PUBLIC CONSULTATION ON ADDITIONAL INTERVENTION MEASURES ON CFD TRADING

I. Introduction

1. Contracts for differences (CFDs) are particularly complex financial instruments characterised by their high-risk, due to the multiplying effect on results caused by their leverage and to their high short-term volatility, requiring a continuous follow-up of the position by the investor, and due to its status of non-standardised product traded bilaterally, implying that the supplier applies its own conditions and commissions. Analysis carried out in Spain as well as other European countries have shown that an important percentage of retail clients suffer losses in their CFDs.
2. The trade of such products is mainly done online through electronic platforms, which facilitates distance distribution, used often in advertising to attract new, often inexperienced, clients.
3. In recent years, the CNMV, ESMA and other European supervisors have adopted various measures aimed at restricting CFD trading to retail investors, highlighting those established by ESMA in 2018 and the subsequent CNMV measures of 2019, still in force, of similar content.
4. In Spain, a large part of distribution of CFDs is carried out by European entities under the freedom to provide services regime, although the activities carried out by branches or agents of European entities or entities authorised in Spain are also relevant.
5. Upon analysing the current market situation in Spain, taking into account CNMV's supervisory activity, there is a combination of the following factors: it is a complex and high-risk product, accessible to retail clients without sufficient financial knowledge through aggressive generalist advertising campaigns, at times by means of the participation of third parties without authorisation to provide investment services, where clients are recruited by offering significant incentives to sales staff to promote marketing in a particularly aggressive way, or even in mass through call centres, and often applying methods eluting existing restrictions. As a result, clients have been obtaining significant and recurring losses.
6. The latter happens despite the restrictions on the marketing, distribution and sale of CFDs established and even if the CNMV has been reinforcing the resources aimed to monitor and supervise this activity, having implemented appropriate action, which in several cases has led to the termination of said distribution. To date, twelve foreign entities providing services without a physical presence in Spain have notified the termination of their activity in Spain, following CNMV's notification to their competent supervisor of the malpractices identified in its monitoring work (and which in general had not been previously identified by the competent supervisor). Additionally, two entities with a location represented by an agent or branch have agreed to close and cease marketing their services in Spain to retail investors.
7. Some European countries hold stricter regimes than those based on warnings and restrictions on marketing, distribution and sale of CFDs previously adopted by ESMA, focusing on distance distribution and advertising. In particular, Belgium prohibited distribution to retailers through electronic platforms and the use of a number of aggressive techniques, such as the use of call centres to contact clients, or certain remuneration techniques of sales agents. On the other hand, France prohibited electronic marketing communications made by entities that may be addressed to retail clients.
8. Therefore, notwithstanding other coordinated measures that may be established at an European level, CNMV considers that the measures taken to date have not been sufficient

to protect retail investors and requires to be strengthened. This scenario calls for the implementation of measures of a greater scope to strengthen the protection of retail investors when investing in such products, as is the case in other jurisdictions.

9. This Public Consultation analyses the effectiveness of the measures in force and proposes additional intervention measures aiming to protect investors, which requires your cooperation to obtain your feedback and assessment.

II. Measures in force that limit CFD trading. Observations on effectivity and concerns

2.1. Content of the valid CFD intervention measures

10. The intervention measures adopted by ESMA in May 2018 (Decision (EU) 2018/796) and the successive quarterly extensions until reaching 12 months, adopted under Article 40 of MIFIR, were replaced in Spain by the CNMV measures of June 2019 (CNMV Resolution of 27 June), of similar content. In regards to CFDs[1], said measures provide that marketing, distribution or sale to retail customers is limited to the compliance with the following conditions:

    a) Limitation on leverage: 1/30 for relevant currencies, 1/20 on other currencies, gold, and relevant equity indices, 1/10 on commodities or non-relevant equity indices, 1/2 on crypto-assets, and 1/5 on equities or other assets not included in the other groups.

    b) Margin close-out protection: positions should be closed when funds fall below half of the initial margin.

