list-style-type: none"> <li>a. breach the rules of performing such services;</li> <li>b. not respecting principles of fair trading;</li> <li>c. violation of the interests of client.</li> </ul> <p>The KNF has also the power to impose a penalty fee up to 10% of the investment firm's income indicated in the last financial statement.</p> <p>In addition to administrative measures in Poland anyone who provides investments services without a legal basis is subject to fine up to 5.000.000 PLN.</p>
<p><u>Success factor</u> – does the measure reach its goal?</p>	<p>Investment firms supervised by KNF abide the guidelines introduced in May 2016. KNF also regularly update warning list, which includes investment firms without authorization.</p>

	However, criminal liability for performing investment services without authorisation is illusory.
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## **22. PORTUGAL**

The CMVM has not yet taken any product intervention measures. On 16 February 2011 the CMVM Board of Directors has however established a Financial Innovation Committee (CIF) with a view to pursuing a policy specifically with respect to the supervision of complex financial products. The CIF may, among other things develop recommendations for financial intermediaries on the marketing of complex financial products and instruments; make proposals for case-by-case intervention by the CMVM regarding the distribution of specific complex products or the performance of specific financial intermediaries; make proposals for regulatory intervention in the field of investor protection.

Until today however the CMVM has not yet considered the introduction of such alternative, more “aggressive” measures, such as the prior approval by the CMVM of new products, a marketing prohibition for certain products, a prohibition of certain product characteristics, an intervention in respect of the price of products, ...

See <http://www.cmvm.pt/pt/SDI/ProdutosFinanceirosComplexos/Pages/Po%C3%ADtica-da-CMVM-em-Mat%C3%A9ria-de-Produtos-Financeiros-Complexos.aspx>

## **23. ROMANIA**

[No information]

## **24. SLOVAKIA**

[No information]

## **25. SLOVENIA**

No product intervention measures have been taken.

## **26. SPAIN**

No specific individual measures have been taken by the Supervisor (the CNMV).

A number of regulatory measures (amendment of Securities Markets Law in November 2012, Ministerial Order of 4 November 2014, and CNMV Circular 3/2013) have reinforced the level of information and transparency to investors, particularly for products offered by banks and complex products. A number of CNMV guidelines in line with- but not only limited to- those issued by ESMA have **reinforced selling practices and information requirements for products such as UCITS, ETF, structured deposits and products, CFD, binary options and complex products in general.**

The CNMV has generic legal powers to limit activities an entity may develop ex art. 234, 2, e), g), j) and ñ) of the Securities Markets Law in its consolidated text passed by the *Real Decreto Legislativo 4/2005*, of 23 October. The CNMV may also establish criteria through Technical Guidelines entities can be obliged to disclose and explain compliance with.

## **27. SWEDEN**

No measures have been taken.

## **28. UK**

### ***Measure 1***

<b><u>Member State</u></b>	<b><u>UK</u></b>
<b><u>Type of measure</u></b>	<p>The regulator has the power to use temporary and permanent product intervention measures. The intervention may be a ban, but other types of intervention are also envisaged eg to deal with problematic features or selling practices.</p> <p>The following restrictions and specific requirements apply to the retail distribution of certain investments:</p> <ul style="list-style-type: none"><li>(a) non-mainstream pooled investments are subject to a restriction on financial promotions (see section 238 of the Act and COBS4.12);</li><li>(b) non-readily realisable securities are subject to a restriction on direct offer financial promotions (see COBS 4.7);</li><li>(c) contingent convertible instruments and CoCo funds are subject to a restriction on sales and on promotions (see COBS 22.3);</li><li>(d) mutual society shares are subject to specific requirements in relation to dealing and arranging activities (see COBS 22.3).</li></ul>
<b><u>Supervising Authority</u></b>	Financial Conduct Authority (FCA)
<b><u>Reference + link</u></b>	<p>The relevant legislation is here: <a href="http://www.legislation.gov.uk/ukpga/2012/21/section/24/enacted">http://www.legislation.gov.uk/ukpga/2012/21/section/24/enacted</a></p> <p>See also the FCA policy documents which preceded these product intervention measures: <a href="https://www.fca.org.uk/publication/consultation/cp12-35.pdf">https://www.fca.org.uk/publication/consultation/cp12-35.pdf</a> and <a href="https://www.fca.org.uk/publication/policy/fsa-ps13-03.pdf">https://www.fca.org.uk/publication/policy/fsa-ps13-03.pdf</a></p> <p><a href="#">See with respect to specific product intervention measures:</a></p>

