

Subject

Decision by the Financial Supervisory Authority to restrict the marketing, distribution and sale of contracts for differences (CFDs) to retail clients

By virtue of Article 42 of the Markets in Financial Instruments Regulation (MiFIR)¹, the Financial Supervisory Authority (FIN-FSA) has decided as follows:

1. The marketing, distribution and sale of contracts for differences (CFDs) to *retail clients*² referred to in chapter 1, section 23(3) of the Act on Investment Services (747/2012) is restricted to circumstances where at least all of the following conditions are fulfilled:
 - a) the CFD provider requires the retail client to pay the *initial margin protection*;
 - b) the CFD provider provides the retail client with the *margin close-out protection*
 - c) the CFD provider provides the retail client with the *negative balance protection*;
 - d) the CFD provider does not directly or indirectly provide the retail client with a payment, monetary or *excluded non-monetary benefit* in relation to the marketing, distribution or sale of a CFD, other than the realised profits on any CFD provided; and
 - e) the CFD provider does not send directly or indirectly a communication to or publish information accessible by a retail client relating to the marketing, distribution or sale of a CFD unless it includes the appropriate risk warning specified by and complying with the conditions in Annex II of this decision.

It is also prohibited to participate, knowingly and intentionally in activities the object or effect of which is to circumvent the requirements of this paragraph.

2. For the purpose of this Decision:

¹ 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.

² The definition of a retail client referred to in chapter 1, section 23(3) of the Act on Investment Services (747/2012) corresponds to the definition of a retail client in Article 4(1)(11) of the Markets in Financial Instruments Directive (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments).

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- a) *contract for differences* or CFD means a *derivative* referred to in Article 2(1)(29) of MiFIR 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, referred to in chapter 1, section 2(1)(13) of the Act on Trading in Financial Instruments (1070/2017) 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;
- b) *excluded non-monetary benefit* means any non-monetary benefit other than information and research tools related to CFDs;
- c) *initial margin* means any payment for the purpose of entering into a CFD, excluding commission, transaction fees and any other related costs;
- d) *initial margin protection* means an initial margin defined in accordance with Annex I of this decision;
- e) *margin close-out protection* means the closure of one or more of a retail client's open CFDs on terms most favourable to the client in accordance with Articles 24 and 27 of the Markets in Financial Instruments Directive³ when the sum of funds in the CFD trading account and the unrealised net profits of all open CFDs connected to that account falls to less than half of the total initial margin protection for all those open CFDs;
- f) *negative balance protection* means the limit of a retail client's aggregate liability for all CFDs connected to a CFD trading account with a CFD provider to the funds in that CFD trading account.

3. This decision enters into force on 8 July 2019 and remains effective until further notice.

Justifications for the decision

The purpose of this decision is to implement nationally a similar restriction on the marketing, distribution and sale of contracts for differences as imposed for the EU by a decision of the European Securities and Markets Authority (ESMA)⁴ on a temporary basis until 31 July 2019. By virtue of Article 40 of MiFIR, ESMA restricted the marketing, distribution and sale of contracts for differences to retail clients for the first time within the Union as of 1 August 2018.⁵ To date, ESMA has renewed the

³ Directive 2014/65/EC of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

⁴ European Securities and Markets Authority Decision (EU) 2019/679 of 23 January 2019 renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients.

⁵ 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 600/2004 of the European Parliament and of the Council.

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restriction three times, since it is authorised to take intervention measures that are valid for a maximum of three months and since the competent authorities of the member states have not yet taken national intervention measures to a significant degree to resolve the concerns caused to investor protection by contracts for differences.⁶

In accordance with Article 42(1) of MiFIR, a competent authority may prohibit or restrict the marketing, distribution or sale (intervention measures) of certain financial instruments in or from that member state. The competent authority in Finland is the Financial Supervisory Authority in Accordance with section 50 o(1) of the Act on the Financial Supervisory Authority. Unlike ESMA's intervention measures, domestic intervention measures may be permanent, but in accordance with Article 42(6), the authority must revoke a measure if its preconditions longer apply.