    c) Negative balance protection: the maximum total losses are limited to the funds contributed.

    d) Prohibition of offers of monetary or non-monetary benefits.

    e) Inclusion of risk warnings: *CFDs are complex instruments and are associated with a high risk of losing money quickly due to leverage. XX % of retail investors lose money when trading CFDs. It is important to evaluate if the function of CFDs is understood and whether a high risk of losing money can be afforded.*

11. The resolution also prohibits circumvention practices of said restrictions.

2.2. Considerations on the effectiveness of regulations in force and other relevant concerns regarding investor protection

12. The CNMV's supervisory activity has revealed a number of practices, in addition to different limitations that have minimised the effectiveness of the restrictions established in 2018 on the marketing, distribution or sale of CFDs, in aims of properly protecting retail investors:

    - Establishment by some entities of a business model focused almost exclusively on CFDs or other high-risk derivative products, which are marketed to retail investors, often aggressively, and without properly informing of the characteristics and risks of such instruments. These are particularly complex and risky products with a very narrow target market, not generally suitable for retail customers[2].

[1] The measures also covered binary options, and prohibited their marketing, distribution and sale. No significant trading of this instrument has been identified.

[2] In relation to the target market of CFDs, the ESMA Consultation Paper on the Review of MiFID II Guidelines on product governance requirements (ESMA 35-43-3114), published in July 2022, points out precisely said condition of CFDs.

- The trade of such instruments through online platforms, mobile apps and social networks, which facilitates their mass and remote distribution by entities.
- New clients are recruited by offering free training without any prior assessment of suitability, which should be carried out for all potential clients.
- Carrying out marketing activities through third parties (affiliates) who are often not authorised to provide investment services nor market such services.
- Use of call centres to aggressively recruit new clients. Training of commercial staff is often insufficient.
- Establishment of remuneration and benefits for commercial staff that encourage them to act in a particularly aggressive way, which generates a highly relevant conflict of interest with the appropriate processing of such clients.
- Provision of investment advisory services and even, in some cases, portfolio management services that are not recognised and external to the entity's procedures and controls, in aims of encouraging clients to purchase such instruments.
- Carrying out practices that circumvent the restrictions in force, such as encouraging retail customers requests to be treated as professionals, which disables the protective measures in place, and promoting operations through group entities located in third countries where the measures in place in Spain would not apply, even if this means carrying out activities without a licence.

13. With specific regard to marketing communications, there is a generalisation of advertising campaigns aimed at a mass audience, giving the misleading impression that the complex products being marketed are cheap and suitable for the inexperienced investor, thus aggravating the situation and its possible damage. Specifically, the following practices identified in the Spanish market can be highlighted:

    - Advertising communications that are misleading to inexperienced investors, along with the existence of relevant corporate and brand advertising targeted to the general public. With the use of celebrities or sponsorships of popular sports clubs and events, which by definition are indiscriminately targeted at the general public, there is an impression that the complex products being marketed are suitable for the retail investor and provide greater profitably from a price movement in the market.

      The supervisory actions carried out by the CNMV show that the client often did not properly understand the nature of the product and risk at the time of investment, but was following by social or emotional factors (image of success and credibility of large companies, sports clubs and celebrities) disseminated on the internet. In addition, expressions such as the following were identified: "easy and safe money", "play for free now", "you only need € 200 to get a second salary", "multiply your income every day without any prior knowledge", "divorced woman from Madrid earns € 800 every day doing this".

    - The dissemination of advertising campaigns is frequently followed by direct telephone calls on behalf of the entity to clients with little or no experience with such products who have shown interest based on such inappropriate advertising, with equally misleading information, offer of benefits or gifts prohibited in CFD marketing, absence of a proper assessment of the compatibility of the product with the client's knowledge and experience, as well as unacknowledged and unauthorised provision of advisory or discretionary investment management services that would require an assessment of suitability among other controls. The first calls are sometimes followed by strong pressure to invest more and more money with the threat of otherwise losing the investment made and difficulties in withdrawing funds.

