



European Securities and  
Markets Authority

# Final Report

**ESMA's Technical Advice to the Commission on the effects of product  
intervention measures**



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## Acronyms and definitions used

AIFs	Alternative Investment Funds
AIFM	Alternative Investment Fund Manager
AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010
CFDs	Contracts for Differences
EBA	European Banking Authority
EC	European Commission
EIOPA	European Insurance and Occupational Pensions Authority
ESA	European Supervisory Authorities
ESMA	European Securities and Markets Authority
EU	European Union
MiFID II	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
MiFIR	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
MTF	Multilateral Trading Facilities
NCA	National Competent Authority
NPIM	National product intervention measure
OJ	Official Journal of the European Union
OTC	Over the counter
PRIIPs	Packaged Retail and Insurance-Based Investment Products
Q&A	Question and Answer
SMSG	Securities and Markets Stakeholders Group
UCITS	Undertakings for Collective Investment in Transferable Securities

# 1. Executive Summary

## Reasons for publication

In 2018, following the entry into application of new legislation in the European Union, Regulation (EU) No 600/2014 (“MiFIR”), ESMA was given the power to temporarily prohibit or restrict the marketing, distribution or sale of certain financial instruments, financial instruments with certain specified features or a type of financial activity or practice (product intervention). Given the investor detriment caused by binary options and contracts for differences (CFDs), ESMA temporarily prohibited the marketing, distribution and sale of binary options to retail clients and temporarily imposed a set of restrictions in relation to CFDs marketed, distributed or sold to retail clients.

The temporary product intervention measures of ESMA started to apply on 2 July 2018 for binary options and 1 August 2018 for CFDs. Following three consecutive renewals, these temporary measures expired on 1 July 2019 for binary options and 31 July 2019 for CFDs. Nearly all National Competent Authorities in the EU have now taken national product intervention measures in order to address, in a permanent way, the investor protection concerns arising from these products.

Article 90 of Directive 2014/65/EU (“MiFID II”) provides that the European Commission (“Commission”) shall, after consulting the European Securities and Markets Authority (“ESMA”), present a report to the European Parliament and the Council on certain aspects of the functioning of MiFID II and of MiFIR.

ESMA received a formal request (mandate) from the Commission on 23 May 2019 to provide technical advice on a number of technical issues stemming from MiFID II and MiFIR, including certain investor protection topics. The mandate is available on the Commission website<sup>1</sup>. One of the technical issues is ESMA’s experience with the new product intervention powers, including the practical effects of the measures.

## Contents

This final report deals with technical advice in relation to ESMA’s experience with the new product intervention powers, taking into account the number of times the mechanism was triggered. In this respect, in the mandate from the Commission, ESMA was requested to focus on:

- The practical effects of the measures adopted by ESMA on market participants and their clients;
- An overview of the measures taken at national level, be those replicating ESMA’s as well as other measures that may go beyond ESMA’s action at European level; and

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<sup>1</sup> Available at: [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/190523-mifid-mifir-esma-technical-advice-request\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190523-mifid-mifir-esma-technical-advice-request_en.pdf).

- Other areas in which ESMA might consider adopting more product intervention measures in the near future or in the long term.

This report summarises the feedback received to the call for evidence published by ESMA on 30 September 2019<sup>2</sup> and provides ESMA's reply. Furthermore, as part of its technical advice, ESMA identified in chapter 6 the areas in which legislative changes might be appropriate in relation to the product intervention framework following ESMA's experience and the feedback from respondents to the call for evidence.

## **Next Steps**

The final report will be submitted to the European Commission. The Commission will present a report to the European Parliament and the Council on the topic of product intervention.

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<sup>2</sup> Available at: [https://www.esma.europa.eu/sites/default/files/library/esma-35-43-2090\\_call\\_for\\_evidence\\_on\\_mifid\\_ii\\_product\\_intervention\\_powers.pdf](https://www.esma.europa.eu/sites/default/files/library/esma-35-43-2090_call_for_evidence_on_mifid_ii_product_intervention_powers.pdf) .

The public responses to the call for evidence have been published and are available at: <https://www.esma.europa.eu/press-news/consultations/effects-product-intervention-measures-regarding-cfds-and-binary-options>

## 2. MiFIR framework for banning or restricting certain products or services

### Background and mandate

1. The Markets in Financial Instruments Regulation (EU) No 600/2014<sup>3</sup> (MiFIR) introduced product intervention powers for National Competent Authorities (NCAs), the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA)<sup>4</sup>. The product intervention powers allow NCAs and ESMA to prohibit or restrict (i) the marketing, distribution or sale of financial instruments or financial instruments with certain specified features or (ii) a type of financial activity or practice. MiFIR also introduced product intervention powers for EBA in relation to structured deposits.
2. For the purpose of this document, we consider the product intervention powers set out in Article 40 (ESMA temporary intervention powers) and Article 42 (Product intervention by competent authorities) of MiFIR.
3. MiFIR and the Commission Delegated Regulation (EU) 2017/567<sup>5</sup> specify the conditions that have to be met to use the product intervention powers. While the specific conditions applicable to ESMA's and NCAs' product intervention powers may slightly differ, in essence these conditions are designed to ensure that the powers are used where, in addition to other conditions, a product, an activity or practice poses a significant investor protection concern, a threat to the orderly functioning and integrity of the financial markets or commodity markets or a threat to financial stability.
4. A prohibition or restriction taken by ESMA shall be reviewed at appropriate intervals and at least every three months and shall expire after three months, if not renewed (Article 40(6) of MiFIR). As part of the recent legislative package in relation to the review of the operations of the European Supervisory Authorities (ESAs), the temporary nature of the product intervention powers of ESMA has been amended. The new Article 40(6) of MiFIR will require ESMA to review a prohibition or restriction at least every six months. Furthermore, following at least two consecutive renewals and based on an analysis of the impact on consumers, ESMA will be able to decide to renew the measure on an annual basis.
5. Article 40(2) and Article 42(2) of MiFIR clarify that the product intervention powers can also be used on a precautionary basis before a financial instrument has been marketed, distributed or sold to clients.
6. An NCA may take product intervention measures that apply in or from that Member State as set out in Article 42(1) of MiFIR. This enables a given NCA to address the threats caused by firms authorised in that jurisdiction or the threats caused by firms authorised elsewhere and providing services or activities in that particular jurisdiction. In order to properly assess the consequences of a national product intervention measure, an NCA

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<sup>3</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>4</sup> The European Insurance and Occupational Pensions Authority (EIOPA) has similar product intervention powers in relation to certain insurance products following from Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p.1).

<sup>5</sup> Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions (OJ L 87, 31.3.2017, p. 90).

that intends to take a measure is required to consult *inter alia* the NCAs in other Member States that may be significantly affected by the action (Article 42(2)(d)).

