

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 24 June 2019

on the product intervention measures relating to contracts for differences proposed by the Finanšu un kapitāla tirgus komisija of Latvia

Having regard to Article 43(2) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 ⁽¹⁾,

Having regard to Article 44(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ⁽²⁾,

THE EUROPEAN SECURITIES AND MARKETS AUTHORITY BOARD OF SUPERVISORS
HAS ADOPTED THIS OPINION:

1. Introduction and legal basis

- (1) National competent authorities (NCAs) may take product intervention measures in accordance with Article 42 of Regulation (EU) No 600/2014. At least one month before a measure is intended to take effect, an NCA must notify all other NCAs and the European Securities and Markets Authority (ESMA) of the details of its proposed measure and the related evidence, unless there is an exceptional case where it is necessary to take urgent action.
- (2) In accordance with Article 43 of Regulation (EU) No 600/2014, ESMA performs a facilitation and coordination role in relation to such product intervention measures taken by NCAs. In particular, after receiving notification from an NCA of its proposed measure, ESMA must adopt an opinion on whether it is justified and proportionate. If ESMA considers that the taking of a measure by other NCAs is necessary, it must state this in its opinion.

¹ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (3) The Finanšu un kapitāla tirgus komisija (FKTK) of Latvia notified ESMA on 21 May 2019 of its intention to take product intervention measures under Article 42 of that Regulation (national measures). Upon request from ESMA, the FKTK 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 Latvia.
- (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 FKTK notified ESMA that the national measures are the same as ESMA's measures at national level, with the difference that the national measures would include minor amendments to the standard risk warnings in ESMA's measures. The national measures are expected to take effect on 1 August 2019.
- (8) The FKTK 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 FKTK notified ESMA that it shares the reasoning given in ESMA's measures on the existence of a significant investor protection concern, as relevant to Latvia and the conditions in Article 42 of Regulation (EU) No 600/2014.
- (9) In respect of the proposed amendments to the standard risk warnings in ESMA's measures, the national measures plan to replace reference to the specific percentage range of retail client accounts that lose money in the standard risk warnings in ESMA's

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).

measures with a reference to, for the durable medium and webpage standard risk warning and the abbreviated 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) The FKTK 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.
- (11) Furthermore, the FKTK 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 FKTK also considers that improved supervision or enforcement of the existing requirements would not better address the concern identified. In particular, the FKTK informed ESMA that it has taken into account the supervisory and enforcement experiences of other NCAs as referred to in ESMA's measures and that its supervisory practices take into account the relevant guidance provided by ESMA, including the 'Opinion on MiFID practices for firms selling complex products' ⁽⁸⁾, the 'Opinion on structured complex products – good practices for product governance arrangements' ⁽⁹⁾ and the 'Joint Position of the European Supervisory Authorities on manufacturers' product oversight and governance processes' ⁽¹⁰⁾. Nonetheless, the FKTK considers that the significant investor protection concern continues to exist.
- (12) Moreover, the FKTK 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 FKTK considers that, as the national measures are the same as ESMA's measures except for the difference described above, any one-off costs that may be incurred by product providers to comply with the national measures are likely to be minimal.
- (13) The FKTK 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.
- (14) Since the national measures are the same as ESMA's measures except for the difference described above, ESMA's measures are binding in all Member States and, on the expiry of ESMA's measures, other NCAs plan to take similar national measures, the FKTK considers that other Member States are not significantly affected by its measures.

⁸ ESMA/2014/146.

⁹ ESMA/2014/332.

¹⁰ JC-2013-77.

Furthermore, the FKTK observed that the activity of CFD providers authorised in Latvia passporting their services throughout the Union is insignificant.

- (15) The FKTK has also notified ESMA and the other NCAs of the national measures not less than one month before they are intended to take effect.
- (16) The FKTK 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 FKTK considers that the national measures are the same as ESMA's measures except for the difference described above and that ESMA consulted the national public bodies competent for the oversight, administration and regulation of physical agricultural markets under Council Regulation (EC) No 1234/2007 ⁽¹¹⁾. None of those bodies raised any objections to ESMA Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 or (EU) 2019/679.

2. Whether the national measures are justified and proportionate

- (17) The significant investor protection concern raised by the offer of CFDs to retail clients led to the adoption of ESMA Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 and (EU) 2019/679. However, ESMA's measures are temporary. According to the information provided by the FKTK, the significant investor protection concern raised by these products continues to exist at national level and needs to be addressed on a longer-term basis to avoid the detrimental consequences that would arise from their unrestricted offer to retail clients.
- (18) In respect of the differences in the risk warnings between the national measures and ESMA's measures, as noted in ESMA's Opinion on the proposed national measures relating to CFDs of the Financial Market Authority (FMA) of Austria ⁽¹²⁾, 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 Latvia. 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. ESMA has also taken into account that the

¹¹ Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1).

¹² 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 (ESMA35-43-1906).

differences in the FKTK's risk warnings are aligned with the differences in the FMA's risk warnings.

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

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

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

4. Conclusion

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

- (a) 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, 24 June 2019

For the Board of Supervisors
Steven Maijor
The Chair