    - Initial marketing communications do not adequately inform about the true nature of the product, the specific service offered and its associated risks, as they are offered indiscriminately to the general public and there is a mixed offer of products of very different nature on the same portal, which gives a misleading impression to the unqualified investor about their operation and the different levels of protection applicable (CFDs, fractional shares, ETFs, ETNs, even unregulated instruments such as cryptos).

- Lastly, there has been widespread use of advertisements and promotions of low or even no applicable commissions that promote trading while diverting the attention of an inexperienced investor with these products from their true implicit costs and high associated risks.

14. Despite the intervention measures adopted in Spain and the repeated warnings issued, as well as the public communication of measures adopted by some entities as a result of the CNMV's supervisory actions in collaboration with the competent national authorities, according to the information available from entities reporting to the CNMV (Spanish and European institutions established in Spain), CFDs continue to be the main derivative product marketed to retailers, even though it is a product that is not generally suitable for a retail investor.

15. According to these reports, retail trading in unlisted derivatives in Spain amounted to 192,243 million euros in notional amounts in 2021, representing close to 60% of total derivatives traded, and an increase of 26% compared to trading of 2020. Within such trading, CFDs accounted for the largest share, reaching 155,389 million euros, an increase of 37% compared to 2020 (114,941 million euros). Such CFD trading is mainly carried out by investment firms (IFs), which brokered 154,042 million euros, compared with credit institutions (CIs), which brokered 1,347 million euros.

16. The eight entities with the highest volume traded in CFDs account for almost 99% of the total traded volume among those reporting to the CNMV, and report more than 60,000 retail clients. The most relevant activity of said eight entities in terms of revenues is CFD trading for retail clients.

17. In order to have updated information on the results obtained by clients in this activity, as well as the costs they incurred, the CNMV requested information on the activity in 2021 of the eight entities, including specific information on the results obtained by clients, the cash provided to this activity and the positions held. The main conclusion to be drawn from the analysis of the data provided is that clients, as a majority, suffer losses in a short period of time ranging on average between -1,649 to -7,269 euros per client. Said eight entities that concentrate CFD activity report in all cases that retail clients considered as a whole suffer losses (as indicated below, the percentage of those who lose is also very high), with the aggregate loss amounting to 70 million euros in 2021.

18. European entities without an establishment do not submit regular information to the CNMV, as it is not their corresponding supervisor. In this case, information on the most active entities is limited, corresponding to 2020, according to which the estimated number of Spanish clients is around 60,000 (number which is similar to that of entities with an establishment in Spain that report to the CNMV) and the net income of these entities without an establishment from their activity in Spain would exceed 100 million euros. Thus, the activity carried out by entities without an establishment is as or more relevant than that of entities with an establishment in Spain.

19. According to an analysis carried out by the CNMV on the percentage of retail clients losses for the most active entities in Spain, those subject to reporting as well as those operating under the freedom to provide services regime, based on the content of the warnings included on its website, a high percentage of retail clients continue to suffer losses, exceeding 70% for the vast majority of the most active entities, and in some cases approaching 90%.

20. Entities' reporting to the CNMV regarding claims includes information on the instrument, where applicable. It is worth highlighting that, of the total number of claims submitted by retail clients to the Customer Service Department in relation to derivative products, all but one corresponded to the eight entities that account for almost all CFD trading. In total,

the number of claims submitted by clients to such eight entities was 558 in 2020 and 531 in 2021.

21. In regards to the entities under the freedom to provide services regime, according to the data available for 2020, the seven entities deemed most active per retail market share in Spain made more than 200 claims.

