

Feedback Statement to the Analysis of Consultation on the Implementation of National Product Intervention Measures in relation to Binary Options

Ref: 08 - 2019

Date: 17 July 2019

1. Introduction

On 13 May 2019, the MFSA issued a [Consultation Document](#) proposing to adopt Product Intervention (PI) measures in terms of Article 42(2) of [MIFIR](#) with respect to Binary Options. The Consultation Period closed on 27 May 2019.

In the referred Consultation Paper, MFSA explained the nature of Binary Options and the reason why these financial instruments are classified as complex financial instruments and why these are deemed to have an inherent risk.

MFSA also proceeded to explain that the proposed national measures would essentially mirror the temporary measures from ESMA which is a prohibition (ban) on the marketing, distribution or sale of binary options to retail investors and which temporary measure is currently in force throughout the EU.

The measures proposed to be taken by MFSA, would be applicable to investment firms authorized in Malta which market, distribute or sell, binary options to retail clients, as well as to investment firms from other EU Member States marketing, distributing or selling such instruments in Malta either through the establishment of a branch in Malta (freedom of establishment) or through the provision of services on a cross border basis (freedom of service).

Further to the said Consultation Document, the MFSA has received feedback from the industry and is hereby issuing this statement with respect to the comments received and its position in relation thereto.

2. Industry Feedback received to Consultation Document

In the above-referred to consultation paper, MFSA posed the following questions:

- A. Do you agree with the permanent Product Intervention measures being proposed by the MFSA which would apply to persons offering services to retail investors, in relation to Binary Options, in or from Malta?
- B. If the answer to question 'A' above is no, please provide reasons.
- C. What other measures, in addition to, or in substitution of, the proposed national measures would you suggest to be implemented by the MFSA to mitigate consumer detriment in this area?

Issue 1

In relation to questions (A) and (B) as posed by the MFSA, the Industry urged the Authority to treat Binary Options as gambling instruments. The main arguments used by the Industry to support the above mentioned views were the following:

1. *Binary Options were originally treated as gambling products and Binary Options fall more naturally within the scope of gambling, as their value and the profit (or loss) that results from them do not "derive" from the fluctuation of an underlying market (i.e. they are not "derivatives"); and*
2. *Given that other gambling products which are directly comparable to Binary Options remain lawful, a ban on binary options only, would mean a non-equal treatment and discrimination towards binaries, which is against the EU law (of equal treatment and non-discrimination).*

MFSA position:

It should be noted that back in 2013, Binary Options were classified as financial instruments following a clarification made by the European Commission that Binary Options meet the requirements prescribed in the definition of financial instruments in point (4) of Section C of Annex 1 to the MiFID ([Directive 2004/39/EC](#)), given that they are derivative contracts settled in cash. This clarification was endorsed by European National Competent Authorities as well as by ESMA. Therefore MFSA is not able to apply a different interpretation with respect to the treatment of binary options.

Furthermore, although the proposed Product Intervention measures would prohibit the distribution of binary options to retail clients, they do not in any manner render binary options illegal per se.

Issue 2

Furthermore, with regards to question (C) as posed by MFSA, the Industry urged the Authority to impose restrictions on binary options rather than prohibit them.

The Industry argued that the classification of Binary Options as financial instruments led to the explosion of abusive marketing tactics, as different types of entities who had been licenced in other jurisdictions, were passporting their services all around the EU and promoted binary options as investment opportunities to retail clients. The Industry argued that it is not the financial instrument per se which is problematic but the manner in which unscrupulous firms went about selling it.

In its feedback the Industry also associated the proposed manner of imposing a number of restrictions in view of the principle of proportionality. In this respect, reference was made to restrictive regulatory practices which are currently in force in US and Japan. Furthermore, the Industry also recommended that MFSA adopts the approach of other EU member states which banned the marketing of Binary Options to retail clients and/or required enhanced risk warnings of Binary Options.

MFSA position:

As explained in the Consultation Document, Binary Options are inherently risky and complex financial instruments and are consequently not suitable for every type of investor.

Furthermore, it should be noted that a number of investment firms operate their business on a cross-border basis to other EU Member States through freedom of services on the strength of their MIFID passport. The majority of EU Member States have indicated that they will be prohibiting the marketing, distribution or sale of binary options to retail clients, similarly to the current ESMA temporary Product Intervention measures (on Binary Options). More information on the implementation status of national product intervention measures in other EU member states can be found in the following link: <https://www.esma.europa.eu/policy-activities/mifid-ii-and-investor-protection/product-intervention>.

The above situation implies that any investment firm licenced in Malta and is actively passporting (on a cross-border basis) to other EU Member States would be required to adhere to the national product intervention measures as implemented in the respective host country – irrespective of the action taken or otherwise by the home regulator of that investment firm. By way of example, if the host EU member state would have implemented a ban on the marketing, distribution or sale of binary options to retail clients, then investment firms licenced in Malta would still need to refrain from marketing, distributing or selling binary options to retail clients in that particular member state.

Furthermore, if MFSA decides not to implement the Binary Options ban (similar to ESMA's temporary Product Intervention measures) then there would be the risk of regulatory arbitrage vis a vis other EU member states.

3. Amendments to the relevant Rulebooks

The national product intervention measures will be reflected in the Conduct of Business Rulebook.

4. Contact

Any comments or queries in relation to this Feedback Statement should be directed to the Conduct Supervision on csu@mfsa.com.mt