

Spanish National Securities Market Commission Resolution of 11 July 2023 on product intervention measures relating to contracts for differences and other leveraged products

The Spanish National Securities Market Commission (CNMV) adopted the *Resolution of 27 June 2019 on product intervention measures relating to binary options and financial contracts for differences*. With regard to CFDs, this Resolution, which is still in force, sustained the temporary measures adopted by ESMA through *Decision (EU) 2018/796 of the European Securities and Markets Authority*, and its quarterly renewals, which were maintained for a total period of 12 months.

As a summary, the intervention measures of 2019 establish that the marketing, distribution and sale of CFDs to retail customers will require compliance with the following conditions:

- The provider will demand the customer pays the initial margin in accordance with certain established limits, this involving a limitation to the maximum leverage allowed (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).
- The provision to retail customers of close position protection, whenever the value of customers' positions falls below half the initial margin provided.
- The provision to retail customers of protection against negative balances.
- The prohibition to provide retail customers, either directly or indirectly, excluded payments, monetary benefits or non-monetary benefits in relation to the marketing, distribution and sale of CFDs.
- The inclusion of an appropriate risk warning in accordance with the established models, which indicates that CFDs are complex instruments entailing a high risk of rapidly losing money due to leverage and informs on the percentage of retail investors that lose money when trading CFDs.

In Spain, these measures currently in force meant an initial reduction in CFD trading by retail investors, but they have not curbed the very aggressive and massively disseminated advertising activity aimed at the general public through the internet and social networks with images and messages that give a misleading impression that these products are suitable for any investor.

These marketing practices, identified by the CNMV when performing its supervisory activities, have hindered the effectiveness of the restrictions established on the marketing, distribution or sale of CFDs, aiming to adequately protect retail investors and the repeated warnings issued regarding these instruments. According to the information available from firms reporting to the CNMV -those established in Spain-, CFDs continue to be the main derivative product marketed to retail customers despite being a product that is not generally appropriate for this type of investor. Furthermore, recent analyses referring to both Spain and other European countries highlight the fact that a high percentage of retail customers continue to suffer losses in these complex and risky products.

Therefore, notwithstanding other coordinated measures that may be established at the European level, the CNMV considers that the measures taken to date have been insufficient to protect retail investors in Spain, for which reason it is necessary to adopt additional measures that reinforce the protection of these investors, as is already the case in other jurisdictions.

Some European countries have already established more restrictive regimes than those considered in ESMA's measures of 2018 and those of the CNMV of 2019, by means of measures applicable to other similar instruments apart from CFDs due to their risk, focussing on distance distribution and advertising. In particular, Belgium prohibited generally in 2016 the distribution to retailers through electronic platforms and the use of certain aggressive

techniques, such as the use of call centres to contact customers, or certain techniques for remunerating sales agents. On its part, also in 2016, France prohibited electronic advertising communications made by entities that may be addressed to retail clients.

More recently, other European supervisors have adopted restrictive measures on marketing concerning instruments other than CFDs, but also of a complex nature and involving leverage. Thus, in 2021, the Netherlands implemented measures concerning the so-called turbos, basically consisting in the establishment of leverage limits, the obligation to publish specific risk warnings and the prohibition to provide investors monetary or non-monetary benefits that constitute pernicious incentives for marketing them.

On its part, in 2022 Germany adopted a restrictive measure regarding the marketing, distribution and sale to retail customers of traded futures which may entail payment obligations in addition to the amounts deposited by customers.

On 28 November 2022, the CNMV started the public consultation period regarding possible intervention measures, its response period ending on 31 January 2023, in which twenty answers were received from investment intermediaries and their representatives, from consumers and the media, including one from a private individual. The comments received were taken into account when modifying the initial proposal for adopting additional measures on the marketing, distribution and sale of CFDs and other leveraged instruments to retail customers.

