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

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) 2018/796 ([4]), the European Securities and Markets Authority (ESMA) restricted the marketing, distribution or sale of contracts for differences (CFDs) to retail clients with effect from 1 August 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) 2018/1636 ([5]), ESMA renewed and amended the temporary restriction on the marketing, distribution or sale of CFDs to retail clients with effect from 1 November 2018 for a period of three months. By Decision (EU) 2019/155 ([6]), ESMA renewed again the temporary restriction on the marketing, distribution or sale of CFDs to retail clients on the same terms as Decision (EU) 2018/1636, with effect from 1 February 2019 for a period of three months.

(4) ESMA's further review of the restriction on CFDs has been informed by, *inter alia*, a survey among 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. This information presents similar trends as the information which led to the previous renewal, Decision (EU) 2019/155.

(5) NCAs detected only limited examples of non-compliance with the ESMA product intervention measure, which mainly related to the risk warnings, notably CFD providers displaying internet banners or other electronic advertisements which did not contain the required risk warning. While internet banners or other electronic

([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) 2018/796 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).
([5]) 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).
([6]) 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).
([7]) 20 NCAs have responded: Financial Market Authority (AT — FMA), Cyprus Securities and Exchange Commission (CY —CySEC), Bundesanstalt für Finanzdienstleistungsaufsicht (DE — BaFiN), Finanstilsynet (DK — Finanstilsynet), Hellenic Capital Markets Commission (EL — HCMC), Comisión Nacional del Mercado de Valores (ES — CNMV), Finnish Financial Supervisory Authority (FI — FSA), Autorité des Marchés Financiers (FR — AMF), Magyar Nemzeti Bank (HU — MNB), Central Bank of Ireland (IE — CBI), Commissione Nazionale per le Società e la Borsa (IT — Consob), 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), Romanian Financial Supervisory Authority (RO — FSA), Finansinspektionen (SE — Finansinspektionen), Financial Conduct Authority (UK — FCA).

advertisements typically did not refer explicitly to CFDs but rather to online investment activities, NCAs and ESMA will continue monitoring their compliance with the risk warning requirements and that they are not used as a means of circumvention.

(6) NCAs reported an overall decrease in the number of CFD retail client accounts, trading volume and total retail client equity over the three months from November 2017 to January 2018 (first period) in comparison with November 2018 to January 2019 (second period). The share of profitable accounts remained broadly stable when comparing these periods ([8]). The average costs incurred by retail clients while trading CFDs, which appear to be less dependent on market conditions than the overall client outcomes, were significantly lower in the second period in comparison to the first period ([9]). Average costs in respect of active retail accounts containing CFDs on cryptocurrencies fell disproportionately in comparison to others, though such accounts continued to incur higher costs than accounts with no cryptocurrency exposure. Finally, NCAs reported a sustained decrease in the number of automatic close-outs, the number of times accounts went into negative equity and the size of negative equity balances for retail client accounts ([10]).

(7) NCAs also reported an increase in the number of clients treated as professional clients on request in the second period in comparison with the first period. ESMA is aware that some CFD providers are advertising to retail clients the possibility of becoming professional clients on request. However, 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 ([11]). ESMA is also aware that some third-country firms are actively approaching Union clients or that some CFD providers in the Union are marketing the possibility for retail clients to move their accounts to an intra-group third-country entity. However, without authorisation or registration in the Union, third-country firms are only allowed to offer services to clients established or situated in the Union at the client's own exclusive initiative. Finally, ESMA is 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.

(8) Since the adoption of Decision (EU) 2018/796, ESMA did not obtain evidence contradicting its overall finding of a significant investor protection concern identified in Decision (EU) 2018/796, Decision (EU) 2018/1636 or Decision (EU) 2019/155 (Decisions). ESMA has therefore concluded that the significant investor protection concern identified in the Decisions would persist if the temporary restriction on the marketing, distribution or sale of CFDs to retail clients is not renewed.

