

16 August 2023

## ESMA issues [Opinion on CNMV Product Intervention Measures](#)

### **Background**

The European Securities and Markets Authority (hereinafter “ESMA”) issued an opinion on 11 July 2023 regarding the recent implementation of the [new product intervention measures introduced by the Spanish Comisión Nacional del Mercado de Valores](#) (hereinafter the “CNMV”).

Following the ESMA Decision (EU) 2018/796, the CNMV (as well as ESMA and other NCAs) adopted in 2019 various measures imposing restrictions on the marketing, distribution and sale of on contacts for differences (hereinafter the “CFDs”). CFDs give rise to significant investor protection concerns. Nevertheless, the CNMV is of the view that the measures introduced in 2019, although effective, had a limited impact to the mass dissemination of the marketing and advertising activities, that promoted such high-risk products. Consequently, after having assessed its detrimental effect to Spanish retail consumers, the CNMV has revisited its existing restrictions on CFDs and other high-risk products.

Between 28<sup>th</sup> November and 31<sup>st</sup> December 2022, the CNMV has initiated a public consultation on the proposed measures on marketing, distribution and sale of CFDs and other leveraged instruments to retail customers, involving market participants such as ESMA, other national competent authorities, investment intermediaries, consumers and the media.

In accordance with powers granted under the existing legal provisions, namely:

- 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
- and
- 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),

ESMA has adopted the proposed CNMV opinion on the product intervention measures relating to contracts for differences (CFDs) and other high-risk products.

**Scope**

Additional measures on marketing and advertising high-risk products are intended for entities authorised to provide investment services in Spain, regardless of the origin of the firm or having a branch in Spain, including Spanish firms passporting-out to other Member States and dealing in instruments with underlying cryptocurrencies that are not considered an asset subject to MiFID regulation.

The newly imposed CNMV measures are divided into two sets of resolutions:

**Part I - Measures applicable to CFDs**

- Prohibition of advertising communications aimed at retail customers or the general public;
- Prohibition of the sponsorship of events or organisations and brand advertising;
- Prohibition of certain marketing practices.

In line with the imposed prohibitions, investment firms and/or their **affiliated parties** (such as, but not limited to, introducers) are no longer allowed to advertise above said high-risk products in a manner that would result in Spanish consumers and the general public interacting with the investment firm. The prohibition includes website redirection, consumer contact forms, offers to download applications and/or other tools, free practice (virtual, demo) accounts, as well as trainings, courses or seminars. The prohibitions exclude interaction initiated by the client or due to already established contractual relationship. Such exclusions would need to be documented and kept on file.

Prohibition is imposed on organization of events, sponsorships or brand advertising, including making use of public figures, where such actions would aim or result in promotion of afore said high-risk products and/or related services. The exception is made in case of no intention to promote such products and services or if they represent a very small part of the investment firm's activities.

Due to the conflict of interest, new measures forbid the practice of investment firms paying inducements to their existing clients (referrals) or to other third parties (affiliates) for introducing new clients from their own networks, making use of call centers whether directly operated by the investment firm or other third party, engaging individuals to train unexperienced clients with inadequate skills and knowledge to trade high-risk products. The ban was also imposed on the use of any software that would in any way result in remuneration to the software provider based on the amount of client's funds deposited with the investment firm. Lastly, the ban was imposed to client's cash deposits by means of credit cards.

**Part II - Measures applicable to other leveraged instruments**

- Restrictive measures applicable to the subject instruments.

These measures are intended for financial instruments other than CFDs, whose maximum risk is unknown at the time of subscription or whose risk of loss is greater than the amount of the initial margin. When engaged in selling of such instruments, the investment firm must comply with the following requirements:

- i. Demand the customer to pay the initial margin, where the initial margin should correspond to the type of the underlying asset (including cryptocurrencies not considered an asset subject to MiFID regulation) from the [27<sup>th</sup> June 2019 CNMV Resolution on product intervention measures relating to binary options and CFDs](#) or the amount demanded by the venue where the instrument is traded, whichever amount is lower;
- ii. Provide the “close position protection” to the retail clients, enabling the closing of one or more open instruments under the most advantageous conditions, in the event when client’ trade account balance and the net unrealized gains of all open instruments fall below 50% of the initial margin committed for those instruments. The position closing will not take place before 50% threshold is reached and the client is informed.

**Target Audience**

This circular is intended to all Investment Firms and Credit Institutions that provide or intend to provide investment services activities on a **cross-border basis to Spanish retail clients**, under the provisions of Article 34 of MiFID II (freedom to provide services).

**Contacts**

Should you have any further questions, please do not hesitate to contact: [csuinvestments@mfsa.mt](mailto:csuinvestments@mfsa.mt).