In accordance with the first subparagraph of Article 42(2), intervention measures by the competent authority of a member state require that the authority is satisfied on reasonable grounds that the conditions provided in points a–f are met. The conditions and satisfaction thereof are explained in more detail below:

- a) *A financial instrument gives rise to significant investor protection concerns.* The criteria and factors that must be assessed by the competent authority in determining whether an issue at hand is a concern referred to herein are recounted in more detail in Article 21(2) of Commission Delegated Regulation (EU) 2017/567.⁷ They are similar to the criteria and factors which had to be assessed by ESMA in accordance with Article 19(2) of the same Regulation in imposing the temporary restriction. As explained in more detail in preamble (2) of Decision (EU) 2018/796, ESMA deemed in its assessment that the issue gives rise to significant investor protection concerns for the following reasons:
- Trading costs and other charges applicable to trading in CFDs are complex and non-transparent for clients.
 - The main feature of CFDs is their ability to operate on leverage, and the leverage levels may be high. While leverage increases both the possible profit and loss for clients, due to the practice of automatic margin close-out, in practice the use of leverage is more likely to increase to probability of a larger loss than the probability of a larger gain for the client. Transaction fees are normally applied to the notional value of the CFD, and therefore the transaction fees relative to the client's investment (initial margin) are higher at higher levels of leverage. Furthermore, another risk associated with leverage is that it

⁶ Recital 9 of the European Securities and Markets Authority Decision (EU) 2019/679.

⁷ Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions

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places clients at risk of losing more money than they have invested.

- The underlyings of CFDs may be complex, such as currency pairs, or unstable, such as cryptocurrencies.
- The offer of CFDs within the Union had increased rapidly, and studies conducted by competent authorities of certain member states showed that most retail clients lost money in CFDs regardless of market developments.
- The evidence on losses incurred on CFDs by retail clients also demonstrates that CFDs have been marketed to such retail clients who have not had adequate expertise to appropriately assess the risks and expenses related to CFDs.
- The marketing and distribution practices of CFDs had been aggressive and misleading.

By reference to the same considerations and the related evidence obtained by ESMA, the FIN-FSA considers that the issue at hand is a significant concern related to investor protection.

- b) *Existing regulatory requirements under Union law applicable to the financial instrument, structured deposit or activity or practice do not sufficiently address the risks referred to in point (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements.* Preamble (3) to the ESMA Decision 2018/796 explains in more detail the requirements applying to the provision of contracts for differences and the guidance issued by ESMA to ensure consistent and effective application thereof.⁸ However, ESMA deemed the restriction necessary, since there was clear evidence that clients had lost and will lose money in contracts for differences despite these requirements. The FIN-FSA concurs with this assessment. In this regard it is also noteworthy that to the extent CFDs were offered to Finnish clients before ESMA's prohibition, it took place across the border from other member states, and therefore it would have been difficult to resolve the problem merely by improving national supervision. Certain other member states' experiences discussed in the justifications of the ESMA Decision also point to same issue.
- c) *The action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument, structured deposit or activity or*

⁸ Opinion on MiFID practices for firms selling complex products, 7 February 2014 | ESMA/2014/146; Opinion on structured complex products - good practices for product governance arrangements, 27 March 2014 | ESMA/2014/332; JC-2013-77 Joint Position of European Supervisory Authorities on manufacturers' product oversight and governance processes.

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practice. The FIN-FSA's restriction under this decision contains the same measures as the temporary restriction by ESMA:

- *Initial margin protection*. Since leverage has been a key reason for the significant investor protection concern related to contracts for differences, the marketing, distribution and sale of CFDs to retail clients is restricted by imposing leverage limits on the contracts based on the type of underlying. In practice, this measure means that clients are protected by requiring them to pay an initial margin protection under Annex I to the decision in entering into a contract for differences. This limits the client's investment risk in terms of notational value relative to the amount of money invested by the client.
- *Margin close-out protection*. This measure requires the providers of CFDs to close out retail clients' open CFDs when losses on the client's CFD trading account reach 50% of the required initial margin. This measure supplements the introduction of the initial margin and reduces the risk that the client loses significant amounts of money in CFDs. The standardisation of the close-out limit also harmonises previously inconsistent practices among CFD providers.
- *Negative balance protection*. This measure is aimed at ensuring that the maximum losses incurred by a retail client on a transaction in CFDs, including related costs, are limited to the total amount of funds in the client's CFD trading account. The measure protects the client in such exceptional circumstances where the change in the price of the underlying is so sudden that the CFD provider in practice cannot close out the client's positions in a manner required by the margin close-out protection.
- *The prohibition of monetary and non-monetary benefits*. This measure prohibits financial promotions, such as bonuses and other incentives seeking to distract retail clients from the high-risk nature of CFD products.
- *Risk warnings*. This measure includes a requirement to use standardised company-specific risk warnings and to provide information on retail clients' loss-making trading accounts. However, in accordance with Annex II to the decision, the format of the risk warnings has been adapted to the communication channel used.

The FIN-FSA furthermore refers to recital (5) of the ESMA Decision (EU) 2018/796 and a separate analysis conducted by ESMA⁹, addressing why these various measures are necessary and proportionate in resolving the investor protection concern referred to in point (a). ESMA has also collected information for the renewal decisions on how its measures pertaining to the re-

⁹ Product Intervention Analysis, Measures on Contracts for Differences, 1 June 2018 | ESMA50-162-215

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striction may have affected the losses and costs incurred by retail clients.¹⁰ Since this FIN-FSA's restriction comprises the same measures as the current temporary restriction by ESMA, compliance with the measures under this national restriction cannot cause immediate further costs to anyone.

- d) *The competent authority has properly consulted competent authorities in other Member States that may be significantly affected by the action.* For as long as ESMA's temporary restriction remains in force, the FIN-FSA's restriction cannot have a significant impact on any member state, since the restriction has the same content as the restriction by ESMA. After ESMA's restriction ceases to be valid, the impacts of this national restriction on other member states will depend on the intervention measures taken by their competent authorities, but impacts are unlikely to be significant. In accordance with Article 42(3) of MiFIR, the FIN-FSA has also notified ESMA and the competent authorities of the other member states on this intervention measure one month before its entry into force.
- e) *The action does not have a discriminatory effect on services or activities provided from another Member State.* This restriction imposed by the FIN-FSA is valid regardless of from which member states CFDs are being marketed, distributed or sold to Finland, and therefore it is non-discriminatory.
- f) *The competent authority has properly consulted public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007¹¹, where a financial instrument or activity or practice poses a serious threat to the orderly functioning and integrity of the physical agricultural market.* The FIN-FSA considers that CFDs have not caused such a serious threat in Finland, but ESMA has also consulted the Ministry of Agriculture and Forestry of Finland regarding its decision on the restriction, and the Ministry has not objected to it.¹²

Due to the temporary restriction by ESMA, CFDs cannot have been provided without restriction to retail clients anywhere in the Union, including Finland, as from 1 August 2018. In accordance with Article 42(2)(2) of MiFIR, where the conditions set out in the first subparagraph are fulfilled, the competent authority may impose the prohibition or restriction referred to in subparagraph 1 *on a precautionary basis* before a financial instrument or structured deposit has been marketed, distributed or sold to clients. When ESMA last renewed its restriction, it continued to

¹⁰ Recital 6 of the European Securities and Markets Authority Decision (EU) 2019/679

¹¹ Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation).

¹² Recital 147 of the European Securities and Markets Authority Decision (EU) 2018/796

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consider it likely that CFDs would again be offered to retail clients without adequate measures to sufficiently protect them against the risks related to CFDs.¹³ Therefore there is a threat that when ESMA ceases to renew its restriction, the offer of CFDs without adequate investor protection may be targeted at retail clients particularly in member states where no national restrictions have been imposed. Due to this threat, the FIN-FSA deems it necessary to restrict marketing, distribution and sale of CFDs to retail clients as a precautionary measure also in Finland.