	<p><a href="https://www.fca.org.uk/publication/tpi/restrictions-in-relation-to-the-retail-distribution-of-cocos.pdf">https://www.fca.org.uk/publication/tpi/restrictions-in-relation-to-the-retail-distribution-of-cocos.pdf</a></p> <p><a href="https://www.fca.org.uk/publication/policy/ps15-14.pdf">https://www.fca.org.uk/publication/policy/ps15-14.pdf</a></p>
<u>Legal basis</u>	Product intervention powers were introduced into the UK in 2012 via s 24 of the Financial Services Act 2012, which amends the Financial Services and Markets Act 2000 (FSMA). See esp s 137D FSMA.
<u>Duration</u>	<p>The bans may be temporary or permanent. Temporary bans have a maximum duration of 12 months.</p> <p>In August 2014 a temporary ban on distribution of CoCo's to retail clients was introduced, which was replaced by a permanent ban in 2015. At this occasion also the other product intervention measures mentioned above were introduced (all permanent).</p>
<u>Scope</u>	<p>The policy goals underlying the introduction of a ban are set out in s 137D(1) FSMA: (a) the consumer protection objective or the competition objective, or</p> <p>(b) if the Treasury by order provide for this paragraph to apply, the integrity objective.</p> <p>The predominant focus is likely to be on retail investors (and this has been the focus of the measures to date) but these powers may also be used in wholesale markets.</p>
<u>Binding or voluntary</u>	Binding
<u>Procedure preceding introduction</u>	
<p>i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)</p>	<p>Any temporary measures can be introduced without consultation (see s 138M FSMA), but have a maximum duration of 12 months, non-renewable. The permanent powers do require consultation.</p> <p>The consultation is a public consultation. The FCA must seek to bring the fact of the consultation to the attention of the public, and provide a period for representations to be made to it (eg the consultation on the ban on the distribution of Cocos</p>

	to retail investors was open for 30 days). See s 138I FSMA 2000.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	The consultation papers introducing product intervention measures discuss the proportionality of the proposed measures.
<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	The FCA has significant oversight of the market from an early stage in product design and development, providing guidance to product providers (eg FCA handbook: Responsibilities of providers and distributors for the fair treatment of customers (RPPD)) and monitoring compliance.
ii. What sanctions apply in case of breach?	In relation to agreements entered into in breach of product intervention rules, s 137C(7) FSMA 2000 sets out that the rules may: <ul style="list-style-type: none"> <li>a) provide for a relevant agreement or obligation to be unenforceable against any person or specified person;</li> <li>b) provide for the recovery of any money or other property paid or transferred under a relevant agreement or obligation by any person or specified person;</li> <li>c) provide for the payment of compensation for any loss sustained by any person or specified person as a result of paying or transferring any money or other property under a relevant agreement or obligation.</li> </ul>
<u>Success factor</u> – does the measure reach its goal?	These powers have only been used infrequently so far. In 2014 the FCA made use of its temporary product intervention powers to restrict firms from distributing Cocos to retail investors. In 2015, after consultation, the FCA used its powers to put in place permanent measures to restrict the distribution of Cocos to retail investors. See <a href="https://www.fca.org.uk/publication/policy/ps15-14.pdf">https://www.fca.org.uk/publication/policy/ps15-14.pdf</a> and <a href="https://www.handbook.fca.org.uk/instrument/2015/FCA_2015_29.pdf">https://www.handbook.fca.org.uk/instrument/2015/FCA_2015_29.pdf</a>

