

THIS TEXT IS A TRANSLATION OF THE DECISION IN DUTCH. IN CASE OF DIFFERENCES THE DECISION IN DUTCH PREVAILS.

Decision dated 18 April 2019, to prohibit the marketing, distribution or sale of binary options to retail clients in the Union in accordance with Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 and the Financial Supervision Act (**Prohibition of Binary Options**).

The Dutch Authority for the Financial Markets, having regard to,

Article 42 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;

Article 21 of the 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;

Article 1:77f of the Financial Supervision Act; and

Article 2, first section, opening lines and part m, of the EU Financial Markets Regulations (Implementation) Decree,

decides:

Article 1

Prohibition of the sale of binary options to retail clients

1. The marketing, distribution or sale of binary options to retail clients in or from the Netherlands is prohibited.
2. For the purposes of paragraph 1, irrespective of whether it is traded on a trading venue, a binary option is a derivative that meets the following conditions:
 - 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 value of the derivative meets one or more predetermined conditions; and
 - ii. a predetermined fixed amount or zero if the underlying value of the derivative does not meet one or more predetermined conditions.
3. The prohibition of paragraph 1 does not apply to:
 - a) a binary option for which the lower amount of the two predetermined fixed amounts is at least equal to the total payment made by a retail client for the binary option, including any commission, transaction rates and related costs;

- b) a binary option that meets the following conditions:
- i. the term from the issuing to maturity is at least ninety calendar days;
 - ii. a prospectus drawn up and approved in accordance with Directive 2003/71/EC is made available to the public; and
 - iii. the binary option does not expose the provider to market risk throughout the term of the binary option and the provider or any of its group entities do not make a profit or loss from the binary option, other than previously disclosed of commissions, transaction fees and other related charges.

Article 2

Prohibition of participating in circumvention activities

It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the requirements in Article 1, including by acting as a substitute for the binary option provider.

Article 3

Entry into force

This Decision enters into force on 19 April 2019.

Done in Amsterdam on 18 April 2019

Explanation

1. Introduction

- 1) In recent years, the European Securities and Markets Authority (**ESMA**) and several competent authorities (**NCA**) including the Dutch Authority for the Financial Markets (**AFM**) have observed a rapid increase in the marketing, distribution or sale of binary options to non-professional clients (**retail clients**) across the European Union (**EU**). Binary options are inherently risky and complex products and are often traded speculatively. ESMA and the NCAs have also observed that the offering of binary options to retail clients has been increasingly characterized by aggressive marketing techniques as well as a lack of transparent information that do not allow retail clients to understand the risks underlying these products. ESMA and the NCAs also established in recent years an increase in the number of retail clients that trades in these products and loses money. This increase was accompanied over the past years by numerous complaints from retail clients from all over the EU who sustained considerable losses trading in binary options.
- 2) The AFM warned of binary options inter alia in 2013 as very high-risk products that mean that investors can lose their entire deposited quickly and easily, and in which connection it is almost impossible to generate a long-term profit.¹ In addition, the AFM communicated a prohibition of advertising for binary options, among other things, on 20 February 2017.² The AFM informed the public on 8 January 2019 that it is investigating whether it is necessary to implement national measures with respect to the sale in or from the Netherlands of binary options and contracts for differences (**CFD**).³ The AFM informed the public on 7 March 2019 that it is preparing a ban on binary options and restrictions on CFDs in the Netherlands.⁴ Several NCAs have also raised concerns about binary options not meeting any genuine investment needs for retail clients (unlike other types of options, which can serve a valuable role in hedging exposure to certain assets).
- 3) The grave concerns about the protection of investors caused ESMA to decide⁵ on 22 May 2018 to prohibit temporarily the marketing, distribution or sale of binary options to retail clients in the European Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council (**ESMA Decision**). This measure entered into effect on 2 July 2018

¹ 'AFM warns against binary options', 10 December 2013, <https://www.afm.nl/nl/nieuws/2013/dec/binaire-opties>.

