

Subject

Decision by the Financial Supervisory Authority to prohibit the marketing, distribution and sale of binary options to retail clients

By virtue of Article 42 of the Markets in Financial Instruments Regulation¹, the Financial Supervisory Authority (FIN-FSA) has decided as follows:

1. The marketing, distribution and sale of binary options to *retail clients*² referred to in chapter 1, section 23, subsection 3 of the Act on Investment Services (747/2012) is prohibited. It is also prohibited to participate, knowingly and intentionally in activities the object or effect of which is to circumvent this prohibition.
2. In this decision, a binary option means a *derivative* referred to in Article 2(1)(29) of MiFIR meeting the conditions listed below, 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):
 - a) it 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) it only provides for payment at its close-out or expiry;
 - c) its payment is limited to:
 - i) a predetermined fixed amount or zero if the underlying of the derivative meets one or more predetermined conditions; and
 - ii) a predetermined fixed amount or zero if the underlying of the derivative does not meet one or more predetermined conditions.
3. This prohibition does not apply to:
 - a) a binary option for which the lower of the two predetermined fixed amounts is at least equal to the total payment made by

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, subsection 3 of the Act on Investment Services (747/2012) corresponds with the definition of a retail client in Article 4(1)(11) of the Markets in Financial Instruments Regulation (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 retail client for the binary option, including any commission, transaction fees and other related costs;

- b) a binary option that meets the following conditions:
- i) the term from issuance to maturity is at least 90 calendar days;
 - ii) a prospectus on it drawn up and approved in accordance with the Prospectus³ is available to the public;
 - iii) the binary option does not expose the provider of the binary option to market risk throughout the term of the binary option and the provider of the binary option or any of its group entities do not make a profit or loss from the binary option, other than previously disclosed commission, transaction fees or other related charges.

4. This decision enters into force on 17 June 2019 and remains effective until further notice.

Justifications for the decision

The purpose of this decision is to implement nationally a similar prohibition on the marketing, distribution and sale of binary options as imposed for the EU by a decision of the European Securities and Markets Authority (ESMA)⁴ on a temporary basis until 1 July 2019. By virtue of Article 40 of MiFIR, ESMA prohibited the marketing, distribution and sale of binary options to retail clients for the first time within the Union as of 2 July 2018.⁵ To date, ESMA has renewed the prohibition 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 binary options.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.

³ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.

⁴ European Securities and Markets Authority Decision (EU) 2019/509 of 22 March 2019 renewing the temporary prohibition on the marketing, distribution or sale of binary options to retail clients.

⁵ European Securities and Markets Authority Decision (EU) 2018/795 of 22 May 2018 to temporarily prohibit the marketing, distribution or sale of binary options to retail clients in the Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council.

⁶ Recital (8) of the European Securities and Markets Authority Decision (EU) 2019/509.

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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 prohibition. As explained in more detail in preamble 2 of Decision (EU) 2018/795, ESMA deemed in its assessment that the issue gives rise to significant investor protection concerns for the following reasons:
- Binary options, and their pricing and transaction fee structures in particular, are so complex and non-transparent for clients that they are unable to understand that their expected return on binary options is on average negative⁸.
 - Trading in binary options is highly speculative and risky (the client loses its entire investment), and the interests of the provider and client are in an immediate conflict.
 - The negative expected return on binary options is not compensated by anything; for example, they cannot be used in hedging purposes similarly to ordinary options.
 - The markets for binary options had grown rapidly throughout the Union before ESMA's prohibition, and information reported by certain national authorities on losses incurred by clients also confirmed the analysis by ESMA that the expected return on binary options is negative for the client.
 - Binary options were mass-marketed to the retail markets, where it is difficult for the majority of clients to assess and understand the actual risks involved in trading, and evidence of losses incurred by clients shows that binary options were not suitable for such clients.
 - The marketing and distribution practices of binary options had been aggressive and misleading.
 - Due to the reasons recounted above, binary options may threaten the trust of inexperienced investors even in the financial system as a whole.

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

⁸ Product Intervention Analysis, Measure on Binary Options, 1 June 2018 | ESMA50-162-214

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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 also on a national scale.

- 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 2018/795 explains in more detail the requirements applying to the provision of binary options and the guidance issued by ESMA to ensure consistent and effective application thereof.⁹ However, ESMA deemed the prohibition necessary, since there was clear evidence that clients had lost and will lose money in binary options despite these requirements. The FIN-FSA concurs with this assessment. In this regard it is also noteworthy that to the extent binary options 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 practice.* In this regard, the FIN-FSA refers to preamble 5 of the ESMA Decision (EU) 2018/795 and a separate analysis¹⁰ explaining in more detail why among the various intervention measures prohibition was deemed necessary and proportionate with a view to the extent and nature of the concern referred to above in point (a). Furthermore, since this FIN-FSA's prohibition has the same content as the currently valid temporary prohibition by ESMA, compliance with the decision cannot cause further immediate 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 prohibition remains in force, the FIN-FSA's prohibition cannot have a significant impact on any member state, since the prohibition

⁹ 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.

¹⁰ Product Intervention Analysis, Measure on Binary Options, 1 June 2018 | ESMA50-162-214

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has the same content as the prohibition by ESMA. After ESMA's prohibition ceases to be valid, the impacts of this national prohibition 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 prohibition imposed by the FIN-FSA is valid regardless of from which member states binary options 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 binary options 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 prohibition, and the Ministry has not objected to it.¹²

Due to the temporary prohibition by ESMA, binary options cannot have been provided to retail clients anywhere in the Union, including Finland, as from 2 July 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 prohibition, it continued to find it likely that if the prohibition is not renewed, binary options will again be offered to retail clients.¹³ Therefore there is a threat that when ESMA ceases to renew its prohibition, the offer of binary options may be targeted at retail clients at a larger scale than previously particularly in member states where no national prohibitions have been imposed. Due to this threat, the FIN-FSA deems it necessary to prohibit the marketing, distribution and sale of binary options to retail clients as a precautionary measure also in Finland.

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.

¹² Recital (98) of the European Securities and Markets Authority Decision (EU) 2018/795.

¹³ Recital (10) of the European Securities and Markets Authority Decision (EU) 2019/509.

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

FINANCIAL SUPERVISORY AUTHORITY

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Appendices

Appeal instructions

¹⁴ OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY of 14 May 2019 on the product intervention measure relating to binary options proposed by the Finanssivalvonta of Finland, ESMA35-43-1913

Appendix to 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 petition 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.

Contact information

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