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ESMA European Securities and Markets Authority
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Frankfurt a.M., 4. November 2019

Our reference: ESMA-Call-for-Evidence-CFDV05022018

Response ESMA Call for Evidence – Effects of product intervention measures regarding CFDs and binary options on market participants and clients (30 September 2019 | ESMA35-43-2090)

Dear Sir or Madam,

please find below our response to the aforesaid Call for Evidence.

As an association of leading providers offering CFDs in Germany the Contracts for Difference Verband e.V. ("CFD Association") represents a significant portion of the German overall CFD-market. The members of the CFD Association are regulated by various European supervisory authorities and conduct various business models when offering their clients various types of contracts for difference ("CFDs").

The mission of the CFD Association is – *inter alia* – to improve the political and regulatory framework for the trading of CFDs and therefore to promote and to support the CFDs as an attractive asset class for investors. One of the major objectives of the CFD Association is investor protection.

The CFD Association responded on 5 February 2018 to ESMA's Call for Evidence – Potential product intervention measures on contracts for differences and binary options to retail clients, to which reference is made to.

With regard to the questions raised in your Call for Evidence – Effects of product intervention measures regarding CFDs and binary options on market participants and clients we would like to state as follows:

General

With regard to the German market the CFD Association has identified similar effects to the trading of CFDs after ESMA's product intervention measures[1] and its renewals[2] as ESMA now published in its Call for Evidence[3]:

- the number of CFD retail client accounts, trading volume and total retail client equity decreased;
- there has been an increase in the number of clients treated as professional clients on request;
- CFD clients relocate their trading activities to un- or less regulated (compared to EU standards) providers with their registered seats in non-EU countries.

At the same time we discovered – as well as ESMA – that the share of profitable retail client accounts remained broadly stable. This means, that from an investor protection point of view, which aim it is to protect an investor from unreasonable or disproportionate losses, ESMAs intervention measures had to this respect practically no positive effect: the profitability of the trading in CFDs in Germany did not improve after ESMAs product intervention measures.

Our view is supported by the Research Study "CFD Market and Provider Analysis in Germany" (dated April 2019) of the Research Center for Financial Services, Munich, of the Steinbeis

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[1] 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).

[2] European Securities and Markets Authority Decision (EU) 2018/1636 of 23 October 2018 renewing and amending the temporary restriction in Decision (EU) 2018/796 on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 272, 31.10.2018, p. 62); European Securities and Markets Authority Decision (EU) 2019/155 of 23 January 2019 renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 27, 31.1.2019, p. 36); European Securities and Markets Authority Decision (EU) 2019/679 of 17 April 2019 renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients (OJ L 114, 30.4.2019, p. 22).

[3] ESMA Call for Evidence – Effects of product intervention measures regarding CFDs and bi-nary options on market participants and clients (30 September 2019 | ESMA35-43-2090), paragraphs 22-24.

Hochschule, Berlin, which confirms that the profitable retail client accounts remained stable in the German market after the product intervention measures of ESMA.

On the other hand we believe that <u>the product intervention measures have a contradictory effect to the mission of investor protection</u> when the core effects are that (a) private clients change the client category to professional clients where investor protection rules are much less stricter, and (b) clients relocate their trading to providers in no-EU-countries which are either not regulated at all or where investor protection is much less stricter compared to the EU and providers are regulated and supervised according to EU law.

To German clients the relocation to unregulated providers bears the highest risks with regard to investor protection. Even BaFin together with the German police warn and alert the public on unregulated and dubios trading platforms[4]. These risks, of course, cannot be banned by product intervention measures but only by consequently prosecuting unregulated providers and by publishing respective information and warnings.

The CFD Association therefore very clearly supports any actions of the local or European supervisors and prosecutors to use all measures to chase and shut down unregulated providers of CFD trading. And we believe that all necessary instruments to do so are already in place.

But at the same time the CFD Association contradicts any measures of product intervention – such as the last ESMA product intervention measures and the current local product intervention measures of the German regulator BaFin – that have, as even identified by ESMA itself, no positive impact to investor protection at all.

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[4] E.g. dated 4 December 2018, https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Meldung/2018/meldung_181204_warnung_bafin_bka.html

Question A: In addition to the effects of ESMA's product intervention measures regarding CFDs mentioned in the renewal Decisions and in paragraphs 22-24 above, were there further practical effects of ESMA's product intervention measures regarding CFDs on you as a market participant that you would like to share?