7. NCAs shall notify the details of a national product intervention measure they intend to take to all other NCAs and ESMA in writing not less than one month before the measure is intended to take effect (Article 42(3) of MiFIR). For NCAs, in exceptional cases, there is the possibility to take urgent action on a provisional basis as set out in Article 42(4) of MiFIR.
8. As part of its coordination role, ESMA shall assess that the action taken by an NCA is justified and proportionate and that, where appropriate, a consistent approach is taken by NCAs (Article 43(1) of MiFIR). More specifically, as set out in Article 43(2), ESMA shall adopt an opinion on whether the proposed national product intervention measure is justified and proportionate and whether ESMA considers that it is necessary that other NCAs take measures to address the risk. This opinion shall be published on ESMA's website.
9. The relevant NCA shall immediately publish on its website a notice fully explaining the reasons for its actions when it intends to take or takes action contrary to an opinion adopted by ESMA or declines to take action contrary to such an opinion (Article 43(3) of MiFIR).
10. The above regulatory framework started to apply on 3 January 2018.
11. In the context of the reports and review foreseen under the Markets in Financial Instruments Directive 2014/65/EU (MiFID II)<sup>6</sup>, the Commission shall, after consulting ESMA, present a report to the European Parliament and the Council on, *inter alia*, “*the experience with the mechanism for banning certain products or practices, taking into account the number of times the mechanisms have been triggered and their effects*” (Article 90(1)(d) of MiFID II).
12. On 23 May 2019, the European Commission addressed a mandate to ESMA with the following specifications:

#### **Extract from the Commission's mandate for advice**

*ESMA is therefore invited to provide technical input to the Commission on [...] the experience with the mechanism for banning certain products or practices, taking into account the number of times the mechanisms have been triggered and their effects.*

*The Commission has followed the procedure leading to the adoption of temporary product intervention measures on binary options and Contracts for Differences (CFDs) by ESMA. As these measures first became applicable in summer 2018, it is due time to have a closer look at the practical effects of the measures on market participants and clients.*

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<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 (OJ L 173, 12.6.2014, p. 349).

*On this basis, ESMA should not only refer to the measures it has taken but also provide a clear and complete overview of the measures taken at national level, be it those replicating ESMA's as well as other measures that may go beyond ESMA's actions at European level.*

*In light of the upcoming changes on product intervention rules due to the review of the European System of Financial Supervision, ESMA is also invited to inform the Commission on other areas in which ESMA might consider adopting more product intervention measures in the near future or in the long term.*



### 3. ESMA's product intervention measures under Article 40 of MiFIR

#### Background

13. Following the introduction of the product intervention powers on 3 January 2018, ESMA adopted product intervention measures in relation to the marketing, distribution or sale of contracts for differences and binary options to retail clients. On 1 June 2018, the first ESMA product intervention measures were published in the Official Journal of the European Union<sup>7</sup>. The measure in relation to binary options started to apply on 2 July 2018 and the measures in relation to CFDs on 1 August 2018.
14. The product intervention decisions set out in detail the reasons and evidence that ESMA analysed when taking the measures. The measures included a temporary prohibition of the marketing, distribution or sale of binary options to retail clients and temporary restrictions on the marketing, distribution or sale of CFDs to retail clients.
15. The restrictions in relation to CFDs consisted of:
  - i. Leverage limits on the opening of a position by a retail client from 30:1 to 2:1, which varied according to the volatility of the underlying:
    1. 30:1 for major currency pairs;
    2. 20:1 for non-major currency pairs, gold and major indices;
    3. 10:1 for commodities other than gold and non-major equity indices;
    4. 5:1 for individual equities and other reference values;
    5. 2:1 for cryptocurrencies;
  - ii. A margin close out rule on a per account basis, in order to standardise the percentage of margin (at 50% of minimum required margin) at which providers were required to close out one or more retail client's open CFDs;
  - iii. Negative balance protection on a per account basis, in order to provide an overall guaranteed limit on retail client losses;
  - iv. A restriction on the incentives offered to trade CFDs; and
  - v. A standardised risk warning, including the percentage of losses on a CFD provider's retail investor accounts.
16. The initial product intervention measures in relation to the marketing, distribution or sale of binary options and CFDs to retail clients have been reviewed and renewed three times in accordance with Article 40(6) of MiFIR. Since the ESMA temporary product intervention measures have not further been renewed, they have expired<sup>9</sup>.
17. During its first review of the product intervention measure regarding binary options, ESMA considered the specific features of binary options within the scope of the original

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<sup>7</sup> 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).

<sup>8</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>9</sup> See for binary options: <https://www.esma.europa.eu/press-news/esma-news/esma-ceases-renewal-product-intervention-measure-relating-binary-options> and see for CFDs: <https://www.esma.europa.eu/press-news/esma-news/esma-ceases-renewal-product-intervention-measures-relating-contracts>

measures and amended and renewed its prohibition in order to exclude a limited sub-set of binary options<sup>10</sup> from the scope of the measures<sup>11</sup>.

18. During its first review of the product intervention measures regarding CFDs, ESMA obtained information that the application of the prescribed risk warnings was causing technical difficulties due to certain character limitations imposed by third party marketing providers. For this reason, ESMA introduced an additional reduced character risk warning when it amended and renewed its measures<sup>12</sup>.
19. The reviews of ESMA's product intervention measures have been informed by surveys among NCAs on the practical application and impact of the product intervention measures as well as additional information provided by NCAs and stakeholders.

### **Effects of ESMA's product intervention measures**

20. As part of its review ESMA reported in its renewal decisions relevant outcomes of the application of the expiring measures. With regard to binary options, it emerged that there were no new authorisations of firms offering binary options to retail clients and NCAs reported limited numbers of non-compliance in relation to the prohibition to market, distribute or sell binary options to retail clients. In general, there is no longer an authorised binary options market for retail clients in the EU.
21. For CFDs, NCAs reported an overall decrease in the number of CFD retail client accounts, trading volume and total retail client equity when comparing the reporting period with the same period a year earlier (when the CFD measures were not applicable). The share of profitable retail client accounts remained broadly stable, and the average costs incurred by retail clients while trading CFDs were significantly lower in the periods after the introduction of the ESMA measures. Average costs in respect of active retail accounts containing CFDs on cryptocurrencies fell significantly 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.
22. NCAs reported that, both for binary options and for CFDs, there has been an increase in the number of clients treated as professional clients on request. For binary options, this number was relatively small in comparison to the number of retail clients before the ESMA prohibition of binary options.
23. Furthermore, ESMA clarified that, unless authorised or registered 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. Such clarification was needed as ESMA was aware that some third-country firms seemed to actively approach clients in the EU.

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<sup>10</sup> Certain binary options were found to have specific features which mitigate the risk of investor detriment, namely: they are sufficiently long-term (at least 90 days); are accompanied by a prospectus; and are fully hedged by the provider or another entity within the same group as the provider. ESMA considered that a binary option that benefits from the cumulative effect of these three criteria is less likely to lead to a significant investor protection concern. In addition, products that at the end of the term have one of two predetermined pay-outs, neither of which is less than the initial investment of the client, were excluded.

<sup>11</sup> See <https://www.esma.europa.eu/press-news/esma-news/esma-renew-prohibition-binary-options-further-three-months>

<sup>12</sup> See <https://www.esma.europa.eu/press-news/esma-news/esma-renew-restriction-cfds-further-three-months>

24. ESMA also re-iterated that it will continue to monitor the offer of other speculative investment products in order to determine whether any other Union measures are appropriate.

### **Further publications**

25. In order to promote common supervisory approaches and practices in the application of ESMA's temporary product intervention measures in relation to the marketing, distribution or sale of binary options and CFDs to retail clients, ESMA has published questions and answers<sup>13</sup> dealing with practical technical questions in relation to the ESMA product intervention measures.
26. On 12 July 2019, ESMA published a statement addressed to providers marketing, distributing or selling CFDs to retail clients<sup>14</sup>. The statement deals with some practices and situations observed in the market, which raise concerns of non-compliance with the applicable legal requirements when providing services to retail clients. More specifically, the statement deals with professional clients on request and the marketing, distribution or sale by third-country CFD providers.

