

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 7 June 2021

on the product intervention measures relating to turbos proposed by the Dutch Authority for the Financial Markets (AFM)

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. 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 Dutch Authority for the Financial Markets (AFM) notified ESMA on 25 January 2021 of its intention to take product intervention measures under Article 42 of that Regulation (national measures). The AFM provided further information on the content of its notification on 3 May 2021.
4. Prior to the notification, the AFM published a consultation paper ⁽³⁾ setting forth the rationale for the national measures.
5. The national measures set out in more detail below consist of a permanent restriction of the marketing, distribution or sale of turbos to retail clients in the Netherlands. In particular, they would introduce (i) a leverage cap, (ii) a prohibition to provide retail clients with a payment or other prohibited benefits in relation to the marketing, distribution or sale of a turbo, and (iii) the requirement of a risk warning, all by and large in line with existing restrictions already applicable to contracts for differences (CFDs) in the Netherlands ⁽⁴⁾ and throughout the Union ⁽⁵⁾.
6. Turbos addressed by the national measures are bonds that have a stop-loss feature and whose value is derived from the value of an underlying asset and the financing of the value of the underlying asset, or other debt instruments that have a stop-loss feature and whose value is derived from the value of an underlying asset and the financing of the value of the underlying asset. They are high-risk leveraged products with which investors speculate that the prices of the underlying asset, such as a share, an index or a currency, will rise or fall.
7. First, the national measures propose to introduce a leverage cap. The following maximum leverage is proposed by type of underlying:
 - a) 30 when the underlying currency pair is composed of any two of the following currencies: US dollar, Euro, Japanese yen, Pound sterling, Canadian dollar or Swiss franc;
 - b) 20 when the underlying index, currency pair or commodity is:
 - i. any of the following equity indices: Financial Times Stock Exchange 100 (FTSE 100); Cotation Assistée en Continu 40 (CAC 40); Deutsche Bourse AG German Stock Index 30 (DAX30); Dow Jones Industrial Average (DJIA); Standard & Poors 500 (S&P 500); NASDAQ Composite Index (NASDAQ), NASDAQ 100 Index (NASDAQ 100); Nikkei Index (Nikkei 225); Standard & Poors/Australian Securities Exchange 200 (ASX 200); EURO STOXX 50 Index (EURO STOXX 50);

³ The consultation paper can be downloaded at <https://www.afm.nl/en/nieuws/2020/december/consultatie-beperking-turbos>.

⁴ <https://www.afm.nl/en/nieuws/2019/apr/binaire-opties-cfds-interventies>.

⁵ See <https://www.esma.europa.eu/policy-activities/mifid-ii-and-investor-protection/product-intervention>.

- ii. a currency pair composed of at least one currency that is not listed in point (a) above; or
 - iii. gold;
 - c) 10 when the underlying commodity or equity index is a commodity or any equity index other than those listed in point (b) above;
 - d) 2 when the underlying asset is a cryptocurrency; or
 - e) 5 when the underlying asset is:
 - i. a share; or
 - ii. not otherwise listed in this Article.
8. Second, the national measures would introduce a risk warning which, generally, shall include an up-to-date provider-specific loss percentage based on a calculation of the percentage of retail clients that have lost money in trading in turbos with a specific provider. The calculation shall be performed every three months and cover the twelve-month period preceding the date on which it is performed.
9. Third, turbo providers would be prohibited from directly or indirectly providing retail clients with a payment, monetary or non-monetary benefits in relation to the marketing, distribution or sale of a turbo, other than the price of the turbo sold by the retail client or the payment of the residual value on settlement of the turbo.
10. Against the backdrop that turbos – unlike CFDs – do not create a residual debt risk for investors, i.e. that turbo investors cannot lose more than the money invested, the measures would not introduce a margin close-out protection and a negative balance protection as are applicable to CFDs and CFD accounts.
11. The national measures are intended to apply both to turbo providers authorised in the Netherlands and to turbo providers authorised in another Member State that provide investment services and/or perform investment activities in the Netherlands by way of a branch or the freedom to provide services.
12. Turbo providers are (i) investment firms within the meaning of Article 4(1)(1) of Directive 2014/65/EU⁶, (ii) credit institutions within the meaning of Article 4(1)(27) of that Directive, when providing investment services and/or performing investment activities, and (iii) market operators within the meaning of Article 4(1)(18) of that Directive, including any trading venues they operate.