Response to Question A:

As mentioned in our general statement above the CFD Association and its members identified as market participants the same practical effects of ESMA's product intervention measures regarding CFDs. In addition, we see a rising number of clients that relocate their trading activities to other leveraged products that are not covered by ESMA's product intervention measures.

In addition, German private clients complain that the product intervention measures with regard to CFDs unacceptably intervene with their core rights of private autonomy. As a consequence, the product intervention measures are not generally accepted by the CFD clients. This might be one of the reasons why private clients tend to either requalify as professional investors or to relocate their trading activities to unregulated and/or non-EU-registered CFD providers.

But other than ESMA or BaFin the CFD Association and its member clearly believe that – at least in Germany – private clients trading in CFDs or wishing to trade in CFDs are well informed on and well aware of the risks associated to CFD trading. Therefore, to the knowledge of the CFD Association and its members there have been placed no major complaints of German private clients with BaFin in view of German regulated CFD providers (neither have they suffered disproportionate losses, even before the product intervention measures!). Any complaints in Germany that were related to CFD trading have been placed in view of dubious and/unregulated CFD providers with its registered seat outside the EU or (at least until approximately 2017) in Cyprus.

Question B: In addition to the effects of ESMA's product intervention measures regarding binary options mentioned in the renewal Decisions and in paragraphs 21, 23-24 above,

were there further practical effects of ESMA's product intervention measures regarding binary options on you as a market participant that you would like to share?

Response to Question B:

Since neither the CFD Association nor its members are active in binary options we do not place a response to this question.

Question C: As a market participant, did you experience any issues arising from the transition between ESMA's and national product intervention measures or from differences between the national product intervention measures taken by NCAs in different jurisdictions?

Question D: As a client, do you experience any issues arising from the transition between ESMA's and national product intervention measures or from differences between the product intervention measures taken by NCAs in different jurisdictions?

Response to Questions C and D:

As, in general, we do not see any differences in the product intervention measures of ESMA and BaFin neither our members nor their clients experienced any issues arising from the transition between ESMA's and BaFin's product intervention measures.

The following should be noted:

As stated above in our response to question A the CFD Association and its members are very confident that private clients trading CFDs in Germany with EU-regulated CFD providers are in general well informed on and well aware of the risks associated to CFD trading. These private clients are well experienced (e.g. due to their profession in the financial market) but still qualify as private clients since they do not dispose of cash and assets of more than EUR 500.000. Unfortunately, neither MiFID nor the German Act on Securities trading (*Wertpapierhandelsgesetz* – WpHG) that transposed MiFID into German law make a difference between categories of private clients. In general, the same rules and the same level of investor protection apply to private clients regardless if these investors are well experienced and have a good knowledge and awareness of what they are doing when trading in CFDs.

Therefore, the CFD Association explicitly appreciates the measures of the NCA of Poland and of Cyprus to introduce a further investor category to local law, the experienced private client[5].

To this respect we want to draw ESMA's attention to the Position Paper prepared by the German Ministry of Finance on Necessary amendments and revisions to investor protection provisions in MiFID and PRIIPS. In this position paper the German Ministry of Finance suggests, as well, to introduce a further category of client under MiFID, a so called semi-professional client, and argues as follows:

> *"MiFID does not differentiate between inexperienced retail clients, who need all of the information and protection provided for in MiFID, and experienced retail clients, who are very active in financial markets and therefore might not have the same need for information. It should be examined how such a semiprofessional client could be defined properly and how information requirements could be limited in such a way that they apply only to inexperienced retail clients. In any case, it should be assessed whether the information requirements that apply to experienced retail clients can be limited to certain types of information (e.g. standardised ex-ante cost information)."*[6]

The CFD Association and its members explicitly appreciate this suggestion of the German Ministry of Finance. In view of both the measures of the NCAs of Poland and Cyprus as well as the position of the German Ministry of Finance the trend becomes very clear that it is necessary to introduce the well experienced, semi-professional client to MiFID (and the local law) as a further client category. The introduction of such a client category would to our opinion have much more positive effects on investor protection in view of CFD trading than the last and current product intervention measures (together with the suggested prosecution of unallowed conducting regulated business in Germany or other EU jurisdictions). Under a regime of a well experienced, semi-professional client a respective client could conduct his or her CFD trading with CFD providers under the supervision of the local NCAs and would have no motivation to relocate the trading activities.[7]

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[5] See press release of the CFD Association of 30 July 2019.

