

## PUBLIC STATEMENT

### Statement of ESMA on the application of product intervention measures under Article 40 and 42 of Regulation (EU) No. 600/2014 <sup>(1)</sup> (MiFIR) by CFD providers

#### 1 Introduction

1. The European Securities and Markets Authority (ESMA) is issuing this statement as a response to various practices and situations observed in the market and which raise concerns of non-compliance with the legal requirements applicable when providing services to retail clients. This statement is notably addressed to providers marketing, distributing or selling contracts for differences (CFDs)<sup>2</sup> to retail clients.
2. By Decision (EU) 2018/796<sup>3</sup>, the European Securities and Markets Authority (ESMA) temporarily restricted the marketing, distribution or sale of contracts for differences (CFDs) to retail clients. This Decision was further amended and renewed three times (Renewal Decisions<sup>4</sup>).
3. Moreover, pursuant to Article 42 of MiFIR, National Competent Authorities (NCAs) may use their own product intervention powers which – contrary to the ESMA’s measures – allow the adoption of permanent measures. Most NCAs have notified ESMA that they will adopt or have already adopted national product intervention measures on the basis of a significant investor protection concern raised by the offer of CFDs to retail clients and the likelihood this concern will persist in case no product intervention measures apply. References in this statement to circumvention practices to ESMA’s product intervention measures also apply to those intervention measures adopted by NCAs which are similar to ESMA’s measures.

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<sup>(1)</sup> 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).

<sup>(2)</sup> The Statement also addresses the providers of binary options, where applicable.

<sup>(3)</sup> 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).

<sup>(4)</sup> 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), 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), 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), 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).

4. ESMA's measures consist of restrictions to the marketing, distribution or sale of CFDs to retail clients and include: leverage limits on opening positions; a margin close-out rule on a per account basis; a negative balance protection on a per account basis; preventing the use of incentives by a CFD provider; and a firm specific standardised risk warning.
5. ESMA wishes to remind firms that the Decision (EU) 2018/796 and the Renewal Decisions are complemented by a set of Questions and Answers<sup>5</sup> (Product Intervention Q&As) to provide additional clarifications on the obligations of CFD Providers. Product intervention measures do not prejudice the application of other requirements imposed on firms by other applicable legislative requirements, including the requirements set out by Directive 2014/65/EC (MiFID II)<sup>6</sup> and MiFIR. Therefore, any document published by ESMA in accordance with MiFID II/MiFIR such as ESMA's Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics<sup>7</sup> (Investor Protection Q&As) should also be taken into account by CFD Providers.
6. This statement is published because ESMA still has serious concerns about firms' marketing, distribution or sale of CFDs to retail clients. For this reason, ESMA considers it necessary to remind CFD providers about some of the requirements connected with the offering of CFDs.

## **2 Professional clients on request**

7. Firms that market, distribute or sell CFDs to retail clients must comply with the restrictions set out in ESMA's product intervention Decision, Renewal Decisions and the product intervention measures from NCAs. These restrictions, as well as the prohibition on binary options<sup>8</sup>, do not apply to the provision of services to professional clients, including professional clients on request, and eligible counterparties.
8. When treating a retail client as a professional client on request, firms must comply with the criteria and procedures set out in Section II of Annex II of Directive 2014/65/EC. The Investor Protection Q&As, particularly section 11 thereof, provides further clarifications on the process for client categorisation. A retail client may request to be treated as a professional client when, in particular, the client submits a request in writing in accordance with all the requirements set out in the applicable legislation. Providers should ensure that they comply at all times with those requirements including those set out in Annex II, Section

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<sup>5</sup><https://www.esma.europa.eu/press-news/esma-news/esma-publishes-qas-in-relation-temporary-product-intervention-measures>

<sup>6</sup> 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 (See page 349 of this Official Journal).

<sup>7</sup> ESMA, Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics (3 October 2018, ESMA35-43-349)

<sup>8</sup> European Securities and Markets Authority Decision (EU) 2018/795 of 22 May 2018 to temporarily prohibit binary options 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. 36),

European Securities and Markets Authority Decision (EU) 2018/1466 of 21 September 2018 renewing and amending the temporary prohibition in Decision (EU) 2018/795 on the marketing, distribution or sale of binary options to retail clients (OJ L 245, 1.10.2018, p. 17), European Securities and Markets Authority Decision (EU) 2018/2064 of 14 December 2018 renewing the temporary prohibition on the marketing, distribution or sale of binary options to retail clients (OJ L 329, 27.12.2018, p. 27), and European Securities and Markets Authority Decision (EU) 2019/509 of 22 March 2019 renewing the temporary prohibition on the marketing, distribution or sale of binary options to retail clients (OJ L 85, 27.03.2019, p. 19).

II of Directive 2014/65/EU. This includes that providers should explicitly warn the clients of the loss of the protection given by the applicable CFD product intervention measures.