² 'Consultation: AFM prepares for ban on advertising of harmful financial products', 20 February 2017, <https://www.afm.nl/nl-nl/nieuws/2017/feb/consultatie-reclameverbod>.

³ 'ESMA verlengt verbod op binaire opties en beperkingen op CFD's', 8 January 2019, <https://www.afm.nl/nl-professionals/nieuws/2019/jan/verlenging-verbod-binaire-opties>.

⁴ 'AFM bereidt verbod voor op binaire opties en beperkingen aan CfD's in Nederland', 7 March 2019 <https://www.afm.nl/nl-nl/professionals/nieuws/2019/mrt/interventies-binaire-opties-cfds>.

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. [https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX:32018X0601\(01\)](https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX:32018X0601(01)).

and has since been extended three times⁶ each time by a period of three months. Prior to the ESMA Decision, ESMA published⁷ a 'Call for Evidence' on 18 January 2018 in which it consulted the market about the possible product intervention measures relating to the marketing, distribution or sale of binary options and CFDs to retail clients (**Call for Evidence**).

- 4) The AFM endorses the considerations in the ESMA Decision to support the measure. The AFM agrees with ESMA that binary options are not suitable for retail clients due to their complexity and characteristics. As is evident from the considerations in paragraph 3.1, the AFM reaches the same conclusion as ESMA, which is that binary options give rise to significant investor protection concerns. The AFM is also of the opinion that it is unacceptable in the current state of affairs if binary options were marketed, distributed or sold to retail clients (again).
- 5) The AFM therefore considers it necessary to impose a prohibition on the marketing, distribution or selling of binary options to retail clients in or from the Netherlands in accordance with Article 42 of Regulation (EU) No 600/2014 (**MiFIR**) and Article 1:77f of the Financial Supervision Act (**Wft**). The prohibition applies to investment firms that have their registered office in the Netherlands and to investment firms that have their registered office in another Member State who provide investment services in the Netherlands by means of a branch office or via the free provision of services on the basis of a European passport. The prohibition also applies to investment firms with their registered office in the Netherlands that provide investment services in another Member State. The prohibition applies for an indefinite period. The AFM will revoke the prohibition as soon as the conditions set out in Article 42, second paragraph, MiFIR no longer apply.
- 6) The AFM did not consult with the market regarding the present decision, because a public consultation or consultation of relevant market parties is not required on the basis of Article 42 MiFIR. What is more, market parties were already afforded the opportunity to respond to ESMA's Call for Evidence. The present AFM measure does not deviate from the ESMA Decision. The AFM notes in conclusion that it took account of the points presented by ESMA concerning the responses that were received, in the present decision.
- 7) In order to remove any doubt, the terminology and definitions in this decision – unless explicitly stated otherwise – have the same meaning as in the Wft, Regulation 2014/65/EU of the European Parliament and of the Council⁸ (**MiFID II**) and MiFIR.

⁶ 'ESMA to renew restriction on CFDs for a further three month', 28 September 2018, <https://www.esma.europa.eu/press-news/esma-news/esma-renew-restriction-cfds-further-three-months>, and "ESMA to renew restrictions on CFDs for a further three months from 1 February 2019", 19 December 2018.

⁷ 'ESMA to renew prohibition on binary options for a further three months', 4 augustus 2018, <https://www.esma.europa.eu/press-news/esma-news/esma-renew-prohibition-binary-options-further-three-months>, 'ESMA renews binary options prohibition for a further three months from 2 January 2019', 9 november 2018, <https://www.esma.europa.eu/press-news/esma-news/esma-renews-binary-options-prohibition-further-three-months-2-january-2019> en 'ESMA renews binary options prohibition for a further three months from 2 April 2019', 18 februari 2019, <https://www.esma.europa.eu/press-news/esma-news/esma-renews-binary-options-prohibition-further-three-months-2-april-2019>.

