

BETTER FINANCE's answer to the Call for Evidence on Potential product intervention measures on contracts for differences and binary options to retail clients

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the dedicated representative of financial services users at European level. It counts about fifty national and international members and sub-member organizations in turn comprising about 4.5 million individual members. Our organization acts as an independent financial expertise centre to the direct benefit of the European financial services users (shareholders, other investors, savers, pension fund participants, life insurance policy holders, borrowers, etc.) and other stakeholders of the European financial services who are independent from the financial industry.

BETTER FINANCE is the most involved European end user and civil society organisation in the EU Authorities' financial advisory groups, with experts participating in the Securities & Markets, the Banking, the Occupational Pensions and Insurance and Reinsurance Stakeholder Groups of the European Supervisory Authorities; as well as in the European Commission's Financial Services User Group (FSUG), and in the European Financial Reporting advisory Group (EFRAG). Its national members also participate in national financial regulators and supervisors bodies when possible.

For further details please see our website: <http://betterfinance.eu/>

BETTER FINANCE welcomes this initiative from ESMA to consult the stakeholders on potential products intervention measures on contracts for differences (CFDs) and binary options (BOs) to retail clients.

BETTER FINANCE wishes to congratulate ESMA for quickly making use of its brand new (03/01/2018) product intervention powers granted by MiFID II to ban or restrict the distribution of toxic investment products to retail clients.

As asked many times in the past by BETTER FINANCE¹, the ESAs are now eventually empowered with broader product intervention powers, no longer solely on the basis of financial risks and stability

¹ See for instance BETTER FINANCE's Press release on the reform of the ESAs "A twin-peaks approach to the European System of Financial Supervision: turning consumer protection into a real priority"

[http://betterfinance.eu/fileadmin/user_upload/documents/Press_Releases/en/Financial_services_users/PR - European System of Financial Supervision Review - Twin Peaks - 220517.pdf](http://betterfinance.eu/fileadmin/user_upload/documents/Press_Releases/en/Financial_services_users/PR_-_European_System_of_Financial_Supervision_Review_-_Twin_Peaks_-_220517.pdf)

considerations but including the power to ban or put on hold the selling of financial products that are toxic or not suited for retail clients, and not only those supervised by ESMA.

BETTER FINANCE has defined the toxicity of investment products as a high probability of generating losses in real returns for the individual investor².

Therefore, BETTER FINANCE welcomes this first initiative from ESMA to use its product intervention powers (article 40 MiFIR Regulation (EU) 600/2014) to restrict or prohibit the sale of Contract for Differences (CFDs) and Binary Options (BOs).

- Regarding CFDs, ESMA is considering restricting the marketing, distribution or sale to retail clients of CFDs to retail clients. ESMA is considering using its intervention powers through the following measures:
 - **Leverage limits** on the opening of a position by a retail client that would be applied to any payment made to a product provider for the purpose of entering into a CFD, excluding commission and transaction fees.
 - **A margin close-out rule** on a position by position basis that would standardize the percentage of margin which providers are required to close out a retail client's open CFD. This measure would protect clients from losing more than what they have invested.
 - **A negative balance protection** to provide an overall guaranteed limit on retail client losses
 - **A restriction on incentivization of trading** provided directly or indirectly by a CFD provider, such as providing retail clients with a payment or a non-monetary benefit in relation to the marketing, sale or distribution of a CFD.
 - **A standardized risk warning**: ESMA considers requiring CFD providers to provide a standardized warning in any communication to, or published information accessible by, a retail client relating to the marketing, distribution or sale of CFD.

- Regarding BOs, ESMA is considering an outright prohibition on the marketing, distribution or sale of binary options to retail clients.

First, BETTER FINANCE notes that most questions of this Call for Evidence only target the potential consequences for providers of the restriction and prohibition of those products. Most of the questions seem addressed to professionals and not to individual investors.

BETTER FINANCE would need the following clarifications in order to be able to formulate an opinion on the specific intervention measures proposed:

² See for instance BETTER FINANCE 's answer to the DRAFT ESMA PUBLIC CONSULTATION "Guidelines on certain aspects of the MiFID II Suitability Requirements"
http://betterfinance.eu/fileadmin/user_upload/documents/Position_Papers/Securities_Market/en/BETTER_FINANCE_s_answer-Consultation_Paper_on_MiFID_II_Suitability_requirements_FINAL.pdf

1. In order to assess the toxicity of these investment products (CFDs and BOs), BETTER FINANCE notes that ESMA does not mention any evaluation of the probability of a real net loss ex ante and of its potential magnitude for retail investors. Yet, such evaluation would constitute an important basis for any intervention.
2. Whereas CFDs and BOs have been sometimes recently heavily advertised to retail clients, they represent only a very small portion of EU households' financial savings. BETTER FINANCE notes that ESMA does not mention the criteria it used to select CFDs and BOs as its first targets to implement its new product intervention responsibilities and powers. There are mass-retail investment products for which the amount of harm to EU savers (amount of potential real net loss) can be much higher, and which much larger traditional distributors provide. BETTER FINANCE has often in the past reported such products to NCAs, to ESMA and to the EC.
3. It is unclear reading the consultation paper, whether BOs are riskier for individual investors than CFDs. In the Call for Evidence, ESMA points to the higher addiction of BO clients compared to CFD ones, but does not bring any evidence of this statement. Finally, ESMA rightly mentions CFDs can be used for hedging: would this be the main reason for the difference in the interventions proposed?