The FIN-FSA has received an opinion from ESMA on the national restriction under this decision in accordance with Article 43(2) of MiFIR. In its opinion, ESMA finds the restriction justified and proportionate.¹⁴

FINANCIAL SUPERVISORY AUTHORITY

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Appendices Initial margin percentages by type of underlying
 Risk warnings
 Appeal instructions

¹³ Recital 11 of the European Securities and Markets Authority Decision (EU) 2019/679.

¹⁴ OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY of 14 May 2019 on the product intervention measures relating to contracts for differences proposed by the Finanssivalvonta of Finland, ESMA35-43-1914

Annex I to decision

INITIAL MARGIN PERCENTAGES BY TYPE OF UNDERLYING

- a) 3.33% of the notional value of the CFD when the underlying currency pair is composed of any two of the following currencies: US dollar, Euro, Japanese yen, Pound sterling, Canadian dollar or Swiss franc
- b) 5% of the notional value of the CFD when the underlying index, currency pair or commodity is:
 - i) any of the following equity indices: Financial Times Stock Exchange 100 (FTSE 100); Cotation Assistée en Continu 40 (CAC 40); Deutsche Bourse AG German Stock Index 30 (DAX30); Dow Jones Industrial Average (DJIA); Standard & Poors 500 (S&P 500); NASDAQ Composite Index (NASDAQ), NASDAQ 100 Index (NASDAQ 100); Nikkei Index (Nikkei 225); Standard & Poors / Australian Securities Exchange 200 (ASX 200); EURO STOXX 50 Index (EURO STOXX 50)
 - ii) a currency pair composed of at least one currency that is not listed in point (a) above; or
 - iii) gold
- c) 10% of the notional value of the CFD when the underlying commodity or equity index is a commodity or any equity index other than those listed in point (b) above
- d) 50% of the notional value of the CFD when the underlying is a cryptocurrency
- e) 20% of the notional value of the CFD when the underlying is:
 - i) a share; or
 - ii) not otherwise listed in this Annex.

Annex II to the decision

RISK WARNINGS

SECTION A: Requirements concerning risk warnings

1. The risk warning shall be presented in a layout ensuring its prominence, in a font size at least equal to the predominant font size and in the same language as that used in the communication or published information.
2. If the communication or published information is in a durable medium or a webpage, the risk warning shall be in the format specified below in section B.
3. If the communication or information is in a medium other than a durable medium or a webpage, the risk warning shall be in the format specified below in section C.
4. If the number of characters contained in the risk warning in the format specified in section B or C exceeds the character limit permitted in the standard terms of a third party marketing provider, the risk warning may be prepared by way of derogation from paragraphs 2 and 3 in the format specified in Section D.
5. If the risk warning in the format specified in Section D is used, the communication or published information shall also include a direct link to the webpage of the CFD provider containing the risk warning in the format specified in Section B.
6. The risk warning shall include an up-to-date provider-specific loss percentage based on a calculation of the percentage of CFD trading accounts provided to retail clients by the CFD provider that lost money. The calculation shall be performed every 3 months and cover the 12-month period preceding the date on which it is performed (12-month calculation period). The following shall apply to the calculation:
 - a) an individual retail client's CFD trading account shall be considered to have lost money if the sum of all realised and unrealised net profits on CFDs connected to the CFD trading account during the 12-month calculation period is negative;
 - b) any costs, including all charges, fees and commissions, relating to the CFDs connected to the CFD trading account shall be included in the calculation;
 - c) the following items shall be excluded from the calculation:
 - i) any CFD trading account that did not have an open CFD connected to it within the 12-month calculation period;

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- ii) any profits or losses from products other than CFDs connected to the CFD trading account;
- iii) any deposits or withdrawals of funds from the CFD trading account.

7. If in the last 12-month calculation period a CFD provider has not provided an open CFD connected to a retail client CFD trading account, that CFD provider shall, by way of derogation from paragraphs 2 to 6, use the standard risk warning in the format specified below in sections E to G, as appropriate.