⁶ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

13. Neither ESMA nor any other NCA ⁽⁶⁾ has taken product intervention measures relating to turbos. ESMA and all other NCAs, however, have implemented similar product intervention measures in relation to CFDs⁽⁸⁾.
14. The AFM informed ESMA that the national measures are expected to take effect no earlier than two months from the date of publication of this opinion.

2. The AFM's justification of the product intervention measures

15. The AFM notified ESMA that it has complied with the conditions set out in Article 42 of Regulation (EU) No 600/2014, including that it has assessed the relevance of all factors and criteria listed in Article 21 of Commission Delegated Regulation (EU) 2017/567 ⁽⁷⁾ and taken into consideration all those that are relevant.

Significant Investor Protection Concerns

16. The AFM reported the following significant investor protection concerns observed in the Netherlands:

The degree of complexity, transparency and the specific features or components of turbos

17. Turbos are complex structured products that are typically traded on a trading venue. Some features of turbos are the dependency of their price on the value of the underlying asset, the financing level and the stop-loss level.
18. Turbos enable a retail client to invest, long or short, in the value of the underlying asset. A turbo does not give the retail client any direct entitlement to the value of the underlying asset. Owing to the lack of a direct entitlement, the retail client is exposed to the credit risk that the issuer may fail to meet its obligations with regard to the turbo. There is no such credit risk if the retail client invests directly in the underlying asset.
19. The retail investor can cash in on the indirect entitlement to the underlying asset by selling the turbo. In practice, the retail client will trade (virtually) exclusively with a single counterparty, which is often also referred to as liquidity provider or market maker. Generally, this counterparty is the issuer of the turbo itself or a party that has made arrangements with the issuer on trading in turbos. The AFM reported that, in their view, these arrangements are not clear for the retail client. The retail client is dependent on this counterparty for the pricing of the turbo. In principle, the counterparty is free to determine the bid and offer price, as well as the volume of the

⁶ Note in this context, however, that the UK Financial Conduct Authority (FCA) issued national product intervention measures capturing CFD-like options. See the FCA press release <https://www.fca.org.uk/news/press-releases/fca-confirms-permanent-restrictions-sale-cfds-and-cfd-options-retail-consumers>.

⁽⁸⁾ See footnote no. 5.

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 regards to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions (OJ L 87, 31.3.2017, p. 90).

turbos requested and offered at its discretion. There is no such dependence on a single counterparty in order to be able to trade, nor the associated liquidity risk, if the retail client invests directly in the underlying asset.

20. A provision may apply to turbos to the effect that the issuer reserves the right to terminate the turbo. If the issuer makes use of this right, the turbo is terminated and its value, if any, is paid out, without the retail client having any influence on this. There is no such termination risk if the retail client invests directly in the underlying asset.
21. Another situation in which the turbo may be terminated is when the built-in stop-loss of the turbo is triggered. This happens when the price of the underlying asset reaches the stop-loss level. This feature contributes to the complexity of turbos. This product feature can wrongly give retail clients the impression that the stop-loss guarantees order execution at the stop-loss level. However, stop-loss levels for turbos do not guarantee any specific level of protection; instead, they solely commence the settlement process, with the settlement value of the turbo still to be specifically determined by the issuer. The price that the client receives for the turbo upon settlement may therefore differ from the price at which the stop-loss was set. A stop-loss is not a unique feature of turbos, but owing to the leverage, the value of the turbo becomes more sensitive to price changes of the value of the underlying asset, which increases the risk of sudden losses in the stop-loss order execution with turbos. This means that the use of a stop-loss with turbos does not fully mitigate the risk of unexpected or significant loss.
22. The leverage of turbos arises from the financing structure that is used. For a turbo long, for instance, the issuer will provide the financing, up to the financing level, for buying the underlying asset. The retail client will not pay the full acquisition price of the underlying asset, but only the portion of the acquisition price that exceeds the financing level. This means that the notional value of the turbo exceeds the (net) value of the turbo. Owing to the use of the leverage, the price risk of turbos exceeds the price risk of a direct investment in the underlying asset.
23. The leverage can be considered to be the principal feature of turbos. Leverage increases the possible gains, but also the possible losses for retail clients. In its review published in 2013 ⁽⁸⁾, the AFM concluded that certain turbos with a high leverage offer investors an undesirably low prospect of a positive return. The AFM's review published in 2020 ⁽⁹⁾ stated that the leverage of turbos can reach 100 and higher. It also stated that the application of a higher leverage increases the risk of a larger loss to a greater extent than the 'risk' of a larger gain. The average return of a transaction in turbos is