The measures established by the CNMV in this resolution comply with the requirements under Article 42 of Regulation (EU) 600/2014 for their adoption, including the assessment of the criteria and factors stipulated in Article 21 of Delegated Regulation (EU) 567/2017, specifically the existence of a significant investor protection concern, the non-existence of other legislative alternatives to sufficiently address the issue, the proportionality of the measure and its non-discriminatory effect.

Prior to implementing the measures contained in this resolution, the CNMV complied with the obligation to report these to ESMA and to the remaining competent authorities for their information, at least one month before their entry into force.

The resolution is made up by two parts, one regarding CFDs and the other regarding other leveraged instruments, apart from a final section referring to the application date.

The first part establishes a prohibition of advertising communications on CFDs aimed at retail customers or the general public. As well as the prohibition of sponsorship of events or organisations and brand advertising, including the use of public figures by the firms marketing CFDs, except in those cases in which this activity is very limited when compared with the general activity of the firm. Finally, it establishes a series of restrictions in the retribution policies and the rules for cash deposits by customers.

This resolution, as also in that of ESMA of 2018 and that of the CNMV of 2019, considers that CFDs include, inter alia, rolling spot forex contracts and financial spread betting, whether they are traded on the market or not. On their part, warrants and turbos would not be classified under CFDs.

In general, the scope of application encompasses the activity of marketing, distribution and sale in Spain of the subject instruments, therefore including the activity in Spain by firms of other Member States, under the freedom to provide services regime, through branches or agents. However, in the case of CFD whose underlying asset is a crypto-asset that is not considered a financial instrument subject to the Directive 2014/65/EU (MiFID), the measure extends to the activity of Spanish investment firms in other Member States, having regard to their particular high risk.

The measure to prohibit courses and seminars offered for free or for a token charge could be considered as already being included in the Resolution of the CNMV of 2019. However, it

was considered appropriate for this issue to be clarified in the text of the resolution by expressly including the prohibition regarding the offering of training aimed at the general public, as well as demo accounts or tools, which have the common characteristic of encouraging retail customers to invest in these complex and high-risk products. The prohibition is not applicable to training aimed specifically at customers with knowledge and experience.

The second part establishes specific intervention measures for other leveraged products, such as futures and options, for which it is considered necessary to impose the limitation on leverage and to close positions when the value of the position is reduced to half the initial margin, measures that were established in the case of CFDs in ESMA's Decision of 2018 and the measures of the CNMV of 2019 (restriction of the initial margin and close position protection).

Generally, in the case of instruments traded in trading venues, the restriction of the initial margin will be applicable on whichever amount is lower from the margins required by the trading venue and the margins included in this resolution for each type of instrument in reference to the Resolution of the CNMV of 2019. However, in the case of instruments whose underlying asset is a crypto-asset that is not considered a financial instrument subject to MiFID, the initial margin may not be below that included in this resolution, even if that established at the trading venue may be lower. On the other hand, as established in the first part with regard to the case of CFDs, considering the high risk this underlying asset entails, this specific measure additionally extends to the activities performed by Spanish investment firms in other Member States.

Leverage is the most important factor leading the majority of retail customers investing in these instruments to incur in inappropriately assessed risks and which end up materialising as losses being generated.

The limitation on leverage is supplemented by the close position protection, aiming to achieve a double objective: on the one hand, contracts must be closed when the value of the customer's position is reduced to half the initial margin, thus limiting the losses generated, but on the other hand, it is clarified that this event should not occur before reaching this threshold to avoid losses from materialising too rapidly.

As already indicated in the resolution of 2019, the CNMV considers it a good practice for firms to define a policy for determining appropriate additional margins, in such a way investors can be informed before reaching the 50% of the initial margin threshold, which implies the obligation of closing the position, thus enabling them to provide additional margins, or where appropriate to close the position, before this threshold is reached.

The application date is generally established twenty days after its publication in the BOE (Spanish Official State Gazette) and special cases are established for sponsorships or brand advertising contracts that are in force on the date of publication.