### **Analysis following feedback from stakeholders**

27. On September 2019 ESMA published a call for evidence in which market participants and investors were asked to provide evidence on the practical effects of the measures on binary options and CFDs. In total ten respondents replied to the call for evidence, eight of which market participants or industry associations, one individual retail client (asking to reverse the decision regarding binary options) and the SMSG. The executive summary of the response of the SMSG is attached to this advice as annex 7.1.

#### *Practical effects of ESMA's product intervention measures regarding CFDs on market participants*

28. Several respondents confirmed certain effects of the ESMA product intervention measures that were described above. These effects include: (i) a reduction in the number of client orders; (ii) the increase of retail clients classified as a professional clients on request, including an increased demand for such a classification by retail clients; (iii) an increase of trading activities by retail clients with unregulated or non-EU registered CFD providers.
29. In relation to the reduction of the number of client orders and the smaller size of the orders, one respondent indicated that, as a consequence, the firm's revenue decreased. This is consistent with the financial results of CFD providers<sup>15</sup>.

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<sup>13</sup> See: <https://www.esma.europa.eu/document/technical-gas-product-intervention-measures-cfds-and-binary-options>

<sup>14</sup> See: [https://www.esma.europa.eu/sites/default/files/library/esma35-36-1743-statement\\_product\\_intervention.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-36-1743-statement_product_intervention.pdf)

<sup>15</sup> These findings are supported by NCAs' information and disclosures of publicly-listed CFD providers, which indicated that the product intervention measures were responsible for a decline in revenues in the EMEA region.

30. As a consequence of the above, the CFD provider decreased the budget for marketing and innovation. Another consequence indicated by respondents is the introduction of new types of costs or fees applied to clients (e.g. inactivity fee).
31. Some respondents indicated that they see retail clients that traded CFDs moving towards other leveraged products as an alternative to CFDs. Several respondents warned ESMA in relation to the repackaging of CFDs in other legal wrappers. While some respondents indicated that they do not see these developments as detrimental ones, one respondent particularly referred to turbo certificates in this context.
32. ESMA is monitoring the markets and has indicated that it will monitor whether other financial instruments will raise similar investor protection concerns as indicated for binary options and CFDs. For example, in its Q&A in relation to turbo certificates<sup>16</sup> it is stated that *ESMA and NCAs will closely monitor whether new distribution trends in respect of turbo certificates raise similar investor protection concerns for retail clients and whether any firms attempt to circumvent ESMA's CFD Decision and will act as necessary.*
33. Some respondents indicated that they did not agree with the content of the specific measures in the ESMA decisions. For example, a trade organisation pointed out that the leverage limits that were imposed by ESMA were too rigid. Another respondent suggested additional requirements for CFD providers, such as supplementing the profit and loss percentages in the risk warning with further standardized information (e.g. the percentage of hedged positions or the percentage of trades that is automatically stopped out) or suggested introducing a more generic wording in the risk warning<sup>17</sup>.
34. The ESMA measures are no longer in place as they expired on 31 July 2019 for CFDs. Nevertheless, ESMA has already provided the background and its reasoning for the adoption of the specific measures that it has taken in the measures themselves.
35. As a further example of comments in relation to the measures taken by ESMA, several respondents, including the SMSG and representatives of regulated markets indicated that rolling spot futures, should not have been included in the scope of ESMA's or NCAs product intervention measures.
36. As referred in paragraph 8 of ESMA's initial product intervention decision regarding CFDs<sup>18</sup> and as confirmed in the ESMA Q&A in relation to rolling spot forex<sup>19</sup>, the characteristics of these products justified their inclusion in the scope of ESMA's decisions.
37. Two respondents indicated that the basis of ESMA's temporary measures was not sufficiently justified as the problems signalled by ESMA were caused by the behaviour of certain specific providers. Therefore, they argued that other measures targeting the providers rather than the products, such as stricter prudential requirements, would have been more proportionate to address the concerns.

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<sup>16</sup> See: ESMA technical Q&A's on product intervention, Q&A 5.10 in relation to securitized derivatives [https://www.esma.europa.eu/sites/default/files/library/esma35-36-1262\\_technical\\_qas\\_product\\_intervention.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-36-1262_technical_qas_product_intervention.pdf)

<sup>17</sup> Suggestions by this respondent were risk warnings with reference to 'the vast majority of retail client account' or 'retail client accounts generally lose money'.

<sup>18</sup> ESMA Decision 2018/796 to temporarily restrict the marketing, distribution or sale of contracts for differences to retail clients.

<sup>19</sup> See: ESMA technical Q&A's on product intervention, Q&A 5.12 in relation to rolling spot forex [https://www.esma.europa.eu/sites/default/files/library/esma35-36-1262\\_technical\\_qas\\_product\\_intervention.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-36-1262_technical_qas_product_intervention.pdf)

38. In its initial decisions and analysis documents published alongside the initial decisions, ESMA already emphasised the specific product characteristics, including the high leverage offered and the absence of a proper protection against residual losses for retail clients, that contributed to the significant investor protection concerns and that justified the adoption of the measures. These characteristics were common across the CFD market in Europe and did not only apply to a specific subset of CFD providers.
39. One respondent claimed that in their Member State, since there were already leverage restrictions, the margin close-out ratio was already below 5% and that the ESMA measures were not needed to further reduce the number of automatic stop-out orders.
40. As set out in ESMA's published analysis, the specific leverage limits of ESMA's product intervention measures ensure consistent treatment across asset classes. Calibration was with reference to a 5% probability of margin close-out to address a specific source of risk (i.e. that of being closed out) most relevant to clients that hold longer-term positions (e.g. a day or more). However, leverage limits benefit clients more generally by reducing their market risk and lowering the costs they incur. ESMA noted that in practice it would expect close-out to be even less frequent over a given duration, a key reason being that the close-out rule operated on an account basis rather than a position basis.
41. One respondent indicated that the problem that ESMA wished to address had more to do with the providers, instead of the loss percentages. This firm indicates that a broad range of leveraged products are likely to show similar loss percentages.
42. As explained in the ESMA CFD decision, several factors contributed to ESMA's decision to restrict these products. While not the only one, risk of excessive leverage for retail investors was one of these factors.
43. Furthermore, there were a number of respondents asking ESMA to reconsider the content of its measures including the leverage limits, the negative balance protection, the leverage for CFDs on cryptocurrencies, the scope in relation to rolling spot forex and products traded on a trading venue.
44. ESMA notes that its measures have expired on 1 July 2019 and 31 July 2019 for binary options and CFDs respectively. In the meantime, nearly all NCAs have adopted national product intervention measures in relation to binary options and CFDs. The reasons for ESMA's measures are provided in the measures themselves.

*Practical effects of ESMA's product intervention measures regarding binary options on market participants*

45. Some respondents representing structured product issuers and regulated markets did not agree with the inclusion of listed products in the scope of ESMA's measure. While they supported the application of the prohibition of OTC-traded binary options, they found that the extension to products listed on regulated markets or MTFs was not supported by appropriate evidence.
46. The same respondents also stated the need for clarity and communication efforts when product intervention measures are adopted since market participants may have doubts on the application of such measures to some products not explicitly excluded from the

scope. In particular, the case of securitised derivatives (inline warrants, stay high/stay low warrants) and the uncertainty on their inclusion in the scope of the ESMA measures was mentioned. The respondents stated that this uncertainty led to different handling by issuers due to different legal opinions causing unclarity and limitation to investors choices. Several respondents argued that, in case of adoption of any future measure, it would be beneficial if ESMA would also provide some examples of products that would not fall within the scope of the relevant measure to further limit the amount of uncertainty.