⁸ 'Aanbieders beloven betere bescherming beleggers bij risicovolle hefboomproducten', 3 September 2013, <https://www.afm.nl/nl-nl/nieuws/2013/sep/hefboomproducten>.

⁹ 'Nederlandse turbomarkt in beeld', February 2020, https://www.afm.nl/~/_profmedia/files/onderwerpen/turbo/afm-turbos-factsheet-ned.pdf?la=nl-NL.

- 1.7% for leverage levels up to 30. This average return decreases to -8.6% for leverage levels exceeding 100.

24. Besides the greater price risk owing to the leverage, the financing structure of turbos also entails financing costs. The financing costs depend on the financing level and the interest rate of the financing. The issuer charges financing costs by adjusting the financing level of the turbo. As a result, the value of the turbo decreases over time *ceteris paribus*. This procedure in effect means that the financing costs are added to the financing already provided, creating a snowball effect. The longer the term of the turbo, the greater the financing costs per unit of time will therefore be¹⁰. Although retail clients themselves are not borrowing money when buying a turbo, they do bear the costs of the financing structure of the turbo. That is because the financing costs will reduce the return on the turbo. Also, the issuer can change the level of the interest rate for the financing structure. There is no such interest rate risk if the retail client invests directly in the underlying asset.
25. In addition to the financing costs, the transaction fees reduce the return on turbos. As stated above, generally the retail client is dependent on a single fixed counterparty for trading in turbos. The AFM reported that the way in which this counterparty determines the bid and offer prices is not transparent for the retail client. Generally, the difference between the bid and offer price of a turbo is greater than the difference in bid and offer price of the underlying asset. The spread costs derived from that difference are accordingly greater than for the underlying asset.
26. Costs charged by the distributor for buying and selling turbos are also part of the transaction fees. This can be a fixed amount or a percentage of the transaction value or a combination of both. Some distributors do not charge any costs for buying and selling (certain) turbos. In that case it is often not transparent for the retail client whether the distributor itself bears the costs for providing this service, or whether the distributor receives payments in another manner for buying and selling turbos, for instance by selling the order flows for turbos to a third party.
27. The BEST, or Barrier Equals Strike turbos, are a special category of turbos. The defining feature of BEST turbos is that the financing level is equal to the stop-loss level. A BEST turbo is terminated without any value if the price of the underlying asset reaches the stop-loss level. For (all) turbos, the financing level is adjusted (daily) by the financing costs. For BEST turbos, this adjustment means that the stop-loss level is also adjusted (daily). Therefore, BEST turbos are even more complex and involve higher risks than other types of turbos.
28. With BEST turbos, the issuer is exposed to the risk that the price of the underlying asset suddenly falls further as soon as the stop-loss level is reached. As a result, the

¹⁰ The interest rate is typically a benchmark interest rate increased with a margin, e.g. Euribor + 3%. For turbos short the interest rate is negative if the benchmark interest rate is higher than the margin.

issuer may incur a price loss with the positions it has entered into in connection with issuing the turbo. The issuer will usually hedge this risk. These hedging costs are charged as part of the price of the turbo, and are also referred to as the *gap risk premium*. Determining the level of the gap risk premium is complex. The gap risk premium depends on numerous factors, such as the financing level, the price, the volatility and the liquidity of the underlying asset, and other market conditions. Viewed from the perspective of the retail client, this complexity is further increased due to the fact that the gap risk premium is not charged separately but as part of the total price of the turbo. It is therefore not transparent for retail clients to what extent the gap risk premium contributes to the total price of the turbo. It is virtually impossible for retail clients to assess whether the gap risk premium is in line with the risk incurred by the issuer.