SECTION B: Durable medium and webpage provider-specific risk warning

“CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage.

***[insert loss percentage per provider]* % of retail investor accounts lose money when trading CFDs with this provider.**

You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.

SECTION C: Abbreviated provider-specific risk warning

***[insert loss percentage per provider]* % of retail investor accounts lose money when trading CFDs with this provider.**

You should consider whether you can afford to take the high risk of losing your money.”

SECTION D: Reduced character provider-specific risk warning

***[insert loss percentage per provider]* % of retail CFD accounts lose money.**

SECTION E: Durable medium and webpage standard risk warning

“CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage.

Between 74-89% of retail investor accounts lose money when trading CFDs.

You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.

SECTION F: Abbreviated provider-specific risk warning

“Between 74-89% of retail investor accounts lose money when trading CFDs.

You should consider whether you can afford to take the high risk of losing your money.”

SECTION G: Reduced character standard risk warning

“74-89 % of retail CFD accounts lose money.”

Appendix III to the decision

Appeal instructions

Anyone wishing to lodge an appeal against the findings of the decision is requested to do so in writing to the Helsinki Administrative Court.

Appeal must be made within 30 days of service of the decision. The appeal period excludes the day of service of the decision.

If the decision has been posted in registered post (an advice of receipt), the date of service is indicated in the receipt. The receipt is annexed to the appeal documents. If the decision has been posted as an ordinary letter, it shall be considered to have been served within seven (7) days of the dispatch date, unless otherwise indicated. If the decision has been served in another manner, eg against receipt to a third party other than the recipient of the decision (surrogate service), the recipient of the decision shall be considered to have been served the decision on the third day from the date indicated in the receipt. If the decision is served by publication, the notice shall be considered to have been effected on the seventh day after the publication of the notice in the Official Gazette.

The appeal must be lodged in writing within the prescribed period to the Helsinki Administrative Court.

The petition for appeal, made to the Helsinki Administrative Court, must contain the following:

1. the decision to which the appeal relates
2. the aspects of the decision that should be amended and the changes being sought
3. the grounds for the changes
4. name and domicile of the appellant and
5. the address and telephone number through which the appellant can be contacted regarding the appeal.

If the right of attorney has been transferred to the appellant's legal representative or authorised proxy, or if the appeal is made by a third party, the name and domicile of such person is to be detailed in 'the appeal'.

The appeal must be signed by the appellant, or by his or her legal representative or proxy.

The appeal must include the following annexes:

1. the decision to which the appeal relates, original or copy
2. proof of the date of service of the decision, or other proof of commencement of the period of appeal and
3. records relating to and supporting the grounds for the appeal, unless these have been delivered to the investigating authorities at the time of the initial hearing.

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The legal representative must attach the appellant's letter of attorney to the petition, unless the appellant has given verbal notice of the power of attorney to the Helsinki Administrative Court. Lawyers and other court officials are required to present a letter of attorney only if so requested by the Helsinki Administrative Court.

If electronic documents submitted to the authorities define the scope of powers of the legal representative, the legal representative is not required to present a letter of attorney. The Helsinki Administrative Court may, however, demand that a letter of attorney be presented, if it has reason to question the scope of powers.

Appeal may be submitted to the Helsinki Administrative Court personally, shipped by post or through an agent or courier. The delivery of the petition by post or courier service occurs at the appellant's own risk. The appeal must arrive at the Helsinki Administrative Court at the latest on the last day of the appeal period, during its opening hours.

Appeal may also be lodged electronically, arriving at the Helsinki Administrative Court's reception facility or IT system in a fully accessible format prior to expiry of the prescribed appeal period. Electronic delivery of documents occurs at the appellant's own risk.

An appeal may also be lodged in the electronic service for administrative and special courts at <https://asiointi2.oikeus.fi/hallintotuomioistuimet>.

Current court fees of the Helsinki Administrative Court are available at www.oikeus.fi. The Act on Service Charges in Courts (1455/2015) provides separately for certain circumstances in which the fee shall not be levied.

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