The Executive Committee of the CNMV, exercising the powers that correspond to the CNMV on the intervention of products and practices or financial activities laid down in Articles 40 to 42 of Regulation (EU) 600/2014, of the European Parliament and of the Council, of 15 May, at its meeting held on 11 July 2023, has adopted, prior to public consultation and report from the Advisory Committee, the following

RESOLUTION

ONE. Additional measures on contracts for differences

Definitions

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

- a) Subject instruments: contracts for differences (hereinafter CFDs), in accordance with the definition contained in the CNMV Resolution of 27 June 2019.
- b) Subject services: investment services in Article 125 of the Law on Securities Markets and Investment Services referring to instruments subject to investment.
- c) Advertising 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 of Application

Part one of 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 in Spain, regardless of the origin of the investment firm marketing and distributing such products or whether there is or not a branch in Spain. In the case of subject instruments whose underlying is a crypto-asset that is not considered a financial instrument subject to the MiFID regulation, this Resolution is also applicable to activities carried out by Spanish firms in other Member States.

Prohibition of advertising communications aimed at retail customers or the general public

- 1. The marketing, distribution and sale of subject instruments and services by means of advertising communications aimed at retail investors in Spain, including potential clients, shall be prohibited.
- 2. In any case, the marketing communications prohibited will be considered to include those:
 - a) Redirecting to a website that offer instruments or subject services;
 - b) 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 that offer said type of instruments or services;
 - c) Offering training, technical seminars, courses or sessions to the general public whenever such offers are related to the subject services or instruments, as well as 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 token charge, either if they are 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 request made by the sole initiative of 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 firm. 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 advertising communications: legal 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.

Prohibition of the sponsorship of events or organisations and brand advertising

Any event or organisation sponsorship operation and 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 on the website of the entity subject when compared with its general activity.

Prohibition of certain marketing practices

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

- a) Rewards to customers who provide new retail customers;
- b) Remuneration to one's own marketing network or those of third parties, 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 clients 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) The acceptance of cash deposits performed by clients using credit cards.

TWO. Restrictive measures applicable to other leveraged instruments

Definitions

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

- a) Subject instruments: financial instruments, other than those indicated in part one of this resolution, whose maximum risk is unknown at the time of subscription or whose risk of loss is greater than the amount of the initial financial contribution.
- b) Subject services: investment services in Article 125 of the Law on Securities Markets and Investment Services referring to instruments subject to investment.

Scope of Application

Part two of 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 in Spain, regardless of the origin of the investment firm marketing and distributing such products or whether there is or not a branch in Spain. In the case of subject instruments whose underlying is a crypto-asset that is not considered a

financial instrument subject to the MiFID regulation, this Resolution is also applicable to activities carried out by Spanish firms in other Member States.

Restrictive measures applicable to the subject instruments

The marketing, distribution and sale to retail customers of the subject instruments will require compliance with the following conditions:

- a) The provider of the instrument will demand the customer pays the initial margin.

Initial margin will be understood as the lower amount of the following:

1. The amount which corresponds according to the type of underlying asset from those indicated in the Resolution of the CNMV of 27 June 2019 on product intervention measures relating to binary options and financial contracts for differences.
2. The amount demanded by the trading venue in which the instrument is traded.

Notwithstanding the foregoing, in the case that the underlying asset is a crypto-asset that is not considered a financial instrument subject to the MiFID regulation, the amount of the margin may not be below that determined according to section a.1 above, not applying thus the amount indicated in section a.2 even if it is lower.

- b) The provider of the instrument will provide the “close position protection” to the retail customer.

“Close position protection” will be understood as the closing of one or more open derivative instruments of a retail customer under the most advantageous conditions for the customer, whenever the sum of the funds in the operating account of these instruments and the net unrealised gains of all open derivative instruments associated with that account fall below half the total initial margin provided for all those open instruments. The closing of the position will not take place before reaching said threshold and the customer being informed.

FINAL PROVISION

Date of application

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.