29. Because the financing level is equal to the stop-loss level, BEST turbos enable the retail client to invest on the basis of (extremely) high leverage levels. The popularity of the BEST turbos in the Netherlands contributes substantially to the use of high-leverage levels and the associated losses for turbos. Analysis by the AFM has established that BEST turbos account for 76% of all turbos traded. If the price of the underlying asset reaches the stop-loss level, the BEST turbo is settled at no value. It is immaterial in this context whether the price rebounds in a direction that is beneficial for the retail client after the stop-loss level was reached. The above mentioned analysis by the AFM has shown that 6% of all turbo transactions in the Netherlands result in a total loss of the amount invested. This total loss percentage can be attributed (virtually) in full to BEST turbos, as other types of turbos do, as a rule, pay out a residual value after executing the stop-loss.
30. Another feature that is connected to the leverage of turbos is their short term. The combination of high-leverage levels that are offered to retail clients, the volatility of certain underlying assets and the transaction fees that affect the return of the investment can lead to rapid changes in the retail client's investment position. As a result, retail clients are forced to act swiftly to maintain control of their risk position. The AFM has established that 56% of turbos traded in the Netherlands have a term of 24 hours or less. It further found that only 5% of turbos traded have a term of 720 hours or more. The AFM recognises that these kinds of short holding periods of positions for retail clients also occur with other financial instruments such as, for instance, shares and bonds. However, while the short holding period of positions is often only secondary in the case of other financial instruments, it is a predominant feature of turbos.
31. Another important aspect of the complexity of turbos is that the retail client would have to be able to understand, in addition to the features of turbos described above, also the specific features of the underlying asset in order to take an informed investment decision.

32. The two following examples reported by the AFM illustrate the way in which the interaction between the turbo and the underlying asset contributes to the overall complexity.
33. With FX trading, clients speculate on one currency against another. If neither of the two currencies is the currency in which the turbo is traded, any return for the client will depend on the actions the client takes to assess the price movements of the three currencies. This means that an investor must have extensive knowledge of all currencies concerned to be able to successfully understand the complexity of this kind of currency trading.
34. With some underlying assets, such as indices, it is possible to trade in a turbo outside the official trading hours of the underlying asset concerned. In that case, the underlying asset itself cannot be used to determine the value of the turbo; instead, it is derived from a different reference value. For a proper estimate of the price, the retail client must therefore not only possess knowledge of the underlying asset itself, but also of any derivative instruments that are used as a reference value. These derivative instruments are generally designed for the professional market rather than the retail market.
35. The AFM concludes for its market that the combination of features and risks of turbos and the costs and associated fees that are charged for trading in turbos are complex, involve high risks and lack transparency for retail clients. Retail clients usually do not have the in-depth knowledge that is necessary to understand the combination of features, risks and costs.

The size of potential detrimental consequences and the degree of disparity between the expected return or profit for investors and the risk of loss in relation to turbos

36. Based on the review published in 2020 ⁽¹¹⁾, the AFM estimates that there are 35,000 retail clients in the Netherlands who trade in turbos ⁽¹²⁾. The average return achieved by Dutch retail clients by trading in turbos is negative: - €2,680. This average return is based on all active clients, i.e. all clients that have at least one turbo transaction in the observed period from 1 June 2017 to 30 June 2018. The number of active clients shows a slight increasing trend from 2015 to 2018 and the AFM estimates that the number of active clients has increased due to retail brokers that entered the Dutch turbo market in 2019 or later.
37. In total, the estimated negative result in the Netherlands is €94 million over a period of thirteen months. Of the total number of retail clients, 68% lost money by trading in turbos. In addition, the data reveals a relationship between the return achieved and

¹¹ Nederlandse turbomarkt in beeld', February 2020, <https://www.afm.nl/~/-/profmedia/files/onderwerpen/turbo/afm-turbos-factsheet-ned.pdf?la=nl-NL>.

