

Public Statement

On identifying derivatives within the scope of the national product intervention measures on CFDs

Background

ESMA and NCAs observe the increased offering of derivatives, often marketed as perpetual futures or perpetual contracts, that provide leveraged exposure to underlying values, including crypto-assets such as Bitcoin or Ethereum. Such financial instruments are likely to fall within the scope of the temporary product intervention measures which were initially adopted with ESMA decision n. 2018/796¹ and which were subsequently replaced by permanent national product intervention measures mirroring the ESMA temporary measures. This means that those derivatives that meet the definition of a CFD would be subject to measures including leverage limits, a mandatory risk warning, a margin close-out and negative balance protection, and the prohibition of monetary and non-monetary benefits.

This statement, which is addressed to firms and NCAs, is a reminder that firms should assess whether the national product intervention measures apply to the products they offer, based on the specific product characteristics. While this public statement specifically mentions derivatives marketed as perpetual futures or perpetual contracts, the assessment whether the national product intervention measures apply should be conducted for all derivatives offered irrespective of their commercial name. In addition, this statement draws firms' attention to the application of certain investor protection requirements established under MiFID II².

Scope of the national product intervention measures on CFDs

National product intervention measures on CFDs have been adopted by NCAs. These national measures reflect the original temporary measures adopted by ESMA in 2018. The ESMA Decision included a definition of CFDs for the specific purpose of the financial instruments affected by that decision.³ This definition may encompass financial instruments from several categories of Annex I, Section C of MiFID II⁴.

¹ European Securities and Markets Authority Decision (EU) 2018/796 of 22 May 2018 to temporarily restrict contracts for differences 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. 50) (**ESMA Decision**). The application of the ESMA measures was confirmed by subsequent quarterly decisions, until 31 July 2019. In the meantime, all NCAs adopted permanent national PI measures mostly mirroring the mentioned ESMA decision, without any changes.

² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

³ "For the purposes of this Decision: (a) 'contract for differences' or 'CFD' means a derivative other than an option, future, swap or forward rate agreement, the purpose of which is to give the holder a long or short exposure to fluctuations in the price, level or value of an underlying, irrespective of whether it is traded on a trading venue, and that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event."

⁴ For example, financial instruments in accordance with C (9), C (4) or C (10) of MiFID II – Annex I.

In this context, the commercial name provided by firms (e.g. “perpetual futures”) is irrelevant for the categorisation under MiFID II of products distributed, marketed or offered to clients, and firms must conduct a careful legal analysis of these products and their functioning, in order to check whether they may fall within the scope of application of product intervention measures. Firms must conduct this careful legal analysis by adhering at all times to the overarching obligation to act honestly, fairly and professionally in accordance with the best interests of clients, to which they are bound.⁵

Consequently, a derivative that provides exposure to an underlying value which is not exclusively settled physically, would likely fall in scope of the product intervention measures on CFDs, unless it classifies as one of the products excluded by the definition in the ESMA Decision. Certain characteristics are not relevant to this assessment. These include whether the product is traded on a trading venue, the presence of additional features such as a funding rate mechanism, or safeguards adopted by firms on a voluntary basis such as negative balance protection or so-called ‘insurance funds’.

Application of certain investor protection requirements

In addition to the necessary analysis on the application of the mentioned product intervention measures, ESMA would like to underline a number of general key investor protection requirements which apply to the provision of investment services to retail clients in the EU and which are particularly relevant for leveraged products, considering their complexity and risk.⁶

Requirements on product governance

Given the particularly complex and risky nature of these products, a very careful assessment of the target market should be performed. This assessment should consider key risk factors, including those linked to leverage and margin trading. This is expected to result in a narrow target market and a distribution strategy that is consistent with such target market.⁷

Investment firms should therefore carefully design their approach when marketing these products. In the view of ESMA, certain initiatives should not be considered to be compliant with the product governance rules. For instance, mass marketing campaigns, initiatives aimed at inexperienced investors, or emails and pop-ups to all clients of a firm that state that such products are now offered and investors should “get started now” should not be considered to be consistent with a narrow target market.

Requirements on appropriateness

⁵ ESMA notes that participating in circumvention activities to the product intervention measures is prohibited.

⁶ These requirements apply to all categories of derivatives, irrespective of their commercial name and regardless of whether they fall within the scope of the product intervention measures on CFDs or not.

⁷ Paragraphs 26 and 58 to 60 of the [ESMA Guidelines on MiFID II product governance requirements](#) are particularly relevant.

As derivatives are complex financial instruments, an appropriateness assessment needs to be carried out where non-advised services are provided.

Requirements on conflicts of interest

Firms should take appropriate steps to identify and to prevent or manage conflicts of interest related to the offering of derivatives such as perpetual futures/contracts. A prominent conflict of interest arises where these derivatives are issued by a group entity or traded on a venue belonging to the group, which may result in the firm of the group to push these products to their clients.

PRIIPs

Derivatives such as so-called perpetual futures/contracts are packaged investment products. As a consequence, the PRIIPs Regulation⁸ applies and firms need to prepare a Key Information Document (KID) when distributing these products to retail clients.

⁸ Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).