ESMA 35-43-1906

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 3 May 2019

on the product intervention measures relating to contracts for differences

proposed by the Financial Market Authority of Austria

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

[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).

considers that the taking of a measure by other NCAs is necessary, it must state this in its opinion.

(3) The Financial Market Authority (FMA) notified ESMA on 25 March 2019 of its intention to take product intervention measures under Article 42 of that Regulation (national measures). Upon request from ESMA, the FMA provided further information on the content of its notification.

(4) The national measures consist of a permanent restriction on the marketing, distribution or sale of contracts for differences (CFDs) to retail clients in or from Austria.

(5) ESMA has taken product intervention measures restricting the marketing, distribution or sale to retail clients of CFDs in Decisions (EU) 2018/796 ([3]), (EU) 2018/1636 ([4]), (EU) 2019/155 ([5]) and (EU) 2019/679 ([6]).

(6) The first of these Decisions took effect on 1 August 2018. In accordance with Article 40(6) of Regulation (EU) No 600/2014, ESMA must review a temporary product intervention measure at appropriate intervals and at least every three months. These measures have been amended once and renewed three times. If they are not renewed again, the currently applicable measures in ESMA Decision (EU) 2019/679 (ESMA's measures) will automatically expire at the end of the day on 31 July 2019.

(7) The FMA informed ESMA that the national measures are the same as ESMA's measures at national level, with the differences that the national measures would: (i) include minor amendments to several of the risk warnings in ESMA's measures; (ii) include a definition of virtual currencies; and (iii) not expressly prohibit participating in circumvention activities. The national measures are expected to take effect on 30 May 2019.

(8) The FMA notified ESMA that it has complied with the conditions in Article 42 of Regulation (EU) No 600/2014, including that it has assessed the relevance of all the factors and criteria listed in Article 21 of Commission Delegated Regulation (EU) 2017/567 ([7]) and taken into consideration all those that are relevant. In particular, the FMA notified ESMA that it shares the reasoning given in ESMA's measures on the existence of a significant investor protection concern, as relevant to Austria and the conditions in Article 42 of Regulation (EU) No 600/2014.

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[3] European Securities and Markets Authority Decision (EU) 2018/796 of 22 May 2018 to temporarily restrict contracts for differences in the Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council (OJ L 136, 1.6.2018, p. 50).

[4] European Securities and Markets Authority Decision (EU) 2018/1636 of 23 October 2018 renewing and amending the temporary restriction in Decision (EU) 2018/796 on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 272, 31.10.2018, p. 62).

[5] European Securities and Markets Authority Decision (EU) 2019/155 of 23 January 2019 renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 27, 31.1.2019, p.36).

[6] European Securities and Markets Authority Decision (EU) 2019/679 of 17 April 2019 renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 114, 30.4.2019, p. 22).

[7] Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions (OJ L 87, 31.3.2017, p. 90).

(9) The FMA informed ESMA that the minor amendments to the risk warnings in ESMA's measures planned for the national measures are: (i) an exclamation mark at the end of the reduced character risk warnings; (ii) a graphical exclamation mark at the beginning of the durable medium and webpage risk warnings; and (iii) the reference to the specific percentage range of retail client accounts that lose money in the standard risk warnings of ESMA's measures is replaced with a reference to, for the durable medium and webpage standard risk warning, 'the vast majority of retail client accounts' and, for the reduced character standard risk warning, 'retail client accounts generally lose money'.

(10) In respect of the exclamation mark at the end of the reduced character risk warnings, the FMA explained that this is the correct German punctuation for the end of a warning. In respect of the graphical exclamation mark at the beginning of the durable medium and webpage risk warnings, the FMA explained that this supports the effect of the warning. In particular, the FMA has indicated that symbols increase the effectiveness of warnings as shown by the results of the consumer testing study undertaken by the Commission in relation to the PRIIPs regulatory framework.

(11) With regard to the differences in the standard risk warnings, the FMA explained that the percentage range in ESMA's measures or another specific percentage may change over time and that continuously monitoring its accuracy may be challenging considering the permanent nature of the measures.

(12) In respect of the proposed definition of 'virtual currency', the FMA has clarified that this would be the same as the definition set out in Article 3(18) of Directive (EU) 2015/849 of the European Parliament and of the Council[8].

(13) Finally, although the national measures would not expressly prohibit participating in circumvention activities due to national constitutional constraints, the FMA informed ESMA that it will ensure through its supervisory and enforcement activity that the national measures are correctly applied.

