

21 August 2019

**Communication from the KNF on *Opinion of the European Securities and Markets Authority of 30 July 2019 on the product intervention measures relating to contracts for differences proposed by Komisja Nadzoru Finansowego of Poland (ESMA35-43-1995)***

On 31 July 2019, pursuant to Article 43(2) of MiFIR<sup>1</sup>, the European Securities and Markets Authority (ESMA) published its opinion on the product intervention measures relating to contracts for differences adopted by the KNF Board (Ref. No ESMA35-43-1995)<sup>2</sup>.

In its opinion, ESMA has concluded that the measures ultimately defined in the decision of the KNF (authority) on the restriction on the marketing, distribution or sale of contracts for differences (CFDs) to retail clients ([Ref. No DAS.456.2.2019](#)) are justified and proportionate, except for:

- the lower margin requirements for experienced retail clients (compared to the ESMA measure relating to CFDs) and
- the territorial scope.

From the Opinion of ESMA it follows that the intervention measure adopted by the KNF to an extent that is at least as stringent as the extent of the ESMA measure has been considered to be justified and proportionate.

**In order to comply with the requirement referred to in Article 43(3) of MiFIR, the authority hereby communicates the following.**

The KNF notes that when introducing product intervention measures, the authority was required, under Article 42(2)(c) of MiFIR, to take into account the level of knowledge of, and the probable effect of the adopted measures for, investors who acquire CFDs. Therefore, the legitimacy of restrictions on the offering of CFDs to retail clients should not be assessed solely on the basis of losses recorded in the past.

The data collected by the KNF show that following the entry into force of the ESMA measure, many retail clients have transferred, or are planning to transfer, their investment activities relating to CFDs to non-EU countries. That is caused by the fact that the leverage available in the European Union has been set at a rate that is too low. In consequence, clients that continue to carry out their investment activities outside the European Union are less protected by the law. That is associated with the differences between the EU legislation and the legislation in non-EU countries.

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<sup>1</sup> 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, as amended);  
<sup>2</sup>[https://www.esma.europa.eu/sites/default/files/library/esma-35-43-1995-esma\\_opinion\\_under\\_article\\_432\\_mifir\\_pl\\_cfd.pdf](https://www.esma.europa.eu/sites/default/files/library/esma-35-43-1995-esma_opinion_under_article_432_mifir_pl_cfd.pdf)

The introduction of the definition of ‘experienced client’ – having a head office or habitual residence only in the territory of Poland – is to prevent the transfer of investment activities outside the European Union. That will allow investors treated as experienced clients to be protected by the EU legislation when carrying out their investment activities, and the leverage rate will be adapted to their expectations.

It is important to note that the lower level of initial margin (associated with the access to higher leverage) will only apply to those retail clients that can prove the required knowledge and experience in the field of investments. The purpose of that arrangement is to identify those retail clients that can demonstrate the knowledge required by the KNF of how to trade in CFDs and of the investment risk associated with CFDs trading. The authority also points to the fact that the transfer of investment activities relating to CFDs to non-EU countries due to insufficient leverage by retail clients that could be granted the status of ‘experienced client’ supports the conclusion that such clients accept higher investment risk.

The KNF notes that after the temporary ESMA product intervention relating to CFDs expired, various EU Member States have adopted national measures which are not the same. Some countries have not adopted any restriction on investments in CFDs.

In the KNF’s view, that might lead to a situation where a CFD provider conducting cross-border activities will determine which measures should be applied in the country concerned, according to how the CFD provider assesses the stringency of the national supervisory measures. That in turn creates a risk of regulatory arbitrage, which should be avoided, in accordance with MiFIR. Thus, the purpose of defining the territorial scope of application of the KNF’s decision was to establish clear conduct of business rules for CFD providers in Poland and in the other EU Member States. The KNF has concluded that the rules will preclude the possibility of CFD providers applying regulatory arbitrage.

Therefore, considering the Opinion of ESMA, the authority has concluded that the final arrangement made in the decision on the restriction on the marketing, distribution or sale of CFDs to retail clients ([Ref. No DAS.456.2.2019](#)) is justified and proportionate, thus it was necessary to adopt.