47. In the context of certain specific binary options, ESMA would like to refer to the first renewal decision of the prohibition of the marketing, distribution or sale of binary options in which ESMA has made explicit that the prohibition of the marketing, distribution or sale of binary options does not apply to those binary options that meet all of 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 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.
48. As set out in its initial product intervention decision, ESMA has duly considered the feedback from market participants that considered that financial instruments that were traded on a trading venue should be excluded from its measure. ESMA has confirmed that the prohibition should be applied similarly regardless of whether products are or are not traded on a trading venue<sup>20</sup>.
49. ESMA acknowledges that setting the scope of a product intervention measure is a very important part of its work in this area. ESMA welcomes the suggestions of the respondents to the call for evidence for it to, if needed and relevant, provide examples of related financial instruments or activities that would not fall within the scope of ESMA's measures.

#### *Views on the temporary nature of ESMA's product intervention powers*

50. The views of respondents on the temporary nature of ESMA's product intervention powers were divergent. Some appreciated the temporary nature and considered a renewal of the ESMA measures as inappropriate whereas others would support longer pan-European measures.
51. One industry association stated that the three-month period for the ESMA temporary measures may undermine brokers' activities since they have to adapt their business arrangements to comply with the ESMA measures for a short period of time. Also, this short period of time may affect firms' ability to make long-term plans and set their budget.

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<sup>20</sup> See paragraph 25 and 26 of ESMA Decision 2018/795 to temporarily prohibit the marketing, distribution or sale of binary options to retail clients. See: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018X0601\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018X0601(01)&from=EN)

The respondent also expressed the need for sufficient time to implement the ESMA decisions.

52. Another respondent indicated appreciation for the temporary nature to address urgent situations. Some respondents from the industry stated that successive renewals of product intervention measures might undermine the temporary nature of ESMA's intervention power.
53. In relation to some of the comments above, ESMA has communicated its agreement on the measures before the measures started to apply in order to allow firms to change their business model or introduce the required changes into their technical systems. For this reason, ESMA has communicated the content of its agreement on 27 March 2018 in order to allow market participants to adopt the required changes before the measures started to apply on 2 July 2018 for binary options and 1 August 2018 for CFDs<sup>21</sup>. Furthermore, ESMA provided additional time to firms following the publication of the adopted measures in the *Official Journal of the European Union* on 1 June 2018.
54. In Article 40(6) of MiFIR, reference is made to the need for ESMA to review any measures at appropriate intervals and at least every three months. Also, it is stated that if the prohibition or restriction is not renewed after that three-month period it shall expire. The reasons for each of ESMA's renewal decisions is set out in those decisions.
55. One respondent fully supported having pan-European product intervention measures as this ensures a level playing field for both investors and market participants. The respondent explained that pan-European measures remove the inconsistencies caused by divergent national product intervention measures, strengthen supervisory convergence in a Single Market and establish the same level of investor protection in Europe. The SMSG supported the longer duration of the ESMA product intervention measures as resulting from the ESA Review. The SMSG further indicated that both NCAs and ESMA should be able to take permanent measures (for ESMA, after two renewals).
56. Several respondents indicated that it is important and necessary that measures that have such a significant impact on the market should be properly reviewed. These respondents, including the SMSG, indicated that there is a necessity for NCAs and for ESMA to review the measures on a yearly basis.
57. As set out in paragraphs 88-96 ESMA agrees that allowing ESMA to adopt product intervention measures having a longer validity period would contribute to a level playing field across the EU, which also supports the role of ESMA in trying to achieve supervisory convergence. ESMA agree that, should the duration of the validity of ESMA measures be extended, the introduction of a review requirement would be appropriate.

#### *Examples of circumvention of the product intervention measures*

58. Respondents described different examples of circumventions. Concerning industry practices respondents mentioned the behaviour of unregulated entities that engaged in mis-selling of OTC derivatives to uninformed retail investors who were not able to appropriately appreciate the risks of their investments; the repackaging of the same

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<sup>21</sup> See press release dated 27 March 2018: <https://www.esma.europa.eu/press-news/esma-news/esma-agrees-prohibit-binary-options-and-restrict-cfds-protect-retail-investors>



products with another legal wrapper and the practice of some distributors to promote to retail investors the possibility to be re-categorised as professional investor on request.

59. Other respondents mentioned the excessive flexibility of some firms when re-categorising retail investors or the decision to set-up new departments in off-shore locations or that EU-regulated entities are referring their clients to a third country provider that is not obliged to follow the product intervention measures applicable in the EU.
60. The practices mentioned by respondents are known to ESMA and NCAs. For this reason, ESMA has published a statement<sup>22</sup> that responds to these practices and situations to the extent that they constitute circumvention practices and raise concerns of non-compliance with the legal requirements applicable when providing services to retail clients.
61. The supervision of the actual behaviour of entities subject to the product intervention measures is the responsibility of the NCAs. ESMA and NCAs will continue to monitor the issues referred to by the respondents to the call for evidence and consider whether further action is required.

*Suggestions of respondents to improve the application of the regulatory framework regarding the product intervention powers*

62. Several respondents, including the SMSG, were of the view that measures that before the entry into application of MiFIR were introduced at national level should be notified to ESMA. Also, these respondents considered that voluntary agreements between NCAs and industry, should be notified to ESMA and be subject to the MiFIR framework.
63. MiFIR started to apply on 3 January 2018 and ESMA has informed national competent authorities that they should assess that any measures taken prior to that date are compatible with the new legal framework of MiFID II and MiFIR. With regard to the voluntary agreements, since these are by definition non-binding, they are not product intervention measures in accordance with Article 42 of MiFIR. Therefore, there is no obligation for NCAs to notify ESMA or other national competent authorities in accordance with Article 42(3) of MiFIR.
64. On 12 January 2017 ESMA issued an Opinion<sup>23</sup> regarding the scope of the product intervention powers under MiFIR in order to underline that the product intervention powers do not cover UCITS management companies and Alternative Investment Fund Managers (AIFMs). The Opinion outlines the potential consequences linked to the exclusion of fund management companies from the scope of the powers, including the risk of arbitrage where a type of financial instrument that is restricted or banned under MiFIR could be distributed through fund management companies if they decided to market or distribute the funds themselves. The SMSG suggested that, pending a clarification by the European Commission on the applicability of ESMA's product

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<sup>22</sup> See ESMA Statement July 2019, available at: <https://www.esma.europa.eu/press-news/esma-news/esma-warns-cfds-providers-application-product-intervention-measures>

<sup>23</sup> See ESMA50-1215332076-23 (available at [https://www.esma.europa.eu/sites/default/files/library/esma50-1215332076-23\\_opinion\\_mifir\\_intervention\\_powers.pdf](https://www.esma.europa.eu/sites/default/files/library/esma50-1215332076-23_opinion_mifir_intervention_powers.pdf)).



intervention measures to all market participants, ESMA should already provide a public interpretation that the measures would apply to all market participants.

65. ESMA would appreciate to receive further clarification from the European Commission on the applicability of the product intervention powers in relation to fund managers. Please also see paragraphs 83-87.
66. Finally, the SMSG encouraged ESMA to closely coordinate with the other European Supervisory Authorities (ESAs) in order to ensure that regulatory arbitrage is avoided and the SMSG suggested for the regulatory framework to include the product intervention powers in the PRIIPs Regulation, instead of MiFIR, in order to improve the cross-sectoral level playing field.
67. ESMA agrees that coordination between the ESAs is important, in particular when there is a cross-sectoral impact of any product intervention measures. In this context, ESMA would also like to refer to the Statement that EIOPA published on 1 June 2018 in relation to ESMA's measures regarding binary options and CFDs<sup>24</sup>. ESMA also agrees that it is important to have consistency between the product intervention powers. Any changes to the product intervention framework should therefore consistently be reflected in all the relevant legislative frameworks.