(14) The FMA shares the reasons given in ESMA's measures that the existing applicable regulatory requirements under Union law, which have not changed since the adoption of ESMA's measures, do not address the concern. The FMA also considers that improved supervision or enforcement of the existing requirements would not better address the concern identified. In particular, the FMA informed ESMA that it has taken into account the supervisory and enforcement experiences of other NCAs as referred to in ESMA's measures and that its supervisory practices take into account the relevant guidance provided by ESMA, including the 'Opinion on MiFID practices for firms selling complex products' ([9]), the 'Opinion on structured complex products – good practices for product

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[8] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).
[9] ESMA/2014/146.

governance arrangements' ([10]) and the 'Joint Position of the European Supervisory Authorities on manufacturers' product oversight and governance processes' ([11]). Nonetheless, the FMA considers that the significant investor protection concern continues to exist.

(15) Moreover, the FMA shares the analysis on proportionality in ESMA's measures and, in particular has concluded that the national measures are proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants. In the case of one-off costs, the FMA considers that, as the national measures are the same as ESMA's measures except for the differences described above, any one-off costs that may be incurred by product providers to comply with the national measures are likely to be minimal.

(16) The FMA considers that the national measures do not have a discriminatory effect on services or activities provided from another Member State as the measures provide for equal treatment of the marketing, distribution or sale of the products regardless of the Member State from which those services or activities are carried out.

(17) Since the national measures are the same as ESMA's measures except for the differences described above, ESMA's measures are binding in all Member States and, on the expiry of ESMA's measures, other NCAs plan to take similar national measures, the FMA considers that other Member States are not significantly affected by its measures. The FMA has also notified ESMA and the other NCAs of the national measures not less than one month before they are intended to take effect.

(18) The FMA considers that the national measures do not pose a serious threat to the orderly functioning and integrity of the national physical agricultural market. In particular, the FMA considers that the national measures are the same as ESMA's measures, except for the differences described above, and that ESMA consulted the national public bodies competent for the oversight, administration and regulation of physical agricultural markets under Council Regulation (EC) No 1234/2007 ([12]). None of those bodies raised any objections to ESMA Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 or (EU) 2019/679.

2. Whether the national measures are justified and proportionate

(19) The significant investor protection concern raised by the offer of CFDs to retail clients led to the adoption of ESMA's Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 and (EU) 2019/679. However, ESMA's measures are temporary. According to the information provided by the FMA, the significant investor protection concern raised by these products

[10] ESMA/2014/332.
[11] JC-2013-77.
[12] 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).

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.

(20) In respect of the differences in the risk warnings between the national measures and ESMA's measures, ESMA notes that its measures have been used as the basis for the national measures of other NCAs. Therefore, ESMA considers that any differences in the national measures may lead to additional costs for CFD providers that would have to adjust the relevant risk warnings when offering CFDs in or from Austria. ESMA encourages NCAs to take measures that use a common Union risk warning to avoid such costs. Nonetheless, taking into account that the proposed risk warnings are substantially the same as those in ESMA's measures and that the standardised risk warning is, in any event, only to be used in exceptional cases where a provider has not provided an open CFD connected to a retail client CFD trading account in the last 12-month calculation period, ESMA considers that the proposed risk warnings in the national measures sufficiently inform retail investors about the risks related to trading in CFDs.

(21) Furthermore, the national measures would include a definition of 'virtual currency'. While ESMA's measures did not define the term, ESMA considers that since it has been recently defined in Union law in Directive (EU) 2015/849, the definition could provide a common reference point for NCAs and could facilitate the supervision and enforcement of the national measures.

(22) Finally, the national measures would not expressly prohibit participation in circumvention activities. However, ESMA considers that the FMA would still be in a position to ensure that the national measures are correctly applied through its supervision and enforcement activities.

(23) Based on this information as well as the reasons for ESMA's measures referred to by the FMA, ESMA is satisfied that the national measures are justified and proportionate.

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

(24) For the reasons explained in ESMA's measures, the significant investor protection concern raised by the offer of CFDs to retail clients is a cross-border issue. As evidenced by practices to date, product providers are able to offer these products through online trading accounts and passport their services throughout the Union. To effectively address the significant investor protection concern and avoid the risk of regulatory arbitrage, it is essential that product providers cannot exploit differences in treatment by NCAs across Member States. On the expiry of ESMA's measures, product providers may again seek to offer such products in or from a Member State that has not taken a measure at least as stringent as ESMA's measures. Therefore, it is essential that NCAs take concerted action to address this risk.

4. Conclusion

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

(a) the national measures are justified and proportionate; and

(b) it is necessary for the NCAs of other Member States to take product intervention measures that are at least as stringent as ESMA's measures.

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

Done at Paris, on 3 May 2019

For the Board of Supervisors

Steven MAIJOOR

The Chair