

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**

THE EUROPEAN SECURITIES AND MARKETS AUTHORITY BOARD OF SUPERVISORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 ⁽¹⁾, and in particular Articles 9(5), 43(2) and 44(1) thereof,

Having regard to 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 ⁽²⁾, and in particular Article 40 thereof,

Having regard to 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 ⁽³⁾, and in particular Article 19 thereof,

Whereas:

1. By Decision (EU) 2018/795 ⁽⁴⁾, the European Securities and Markets Authority (ESMA) prohibited the marketing, distribution or sale of binary options to retail clients with effect from 2 July 2018 for a period of three months.
2. 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.
3. By Decision (EU) 2018/1466 ⁽⁵⁾, ESMA renewed and amended the temporary prohibition on the marketing, distribution or sale of binary options to retail clients with effect from 2 October 2018. By Decision (EU) 2018/2064 ⁽⁶⁾, ESMA further renewed the temporary prohibition on the marketing, distribution or sale of binary option to retail clients on the same terms as Decision (EU) 2018/1466, with effect from 2 January 2019 for a period of three months.
4. ESMA's further review of the prohibition on binary options has been informed by, inter alia, a survey amongst national competent authorities ⁽⁷⁾ (NCAs) on the practical application and impact of the product intervention measure as well as additional information provided by NCAs and stakeholders.
5. NCAs detected only limited examples of non-compliance with the ESMA product intervention measures. Furthermore, no new authorisations have been provided to firms that market, distribute or sell binary options since the announcement of the agreed measures on 27 March 2018.

⁽¹⁾ OJ L 331, 15.12.2010, p. 84.

⁽²⁾ OJ L 173, 12.6.2014, p. 84.

⁽³⁾ OJ L 87, 31.3.2017, p. 90.

⁽⁴⁾ European Securities and Markets Authority Decision (EU) 2018/795 of 22 May 2018 to temporarily prohibit the marketing, distribution or sale of binary options to retail clients 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. 31).

⁽⁵⁾ 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).

⁽⁶⁾ 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).

⁽⁷⁾ 20 NCAs have responded: Financial Market Authority (AT-FMA), Bundesanstalt für Finanzdienstleistungsaufsicht (DE-BaFin), Finanstilsynet (DK-Finanstilsynet), Hellenic Capital Markets Commission (EL-HCMC), Comisión Nacional del Mercado de Valores (ES-CNMV), Finantsinspeksioon (EE-FSA), Finnish Financial Supervisory Authority (FI-FSA), Autorité des Marchés Financiers (FR-AMF), Magyar Nemzeti Bank (HU-MNB), Central Bank of Ireland (IE-CBI), Commission de Surveillance du Secteur Financier (LU-CSSF), Finanšu un kapitāla tirgus komisija (LV-FKTK), Malta Financial Services Authority (MT-MFSA), Autoriteit Financiële Markten (NL-AFM), Komisja Nadzoru Finansowego (PL-KNF), Comissão do Mercado de Valores Mobiliários (PT-CMVM), Finansinspektionen (SE- Finansinspektionen), Agencija za trg vrednostnih papirjev (SI-ATVP), National Bank Slovakia (NBS-SK), Financial Conduct Authority (UK-FCA).