22. In conclusion, CNMV believes that, despite the restrictive measures on CFD adopted in 2018, there is still a lack of protection for retail investors due to the marketing of these high-risk products, which makes it necessary to assess the adoption of additional measures. So:

    - The marketing of said high-risk and complex products to retail customers continues to be relevant in Spain according to the activity reports obtained by the CNMV when it is a product not generally suitable for retail clients.
    - The percentage of retail clients who suffer losses in their investments with this product remains very high (close to 75%).
    - There is a high level of advertising activity aimed at the general public, mainly through electronic media such as e-mails, advertisements through banners or social media, with images and messages giving a misleading impression that the complex products being marketed are suitable, if not simple, for retail investors. Advertising campaigns are often aggressive and do not warn about the unsuitability of the product for retailers in general.
    - Moreover, it is common for clients to come into contact with entities and start evaluating the possibility of trading without a prior assessment of their suitability. This assessment is usually delayed until moments prior starting operations.
    - There has been widespread use of remuneration systems for the commercial network, employees and third parties, often without authorisation to do so, which pushes aggressive retail client transactions, sometimes on a massive scale through call centres, in breach of the rules of conduct on duties of information and acting in the best interests of clients.

23. Despite CNMV's resources devoted to monitoring and supervising activities, commercial and circumvention of regulations practices continue to take place, leading in many cases to widespread losses among retailers. Supervision of this activity alone has been found to be insufficient to achieve appropriate investor protection, therefore leading to the need for additional restrictive measures, particularly in the area of advertising, given that this is a product which is generally not suitable for retail clients and advertising is a key for the products' marketing.

III. Proposal of additional restrictive measures

24. A number of additional measures to those established in 2018 are envisaged in order to protect retail clients. These measures would apply to all CFD marketing, distribution and sales activity directed at retail clients within Spanish territory, regardless of whether it is carried out by Spanish entities or by entities from other European or third states with or without an establishment in Spain.

3.1. Text of the Proposal

25. The proposal for CNMV's Resolution is as follows:

Definitions

For the purposes of this Resolution, the following terms will be understood as follows:

a) Instruments subject: contracts for differences (hereinafter CFDs), in accordance with the definition contained in the CNMV Resolution of 27 June 2019.

b) Service subject: investment services in Article 140 of the Spanish Securities Market Act referring to instruments subject to investment.

c) Marketing communication: any form of verbal or visual transmission of information, directly or indirectly aimed at promoting the subject instruments and services, regardless of the communication media, advertising media and formats used, such as television, cinema, radio, press, telephone, online advertising (in any of its forms, including social media, video channels, audios, news, blogs, search engines, specialised platforms or web pages) or mobile devices, all kinds of external advertising, direct mail, advertising at the point of sale, brochures, catalogues, promotional gifts, loyalty campaigns, home visits, or any other form of commercial communication.

Scope

This Resolution is applicable to the entities authorized to provide investment services in Spain regarding any marketing, distribution and sale of the subject instruments and services to retail investors resident in Spain, regardless of the origin of the investment firm marketing and distributing such products or of the existence of a branch in Spain.

Prohibition of marketing communications aimed at retail clients or the general public

1. The marketing, distribution and sale of subject instruments and services by means of marketing communications to retail investors resident in Spain, including potential clients, is prohibited.
2. In any case, the marketing communications prohibited will be considered to include those:
   - Redirecting to a website offering instruments or services subject;
   - Sending to a contact form, an application download, or to any other kind of tool intending to put the client in touch with investment service providers offering said type of instruments or services;
   - Offering training or technical seminars, courses or sessions whenever such offers are related to the services or instruments subject, together with similar training demo accounts or tools for retail investors or the general public or which encourage investing in these, whenever such offers are free or have a symbolic price, both if they promoted or held by the regulated entities or by related or affiliated parties.
3. The following are excluded from this Resolution:
   a) The provision of information related to the subject products or services in response to the sole request by the client. The investment service provider will be responsible for keeping the elements (mail, emails, telephone records, etc.) that accredit the initial request by the client.

   b) The information required to contract the products or services that are subject to this Resolution, or to perform a transaction regarding said products, such as the pre-contractual and contractual information or the information or warnings regarding the characteristics and risks of the products or services offered that are provided to investors in compliance with the information obligations, via any means, including the website of the entity. Likewise and without prejudice to the compliance with that established in Article 44 of Delegated Regulation (EU) 2017/565, of 25 April 2016, the following will be excluded for not being considered marketing communications: information sent to clients or published on the website regarding objective data on a financial instrument (for example, product fact sheets) that does not include subjective elements or value judgements on same, together with the documents or information publications sent to clients explaining the situation of the markets and the management decisions taken by the entity regarding such market context for a specific time period.

