

**Recent product intervention developments  
in key EU jurisdictions**

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- **The Netherlands**
- **France**
- **Germany**
- **UK**
- **Three questions going forward**

## Product intervention Recent developments in the Netherlands (1/5)

- **AFM, [Consultation on ban on advertising of harmful financial products](#) (*Wijziging Nadere regeling gedragstoezicht financiële ondernemingen in verband met aanwijzing financiële producten voor beperking reclame-uiting*)**

- **In a nutshell?**

Proposed product intervention that would ban advertising with respect to certain financial products that are considered harmful

- **Status?**

Consultation launched in February 2017

Consultation closed on 3 April 2017

- **What is the rationale?**

According to Merel van Vroonhoven, chair of the AFM:

*« The current low interest-rate environment and digitalisation are creating a fertile base for the arrival of harmful financial products offered online. We are also dealing with parties who offer these products from other countries. [...] For the AFM, it is a priority to protect consumers against products that lead to large losses or involve high costs. The advertising ban will be an important weapon in the fight against harmful products »*

([Press release AFM of 21 February 2017](#); own underlining)

- **What products are in scope?**
  - Binary options
  - Cash warrants
  - Contingent convertible bonds (« Cocos »)
  - CFDs with the possibility of additional payment obligations
  - CFDs with leverage of 10 or more
  - Turbos with leverage of 10 or more
  - Futures with leverage of 10 or more
  - Pay-day loans (flash credit)
  - Long term loans carrying excessive rates of interest

- **How is the ban justified?**

*« De AFM concludeert uit de onderzoeken dat cfid's zeer risicovolle producten zijn die alleen geschikt zijn voor beleggers met veel kennis en ervaring, en die bereid zijn grote risico's te nemen. Voorts concludeert de AFM uit de onderzoeken dat wanneer de hefboom in grote mate toeneemt, de kans op een positief rendement zeer laag is. Ook andere Europese toezichthouders hebben onderzoek gedaan naar cfid's. [...] Daarnaast acht de AFM het risico dat het verlies hoger is dan de inleg, waardoor de belegger het risico loopt dat hij bij tegenvallende marktontwikkelingen met een schuld achterblijft, in deze situatie ook voldoende aanleiding voor een reclameverbod »*

([Consultation](#), « Toelichting », own underlining)

- **How is the proposed ban received?**

*« Our concerns relate in particular to the application of marketing ban to certificates warrants and turbos and are rooted in the absence of any evidence [...], the insufficient distinction between the financial instruments [...], the inadequacy of the regulatory impacts [...] and the foreseeable upcoming conflicts with EU law »*

[\(EUSIPA letter to the AFM of 31 March 2017\)](#)

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## Product intervention Recent developments in France (1/4)

- **AMF, [Position 2017-01 on the prohibition of marketing communications with regard to the provision of investment services on certain financial derivatives](#)**

- **In a nutshell?**

Product intervention that bans advertising with respect to certain financial products

- **Status?**

9 December 2016 : New article L. 533-12-8 in the French Monetary and Financial Code – Prohibition of marketing communications of certain financial products to be defined by the AMF General Regulation (article 314-31-1 RGAMF)

- **What is the rationale?**

*« Afin de limiter l'accès des particuliers à ces outils très spéculatifs, le régulateur s'est emparé de tous les moyens à sa disposition et a notamment proposé qu'une disposition législative donne la capacité juridique d'interdire la publicité sur ces produits. [...] L'AMF a lancé le 1er août 2016 une consultation publique afin que les parties prenantes puissent réagir quant au projet de modification du règlement général qui doit être faite pour l'application de la nouvelle loi. Clôturée le 30 septembre, cette consultation a été mobilisatrice et a généré 208 réponses d'entreprises, d'associations et de particuliers. [...] Après l'étude et la prise en compte de ces retours, le règlement général de l'AMF se voit modifié et définit les catégories de contrats financiers visés par ce dispositif, à savoir : Les options binaires ; Les CFD (contract for difference) ; Les contrats financiers sur devises »*