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<sup>24</sup> See statement EIOPA, available at: <https://eiopa.europa.eu/Publications/Statements/EIOPA-18-251%20Statement%20on%20contracts%20for%20differences%20and%20binary%20options.pdf>

## 4. NCAs' product intervention measures under Article 42 of MiFIR

### Background/Mandate

68. Under Article 42 of MiFIR, NCAs have the power to introduce permanent product intervention measures. As set out in chapter 2 of this Final Report, NCAs that propose to take national product intervention measures (NPIMs) have to consult NCAs in other Member States that may be significantly affected by their action and notify their intended NPIMs to all NCAs and ESMA not less than one month before these measures are intended to take effect.
69. Nearly all NCAs have taken NPIMs in relation to the marketing, distribution or sale of binary options and CFDs to retail clients. In relation to these NPIMs, ESMA has adopted opinions indicating whether the proposed NPIMs were considered justified and proportionate. Furthermore, ESMA has concluded in its opinions that it was necessary for the NCAs of other Member States to take product intervention measures that are at least as stringent as ESMA's measures.
70. Although most of the NPIMs have the same scope as the scope of ESMA's temporary product intervention measures, some NCAs took NPIMs that diverge from ESMA's ones. Divergences in NPIMs should be taken into account by firms providing services on a cross-border basis. For example, if Member State A adopts stricter NPIMs than Member State B, then firms from Member State B still have to abide by the NPIMs of Member State A in respect of any cross-border activity provided to retail clients in Member State A that is within the scope of the NPIMs of Member State A.
71. An overview of the NPIMs taken by NCAs in relation to binary options and CFDs can be found in Annex 7.2 to this document. The overview also contains summary information concerning divergences from the ESMA measures. Furthermore, a link to the relevant ESMA opinion is included. The ESMA opinions in relation to the proposed NPIMs are also published on ESMA's website<sup>25</sup>.
72. At this stage, no NPIMs dealing with products other than binary options and CFDs have been taken by NCAs in accordance with Article 42 of MiFIR<sup>26</sup>.

### Analysis following feedback from stakeholders

*National product intervention measures following ESMA's temporary product intervention measures.*

73. One respondent representing structured products issuers appreciated the adoption of national product intervention measures mirroring ESMA's ones in order to ensure stability and consistent implementation across the EU. Other respondents indicated that having several national measures could lead to an 'uneven' playing field for firms active on a cross border basis due to the inconsistency of national measures and the complexity of the application of different measures, including increasing the operational risk for firms

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<sup>25</sup> <https://www.esma.europa.eu/policy-activities/mifid-ii-and-investor-protection/product-intervention>

<sup>26</sup> For completeness, please see the consultation paper of the UK FCA via <https://www.fca.org.uk/publication/consultation/cp19-22.pdf>

to comply with the regulatory requirements. The SMSG indicated that the practice in which NCAs transpose the ESMA product intervention measure into a national permanent measure is highly inefficient and undermines the internal market.

74. In this context ESMA would also like to refer to the preceding chapter of this paper that relates to the temporary nature of ESMA's product intervention powers.
75. Two respondents from the industry indicated that it was unclear if the existing national rules and guidance adopted before MiFIR started to apply would still be valid when ESMA introduced the product intervention measures. Particularly, if these national rules were either additional requirements for CFD providers or were stricter than the ESMA measures.
76. In its initial product intervention decision regarding CFDs, ESMA has indicated that the ESMA measures were a necessary minimum level of protection to retail clients across the Union, in addition to existing investor protection requirements. Furthermore, it has been clarified that the ESMA decision did not prevent NCAs or CFD providers from ensuring a greater level of investor protection<sup>27</sup>.
77. Some industry associations indicated that, although there were no differences with the national measures in the jurisdiction in which they operate, they do not agree with the content of the measures. They support the introduction of a new category of retail clients that consists of experienced, semi-professional clients. Another association claimed that the leverage limits introduced did not sufficiently take into account the market participants' and clients' opinion following ESMA's consultation. This respondent is of the view that ESMA should take better into account the specificity of the target market or markets.
78. ESMA acknowledges that a large number of individual respondents to its call for evidence dated January 2018 did not support the proposed leverage limits as they considered them too low. However, there were also respondents, including the consumer representatives, that supported the proposed measures by ESMA. As for the consumer representatives, some of them suggested to introduce even stricter measures, such as a complete prohibition of the marketing, distribution or sale of CFDs to retail clients. As set out in its initial product intervention decisions, ESMA explained why it considered that the combination of measures regarding CFDs were needed in order to provide a minimum level of protection to retail clients and were proportionate and justified.
79. Furthermore, ESMA is aware that several stakeholders are considering the need to introduce a new category of retail clients, that seem to be more 'sophisticated'. In this context ESMA would like to reiterate that, when assessing the investor protection concerns and the client detriment justifying the adoption of ESMA's measures, no justification emerged for such a distinction. More specifically, ESMA has no evidence that a specific subset of retail clients lose less money or lose less frequently when trading CFDs. Available information suggests that trading outcomes for retail clients do not differ systematically based on the number of past trades a client has previously carried out.

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<sup>27</sup> See paragraph 144 of ESMA Decision 2018/796 to temporarily restrict the marketing, distribution or sale of contracts for differences to retail clients.

## **5. Other areas in which ESMA may consider product intervention measures**

80. The mandate of the European Commission also asks ESMA to inform the Commission on other areas in which ESMA might consider adopting more product intervention measures in the near future or in the long term.
81. At this stage, ESMA is aware that some NCAs are consulting on potential product intervention measures concerning certain financial instruments linked to crypto assets. ESMA will continue monitoring markets and will exercise its coordination role in relation to measures proposed by NCAs. If, based on its monitoring activities, ESMA becomes aware that there is an issue that causes a significant investor protection concern, a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system in the Union, ESMA will consider the possibility of taking product intervention measures.

## 6. Technical advice to the European Commission

82. This chapter sets out the technical advice from ESMA to the European Commission in relation to the product intervention legislative framework. This advice has taken into consideration the suggestions by stakeholders as part of their response to the call for evidence, and the advice from the SMSG. Furthermore, the technical advice is based on ESMA's and NCA's experiences of the application of the MiFIR legislative framework in relation to the product intervention powers.