(9) 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. This continues to be a pan-European concern. Therefore, ESMA considers that, without additional NCAs taking national product intervention measures, a further renewal of ESMA's measure is needed for the significant investor protection concern identified in the Decisions to be adequately addressed.

(10) The renewal of the restriction 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.

([8]) The share of profitable retail client accounts increased in January 2019, a development that may be associated with market conditions.
([9]) This is consistent with observed decreases in total trade volumes on which spreads and fees are typically calculated. Average client equity increased slightly among active retail client accounts, though this was a significantly smaller change in percentage terms than the decrease in total trade volumes and total exposure for these accounts.
([10]) In the second period, the negative balance protection was applicable. However, market gapping can lead to the client initially being closed out at a price that creates negative equity, with the account then re-credited back to zero equity by the provider to meet the new requirement of negative balance protection. This was also the case for those providers that offered negative balance protection in the first period.
([11]) Annex II, Section II of 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). See also Section 11 of ESMA's Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics (ESMA35-43-349), where ESMA has identified forms of practices that investment firms should not use when applying the legal requirements on the categorisation of clients as professionals on request. Section 11 was last updated on 25 May 2018.

(11) If the temporary restriction is not renewed, ESMA continues to consider it likely that CFDs will again be offered to retail clients without adequate measures to sufficiently protect them against the risks related to those products that gave rise to the consumer detriment identified in the Decisions.

(12) In view of these reasons, taken together with the reasons set out in the Decisions, ESMA has decided to renew the restriction on the same terms as those set out in Decision (EU) 2018/1636 and Decision (EU) 2019/155 for a further three-month period to address the significant investor protection concern.

(13) 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 ([12]). None of those bodies has raised any objections to the proposed renewal of the measures.

(14) ESMA has notified NCAs of the proposed renewal Decision,

HAS ADOPTED THIS DECISION

Article 1

Definitions

For the purposes of this Decision:

(a) '*contract for differences*' or '*CFD*' means a derivative other than an option, future, swap or forward rate agreement, the purpose of which is to give the holder a long or short exposure to fluctuations in the price, level or value of an underlying, irrespective of whether it is traded on a trading venue, and that 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) '*excluded non-monetary benefit*' means any non-monetary benefit other than, insofar as they relate to *CFDs*, information and research tools;

(c) '*initial margin*' means any payment for the purpose of entering into a *CFD*, excluding commission, transaction fees and any other related costs;

(d) '*initial margin protection*' means the *initial margin* determined by Annex I;

(e) '*margin close-out protection*' means the closure of one or more of a retail client's open *CFDs* on terms most favourable to the client in accordance with Articles 24 and 27 of Directive 2014/65/EU when the sum of funds in the *CFD* trading account and the unrealised net profits of all open CFDs connected to that account falls to less than half of the total *initial margin protection* for all those open *CFDs*;

(f) '*negative balance protection*' means the limit of a retail client's aggregate liability for all *CFDs* connected to a *CFD* trading account with a *CFD* provider to the funds in that *CFD* trading account.

Article 2

Temporary restriction on CFDs in respect of retail clients

The marketing, distribution or sale to retail clients of *CFDs* is restricted to circumstances where at least all of the following conditions are met:

(a) the *CFD* provider requires the retail client to pay the *initial margin protection*;

(b) the *CFD* provider provides the retail client with the *margin close-out protection*;

(c) the *CFD* provider provides the retail client with the *negative balance protection;*

([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).

(d) the *CFD* provider does not directly or indirectly provide the retail client with a payment, monetary or *excluded non-monetary benefit* in relation to the marketing, distribution or sale of a *CFD*, other than the realised profits on any *CFD* provided; and

(e) the *CFD* provider does not send directly or indirectly a communication to or publish information accessible by a retail client relating to the marketing, distribution or sale of a *CFD* unless it includes the appropriate risk warning specified by and complying with the conditions in Annex II.