([Press release AMF of 10 January 2017](#); own underlining)

- **What products are in scope?**
  - Binary options
  - CFDs (unless no additional payments will be required)
  - Forex products (i.e. CFDs allowing the client to open a forex position and rolling spot foreign transactions)
  - Initially, it was proposed to extend the scope to « financial contracts which have an economic effect equivalent to those set out above ». As a result of the public consultation those products are no longer subject to the ban (as that would give rise to significant legal uncertainty and was almost unanimously criticized)

- **How is the ban justified?**

*« Les impacts sont considérables : au-delà des pertes causées par des prestataires non autorisés, une étude AMF a démontré le caractère intrinsèquement dangereux du trading très spéculatif pour les particuliers : les clients des principaux prestataires autorisés par des régulateurs sérieux ont enregistré 175 millions d'euros de pertes contre 13 millions de gains sur 4 ans et 90% d'entre eux sont perdants »*

([Press release AMF of 10 January 2017](#); own underlining)

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## Product intervention Recent developments in Germany (1/5)

- **BaFin, Hearing on intended measure regarding contracts for difference ([Draft General Administrative Act, 8 December 2016](#))**

- **In a nutshell?**

Proposed product intervention that would ban the marketing, distribution and sale of certain CFDs to retail clients

- **Status?**

Consultation launched in December 2016

Consultation closed on 20 January 2017

- **What is the rationale?**

According to Elisabeth Roegele, Chief Executive Director of Securities Supervision of BaFin:

*« BaFin has investor protection concerns in relation to financial contracts for difference with an additional payments obligation for retail clients. If the difference to be paid by the retail client exceeds the capital they have invested, they must pay the difference amount from their other assets. In the case of CFDs with an additional payments obligation, the risk of loss for the investor is incalculable. For consumer protection reasons, we cannot accept that »*

([Press release BaFin, 8 December 2016](#); own underlining)

- **What products are in scope?**
  - CFDs in the event the CFDs give rise to an additional payment obligation
  - Initially, the BaFin intended (as announced on 28 July 2016) to prohibit the retail distribution of certificates linked to creditworthiness risks. However, the German industry has accepted a self-commitment for the issue and distribution of credit-linked notes (see [Press release BaFin 16 December 2016](#))



- **How is the ban justified?**

*« BaFin is of the view that the risk of loss for the investor cannot be limited effectively through the margin call process or through stop-loss orders. Price fluctuations of an underlying may be so significant within the shortest periods of time that the CFD provider will not have sufficient time to ask the investor for an additional payment on top of the margin they have deposited (margin call). In such instances, the investor's position will be forcibly closed, sometimes resulting in very significant losses. Neither are stop-loss orders a reliable way for investors to protect themselves from large losses. This is because the next available price at which such an order is normally executed may differ significantly from the price originally strived for. The difference to be paid by the investor can then amount to multiples of the margin they have put down »*

([Press release BaFin, 8 December 2016](#); own underlining)

## Product intervention Recent developments in Germany (5/5)

- **How is the proposed ban received?**

« *The proposal is consistent with IG's recent introduction of Limited Risk Accounts, which guarantee that a client cannot incur losses in excess of the amount deposited in their account* » ([IG Group Holdings, 9 December 2016](#))

« *The BaFin consultation paper requires CFD providers to ensure that retail clients cannot lose more money than is deposited in their account, a functionality which is already available to CMC Markets clients in Germany. [...], there are no other requirements from BaFin including no leverage limits, and where retail clients' risk is limited to their deposits, there is no prohibition on marketing, distribution and sale of CFDs. We welcome this balanced approach from BaFin [...]* » ([CMC Markets, 9 December 2016](#), own underlying)

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## Product intervention

### Recent developments in the UK (1/4)

- **FCA, [Consultation Paper 16/40 enhancing conduct of business rules for firms providing contract for difference products to retail clients](#)**