**Measure 2**

<u>Member State</u>	<u>UK</u>
<u>Type of measure</u>	<p>The FCA also has general powers that it can use to intervene (s 137A FSMA). For example, a consultation launched by the FCA in December 2016 suggests a range of measures to tackle concerns about retail customers opening and trading CFD products that they do not adequately understand.</p> <p>The new measures include:</p> <ul style="list-style-type: none"> <li>• Introducing standardised risk warnings and mandatory disclosure of profit-loss ratios on client accounts by all providers to better illustrate the risks and historical performance of these products.</li> <li>• Setting lower leverage limits for inexperienced retail clients who do not have 12 months or more experience of active trading in CFDs, with a maximum of 25:1.</li> <li>• Capping leverage at a maximum level of 50:1 for all retail clients and introducing lower leverage caps across different assets according to their risks. Some levels of leverage currently offered to retail customers exceed 200:1.</li> <li>• Preventing providers from using any form of trading or account opening bonuses or benefits to promote CFD products</li> </ul>
<u>Supervising Authority</u>	Financial Conduct Authority (FCA)
<u>Reference + link</u>	See <a href="https://www.fca.org.uk/publication/consultation/cp16-40.pdf">https://www.fca.org.uk/publication/consultation/cp16-40.pdf</a>
<u>Legal basis</u>	
<u>Duration</u>	
<u>Scope</u>	
<u>Binding or voluntary</u>	Binding

<u>Procedure preceding introduction</u>	
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	Yes. December 2016 – 7 March 2017 Open to everyone.
ii. Has the proportionality of the measure been discussed and demonstrated? How?	
<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	
ii. What sanctions apply in case of breach?	
<u>Success factor</u> – does the measure reach its goal?	

#### **EEA - NORWAY**

<u>Member State</u>	<b>Norway</b>
<u>Type of measure</u>	Requirement to provide extra information to clients when selling structured products
<u>Supervising Authority</u>	Finanstilsynet (Norwegian Financial Supervisory Authority)
<u>Reference + link</u>	Rundskriv concerning information on the sale of structured products, including index-linked bonds and deposits, <a href="http://www.finanstilsynet.no/no/Artikkelarkiv/Rundskriv/2005/Informasjon-ved-salg-av-sammensatte-produkter-herunder-aksjeindekserte-obligasjoner-og-innskudd/">http://www.finanstilsynet.no/no/Artikkelarkiv/Rundskriv/2005/Informasjon-ved-salg-av-sammensatte-produkter-herunder-aksjeindekserte-obligasjoner-og-innskudd/</a>

<u>Legal basis</u>	The Norwegian Securities Trading Act
<u>Duration</u>	The first “Rundskriv” was published in 2004 and was then followed up by a regulation in 2006 and replaced by a new “Rundskriv” in 2008
<u>Scope</u>	
<u>Binding or voluntary</u>	Binding (“Rundskriv”, which is the authorities interpretation of existing legislation (in this case the Norwegian FSA))
<u>Procedure preceding introduction</u>	
i. stakeholder consultation? (How long? What stakeholders? Via sector organisations or open to everyone?)	No, not before the first Rundskriv, but a consultation before the regulation was set into force in 2006 and the second Rundskriv
ii. Has the proportionality of the measure been discussed and demonstrated? How?	[This is not clear]
<u>Enforcement</u>	
i. How does the supervisor monitor the market to detect breaches?	Supervision and an inquiry among the distributors in 2008
ii. What sanctions apply in case of breach?	Loss of authorisation was one of the sanctions
<u>Success factor</u> – does the measure reach its goal?	The regulator achieved its goal to stop the sale of certain products to investors who did not understand the risks - as well as they stopped certain methods to sell the products