Article 3

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 2, including by acting as a substitute for the *CFD* provider.

Article 4

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 1 May 2019 for a period of 3 months.

Done at Paris, 17 April 2019.

For the Board of Supervisors

Steven MAIJOOR

The Chair

ANNEX I

INITIAL MARGIN PERCENTAGES BY TYPE OF UNDERLYING

(a) 3,33 % of the notional value of the *CFD* 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) 5 % of the notional value of the *CFD* 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);

(ii) a currency pair composed of at least one currency that is not listed in point (a) above; or

(iii) gold;

(c) 10 % of the notional value of the *CFD* when the underlying commodity or equity index is a commodity or any equity index other than those listed in point (b) above;

(d) 50 % of the notional value of the *CFD* when the underlying is a cryptocurrency; or

(e) 20 % of the notional value of the *CFD* when the underlying is:

(i) a share; or

(ii) not otherwise listed in this Annex.

ANNEX II

RISK WARNINGS

SECTION A

Risk warning conditions

1. The risk warning shall be in a layout ensuring its prominence, in a font size at least equal to the predominant font size and in the same language as that used in the communication or published information.

2. If the communication or published information is in a durable medium or a webpage, the risk warning shall be in the format specified in Section B.

3. If the communication or published information is in a medium other than a durable medium or a webpage, the risk warning shall be in the format specified in Section C.

4. By way of derogation to paragraphs 2 and 3, if the number of characters contained in the risk warning in the format specified in Section B or C exceeds the character limit permitted in the standard terms of a third party marketing provider, the risk warning may instead be in the format specified in Section D.

5. If the risk warning in the format specified in Section D is used, the communication or published information shall also include a direct link to the webpage of the CFD provider containing the risk warning in the format specified in Section B.

6. The risk warning shall include an up-to-date provider-specific loss percentage based on a calculation of the percentage of *CFD* trading accounts provided to retail clients by the *CFD* provider that lost money. The calculation shall be performed every three months and cover the 12-month period preceding the date on which it is performed ('12-month calculation period'). For the purposes of the calculation:

   a. an individual retail client *CFD* trading account shall be considered to have lost money if the sum of all realised and unrealised net profits on *CFDs* connected to the *CFD* trading account during the 12-month calculation period is negative;

   b. any costs relating to the *CFDs* connected to the *CFD* trading account shall be included in the calculation, including all charges, fees and commissions;

   c. the following items shall be excluded from the calculation:

      i. any *CFD* trading account that did not have an open *CFD* connected to it within the calculation period;

      ii. any profits or losses from products other than *CFDs* connected to the *CFD* trading account;

      iii. any deposits or withdrawals of funds from the *CFD* trading account.

7. By way of derogation from paragraphs 2 to 6, if in the last 12-month calculation period a *CFD* provider has not provided an open *CFD* connected to a retail client *CFD* trading account, that *CFD* provider shall use the standard risk warning in the format specified in Sections E to G, as appropriate.

SECTION B

Durable medium and webpage provider-specific risk warning

CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage. **[*insert percentage per provider*] % of retail investor accounts lose money when trading CFDs with this provider.** You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.

SECTION C

Abbreviated provider-specific risk warning

[*insert percentage per* provider] % of retail investor accounts lose money when trading CFDs with this provider.
You should consider whether you can afford to take the high risk of losing your money.

SECTION D

Reduced character provider-specific risk warning

[*insert percentage per* provider] % of retail CFD accounts lose money.

SECTION E

Durable medium and webpage standard risk warning

CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage.
Between 74-89 % of retail investor accounts lose money when trading CFDs.
You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.

SECTION F

Abbreviated standard risk warning

Between 74-89 % of retail investor accounts lose money when trading CFDs.
You should consider whether you can afford to take the high risk of losing your money.

SECTION G

Reduced character standard risk warning

74-89 % of retail CFD accounts lose money.