### Level playing field between MiFID firms and AIFMs/UCITS management companies

83. As indicated in ESMA's opinion<sup>28</sup> dated 12 January 2017, without prejudice to national laws, ESMA and NCAs cannot exercise the MiFIR product intervention powers in relation to AIFMs authorised under Directive 2011/61/EU (referred hereafter to 'AIFMD') and UCITS management companies authorised under Directive 2009/65/EC (including UCITS investment companies that have not designated a management company and internally-managed AIFs, i.e. self-managed UCITS and AIFs).
84. As part of their authorisation, AIFMs and UCITS management companies (hereafter referred to as 'fund management companies') may themselves market units or shares of the UCITS and AIFs they manage. If a restriction/prohibition were applied to MiFID firms in relation to the distribution of a type of UCITS or AIFs, that restriction/prohibition could not be applied to fund management companies because those entities are outside the scope of the intervention powers. This means that the distribution of the type of UCITS or AIFs subject to the restriction could continue through fund management companies if they decide to market their funds themselves.
85. Furthermore, AIFMs and UCITS management companies may be given permission under the AIFMD or the UCITS Directive to carry out certain MiFID services/activities (i.e. individual portfolio management, investment advice and, for AIFMs only, reception and transmission of orders) in relation to all MiFID financial instruments. AIFMs and UCITS management companies can also be given permission to carry out the MiFID ancillary service/activity of safekeeping and administration of assets in relation to units of collective investment undertakings. However, the product intervention powers following MiFIR cannot be applied to AIFMs and UCITS management companies, unless national law is in place.
86. Therefore, if product intervention powers were to be used in relation to a specific financial instrument that may also be marketed, distributed or sold by AIFMs and UCITS management companies there would be a unlevel playing field as the product intervention measures would not cover these entities.
87. As set out in the ESMA opinion mentioned above, the EU institutions should address the risk of arbitrage between MiFID firms and fund management companies. In particular, with reference to the powers available under MiFIR, NCAs and ESMA should have the powers to apply restrictions/prohibition directly to AIFMs and UCITS management companies. This would ensure that there is a common toolkit for NCAs and ESMA across

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<sup>28</sup> See <https://www.esma.europa.eu/press-news/esma-news/esma-calls-consistent-application-mifir-product-intervention-powers>

entities and instruments, thereby contributing to the establishment of a level-playing field between MiFID entities and AIFMs and UCITS management companies.

**Technical advice:**

ESMA recommends that the European Commission addresses the risk of arbitrage between MiFID firms and fund management companies. In particular, with reference to the powers available under MiFIR, NCAs and ESMA should have the powers to apply restrictions/prohibition directly to AIFMs and UCITS management companies.

### **Extending time validity of ESMA's temporary product intervention powers**

88. The experiences of the use of ESMA's temporary product intervention powers was positive since this resulted in measures that proportionally addressed a significant investor protection concern that ESMA and NCAs had identified and had concerns about for many years.
89. Nevertheless, the very short temporary nature of the ESMA measures (Article 40(6) of MiFIR), has added complexity to the process which was already burdensome and resource intensive for both ESMA and the NCAs.
90. As set out in paragraph 6 of Article 9 of the ESMA Regulation (1095/2010) as it will likely be replaced by the ESA review (Art. 3(8) of the adopting ESA review regulation)<sup>29</sup>, the validity of ESMA product intervention measures will already be extended.
91. However, the new regime will still require a short-term renewal of the ESMA measures (twice every six months and subsequently every year) and the suggested amendments to the MiFIR framework will only be applicable from 1 January 2022.
92. Given ESMA's and NCA's experiences with the temporary nature of ESMA's product intervention powers, the review period to analyse the impact and effect of temporary measures should be extended, particularly when the analysis requires an extensive data collection across the EU and an analysis thereof. The short review period also needs to include sufficient time for the necessary administrative steps, such as the administrative processes concerning the translation of a measure in all EU languages.
93. For product intervention measures taken to tackle a significant investor protection concern, considering the obligation to analyse the product concerned for the taking of the initial measure, it is unlikely that circumstances would have changed sufficiently in relation to that product for the concern to no longer be significant after a six-month period. Therefore, this (still short) time validity of ESMA's measures does not appear to be in

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<sup>29</sup> Under the current MiFIR, a prohibition or restriction taken by ESMA shall expire after three months, if not renewed (Article 40(6) of MiFIR). As part of the recent legislative package in relation to the review on the operations of the European Supervisory Authorities (ESAs), the temporary aspect of the product intervention powers of ESMA has been reviewed and amended. The reviewed Article 40(6) of MiFIR will require ESMA to review a prohibition or restriction at least every 6 months. Following at least two consecutive renewals and based on proper analysis in order to assess the impact on consumers, ESMA may decide on the annual renewal of the prohibition. See trialogue compromise text Article 4(8) available at <https://data.consilium.europa.eu/doc/document/PE-75-2019-INIT/en/pdf>

line with the need to tackle the concern and with the best use of resources by NCAs and ESMA in pursuing their investor protection objective.

94. It is also worth noting that divergences in national product intervention measures are not contributing to a European level playing field. As reflected in the Annex 7.2, some of the permanent national measures diverge from the temporary ones adopted by ESMA. For firms that are active on a cross-border basis this may raise additional barriers.
95. For the above reasons, ESMA would welcome the introduction of a legal mechanism to consolidate pan-European product intervention measures and make them permanent (for example by a legal act of the European Commission consolidating temporary measures after a given period). Alternatively, if it is not possible for the EC to consolidate temporary measures, ESMA would welcome a further extension of the temporary nature of the product intervention powers to 18 months.
96. In case of a further extension of the temporary nature of the measures, ESMA would still be able to change or withdraw the measures during the validity period of the temporary measures, if this need arises.

#### **Technical advice:**

ESMA advises the European Commission to introduce a mechanism to further consolidate pan-European product intervention measures to improve convergence and the level playing field across the EU single market. This could take the form of a legal mechanism taken by the EC or of a legal act to consolidate the temporary measures as permanent ones. Alternatively, ESMA would welcome a further extension of the temporary nature of the product intervention powers to 18 months.

#### **Interaction of national product intervention measures**

97. Article 42(1) of MiFIR states that a competent authority may prohibit or restrict the marketing, distribution or sale of a product in or from that Member State [...]. The reference to 'in or from' could suggest that an NCA has the possibility to take product intervention measures that only apply in that member state (and not from), and vice versa.
98. Furthermore, in the case of multiple NCAs taking product intervention measures in and from their member states, it may not be easy for market participants or even clients to assess which product intervention measures they are subject to.
99. In this context, ESMA published a Q&A<sup>30</sup> that provides for a general orientation on which national product intervention measures a firm should apply in case of cross-border provision of investment services when the measures under consideration both apply "in" and "from" the Member States involved.

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<sup>30</sup> See Q&A 1 of Section 17: Product intervention of the Questions and Answers: On MiFID II and MiFIR investor protection and intermediaries topics, available at: [https://www.esma.europa.eu/sites/default/files/library/esma35-43-349\\_mifid\\_ii\\_qas\\_on\\_investor\\_protection\\_topics.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf)

100. ESMA would appreciate if the European Commission could further clarify the application of the product intervention measures when multiple Member States take overlapping product intervention measures. This becomes particularly relevant when the content of national product intervention measures diverges.
101. Furthermore, the possibility to take measures in and from a Member State is also relevant for the distribution of responsibilities between home and host NCAs with respect to the supervision and enforcement in relation to compliance with an NCA's product intervention measures and measures taken by other NCAs. Further clarifications on the distribution of responsibilities in this area would be welcomed.

**Technical advice:**

ESMA advises the European Commission to further clarify:

- the application of product intervention measures to firms acting on a cross-border basis when NCAs from different Member States take overlapping product intervention measures; and
- the distribution of responsibilities of supervision and enforcement of NCAs of the home and host Member States in respect of those measures.