¹² This number does not include distributors who commenced their activities in the Dutch market in the second half of 2019 or later. According to the AFM, the total number of retail clients trading in turbos will therefore be higher.

the leverage of the turbo. The higher the leverage, the more negative the average return achieved. It is also clear from the data that the more frequently retail clients trade in turbos, the higher the losses become. In particular, overall results per account tend to get worse with more transactions; accounts with more transactions also tend to use higher leverage, which is associated with worse outcomes. The AFM concludes that possessing more experience in trading in turbos does not lead to better results.

The type of clients involved and the degree of innovation of turbos

38. Turbos are marketed on a large scale and distributed and sold to retail clients. The financial threshold for purchasing turbos is low. Clients can already purchase turbos with a small amount of money (€100 for example). The threshold is lowered further due to the fact that no transaction fees are charged for trading in turbos in some cases. Partly for that reason, turbos are accessible to a wide public. The notion of wide accessibility is reinforced by the fact that some turbo providers also offer widely purchased (basic) products, such as current accounts and savings accounts, and their brand name is therefore recognised by a wide public.
39. Retail clients with turbos invest indirectly in the underlying assets. This means that turbos more readily allow a wider public to trade in certain underlying assets, such as a variety of different commodities, which would otherwise not have been available to part of the public. Although a broader offer of investment options can be a good thing, where underlying assets are geared predominantly to the professional market, it may not be in the interests of retail clients to invest in them. The leverage of turbos also enables retail clients to trade larger positions in the underlying asset, which would not have been possible for the retail client in question without the leverage.
40. The AFM has established that some providers, partly due to the product governance rules of Directive 2014/65/EU, make buying turbos less accessible for the general public by making turbos less easy to find within the product range. Conversely, the AFM has found that other providers prominently advertise turbos on their website. Turbos are also promoted in a convenient manner via readily accessible events that are described by terms such as 'game' or 'competition', and that draw attention to the element of play in trading in turbos. This contrasts with the high risks involved and the complex nature of turbos.
41. Further, the application of technology contributes to the wide accessibility and ready availability of turbos. Some distributors, for instance, offer the option of issuing orders for turbos via apps. This means that constraints of place and time for trading in turbos are eased for retail clients. While ease of use can offer added value, this is all the more perilous in the case of turbos as it has become clear that the frequent trading and short terms contribute significantly to the losses with turbos.
42. The fact that turbos are mainly sold without advice or portfolio management means that distributors of turbos have limited insight into the personal situation or core

objectives of the client. This contributes to the significant risk that turbos are purchased by the general public rather than with a specifically described target group. The fact that the general public is involved in turbos contributes to the significant investor protection concern.

The selling practices associated with turbos

43. Although turbos are complex products, they are offered to retail clients most commonly on electronic trading platforms, without the provision of investment advice or portfolio management. An assessment of appropriateness is required in such cases pursuant to Article 4:24 of the Dutch Financial Supervision Act (Wet op het financieel toezicht / Wft). Providers are obliged to warn clients if they judge the service or product to be inappropriate. However, this assessment alone does not prevent turbos, without applying restrictions, from winding up with clients for whom they are not appropriate.
44. In the Netherlands, turbos are regularly promoted in advertisements in a manner that draws attention to the element of play in trading in turbos. In the product brochures, turbos are often promoted as a product enabling the investor to profit more, more quickly or disproportionately from a specific price movement of the underlying asset. In addition, in some cases turbos are promoted in advertisements by offering reduced transaction fees or even no transaction fees at all for trading in turbos. Such promotions and incentives may divert clients' attention from the high risks associated with the product. They are targeted to attract retail clients and to incentivise trading. This is conducive to the risk that retail clients will consider these offers to be a core feature of the product, and this will compromise their ability to assess the actual risks of the product.
45. Further, the manner in which turbos are distributed in the Netherlands entails the risk that retail clients have an incorrect or incomplete understanding of the pricing mechanism for turbos and of the relations between the various parties in the distribution chain. The AFM explains this as follows:
 - (a) turbos are offered as a vehicle with which a retail client invests in an underlying asset. Turbos are traded via trading platforms. This combination may give rise to the impression for retail clients that the pricing mechanism for turbos works in a similar way to the pricing mechanism for the underlying asset. That is not so. Whereas the price of the underlying asset is formed, as a rule, by the mechanism of supply and demand of a large number of market parties, in the case of turbos, the retail client will often trade with a single counterparty only. Therefore, the retail client is strongly dependent on that counterparty for obtaining price information and for pricing;
 - (b) cooperation agreements may be in place between the various parties in the distribution chain for turbos - including the distributor, the counterparty trading with the retail client, the trading platform and the issuer - for instance, on making turbos

