European Securities and Markets Authority

ESMA35-43-1935

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 24 June 2019

on the product intervention measures relating to contract for differences proposed by Comisión Nacional del Mercado de Valores of Spain

Having regard to Article 43(2) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 ([1]),

Having regard to Article 44(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ([2]),

THE EUROPEAN SECURITIES AND MARKETS AUTHORITY BOARD OF SUPERVISORS HAS ADOPTED THIS OPINION:

1. Introduction and legal basis

(1) National competent authorities (NCAs) may take product intervention measures in accordance with Article 42 of Regulation (EU) No 600/2014. At least one month before a measure is intended to take effect, an NCA must notify all other NCAs and the European Securities and Markets Authority (ESMA) of the details of its proposed measure and the related evidence, unless there is an exceptional case where it is necessary to take urgent action.

(2) In accordance with Article 43 of Regulation (EU) No 600/2014, ESMA performs a facilitation and coordination role in relation to such product intervention measures taken by NCAs. In particular, after receiving notification from an NCA of its proposed measure, ESMA must adopt an opinion on whether it is justified and proportionate. If ESMA considers that the taking of a measure by other NCAs is necessary, it must state this in its opinion.

(3) The Comisión Nacional del Mercado de Valores of Spain (CNMV) notified ESMA on 26 April 2019 of its intention to take product intervention measures under Article 42 of that

[1] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).
[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Regulation (national measures). Upon request from ESMA, the CNMV provided further information on the content of its notification.

(4) The national measures consist of a permanent restriction on the marketing, distribution or sale of contracts for differences (CFDs) to retail clients in or from Spain.

(5) ESMA has taken product intervention measures restricting the marketing, distribution or sale to retail clients of CFDs in Decisions (EU) 2018/796 ([3]), (EU) 2018/1636 ([4]), (EU) 2019/155 ([5]) and 2019/679 ([6]).

(6) The first of these Decisions took effect on 1 August 2018. 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. These measures have been amended once and renewed three times. If they are not renewed again, the currently applicable measures in ESMA's Decision (EU) 2019/679 (ESMA's measures) will automatically expire at the end of the day on 31 July 2019.

(7) The CNMV informed ESMA that the national measures are the same as ESMA's measures at national level, except that the national measures would 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: "*Product that is difficult to understand. The CNMV considers that, in general, it is not appropriate for retail investors*" (additional requirement). The CNMV informed ESMA that the additional requirement would not apply to discretionary portfolio management and investment advice services. Furthermore, the CNMV informed ESMA that the statement in the additional requirement would have to be obtained in writing (handwritten or in a text-box for online services), except for orders placed via the phone for which the statement would have to be obtained orally and recorded. The CNMV also informed ESMA that 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. The national measures are expected to take effect on 1 August 2019.

(8) The CNMV notified ESMA that it has complied with the conditions in Article 42 of Regulation (EU) No 600/2014, including that it has assessed the relevance of all the factors and criteria listed in Article 21 of Commission Delegated Regulation (EU)

---

[3] 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).

[4] 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).

[5] 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).

[6] European Securities and Markets Authority Decision (EU) 2019/679 of 17 April 2019 renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 114, 30.4.2019, p. 22).

2017/567 ([7]) and taken into consideration all those that are relevant. In particular, the CNMV notified ESMA that it shares the reasoning given in ESMA's measures on the existence of a significant investor protection concern, as relevant to Spain and the conditions in Article 42 of Regulation (EU) No 600/2014.

(9) With regard to the additional requirement, the CNMV observed that an identical requirement is already set out in the CNMV's measures on warnings relating to financial instruments ([8]) and applies to providers authorised in Spain as well as Spanish branches and tied agents of providers authorised in other Member States offering CFDs to retail clients in Spain. The CNMV informed ESMA that those measures were notified to the European Commission on 6 April 2017([9]) pursuant to Article 24(12) of Directive 2014/65/EU ([10]).

(10) Unlike the requirement in the CNMV's measures on warnings relating to financial instruments, the additional requirement would also apply to providers authorised in other Member States offering CFDs in Spain without a Spanish branch or tied agent through the freedom to provide services.

(11) Furthermore, the CNMV shares the reasons given in ESMA's measures that the existing applicable regulatory requirements under Union law, which have not changed since the adoption of ESMA's measures, do not address the concern. The CNMV also considers that improved supervision or enforcement of the existing requirements would not better address the concern identified. In particular, the CNMV informed ESMA that it has taken into account the supervisory and enforcement experiences of other NCAs as referred to in ESMA's measures and that its supervisory practices take into account the relevant guidance provided by ESMA, including the 'Opinion on MiFID practices for firms selling complex products' ([11]), the 'Opinion on structured complex products – good practices for product governance arrangements' ([12]) and the 'Joint Position of the European Supervisory Authorities on manufacturers' product oversight and governance processes' ([13]). Nonetheless, the CNMV considers that the significant investor protection concern continues to exist.