Prohibition of the sponsorship of events and organisations and brand advertising

Any event or organisation sponsorship operation or brand advertising, including the use of public figures, is forbidden whenever their purpose or effect is to directly or indirectly advertise instruments or services subject to this Resolution, except when it is proven that such sponsorship or brand advertising does not intend to offer such products or services, particularly when it is proven that such products or services are only a very small part of the offers of the investment firm when compared with its general activity.

Prohibition of certain marketing practices

The following marketing practices on subject instruments and services are prohibited:

a) Rewards to clients who provide new retail clients;

b) Remuneration to one's own marketing network, or that of a third party, dedicated to acquiring and marketing that is determined, either directly or indirectly, partially or totally, based on the number of clients acquired, the cash deposits by clients, the deposits by the entity providing the investment service, or the losses by clients and, in general, any type of remuneration that may come into conflict with the interests of the clients;

c) The use and remuneration of collaborators to train new potential clients without these having accredited knowledge and experience;

d) The use of own call centres, or of those operated by third parties, which contact clients or possible clients to promote the provision of investment services regarding the instruments that are subject to the restriction;

e) The use of software in which the remuneration of the software providers is determined, either directly or indirectly, partially or totally, based on the cash deposits by clients, or deposits by the distributor or losses by clients;

f) Acceptance of cash deposits being performed by clients using credit cards.

Entry into force

This Resolution will come into force twenty days after its publication in the Spanish Official State Gazette, with the following particularities:

1. Sponsorship or brand advertising contracts agreed previously to the date of publication may remain in place up until their first expiry date which, in any case, will not extend beyond 12 months starting from the date of publication, and without having the possibility of any extension.
2. The measures adopted in this Resolution may be reviewed annually and revoked in accordance with the provisions of Article 42.6 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.

Application to other instruments

The conditions set out in Article 4(a) and (b) of CNMV's Resolution of 27 June 2019 for CFDs shall also apply to the marketing, distribution or sale to retail clients of instruments that meet any of the following characteristics:

(1) the maximum risk is not known at the time the contract is entered into;

(2) the risk of loss is greater than the amount initially invested.

3.2. Considerations regarding the proposal

3.2.1. Prohibition of marketing, distribution, or sale of said instruments and services through advertising communications

26. Supervisory actions have revealed that one of the significant contributors to CFD marketing to retail investors ultimately leading to widespread losses is the use of mass media and aggressive marketing practices.

27. CFDs are products that are generally not suitable for retail investors whose needs, characteristics and objectives are usually not compatible with the financial instrument.

28. Retail clients often state that they do not understand the nature of the product and risk at the time of investment, but rather follow the positive aspects highlighted in marketing communications, such as the simplicity of the instrument, its lack of fees, or recommendation by persons of public relevance, disseminated by inappropriate marketing activity aimed at a mass audience.

29. Some European countries with stricter regulations have focused on limiting marketing communications related to the instrument. Thus, in 2016, the French regulations set marketing restrictions[3], and established in particular that investment service providers may not send, directly or indirectly, by electronic means (for example, the Q&A document it published on this initiative includes e-mail, internet banners, radio, TV, etc., to which marketing on social networks could be added), marketing communications to clients who may be non-professional, including potential clients, in connection with the provision of investment services related to the instruments covered by the measure.