available for trading and on forwarding order flows. In some cases, various parties in the distribution chain are part of the same group of enterprises. This can give rise to a degree of interdependence of the interests of the parties in the distribution chain, of which the retail client may not be aware.

46. Furthermore, according to the AFM, turbos are very similar to CFDs which already are subject to the restrictions that decrease the risks for retail investors. The AFM examined the transaction data for turbos and published the results of the review in February 2020 ⁽¹³⁾. The principal conclusion was that in the Netherlands turbos are generally traded with similar results to CFDs in terms of commercial outcomes for investors.
47. Based on its finding that in the Netherlands turbos are very similar to and similarly used by retail clients as CFDs, the AFM is of the view they should also be subject to similar restrictions as CFDs.
48. For the above reasons, the AFM reached the conclusion that turbos pose significant investor protection concerns in the Netherlands and that, without the national measures, turbos would continue to cause retail clients harm, inter alia, from potentially sudden and unexpected losses.

Existing Union law regulatory requirements do not sufficiently address the risks

49. The AFM believes that existing regulatory requirements applicable to turbos, including product governance, appropriateness and disclosure requirements, do not sufficiently address the threats posed to retail clients by these products for the following reasons:
 - (a) improving the provision of information does not have an influence on the specific characteristics or components of turbos. In particular, improving information does not reduce the significant risk of loss or the negative return on turbos. Secondly, the complexity of turbos as described above is such that even if the legal requirements to provide information, including under MiFID II ⁽¹⁴⁾ and the Prospectus Directive ⁽¹⁵⁾, are satisfied, the products will still be difficult to understand for retail clients;
 - (b) the suitability requirements are only applicable to the provision of investment advice and portfolio management. They are usually irrelevant in relation to the marketing, distribution or sale of turbos, which mostly occurs on electronic platforms, without the provision of investment advice or portfolio management. These requirements

¹³ Nederlandse turbomarkt in beeld', February 2020, <https://www.afm.nl/~profmedia/files/onderwerpen/turbo/afm-turbos-factsheet-ned.pdf?la=nl-NL>.

¹⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

¹⁵ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.

are therefore insufficient to remove the significant cause for investor protection concern;

- (c) turbos are complex financial products and are therefore subject to the appropriateness test. However, requirements with respect to appropriateness cannot prevent a retail client from trading in turbos even if non-appropriateness has been demonstrated. It is therefore unlikely that improved supervision and enforcement of compliance with the requirements pertaining to appropriateness would be able to remove the significant cause for concern about investor protection;
- (d) best execution requirements do not have an impact on the degree of complexity, the transparency or the characteristics and components of the product itself. This means that supervision or enforcement of these requirements cannot lead to a change in the complexity or of the features of turbos. Supervision and enforcement of the above-mentioned criteria therefore cannot remove the significant investor protection concerns identified;
- (e) as for product governance, the significant investor protection concerns pertain not only to an individual provider of turbos, but constitutes a market-wide issue involving numerous providers in the Netherlands, in the role of manufacturer, the role of counterparty in the transaction or in the role of distributor. An enforcement process involving each of such providers on the basis of product governance requirements is complex and highly intensive by its nature. Enforcement at all turbo providers would therefore be disproportionately burdensome for both the providers concerned and the responsible NCA. What is more, enforcement on the basis of product governance requirements cannot prevent newly developed or newly distributed turbos from raising concerns about investor protection.

Improved supervision or enforcement would not better address the issue

50. As already mentioned in paragraph 49 above, the AFM does not believe that improved supervision or enforcement of existing requirements can adequately address the concerns identified. The AFM rather believes that no improved supervision or enforcement could appropriately protect retail clients from the risks of turbos, as observed by the AFM.