**ESMA Opinion on proposed national product intervention measures**

102. In accordance with Article 42(3) of MiFIR, NCAs should notify ESMA of its proposed national product intervention measures, not less than one month before the measure is intended to take effect<sup>31</sup>. ESMA shall adopt an opinion regarding the proposed national product intervention in accordance with Article 43(3).
103. ESMA has adopted 51 opinions regarding national measures in relation to binary options and CFDs. Most of these opinions conclude that the proposed national product intervention measures are justified and proportionate, in particular for those national measures that have the same content as the temporary ESMA measures and for which the national measure benefited from the extensive analysis carried out when adopting ESMA's measures.
104. The obligations for NCAs to notify their measures at least one month in advance and for ESMA to issue an opinion on that proposed measure seems very burdensome and could therefore be simplified in cases where the content of the ESMA and the national measure is the same.
105. For this reason, ESMA would suggest exempting NCAs from seeking an ESMA opinion for national product intervention measures when NCAs apply the exact same measures as ESMA's temporary measures on a permanent basis. However, it remains important that NCAs notify ESMA of their intention to introduce national product intervention measures, specifying when the measures are the same as any measures previously adopted by ESMA. Such a notification enables ESMA to retain an overview of the

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<sup>31</sup> Except for exceptional cases as set out in Article 42(4) of MiFIR in which an urgent action is required.



applicable national product intervention measures and to analyse whether the national measures are the same as ESMA's measures.

106. Also, the consultation of other NCAs that may be materially affected might not be necessary as in this specific case there would already be an applicable measure at EU level, having the same content as the national one.

**Technical advice:**

Where an NCA intends to adopt at national level the same product intervention measure at a national level as an applicable temporary measure adopted by ESMA, ESMA advises the European Commission to:

- provide ESMA with the option rather than an obligation to issue an opinion on that measure in accordance with Article 43(2) of MiFIR; and
- exempt that NCA from consulting other NCAs that may be materially affected in accordance with Article 42(2)(d) of MiFIR.

**Further clarification Article 40(3) of MiFIR**

107. The text of the last subparagraph of Article 40(3) of MiFIR is unclear ("Where ... competent authorities have taken a measure under Article 42, ESMA may take any ... measures ... without issuing the opinion provided for in Article 43"). The situation that seems to be described in this paragraph seems not likely to occur in practise, given ESMA's experience.
108. ESMA would appreciate a further clarification of the wording of Article 40(3) of MiFIR to understand in which situations ESMA would not be required to issue an opinion provided for in Article 43 of MiFIR. As set out in the previous chapter ESMA would welcome the possibility to forgo publishing an opinion on proposed national product intervention measures that have the same content as measures taken under Article 40 of MiFIR.

**Technical advice:**

ESMA would appreciate if the European Commission could further clarify the wording of Article 40(3) of MiFIR.

## 7. Annexes

### 7.1 Executive summary SMSG advice <sup>32</sup>

#### Executive summary

1. *Introduction.* The SMSG fully supports this ESMA call for evidence, which will result in an improved picture of the effects of its product intervention measures. However, the SMSG (i) requests more information on a number of important statements in the call; (ii) advises ESMA to resolve a number of interpretation issues; and (iii) takes position on a number of issues which should be taken into account in the MiFID/MiFIR and PRIIPs Review.

2. *Information request.* The SMSG would like to receive more information in respect of a number of statements made in the call for evidence, and more in particular on (i) the impact of leverage limits on different types of CFDs in the different Member States; and (ii) the reported increase in the number of clients treated as professional clients on request.

3. *Interpretation issues.* The SMSG further believes that ESMA should resolve a number of interpretation issues and:

- (i) Clarify that NCAs should, in view of article 40(7) MiFIR, not deviate from an ESMA product intervention measure, as long as the ESMA measure exists;
- (ii) Clarify that national pre-MiFIR product intervention measures should be brought into the scope of MiFIR if Member States want to maintain them (no 'grandfathering'), since national pre-MiFIR measures which are not brought into the scope of MiFIR result in (a) ESMA giving an incomplete and therefore misleading picture of NPIMs and (b) hampering of the internal market;
- (iii) Ensure that there is no room for interpretation on what products are in the scope of ESMA's product intervention measures and that the scope of those measures is directly connected to the investor threat assessment;
- (iv) Clarify that the MiFIR product intervention measures do apply to all market participants selling products in scope of ESMA or NCA product intervention measures, not only to credit institutions or investment firms.
- (v) Closely cooperate with the other ESAs to avoid regulatory arbitrage.
- (vi) Recognize that the question whether there are examples of circumvention of product intervention measures can be interpreted in many different manners, recognize that they are all relevant, and look into all those sources of circumvention.

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<sup>32</sup> Available at [https://www.esma.europa.eu/system/files\\_force/library/smsg\\_advice\\_on\\_product\\_intervention.pdf?download=1](https://www.esma.europa.eu/system/files_force/library/smsg_advice_on_product_intervention.pdf?download=1)

4. *Need for legislative changes.* With a view to the MiFID/MiFIR and PRIIPs Review, the SMSG is in favour of a number of legislative changes, including: (i) the possibility for both NCAs and ESMA to take permanent measures, the necessity of which should in both cases, however, be reviewed on a yearly basis (the current solution where all NCAs need to transpose the temporary ESMA measures into permanent national measures is inefficient and potentially undermines the internal market); (ii) the extension of ESMA scrutiny to NCAs voluntary agreements with market participants, which have the same effect as product intervention measures but cannot be scrutinized by ESMA even when they have a disruptive effect on the internal market; and (iii) a further alignment of the MiFIR and PRIIPs provisions on product intervention, ideally by putting them all in the PRIIPs Regulation.

## 7.2 Overview national product intervention measures

Binary options					
NCA	Date of the ESMA opinion	Date the measure intended to take effect	Differences with ESMA's measure (if any)	ESMA opinion	Link to NCA's measure
FSMA-BE <sup>1</sup>	N/A	N/A		N/A	N/A
FSC-BG	26-Jun-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
CNB-CZ	05-Jun-19	02-Jul-19	The measure (i) does not expressly prohibit participating in circumvention (ii) includes a definition of 'group', 'provider' and 'retail investor' and (iii) explicitly explains that only binary options that qualify as financial instruments fall within the scope of the measure.	<a href="#">Link</a>	<a href="#">Link</a>
Finanstilsynet-DK	26-Jun-19	07-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>

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<sup>1</sup> Legislative measures in place in BE.

BaFin-DE	26-Jun-19	02-Jul-19	No express exclusion of the binary options referred to in Article 1(3)(a) of ESMA's measure. Nevertheless, BaFIN confirmed its national prohibition does not capture these products.	<a href="#">Link</a>	<a href="#">Link</a>
FSA-EE	05-Jun-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
CBI-IE	13-Jun-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
HCMC-EL	26-Jun-19	04-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
CNMV-ES	28-May-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
AMF-FR	01-Jul-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
HANFA-HR	23-Jul-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
CONSOB-IT	13-Jun-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
CySEC-CY	01-Jul-19	07-Jul-19	The measures do not apply to credit institutions	<a href="#">Link</a>	<a href="#">Link</a>
FKTK-LV	26-Jun-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
LB-LT	28-May-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
CSSF-LU	13-Jun-19	01-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>

MNB-HU	N/A	N/A		N/A	N/A
MFSA-MT	01-Jul-19	11-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
AFM-NL	26-Mar-19	19-Apr-19		<a href="#">Link</a>	<a href="#">Link</a>
FMA-AT	03-May-19	30-May-19	The measure does not expressly prohibit circumvention of the measure.	<a href="#">Link</a>	<a href="#">Link</a>
KNF-PL	26-Mar-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
CMVM-PT	13-Jun-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
ASF-RO <sup>2</sup>	N/A	N/A		N/A	N/A
SMA-SI	23-Aug-19	01-Oct-19		<a href="#">Link</a>	<a href="#">Link</a>
NBS-SK	05-Jun-19	01-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
FSA-FI	14-May-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
FI-SE	01-Jul-19	02-Jul-19		<a href="#">Link</a>	<a href="#">Link</a>
FCA-UK	26-Mar-19	02-Apr-19	The measures also apply to the binary options referred to in Article 1(3)(b) of ESMA's measure (securitised binary options).	<a href="#">Link</a>	<a href="#">Link</a>

<sup>2</sup> Legislative measures in place in RO.