9. ESMA reported<sup>9</sup> an increase in the number of clients treated as professional clients on request by CFD providers. ESMA is aware that some CFD providers are advertising to retail clients the possibility to become professional clients on request.
10. As mentioned in Q&A 2 on client categorisation (see Investor Protection Q&A Section 11), investment firms should strictly refrain from implementing any form of practice that incentivises, induces or pressures an investor to request to be treated as a professional client. In this respect, any form of promotional language in relation to the status of professional client shall be seen as incentivising a retail client to request a professional client status. Some examples of such a wording are:
  - “Benefit with your status as a professional client”
  - “Enjoy higher leverage as a Pro”
  - “Professional client – a smart choice for experienced traders”
11. Providers of CFDs should also consider the context in which language appearing as purely informative is provided. For instance, ESMA considers that providing a comparison between leverage limits available to different types of clients would qualify as an incentivisation. Also, the promise or the provision of any form of monetary or non-monetary benefit as a “reward” for becoming a professional client will be seen as an inappropriate practice.
12. Further, it is to be reminded that, according to MiFID II Annex II Section II.1., a firm may treat a retail client as a professional client on request only if an adequate assessment of the expertise, experience and knowledge of the client gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making investment decisions and understanding the risks involved. Before deciding to accept any request for a waiver, investment firms must be required to take all reasonable steps to ensure that the client requesting to be treated as a professional client meets the relevant requirements stated in Section II.1.
13. In this regard, the Investor Protection Q&A Section 11, Question and Answer 3 in relation to the “adequate assessment” of the client’s request and to “all reasonable steps” taken for client categorisation, highlights (inter alia) that (i) the fulfilment by a private individual investor of two of the criteria provided in the fifth paragraph of Sub-Section II is just an indication that such client may be treated as a professional client; and that, (ii) accordingly, a firm should not automatically accept to treat as professional clients those who do meet two or more of these criteria.

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<sup>9</sup> See recital (7) of the ESMA Decision (EU) 2019/679 and relevant recitals of the previous Renewal Decision.

14. Therefore, in light of the high complexity of CFDs, it is expected that CFD providers do not base their assessment only on these criteria but also run an appropriate complementary assessment in order to have reasonable assurance that the client is capable to make investment decisions and understands the risks involved.

### **3 Marketing, distribution or sale by third-country CFD-Providers.**

15. In the absence of authorisation or registration in the Union in accordance with MiFIR or to the national third-country regimes in force in various Member States, third-country firms are only allowed to provide services to clients in the Union at the client's own exclusive initiative. As provided in recital 111 of MiFID II, and as also mentioned in the Investor Protection Q&As section 13, "where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client". ESMA has also clarified that "every communication means used such as press releases, advertising on internet, brochures, phone calls or face-to-face meetings should be considered to determine if the client or potential client has been subject to any solicitation, promotion or advertising in the Union on the firm's investment services or activities or on financial instruments". Client solicitation by a CFD provider cannot be ruled out based on the sole fact that a potential client filled out a form requesting personal information and returned the form to such a provider, including situations in which the potential client previously requested more general information from the provider.
16. Firms are also reminded that Article 3 of Decision (EU) 2018/796 and the Renewal Decisions prohibits firms from participating, knowingly and intentionally, "in activities the object or effect of which is to circumvent the requirements in Article 2, including by acting as a substitute for the CFD provider."
17. ESMA is aware that some third-country firms are marketing CFDs that do not comply with ESMA's measures to retail clients in the Union, particularly through online advertising, and that EU firms are engaged in activities that are intended to circumvent ESMA's temporary product intervention measures.
18. Furthermore, it was observed that some CFD providers established in the Union are marketing the possibility for retail clients to move their accounts to an intra-group third-country entity. Information in relation to the 'benefits' of trading CFDs with such an intra-group third-country entity could be seen as a circumvention of ESMA's product intervention measures by the EU authorised firm or a solicitation of retail clients or potential clients, promotion or advertising of investment services in the Union by the third-country entity. As clarified in Q&A 1 of section 13 of ESMA's Q&A document on 'MiFID II and MiFIR investor protection and intermediaries topics', "ESMA is of the view that such a solicitation, promotion or advertising should be considered regardless of the person through whom it is issued: the third-country firm itself, an entity acting on its behalf or having close links with such third-country firm or any other person acting on behalf of such entity".

19. Some examples of this include:

- EU firms comparing the different leverage available with intra-group third-country entities on their EU website;
- Automatically re-directing EU retail clients to the third-country website of an intra-group entity when the clients entered an EU website address or searched for an EU entity through internet search engines; and
- Third-country intra-group firms using online marketing platforms that target potential retail clients located in the Union based on the clients' IP address advertising the availability to trade CFDs with higher leverage.

20. Intra-group marketing sometimes could occur on a common webpage of a group that includes information on the activities and the structure of the group, as well as of the entities forming the group. The information presented on a common webpage of a group should not incentivise retail clients to start trading with an intra-group firm established in a non-EU jurisdiction, for example by proposing as a default option the opening with that firm of an account to trade CFDs at higher leverage limits than those set out in ESMA's product intervention measures.

21. A good practice on the other hand would be implementing a communication/warning, that would pop-up when the EU client enters a group website, stating that the client is connecting from the EU and therefore he/she should enter the website of the EU entity that is subject to the product intervention measures, and not the group website or any other non-EU entity.

22. Promotional or incentivising language about the possibility to open an account with a third-country entity shall be seen as a marketing towards the client located in the EU, for example marketing the possibility to open an account where CFDs with higher leverage limits can be traded. By analogy, even if the language of a communication is purely informative, the information itself may have a promotional character given the broader context. CFD providers are not allowed to market CFDs to retail clients in the Union that do not comply with the requirements from ESMA's or national product intervention measures.

#### **4 Conclusion**

23. Firms must ensure that they are compliant with all applicable legislative requirements and with the relevant product intervention Decisions, taking into consideration clarifications provided in relevant Q&As and the content of this statement. ESMA and NCAs will continue to monitor compliance of CFD providers with the product intervention Decisions. Furthermore, both ESMA and NCAs will monitor the issues set out in this statement and consider whether further action is required.