30. The restriction set in France is not limited to CFDs, as it extends to unlisted financial contracts that meet one of the following characteristics: (1) the maximum risk is not known at the time the contract is entered into; (2) the risk of loss is greater than the amount initially invested; (3) the risk of loss compared to the potential advantages is not reasonably understood with regard to the particular nature of the derivative.

31. Implementing a measure such as the one adopted in France, at least for CFDs, is believed to reinforce the protection of the retail client, including potential clients, with regard to distance selling at the entity's initiative, understood as any unsolicited contact by the client, and general advertising of these products by electronic means. Clients that wish to trade such products may do so on their own initiative, and not because they have seen or received advertising that has prompted them to. Thus, it should be understood that this restriction is addressed to the providers of such instruments and not to clients, who on their own initiative could contact a provider that complies with the established requirements for contracting such products. The service provider must, in any case, assess the potential client's knowledge and experience and notify them, in the given case, of any lack of suitability before providing information on the provision of the service.

32. The proposed measure is, therefore, similar to the French measure in forbidding electronic, computer and telephone marketing communications, as well as sponsorship (discussed below), which are, currently, the main forms of advertising of such products. However, in order to prevent this activity from being redirected to other formats that would be just as harmful to non-professional clients, it also includes other more traditional advertising media (outdoor advertising, brochures, catalogues, paper, etc.).

33. **Question: Do you agree with the adoption of the prohibition foreseen in the proposed text, similar to that established in France? Please reason your answer.**

[3] France established restrictions on marketing through electronic means to clients who may be non-professionals by means of Law 2016-1691 of 9 December 2016, which introduced Article L. 533-12-7 into the Monetary and Financial Code (link). Article 314-7 of the AMF General Regulation sets out the financial instruments to which it applies (link).

34. The proposed measure establishes a limitation to advertising communications to retail investors in all cases, without differentiating the medium in which the communication is made and would therefore cover both general and financial specialised media, covering traditional media in paper and other formats, as well as digital media.

35. **Question: Do you agree with the prohibition to include specialised media? Should you believe that the proposed prohibition should be limited to general mediums, please reason your answer, include if possible a definition of specialised media and how you think the audience of the specialised medium can be guaranteed to be made up exclusively of professional investors.**

3.2.2. Additional prohibition of sponsorships and brand advertising.

36. In addition to the establishment of restrictions on CFDs advertising, it is considered necessary to establish a limit on certain corporate or brand advertising by entities whose main activity is the marketing of this type of instrument, which would become a ban on sponsorship of events or organisations and brand advertising indiscriminately aimed at the general public, including retail investors. This restriction would include the use of individuals of public relevance.

37. As one of the main new features introduced by MiFID is product governance obligations, which establish the duty to review the product's or service's suitability for the target audience. CFDs are instruments that are generally considered to be unsuitable for retail investors, as provided in CNMV's Circular 1/2018. It is therefore unreasonable to promote these instruments indiscriminately to the general public or to promote entities or brands whose main activity is the marketing of such instruments, even if these are not promoted directly.

38. Therefore, we propose establishing, in addition to the prohibition of advertising of subject instruments and services, a restriction on brand advertising similar to that established in France, which in its Consumer Code[4] states that sponsorship agreements are prohibited when their purpose or effect is, directly or indirectly, to advertise investment services on the instruments that are the subject to restrictions.

39. The proposal would have the scope provided in section of the text of the proposal referring to the prohibition of sponsorship agreements of these entities and brand advertising, except where there is proof that such sponsorship or advertising is not aimed at offering such products or services, in particular where it is demonstrated that such products or services are only a very small part of the financial product offerings of the investment firm compared to its overall business.