(12) Moreover, the CNMV shares the analysis on proportionality in ESMA's measures and, in particular, has concluded that the national measures are proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market

[7] Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions (OJ L 87, 31.3.2017, p. 90).
[8] CNMV's 'Circular 1/2018 on warnings relating to financial instruments' dated 18 March 2018.
[9] https://ec.europa.eu/info/sites/info/files/mifid-notification-16-11-es_en.pdf
[10] 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).
[11] ESMA/2014/146.
[12] ESMA/2014/332.
[13] JC-2013-77.

participants. In the case of one-off costs, the CNMV considers that, as the national measures are the same as ESMA's measures except for the additional requirement described above, any one-off costs that may be incurred by product providers to comply with the national measures are likely to be minimal.

(13) With regard to the additional requirement, the CNMV considers it proportionate. In particular, the CNMV observed that the requirement to obtain a specific statement from retail clients, which currently applies to Spanish providers as well as Spanish branches and tied agents of providers established in other Member States offering CFDs to retail clients in Spain, has significantly enhanced Spanish retail clients' informed consent for highly complex products like CFDs as well as clients' awareness when making investment decisions. The CNMV acknowledges that its planned application to providers of other Member States offering CFDs in Spain to retail clients without a branch or tied agent through the freedom to provide services could result in some costs for those providers. However, it considers the benefits of the additional requirement for Spanish retail clients outweigh those costs.

(14) The CNMV considers that the national measures do not have a discriminatory effect on services or activities provided from another Member State as the measures provide for equal treatment of the marketing, distribution or sale of the products regardless of the Member State from which those services or activities are carried out.

(15) The CNMV notified ESMA that it has consulted NCAs in two other Member States ([14]) that may be significantly affected by its national measures, due to the number of providers established in those Member States offering CFDs to retail clients in Spain. Neither of these NCAs raised any objections. Following its consultation, the CNMV expects that the costs for providers in those Member States are likely to be low. The CNMV has also notified ESMA and the other NCAs of the national measures not less than one month before they are intended to take effect.

(16) The CNMV considers that the national measures do not pose a serious threat to the orderly functioning and integrity of the national physical agricultural market. In particular, the CNMV considers that the national measures are the same as ESMA's measures except for the additional requirement described above and that ESMA consulted the national public bodies competent for the oversight, administration and regulation of physical agricultural markets under Council Regulation (EC) No 1234/2007 ([15]). None of those bodies raised any objections to ESMA Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 or (EU) 2019/679.

---

[14] The Financial Conduct Authority in the United Kingdom (FCA) and the Cyprus Securities and Exchange Commission in Cyprus (CySEC).

[15] 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).

2. Whether the national measures are justified and proportionate

(17) The significant investor protection concern raised by the offer of CFDs to retail clients led to the adoption of ESMA's Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 and (EU) 2019/679. However, ESMA's measures are temporary. According to the information provided by the CNMV, the significant investor protection concern raised by these products continues to exist at national level and needs to be addressed on a longer-term basis to avoid the detrimental consequences that would arise from their unrestricted offer to retail clients. As the national measures are the same as ESMA's measures, except for the additional requirement described above, ESMA has taken into account the reasons for ESMA's measures referred to by the CNMV as well as the additional information and reasons given by the CNMV.

(18) In addition to the requirements in ESMA's measures, the national measures would also require providers offering CFDs to retail clients in or from Spain, prior to selling a CFD to a retail client, to obtain a specific statement from that client. While ESMA has some concerns that such statement could potentially be used by providers to protect themselves in any supervisory case or litigation against the client[16], and despite the potential for extra costs for certain CFD providers that would have to adjust their systems when offering CFDs in or from Spain, ESMA has assessed the relevance of the CNMV's supervisory experience. ESMA has also taken into account that the planned statement is already used in Spain following notification to the European Commission and that the CNMV considers it to be a useful tool to increase Spanish retail clients' awareness when making investment decisions, including in respect of the offer of CFDs to retail clients in Spain without a Spanish branch or tied agent through the freedom to provide services.

3. Whether the taking of a measure by other competent authorities is necessary

(19) For the reasons explained in ESMA's measures, the significant investor protection concern raised by the offer of CFDs to retail clients is a cross-border issue. As evidenced by practices to date, product providers are able to offer these products through online trading accounts and passport their services throughout the Union. To effectively address the significant investor protection concern and avoid the risk of regulatory arbitrage, it is essential that product providers cannot exploit differences in treatment by NCAs across Member States. On the expiry of ESMA's measures, product providers may again seek to offer such products in or from a Member State that has not taken a measure at least as stringent as ESMA's measures. Therefore, it is essential that NCAs take concerted action to address this risk.

[16] See also ESMA's Peer Review Report on MiFID suitability requirements of 7 April 2016, ESMA/2016/584, paragraph 122.

4. Conclusion

(20) In conclusion, ESMA is of the opinion that:

(a) the national measures are justified and proportionate; and

(b) it is necessary for the NCAs of other Member States to take product intervention measures that are at least as stringent as ESMA's measures.

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

Done at Paris, 24 June 2019

For the Board of Supervisors
Steven Maijoor
The Chair