<b>Contracts for differences</b>					
NCA	Date of the ESMA opinion	Date the measures intended to take effect	What are the differences with ESMA's measure	ESMA opinion	Link to NCA's measure
FSMA-BE <sup>3</sup>	N/A	N/A	N/A	N/A	N/A
FSC-BG	23-Jul-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
CNB-CZ	11-Jul-19	01-Aug-19	The measure (i) does not expressly prohibit participating in circumvention (ii) includes a definition of 'group', 'provider' and 'retail investor' and (iii) explicitly explains that only CFDs that qualify as financial instruments fall within the scope of the measure	<a href="#">Link</a>	<a href="#">Link</a>
Finanstilysynet-DK	23-Jul-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>

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<sup>3</sup> Legislative measures in place in BE.

BaFin-DE	30-Jul-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
FSA-EE	05-Jun-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
CBI-IE	13-Jun-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
HCMC-EL	26-Jun-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
CNMV-ES	26-Jun-19	01-Aug-19	The national measures require providers offering CFDs to retail clients in Spain, including without a Spanish branch or tied agent through the freedom to provide services, to obtain, prior to selling a CFD to a retail client, the following statement from the client in writing (handwritten, in a text-box for online services, or recorded for telephone sales): “Product that is difficult to understand. The CNMV considers that, in general, it is not appropriate for retail investors”. This additional requirement does not apply to discretionary portfolio management and investment advice services. The additional requirement would have to be obtained in writing (handwritten or in a text-box for online services). CFD providers would have to obtain the statement only for the first two orders placed by a retail client, and not for subsequent orders placed by the client.	<a href="#">Link</a>	<a href="#">Link</a>



AMF-FR	02-Jul-19	01-Aug-19	For virtual currency the definition set out in Article 3(18) of Directive (EU) 2015/849 is used.	<a href="#">Link</a>	<a href="#">Link</a>
HANFA-HR	23-Jul-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
CONSOB-IT	13-Jun-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
CySEC-CY	27-Sep-19	02-Oct-19	<p>The measures do not apply to credit institutions and the content of the national measures is variable based on the country of residence of the client. Therefore, where an entity falling under CySEC's remit markets, distributes or sells CFDs to a resident of:</p> <ul style="list-style-type: none"> <li>i Cyprus, the national measures will have their "<i>Default Content</i>", namely the same as ESMA's measures with the only difference the risk warning (see below).</li> <li>ii A Member State, where the NCA has introduced national measures, CySEC's measures will have the content of the measures taken by the NCA of the respective Member State.</li> <li>iii A Member State, where the NCA has not introduced national measures, CySEC's measures will have their Default Content.</li> <li>iv A third country, CySEC's measures will have their Default Content.</li> </ul>	<a href="#">Link</a>	<a href="#">Link</a>

			Finally, the national measures use a different wording for the standard risk warnings than the corresponding risk warning in ESMA's measures. For the durable medium and webpage standard risk warning and for the abbreviated standard risk warning, the national measures refer to the 'the vast majority of retail investor accounts' instead of including a specific percentage range of retail investor accounts that lose money and, for the reduced character standard risk warning, the refer to 'CFD-retail clients accounts generally lose money'.		
FKTK-LV	26-Jun-19	01-Aug-19	The standard risk warnings in the national measures use different wording than the corresponding risk warnings in ESMA's measures. For the abbreviated standard risk warning, the national measures refer to 'the vast majority of retail clients accounts' instead of including a specific percentage and, for the reduced character standard risk warning, they refer to 'retail clients accounts generally lose money'.	<a href="#">Link</a>	<a href="#">Link</a>
LB-LT	28-May-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
CSSF-LU	13-Jun-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
MNB-HU	30-Jul-19	01-Aug-19	The measures take the form of individual decrees instead of measures of general application.	<a href="#">Link</a>	<a href="#">Link</a>
MFSA-MT	30-Jul-19	11-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
AFM-NL	26-Mar-19	19-Apr-19		<a href="#">Link</a>	<a href="#">Link</a>

FMA-AT	03-May-19	30-May-19	(i) For virtual currency the definition set out in Article 3(18) of Directive (EU) 2015/849 is used (ii) the measures do not expressly prohibit participating in circumvention (iii) the standard risk warnings in the national measures use different wording than the corresponding risk warnings in ESMA's measures. For the abbreviated standard risk warning, the national measures refer to 'the vast majority of retail clients accounts' instead of including a specific percentage and, for the reduced character standard risk warning, they refer to 'retail clients accounts generally lose money' (iv) an exclamation mark is included at the end of the reduced character risk warnings; and (v) a graphical exclamation mark is included at the beginning of the durable medium and webpage risk warnings.	<a href="#">Link</a>	<a href="#">Link</a>
KNF-PL	30-Jul-19	01-Aug-19	The national product intervention measures (i) do not apply 'from' Poland in case of a related product intervention measure is applicable to those services in the host Member State and (ii) in the case of services provided to clients with habitual residence in Poland that qualify as experienced clients by firms authorised to provide services in Poland, the initial margin protection for (a) main currency pairs; and (b) other currency pair, main equity indices and gold is set at 1%. In order to be qualified as an experienced client the client has to be located in Poland and meet several conditions in relation to knowledge and experience.	<a href="#">Link</a>	<a href="#">Link</a>
CMVM-PT	13-Jun-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
ASF-RO <sup>4</sup>	N/A	N/A	N/A	N/A	N/A
SMA-SI	23-Aug-19	01-Oct-19		<a href="#">link</a>	<a href="#">Link</a>

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<sup>4</sup> Legislative measures in place in RO.

NBS-SK	05-Jun-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
FSA-FI	14-May-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
FI-SE	02-Jul-19	01-Aug-19		<a href="#">Link</a>	<a href="#">Link</a>
FCA-UK	02-Jul-19	01-Aug-19 and 01-Sept-19 for CFD like options	<p>(i) The measures also apply to CFD-like options defined as “an option (1) that is in the money at the point of sale, (2) where the value is determined by one-to-one fluctuations in the value or price of the underlying asset, and (3) for which the value is not significantly affected by the time to expiry.” The measures do not apply to CFD-like option providers authorised in other Member States other than through a UK branch or tied agent in respect of the sale or distribution of those products to UK retail clients;</p> <p>(ii) the initial margin protection is 3.33% for CFDs referencing government debt of the following jurisdictions: a) the government of the United Kingdom; b) the Scottish Administration; c) the Executive Committee of the Northern Ireland Assembly; d) the National Assembly of Wales; e) a member state of the EU that has adopted the Euro as its currency; f) the United States of America; g) Japan; h) Canada; or i) Switzerland;</p> <p>(iii) the standardised risk warnings must be “statically fixed and visible at the top of the screen even when the retail client scrolls up or down the webpage” (iv) the standard risk warnings in the national measures use different wording than the wording in the corresponding risk warnings in ESMA's measures . For the abbreviated standard risk warning, the national measures refer to 'the vast majority of retail client accounts' instead of including a specific percentage and for the reduced character standard risk warning they refer to 'retail clients accounts generally lose money' and (v) the definition of initial margin expressly state that initial margin is to be calculated based on the exposure provided by the ultimate underlying of a CFD.</p>	<a href="#">Link</a>	<a href="#">Link</a>