40. **Question: Do you agree with the implementation of a restriction on sponsorships and brand advertising, as established in France, when the Entity's object or effect, corresponding to its main activity whether direct or indirect, is the advertising of CFDs? Please reason your answer.**

3.2.3. Additional restrictions on remunerations and other sales techniques.

41. During its supervisory actions on CFDs, the CNMV has identified inappropriate remuneration practices for the commercial network, consisting of the establishment of remuneration systems that are determined as the payment of a relevant amount for the recruiting of clients or for operations carried out by them. Such agreements are an inappropriate incentive to market these products to retail customers in a particularly aggressive and in mass manner, often through call centres, using sales techniques that promote quick and compulsive decision-making by the investor, often without sufficient knowledge and experience. Other commercial practices on retailers, whether existing or

[4] Article L222-16-2 of the Consumer Code (link)

potential clients, such as offering free training to inexperienced individuals, making calls, admitting income via credit cards or sending frequent warnings and alerts mainly via software with investment suggestions, also promote unconsidered decisions by the non-professional investor, which in most cases end up in losses.

42. Such remuneration practices are used in the entity's own commercial network as well as with third parties who carry out marketing tasks, in some cases without having the authorisation to provide these services.

43. In relation to these practices, in 2016, Belgium introduced a number of measures restricting CFDs distribution that included several measures in addition to the general prohibition of OTC derivatives trading through electronic platforms[5]. CNMV believes that some of these additional measures which refer to specific aggressive or inappropriate distribution techniques are of interest (such as the incentives of sales staff, direct telephone calls, or making deposits by credit card), which reinforce the protection of the retail customer.

44. In this regard, including a specific restriction on certain commercial practices, with the scope set out in the text of the proposal, is considered among the possible measures.

45. **Question: Do you agree with the implementation of such restrictions to the remuneration system of commercial networks and to some or all the remaining sales practices mentioned herein? Please reason your answer.**

3.2.4. Extension of the restrictive measures to other leveraged instruments.

46. The 2019 CNMV intervention measures concerned CFDs and binary options. In the case of binary options, the measure consisted of a general prohibition on the marketing, distribution and sale of these financial instruments to retail clients, and no relevant incidences of compliance with this restriction have been identified since then, excluding the use of other similar instruments whose improper marketing has been corrected by supervisory actions. In the case of CFDs, the measures did not imply a general prohibition but restrictions on the level of leverage, the protection of positions and balance, as well as the offer of benefits to promote their purchase and a duty of information by means of warnings.

47. There are other financial instruments that have the fact that they are highly leveraged in common with CFDs, which means that they represent a higher risk of loss to the investor, notably financial futures and options. Today, such operation is not very frequent for many entities in Spain, particularly when the service is provided to retail clients, while some situations requiring correction through the relevant supervisory actions have been identified, as they have allowed retail clients to acquire higher levels of leverage than those permitted in CFD trading. In particular, a recent supervisory action by the CNMV, concerning a single entity that allowed its retail clients significant intraday leverage, revealed that the percentage of retail clients suffering losses in futures listed on regulated markets was in a similar range (75%) to that of clients trading CFDs.

48. Other European supervisors have recently adopted restrictive marketing measures concerning instruments other than CFDs, but of a complex nature and involving leverage. Thus, in 2021, the Dutch securities authority implemented measures concerning the so-called turbos[6], consisting basically of the establishment of leverage limits, the obligation to publish specific risk warnings and the prohibition of establishing certain remunerations that constitute pernicious inventions for marketing.

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[5] Such measures were approved by Spanish the Royal Decree of 21 July 2016 which approved FSMA's Resolution on the distribution of OTC derivatives (see link).

[6] Such decision of the Dutch AFM securities authority was published in June 2021 and is applicable as of 1 October 2021 (see link).

49. On the other hand, Germany is processing, for 2022, a restrictive measure regarding the marketing[7], distribution and sale to retail clients of traded futures with payment obligations in addition to the amounts deposited by clients.

50. Although retail client trading in leveraged instruments other than CFDs in Spain is not currently very common in the vast majority of entities, considering that restrictions on CFDs distribution could lead to a strategic shift in the marketing of other highly speculative products, the possibility of establishing limitations on the marketing, distribution or sale of other leveraged products marketed to retail clients in some way similar to what has been done for CFDs or other instruments in the case of some EU jurisdictions is raised.