⁸ Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets for financial instruments and amending Directives 2002/92/EC and 2011/61/EU.

- 8) This decision applies to investment firms MiFID II and credit institutions authorised under Directive 2013/36/EU of the European Parliament and of the Council when providing investment services and/or performing investment activities, and to market operators including any trading platforms they operate.⁹
- 9) The present AFM decision satisfies the conditions set out in Article 42 MiFIR. The AFM explains this as follows in this decision:
- Chapter 2 describes the scope of this decision.
 - Chapter 3 describes the basis on which the AFM concludes that the conditions of Article 42, second paragraph, MiFIR have been satisfied.
 - i. Paragraph 3.1 describes the existence of a significant cause for concern about investor protection (Article 42, second paragraph, under a, point i, MiFIR).
 - ii. Paragraph 3.2 describes the applicable, existing requirements on the basis of Union law and that do not and cannot remove the concern about investor protection (Article 42, second paragraph, under b, MiFIR).
 - iii. Paragraph 3.3 describes the proportionality of this decision (Article 42, second paragraph, under c, MiFIR).
 - iv. Paragraph 3.4 describes the AFM's consultation of the NCAs in other Member States that may be significantly effected by this decision (Article 42, second paragraph, under d, MiFIR).
 - v. Paragraph 3.5 describes the absence of a discriminatory effect on services and activities that are provided from another Member State (Article 42, second paragraph, under e, MiFIR).
 - vi. Paragraph 3.6 describes the AFM's consultation with the public body competent for the oversight, administration and regulation of the physical agricultural markets (Article 42, second paragraph, under f, MiFIR).
 - Chapter 4 describes the manner in which the AFM has notified all other NCAs and ESMA of the present measure (Article 42, paragraph 3, MiFIR).
 - Chapter 5 describes the manner of publication of the notification of the present decision (Article 42. paragraph 5, MiFIR).

2. Scope of application

- 10) A binary option is defined in this decision as any cash-settled derivative in which the payment of a fixed monetary amount depends on whether one or more specified events in relation to the price, level or value of the underlying value occurs at, or prior to, the derivative's expiry (for example the underlying value has reached a specified price (the "strike price") at expiry).
- 11) Binary options enable an investor to make a bet on the occurrence of a specified event in relation to the price, level or value of one or more underlying values (for example a share, a currency, a commodity or an index). If the event does not occur, the investor loses their money (that is, the option finishes 'out-of-the-money'). If the event occurs, the option pays out or the contract remains open with the opportunity to receive a pay-out if a separate event occurs (the

⁹ See Article 1, second paragraph, MiFIR.

option finishes 'in-the-money'). In this sense, binary options can be regarded as 'yes/no propositions'. Often, the 'yes/no proposition' is whether the price of the underlying value at expiry of the binary option is above or below a given price (the so-called 'strike price'). In some cases, the 'strike price' corresponds to the market price of the underlying value at the time of entering into the binary option or at a future specified time. However, binary option providers offer a range of potential market outcomes for investors to bet on. The term 'offering' in this decision refers to 'marketing, distributing or selling', as referred to in Article 1 of the present decision.