[6] Necessary amendments and revisions to investor protection provisions in MiFID and PRIIPS, Position paper prepared by the German Ministry of Finance, p. 2; as published by the Federal Ministry of Finance (Bundesministerium der Finanzen) on 27 August 2019 under https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Internationales_Finanzmarkt/Positionspapiere-Mifid-Mifir.html.

[7] Even according to Article 19 para. 2 lit. c) 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

To this regard we would like to underline, that from an investor protection point of view the CFD Association does not contradict all of the measures in general. Explicitly, the CFD Association supports the abolition of additional payments liabilities (*Nachschusspflicht*) for inexperienced private clients, which has been proved positive to the market in the past.

Question E: What is your view on the temporary nature (see paragraph 4) of ESMA's product intervention powers?

Response to Question E:

In general, the CFD Association appreciates the temporary nature of ESMA's product intervention powers.

The regulatory background for the temporary nature of the product intervention powers is to our opinion to give ESMA the authority to eliminate current emergencies (e.g. when in times of crises of bank shares ESMA needs to contradict short-selling-speculations that might additionally disrupt the stability of banks or the financial market as such). But in case the respective emergency has ceased any ESMA measures need to be omitted. The temporary nature of the product intervention powers of ESMA is the result of the principle of subsidiarity, which ESMA has to observe.

ESMA's product intervention measures regarding CFDs on the other hand now are practically permanent which contradicts the legislative motivation for ESMA's authorities according to Article 40 MiFIR, since all the EU-NCA's now more or less followed ESMA's product intervention measures without declaring them temporary. In the practical outcome therefore to the opinion of the CFD Association the principle of subsidiarity has been contradicted.

The CFD Association neither has not seen and neither does not see an emergency (nor even a risk) or any other circumstance that would justify the current permanent product intervention in view of CFD trading, especially not all over Europe at the same level. Even though it might be possible that in view of CFD trading the risks for investor protection in single EU member states might be higher than in other EU member states (or at least in Germany) we do not comprehend that ESMA's product intervention had to be placed throughout the EU as a whole. In several EU

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and positions the experience of clients is one of the criteria to be observed in a product intervention process, which underlines, that investor's experiences are of greater value to the European legislator.

countries, such as in Germany, the risks as stipulated by ESMA (and BaFin) do not exist and therefore the measures taken by ESMA (and BaFin) with permanent effect to all EU member states and with the same level of intended protection is by no means justified.

In addition, any product intervention must prove to be effective with regard to the stipulated risks published by ESMA or the NCA. As discussed above in our response to question A we believe that the last and the current product intervention measures in view of CFD trading are ineffective and by no means have of positive effect on investor protection.

Furthermore, we refer to our responses dated 5 Febuary 2018 to ESMA's Call for Evidence – Potential product intervention measures on contracts for differences and binary options to retail clients, especially pagers 13pp.

Question F: Would you have any examples of circumvention of the product intervention measures? If yes, could you please share your views on such circumvention.

Response to Question F:

Further to the descriptions in our response to question A (requalification of private clients as professional clients, relocating the trading activities to non or less regulated providers with its sear in non-EU-countries) we do not experience any examples of circumvention of the product intervention measures.

Question G: Are there any suggestions or comments you wish to share to improve the application of the regulatory framework regarding the product intervention powers?

Response to Question G:

As stipulated above, product intervention is only justified if current risks are effectively banned by the measures of product intervention. ESMA's and BaFin's product intervention measures have shown to be ineffective and contradictory to investor protection. In addition, the temporary character of ESMA's measures have been undermined by the repeated renewal of the measures and the permanent implementation of product intervention of the NCA's. It seems that ESMA's and

BaFin’s information and data base to which both refer to in the justification for their product intervention measures do not reflect the reality of the CFD market. The CFD Association will be happy to meet with ESMA at any time face to face to further discuss this issue and offers to present ESMA on this occasion with the market study and the profit and loss statistics referred to in the present statement.

Regards,

Niklas Helmreich
Chairman of the Management Board