Proportionality

51. The AFM states that the national measures are justified and proportionate. The AFM considered alternative options, including warnings, disclosure remedies and other sales restrictions. However, none of these options were deemed sufficient to adequately protect retail clients from the risks posed by turbos.

52. The AFM deems it appropriate in selecting the restrictions for turbos to seek as much alignment as possible with the restrictions imposed on CFDs. According to the AFM,

the reason for this is the high degree of similarity found in the Netherlands between the criteria and factors that have led to the significant investor protection concern for turbos and CFDs.

53. The AFM does not expect significant one-off or ongoing costs for firms. It does, however, expect a loss of revenue from fees and charges.
54. The AFM does also not see any significant costs to retail clients. To the contrary, retail clients' losses will likely be reduced.

Consultation of competent authorities in other relevant Member States

55. The AFM informed ESMA that it has consulted NCAs in three other Member States that might be significantly affected by its measures, namely the French Autorité des marchés financiers (AMF), the German Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) and the Danish Finanstilsynet (DFSA).
56. Both BaFin and the AMF pointed to the differences between turbos and CFDs. For instance, both pointed out that – unlike CFDs – turbos never result in additional payment obligations for the investor. Furthermore, turbos – again unlike CFDs – are subject to Regulation (EU) 2017/1129⁽¹⁶⁾. Hence, prior to their marketing, distribution and sale, a prospectus needs to be drafted and approved by the relevant regulator. This results in better disclosure and transparency for investors. Unlike CFDs, turbos are typically listed and traded on regulated markets or multilateral trading facilities (MTFs). Lastly, both BaFin and the AMF believe that the losses incurred by the average turbo investor are smaller than the ones incurred by the average CFD investor and that turbo investors are less likely to lose on a cumulative basis than are CFD investors. The AMF underpins this assessment by referring to data showing that the percentage of turbo investors losing money is somewhat smaller than the percentage of CFD investors incurring losses. Similarly, the AMF points to data showing that the average loss by investor is smaller. The AMF further points out that the distribution channels for turbos are better regulated and operate in a less aggressive manner than the ones for CFDs. Furthermore, the AMF reported that it had received considerably less complaints relating to turbos than to CFDs.
57. The AFM appreciates the arguments brought forward by BaFin and the AMF. It does believe, however, that the arguably better disclosure does not result in a sufficiently better understanding of the product by retail clients considering the highly risky and complex nature of turbos. The AFM also believes that there is overlap in the investor

¹⁶ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12–82).

base of turbos and CFDs and that, based on its observations, the two products are marketed in the Netherlands side by side in some cases. Furthermore, the AFM points out that it is not clear-cut that the turbo investor losses are smaller than the CFD investor losses. The CFD loss figures vary by market and by provider according to data reported by several NCAs⁽¹⁷⁾. The AFM analysis of the Dutch CFD market shows that 76% of CFD investors lose money and the average return is -/- EUR 1,201 in a twelve-month period⁽¹⁸⁾. This compares to 68% of turbo investors losing money and the average return of -/- EUR 2,680 in a thirteen-month period. While a higher percentage of CFD investors loses money, the average return on turbos is worse. In addition, the AFM notes that the UK Financial Conduct Authority (FCA) issued national product intervention measures capturing CFD-like options⁽¹⁹⁾, including turbo certificates, and that ESMA considered that this was justified and proportionate given the national specificities of the UK market⁽²⁰⁾. The AFM believes that this, in connection with the other reasons mentioned above, is enough for a product intervention similar to the ones applicable to CFDs. This conclusion is further supported by the fact that turbos seem to be on the rise in the Netherlands as demonstrated by the entry of new turbo providers, some of them also offering CFDs.

Discriminatory effect on services or activities provided from another Member States

58. The AFM does not believe that the national measures have a discriminatory effect on services or activities provided from another Member States (including indirect discriminatory effect) because the national 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.