51. Particularly, the measure could involve extending the additional restrictions set out in this consultation, or some of them, on the distribution to retail clients not only of CFDs, but of other types of financial contracts or derivatives which, being leveraged instruments, have one or more of the following characteristics:

    (1) the maximum risk is not known at the time the contract is entered into;

    (2) the risk of loss is greater than the amount initially invested.

52. In any case, the proposal includes to such instruments some of the measures adopted by the CNMV in its Resolution of 27 June 2019, on product intervention measures relating to financial contracts for differences, and at least that consisting of the requirement of the initial guarantee established in the terms of that Resolution, which would limit the leverage of said products (article 4.a of the 2019 Resolution), and that regarding the protection of position closure (article 4.b of the 2019 Resolution).

53. **Question: Do you agree with applying the marketing restrictive measures to leveraged instruments that are not CFDs, as is the case in other European jurisdictions, to properly protect retail clients? In your opinion, what measures would be reasonable and adequate to properly protect the investor? What specific instruments do you believe should the measure include? Please reason your answer.**

54. **Do you agree with applying the restrictive measures of initial margin protection and margin close-out protection included in the CNMV Resolution of 27 June 2019 to the other indicated leveraged instruments? Do you think that the other measures set out in said Resolution, namely the negative balance protection, the prohibition to provide retail clients with benefits, and the mandatory provision of risk warnings, should also apply to these other instruments?**

3.3. Alternative possibility to establish a prohibition on OTC trading platforms.

55. CNMV determines, as a first option, to establish restrictive measures regarding promotional and advertising activities of CFDs, as well as brand advertising and sponsorship in cases where there is a close link between the brand and the CFDs activity. It also deems the possibility of including additional restrictive measures related to remuneration techniques for commercial staff, use of call centres, and other practices considered inappropriate.

56. Should the mentioned measures not be able to be fully implemented or are deemed insufficient, the CNMV considers a measure of greater scope as an alternative, implying establishing a prohibition of the marketing, distribution or sale on OTC CFDs to retail clients through electronic platforms (that is, it would not include instruments listed on trading venues).

[7] BaFin, the German supervisor, submitted said measure to public consultation on February 2022 (see link).

57. It would be a restriction similar to the measure adopted by Belgium in 2016, which prohibits the distribution of various OTC instruments, including CFDs, to clients through electronic trading platforms.

58. **Question: Would you agree with the possibility of introducing a prohibition similar to that on the marketing, distribution or sale of CFDs through electronic platforms in Belgium after considering that the measures proposed as a first option may be insufficient to achieve the desired protection of retail investors?**

3.4. Other matters.

59. **Question: Do you think there are any other relevant issues or do you have any comments on the proposal of a Resolution?**

IV. Consultation period and next steps

60. As mentioned herein, CNMV is interested in the views of market participants on the various options for national intervention measures restricting the marketing, distribution or sale of CFDs or other instruments. This consultation is particularly aimed at investment firms and credit institutions providing investment services, as well as investors' associations. Please provide the reasons for the comments provided.

61. The deadline to submit an answer to the consultation is 31 January 2023.

62. In order to facilitate and speed up the submission of comments, the following e-mail address has been enabled: dge.supervision@cnmv.es.

63. All comments received will be published at the end of the public consultation period. If anyone does not wish their comments to be made public, either in full or in part, they should expressly state so in their own reply and properly identify, where appropriate, which part they do not wish to be made public. For this purpose, generic confidentiality warnings included in emails will not be considered an express statement that the comments submitted are not intended to be made available to the public.

64. After the deadline to submit answers to the consultation, the CNMV will take into consideration the responses received in order to process the proposed Resolution being considered, which will comply with the duty to notify ESMA and other European authorities, as well as other requirements established in articles 42 onwards of Regulation (EU) No. 600/2014, and which will in any case establish a transitional period for its implementation.