- **In a nutshell?**

Proposed product intervention that would improve investor protection by limiting the risks of CFD products for retail investors and by addressing the concerns relating to binary options risks. The proposals would enhance disclosure requirements, leverage limits, mandatory close out requirements and prohibitions on promotional bonuses and benefits

- **Status?**

Consultation launched in December 2016

Consultation closed on 7 March 2017

## Product intervention

### Recent developments in the UK (2/4)

- **What is the rationale?**

*« Retail contracts for differences (CFDs) are complex, leveraged derivative financial instruments that investment firms commonly offer to retail clients through online trading platforms. This Consultation Paper (CP) outlines our concerns about increasing evidence of poor conduct and risks to investor protection from retail CFDs and proposes a package of policy measures designed to address those risks. Binary bet firms use complex probability methodologies and internal models to calculate payoffs. Furthermore, the short duration of binary bet – some as low as 30 seconds – can lead to potentially addictive ‘trading’ behaviours more associated with gambling and do not appear to meet a genuine investment need. This CP also discusses our early policy considerations for the sale and distribution of binary bets (commonly known as binary options) to retail clients. It is anticipated binary bets will be brought in to scope of FCA regulation following the expected amendment to the Regulated Activities Order (RAO) »*

([FCA, December 2016](#); own underlining)

- **What products are in scope?**

- CFDs
- Binary options

- **How is the ban justified?**

*« We are proposing a package of policy measures that are intended to improve investor protection by limiting the risks of CFD products for retail investors. They will also raise conduct standards across the industry by ensuring CFD products are targeted at, and sold to, retail clients who understand the products and the risks involved »*

[\(FCA, December 2016\)](#)

- **How is the proposed ban received?**

« *The Company notes, however, that the FCA's proposals do not appear to directly apply to firms operating from outside the UK offering CFDs and binaries to clients in the UK on a cross-border services passport from another EU member state »*

([IG Group Holdings, 6 December 2016](#); own underlining)

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# Three questions about product intervention post 3 January 2018 (1/3)

- **First question: How should issuers take into account NCA product intervention going forward?**
  - Differences in what is being regulated and how it is regulated (table reflects only 2016/2017 measures)
  - Tendency whereby more common products become restricted – Quid Art. 42(2)(e) MiFIR: Discriminatory effect?

	The Netherlands	France	Germany	UK	Belgium
Binary options	Advertising	Advertising		Possible measures	Product ban
CFDs	Advertising (with leverage of min 10 and/or additional payment obligation)	Advertising	Product ban (if additional payment obligation)	Advertising, disclosure, leverage limits	Product ban
Futures	Advertising (with leverage of min 10)				
Cash warrants	Advertising (with leverage of min 10)				
Turbos	Advertising (with leverage of min 10)				
Coco's	Advertising				Not suitable
Derivative contracts (maturity <1 hour)					Product ban
FX products		Advertising			Product ban (rolling spot)

- **Second question: Going forward will NCA product intervention be sufficiently « proportionate »?**
  - Cf. Art. 42(2)(c) MiFIR: Likely, the proportionality of a retail advertisement ban is easier to defend when compared with a full product ban
  - What about Member State laws restricting the features of products in order to be legally distributed in that Member State?
    - Art. 20 Insurance Law (will be abolished)
    - FSMA Position 2017-4

## Three questions about product intervention post 3 January 2018 (3/3)

- **Third question: Shouldn't MiFID II product governance – when done right – make most product intervention obsolete?**
  - Products should only be manufactured or distributed where they meet the needs of the target market
  - Art. 42(2)(b) MiFIR: The issue may be better addressed by « improved supervision or enforcement of existing requirements »?

*« [...] impressed by the level of attention we receive – we feel that we get red carpet treatment »*

*« Clients recommend the team with great enthusiasm, with one interviewee saying: "It is an honour to work with somebody as professional and intelligent as Tom." »*

Chambers 2014 and 2017

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