Consultation with public bodies competent for the oversight, administration and regulation of physical agricultural markets

59. The AFM has no indications that turbos pose a serious threat to the orderly functioning and integrity of the national physical agricultural market. Nonetheless, the AFM consulted the Ministry of Agriculture, Nature and Food Quality, European Agriculture and Fisheries Policy and Food Security, which is the national public body competent for the oversight, administration and regulation of the physical agricultural market

¹⁷ See paragraph (35) of European Securities and Markets Authority Decision (EU) 2018/796 where the data of some NCAs are reported, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018X0601\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018X0601(02)).

¹⁸ See section 3.1.3 of AFM national product intervention measures CFD, <https://www.afm.nl/en/nieuws/2019/apr/binaire-opties-cfds-interventies>.

¹⁹ See the FCA press release <https://www.fca.org.uk/news/press-releases/fca-confirms-permanent-restrictions-sale-cfds-and-cfd-options-retail-consumers>.

²⁰ 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 Financial Conduct Authority of the United Kingdom, ESMA 35-43-1961.

under Council Regulation (EC) No 1234/2007 ⁽²¹⁾. This consultation did not lead to insights that would lead to different national measures.

Timely Notification

60. The AFM notified ESMA and the other NCAs of the national measures not less than one month before the measures are intended to take effect.

3. ESMA's assessment of the national measures' justification and proportionality

61. In its assessment of the justification and proportionality of the national measures, ESMA has taken into account (i) the reasons provided by the AFM in its notification of the national measures and in subsequent exchanges, as resulting from this opinion; (ii) the AFM's consultation paper, including the accompanying cost-benefit-analysis and the analysis of data provided on significant losses incurred by Dutch retail clients; (iii) the complexity of turbos; (iv) the lack of transparency in their pricing; and (v) the AFM's assessment of the turbo market in the Netherlands and its evolution.

62. In ESMA's measures ⁽²²⁾, ESMA acknowledged that turbos, despite differing in various respects from CFDs, also have similarities with CFDs and that ESMA and the NCAs would monitor whether detrimental consequences for retail clients similar to those observed in relation to CFDs would also arise in respect of products with similar or comparable features to CFDs. For the purposes of the national measures, ESMA has assessed the relevance of the AFM's supervisory experience, in particular the evidence concerning the significant losses of Dutch retail clients when investing in turbos and the recent expansion of the turbo retail market in the Netherlands.

63. Given these national specificities, ESMA considers that the national measures are justified and proportionate.

64. Furthermore, the AFM has considered less restrictive measures. However, such measures would not adequately address the significant investor protection concerns identified by the AFM in respect of the offer of turbos to retail clients in the Netherlands.

65. It is also noteworthy that the AFM does not propose to prohibit the marketing, distribution or sale of turbos to retail clients altogether. Instead, based on the national specificities which indicate that turbos are used by Dutch retail investors and are

²¹ 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. 1–149). ²² 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).

²² 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).

marketed, distributed and sold by firms in the Netherlands similarly to CFDs, the national measures propose restrictions calibrated to align with the measured protections offered by the CFD national product intervention measures ⁽²³⁾. The AFM therefore has not just opted for the most stringent product intervention measures but has duly taken into account proportionality considerations.

66. Finally, ESMA notes that the national measures do not apply to the marketing, distribution or sale of turbos to retail clients outside the Netherlands from providers authorised in the Netherlands. While ESMA is of the general view that retail clients should be effectively protected regardless of their location, ESMA has considered that the national measures aim to address the specific concerns identified by the AFM in respect of the turbo retail market in the Netherlands. Furthermore, ESMA has taken into account the capacity of the AFM to continue to closely monitor the market and the activity of turbo providers.

4. Conclusion

67. For the above-mentioned reasons, ESMA is of the opinion that the national measures are justified and proportionate.

68. As to whether the taking of measures should be considered by other national competent authorities, ESMA is of the opinion that insufficient evidence has been gathered so as to make such determination at this stage. Therefore, ESMA encourages national competent authorities to monitor these products at national level in order to assess whether similar risks for retail investors as those identified by the AFM could arise.

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

Done at Paris, 7 June 2021

For the Board of Supervisors
Anneli Tuominen
Interim Chair

[Signed]

²³ <https://www.afm.nl/en/nieuws/2019/apr/binaire-opties-cfds-interventies>.