

23 July 2019

ESMA's Public Statement on the application of product intervention measures under Article 40 and 42 of Regulation (EU) No. 600/2014 (1) (MiFIR) by CFD providers

Background

By way of an update, kindly note that the European Securities and Markets Authority has issued a [Statement](#) on 11 July 2019, in response to various practices and situations observed in the market which raised a number of concerns of non-compliance with the requirements imposed by ESMA's Product Intervention Measures. The [Statement](#) in question specifically refers to all regulated entities which either provide, distribute or sell Contracts for Differences (CFDs) to retail clients.

The referred [Statement](#) is aiming to draw your attention and subsequently address, amongst others, the following issues:

I. Professional Client on Request

- Any documents published by ESMA in accordance with MiFID II/ MiFIR such as ESMA's Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics (Investor Protection Q&As) should also be taken into consideration by Contracts for Differences ('CFD') Providers. In particular, the Investor Protection Q&As and particularly section 11, provides with further clarifications on the Client Categorisation process;
- ESMA has observed a substantial increase in the number of clients treated as professional clients on request by CFD providers. Furthermore, ESMA is aware that some CFD providers are advertising to retail clients the possibility to become professional clients on request;
- As described in Investor Protection Q&A, Section 11, *"Investment firms should strictly refrain from implementing any form of practice that incentivises, induces or pressures an investor to request to be treated as a professional client"*. In this respect, any form of promotional language in relation to the status of professional clients can potentially be seen as incentivising retail clients to apply for a client reclassification. The [Statement](#) provides more detail on this matter. You may wish to note that this issue is also being discussed during the Product Intervention on-site inspections; and
- It is expected that CFD Providers delve deeper by also running an appropriate complementary assessment in order to have reasonable assurance that the clients are capable of making their own investment decisions.

II. Marketing, distribution or sale by third-country CFD providers

- The [Statement](#) notes that third-country firms are only allowed to provide services to clients in the Union at the **client's own exclusive initiative**. The issue of client solicitation is further discussed and in this respect specific reference is made to Recital 111 of MiFID II and the Investor Protection Q&As Section 13. It is expected that compliance officers which belong to group companies to carefully consider these clarifications:
- In relation to the above, ESMA reminds that according to Article 3 of the ESMA Decision (EU) 2018/796 and the subsequent Renewal Decisions, firms should be restrained from **participating, knowingly and intentionally, "in activities the object or effect of which is to circumvent the requirements in Article 2, including by acting as a substitute for the CFD provider."**
- ESMA is aware of the fact that some CFD providers established in the Union are marketing the possibility for retail clients to move their accounts to an intra-group third country entity. ESMA specifically warns CFD providers established in the Union, that information in **relation to the 'benefits' of trading CFDs with such an intragroup third-country entity could potentially be seen as a circumvention of ESMA's product intervention measures by the EU authorised firm**. The [Statement](#) provides a number of good and bad practices and establishes a number of guidelines on intra-group marketing. It is expected that compliance officers which belong to group companies to carefully consider these clarifications and to implement accordingly on the companies' respective websites.

Contacts

Any queries or requests for clarifications on the contents of this Circular should be addressed to the Conduct Supervision on offsiteinv@mfsa.com.mt.