OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 28 June 2019

on the product intervention measure relating to binary options proposed by the Cyprus Securities and Exchange Commission of Cyprus

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 Cyprus Securities and Exchange Commission of Cyprus (CySEC) notified ESMA on 7 June 2019 of its intention to take a product intervention measure under Article 42 of

[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).

that Regulation (national measure). Upon request from ESMA, CySEC provided further information on the content of its notification.

(4) The national measure consists of a permanent prohibition on the marketing, distribution or sale of binary options to retail clients in or from Cyprus.

(5) ESMA has taken product intervention measures prohibiting the marketing, distribution or sale to retail clients of binary options in Decisions (EU) 2018/795 ([3]), (EU) 2018/1466 ([4]), (EU) 2018/2064 ([5]) and (EU) 2019/509 ([6]).

(6) The first of these Decisions took effect on 2 July 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 measure in ESMA Decision (EU) 2019/509 (ESMA's measure) will automatically expire at the end of the day on 1 July 2019.

(7) CySEC notified ESMA that the national measure is the same as ESMA's measure at national level, with the difference that the national measure would not apply to binary option providers that are credit institutions authorised under Directive 2013/36/EU of the European Parliament and of the Council[7] (credit institutions). The national measure is expected to take effect on 7 July 2019.

(8) CySEC 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) 2017/567 ([8]) and taken into consideration all those that are relevant. In particular, CySEC notified ESMA that it shares the reasoning given in ESMA's measure on the existence of a significant investor protection concern, as relevant to Cyprus and the conditions in Article 42 of Regulation (EU) No 600/2014.

[3] 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).
[4] European Securities and Markets Authority Decision (EU) 2018/1466 of 21 September 2018 renewing and amending the temporary prohibition in Decision (EU) 2018/795 on the marketing, distribution or sale of binary options to retail clients (OJ L 245, 1.10.2018, p. 17).
[5] European Securities and Markets Authority Decision (EU) 2018/2064 of 14 December 2018 renewing and amending the temporary prohibition in Decision (EU) 2018/795 on the marketing, distribution or sale of binary options to retail clients (OJ L 329, 27.12.2018, p. 27).
[6] European Securities and Markets Authority Decision (EU) 2019/509 of 22 March 2019 renewing the temporary prohibition on the marketing, distribution or sale of binary options to retail clients (OJ L 85, 27.3.2019, p.19).
[7] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L176, 27.6.2013, p. 338).
[8] 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).

(9) CySEC indicated that the national measure would not cover credit institutions because the Central Bank of Cyprus (CBC) is the NCA responsible for taking a product intervention measure prohibiting the marketing, distribution or sale of binary options to retail clients by those entities in or from Cyprus. CySEC indicated that it had contacted the CBC informing it of the national measure and encouraging it to take the same measure in respect of credit institutions. Furthermore, CySEC observed that, prior to ESMA's temporary product intervention measure, binary options were principally offered to retail clients in Cyprus by product providers which would be captured by the national measure.

(10) With regard to the planned date of taking effect of the national measure, CySEC informed ESMA that, although, in case ESMA's measure is not renewed, the national measure would take effect after the expiry of ESMA's measure, it considers that the risk of binary opinions being offered again in Cyprus to retail clients by product providers captured by the national measure during that time period would be very limited, given the short duration of a possible time gap between the expiry of ESMA's measure and the taking effect of the national measure.

(11) Furthermore, CySEC shares the reasons given in ESMA's measure that the existing applicable regulatory requirements under Union law, which have not changed since the adoption of ESMA's measure, do not address the concern. CySEC also considers that improved supervision or enforcement of the existing requirements would not better address the concern identified. In particular, CySEC informed ESMA that it has taken into account the supervisory and enforcement experiences of other NCAs as referred to in ESMA's measure 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' ([9]), the 'Opinion on structured complex products – good practices for product governance arrangements' ([10]) and the 'Joint Position of the European Supervisory Authorities on manufacturers' product oversight and governance processes' ([11]). Nonetheless, CySEC considers that the significant investor protection concern continues to exist.

(12) Moreover, CySEC shares the analysis on proportionality in ESMA's measure and, in particular, has concluded that the national measure is 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 participants. In the case of one-off costs, CySEC considers that, as the national measure is the same as ESMA's measure, except for the difference described above, any one-off costs that may be incurred by product providers to comply with the national measure are likely to be minimal.

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[9] ESMA/2014/146.
[10] ESMA/2014/332.
[11] JC-2013-77.

(13) CySEC considers that the national measure does not have a discriminatory effect on services or activities provided from another Member State as the measure provides 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.

(14) Since the national measure is the same as ESMA's measure, except for the difference described above, ESMA's measure is binding in all Member States and, on the expiry of ESMA's measure, other NCAs plan to take similar national measures, CySEC considers that other Member States are not significantly affected by its measure. CySEC has also notified ESMA and the other NCAs of the national measure not less than one month before it is intended to take effect.

(15) CySEC considers that the national measure does not pose a serious threat to the orderly functioning and integrity of the national physical agricultural market. In particular, CySEC considers that the national measure is the same as ESMA's measure, except for the difference 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 ([12]). None of those bodies raised any objections to ESMA Decisions (EU) 2018/795, (EU) 2018/1466, (EU) 2018/2064 or (EU) 2019/509.

2. Whether the national measure is justified and proportionate

(16) The significant investor protection concern raised by the offer of binary options to retail clients led to the adoption of ESMA Decisions (EU) 2018/795, (EU) 2018/1466, (EU) 2018/2064 and (EU) 2019/509. However, ESMA's measures are temporary. According to the information provided by CySEC, 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.

(17) Unlike ESMA's measure, the national measure would not apply to credit institutions offering binary options to retail clients in or from Cyprus. ESMA notes that, when there is a division of competences under Regulation (EU) 600/2014 between NCAs in the same Member State, those NCAs are under an obligation to closely cooperate for the purposes of that Regulation, including in respect of the power to take product intervention measures. Nonetheless, ESMA has taken into account the necessity of the national measure to promptly address the significant investor protection concern identified by CySEC as well as the relevance of CySEC's supervisory experience, according to which, prior to ESMA's temporary product intervention measure, binary options were principally

[12] Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1).

offered to retail clients in Cyprus by providers which would be captured by the national measure.

(18) With regard to the planned date of taking effect of the national measure, ESMA has taken into account the short duration of a possible time gap between the expiry of ESMA's measure and the taking effect of the national measure as well as the capacity of CySEC to adequately monitor the market during that period and act as necessary.

(19) Based on these reasons, together with the reasons for ESMA's measure referred to by CySEC, ESMA considers that the national measure is justified and proportionate.

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

(20) For the reasons explained in ESMA's measures, the significant investor protection concern raised by the offer of binary options 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 measure, 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 measure. Therefore, it is essential that NCAs take concerted action to address this risk.

(21) Furthermore, in order to avoid the risk of regulatory arbitrage related to credit institutions being able to market, distribute or sell binary options to retail clients in or from Cyprus and address the relevant significant investor protection concern, ESMA considers it essential that the CBC, in close cooperation with CySEC, takes a measure at least as stringent as ESMA's measure in respect of the marketing, distribution or sale of binary options to retail clients by those entities in or from Cyprus.

4. Conclusion

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

(a) the national measure is justified and proportionate;

(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 measure; and

(c) it is necessary for the CBC to take a product intervention measure that is at least as stringent as ESMA's measure in respect of the marketing, distribution or sale of binary options by credit institutions in or from Cyprus.

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

Done at Paris, 28 June 2019

For the Board of Supervisors
Steven Maijoor
The Chair