6. ESMA is aware that some third-country firms are actively approaching Union clients. However, without authorisation or registration in the Union, these firms are only allowed to offer services to clients established or situated in the Union at the client's own exclusive initiative. ESMA is also aware that firms are starting to provide other speculative investment products. ESMA will continue to monitor the offer of these other products to determine whether any other Union measures are appropriate.
7. Since the adoption of Decision (EU) 2018/795, ESMA did not obtain evidence contradicting its overall finding of a significant investor protection concern identified in Decision (EU) 2018/795, Decision (EU) 2018/1466 or Decision (EU) 2018/2064 (Decisions). ESMA has therefore concluded that the significant investor protection concern identified in the Decisions would persist if the temporary prohibition on the marketing, distribution or sale of binary options to retail clients is not renewed.
8. Moreover, the applicable existing regulatory requirements under Union law have not changed and continue not to address the threat identified by ESMA. Furthermore, NCAs have not taken action to address the threat or the actions taken do not adequately address the threat. In particular, since the adoption of Decision (EU) 2018/795, no NCA has adopted its own national product intervention measure under Article 42 of Regulation (EU) No 600/2014 ⁽⁸⁾.
9. The renewal of the prohibition does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action and does not create a risk of regulatory arbitrage for the same reasons set out in the Decisions.
10. If the temporary prohibition is not renewed, ESMA continues to consider it likely that binary options will again be offered to retail clients and that the same or similar products will return to the market that gave rise to the consumer detriment identified in the Decisions.
11. In view of these reasons, taken together with the reasons set out in the Decisions, ESMA has decided to renew the prohibition on the same terms as those set out in Decision (EU) 2018/1466 and Decision (EU) 2018/2064 for a further three-month period to address the significant investor protection concern.
12. As the proposed measures may, to a limited extent, relate to agricultural commodities derivatives, ESMA has consulted the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Council Regulation (EC) No 1234/2007 ⁽⁹⁾. None of those bodies has raised any objections to the proposed renewal of the measures.
13. ESMA has notified NCAs of the proposed renewal Decision,

HAS ADOPTED THIS DECISION:

Article 1

Temporary prohibition on binary options in respect of retail clients

1. The marketing, distribution or sale to retail clients of binary options is prohibited.
2. For the purposes of paragraph 1, irrespective of whether it is traded on a trading venue, a binary option is a derivative that meets the following conditions:
 - (a) it must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;
 - (b) it only provides for payment at its close-out or expiry;

⁽⁸⁾ On 4 June 2018, a competent authority of an EEA EFTA State, NO-Finanstilsynet, adopted national product intervention measures that have the same terms and dates of application of ESMA's measures. Furthermore, on 5 July 2018, the Financial Supervisory Authority of Iceland published that it considers the marketing, distribution or sale of binary options to be contrary to proper and sound business procedures and practices in securities trading according to its national law (Article 5 of Act No 108/2007 on Securities Transactions). Furthermore, on 6 July 2018 in Romania national law started to apply that has similar terms as ESMA's measures.

⁽⁹⁾ 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).

- (c) its payment is limited to:
- (i) a predetermined fixed amount or zero if the underlying of the derivative meets one or more predetermined conditions; and
 - (ii) a predetermined fixed amount or zero if the underlying of the derivative does not meet one or more predetermined conditions.
3. The prohibition in paragraph 1 does not apply to:
- (a) a binary option for which the lower of the two predetermined fixed amounts is at least equal to the total payment made by a retail client for the binary option, including any commission, transaction fees and other related costs;
 - (b) a binary option that meets the following conditions:
 - (i) the term from issuance to maturity is at least 90 calendar days;
 - (ii) a prospectus drawn up and approved in accordance with Directive 2003/71/EC of the European Parliament and of the Council ⁽¹⁰⁾ is available to the public; and
 - (iii) the binary option does not expose the provider to market risk throughout the term of the binary option and the provider or any of its group entities do not make a profit or loss from the binary option, other than previously disclosed commission, transaction fees or other related charges.

Article 2

Prohibition of participating in circumvention activities

It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the requirements in Article 1, including by acting as a substitute for the binary option provider.

Article 3

Entry into force and application

1. This Decision enters into force on the day following that of its publication in the *Official Journal of the European Union*.
2. This Decision shall apply from 2 April 2019 for a period of 3 months.

Done at Paris, 22 March 2019.

For the Board of Supervisors
Steven MAIJOR
The Chair

⁽¹⁰⁾ 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 (OJ L 345, 31.12.2003, p. 64).