- 12) It is also pointed out that all binary options, although marketed, distributed or sold under other names, fall within the scope of application of this decision. Reference is made, for example, to all-or-nothing options, up-or-down options, trend options, digital options and one-touch options.
- 13) In addition, this decision includes binary options that have several different predetermined conditions, which have to be met (or not met) before the payment is provided. The reason being that any requirement that several predetermined conditions have to be met can be rewritten into an equivalent requirement that a single condition has been met.
- 14) This decision also applies to binary options that have more than two possible outcomes. A binary option that for example pays out if condition A (for example: "the price of the underlying value increases by more than 0% but by less than 1%") has been met, pays out a different predetermined amount if condition B (for example: "the price of the underlying value increases by 1% or more") and does not make payment if none of the conditions has been satisfied (the price of the underlying value in the example remains the same or the price of the underlying value has decreased), is therefore covered by the scope of application of this decision. The purchase of the binary option described above comes down to the same thing as purchasing a binary option that only pays out if condition A has been satisfied in combination with the purchase of a binary option that only pays out if condition B has been satisfied. The present decision therefore also prohibits combinations of binary options.
- 15) ESMA exempted two types of binary options from the prohibition of the sale of binary options in its decision dated 21 September 2018¹⁰ to extend the ESMA Decision. Firstly, this is the type of binary option whereby the payment of the binary option is at least as high as the overall payment for the binary option. The circumstance that clients predominantly sustain a loss as a result of binary options plays an important role in the considerations that led to the prohibition of binary options. This circumstance clearly does not play a role for this group of exempted binary options. Similarly to ESMA, the AFM therefore considers that there is cause to exempt this group of binary options from the prohibition. Secondly, this concerns the type of binary option that satisfies three cumulative conditions: a minimum term of 90 calendar days, an available prospectus and the provider of the option is not exposed to market risks by the binary option. The minimum term reduces the risk that the client trades often and with short intervals and thus

¹⁰ European Securities and Markets Authority Decision (EU) 2018/1466 of 21 September 2018 renewing and amending the temporary prohibition on the marketing, distribution or sale of binary options to retail clients, as laid down in Decision (EU) 2018/795, [https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX:32018X1001\(01\)&qid=1542030592888](https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX:32018X1001(01)&qid=1542030592888).

increases their losses. The prospectus guarantees the client a minimum of information. The absence of market risks for the provider reduces the risk of a conflict of interest in the sense that the provider earns from the client's losses. Although satisfying an individual condition is not sufficient to counter the risks that have been identified, the AFM agrees with ESMA that compliance with the three cumulative conditions is sufficient at this time to remove the significant cause for concern regarding investor protection. The AFM will continue to monitor these products and developments.

3. The conditions for a prohibition (Article 42, second paragraph, MiFIR)

16) Article 42, second paragraph, MiFIR, includes the conditions for implementing product intervention on the basis of Article 42 MiFIR and Article 1:77f Wft. The abovementioned articles authorise the AFM to prohibit the marketing, distribution or sale of binary options if it concludes on reasonable grounds that all conditions of the second paragraph of Article 42 MiFIR have been satisfied. This chapter includes the AFM's substantiation of the decision in which the AFM explains for each condition why it concludes that this condition has been satisfied.

3.1 Significant cause for concern about investor protection (Article 42, second paragraph, under a, point i, MiFIR)

17) The first condition that is imposed by Article 42, second paragraph, under a, MiFIR is that the AFM concluded on reasonable grounds that binary options constitute a significant cause for concern regarding investor protection. In order to determine whether there is a significant cause for concern regarding investor protection, the AFM assessed the criteria and factors listed in Article 21, second paragraph, under (a) up to and including (v), Delegated Regulation (EU) 2017/567 of 18 May 2016 (**Delegated Regulation**). Taking into account all criteria and factors, the AFM concludes that there is a significant cause for concern regarding investor protection. The AFM explains this below on the basis of the relevant criteria and factors.

3.1.1 The degree of complexity and transparency of binary options (Article 21, second paragraph, under (a), Delegated Regulation)

18) Binary options are complex financial instruments. The complexities of the pricing structure pose a risk of significant information asymmetries between providers and retail clients and hence raise significant investor protection concerns. Furthermore, there are a number of inherent features of binary options that make them complex and difficult for retail clients to understand.

19) Binary option providers typically price binary options based on the market-implied or otherwise modelled probability of a specified event occurring before applying a spread or other form of transaction fee to each option such that it yields a negative expected return for the client. Most commonly, binary options offer a comparatively large return for a statistically less likely event and vice-versa (pricing structure).

- 20) The AFM is of the opinion that it is difficult for retail clients to make an informed assessment of the risk-return profile of a binary option. The pricing structure of binary options presents a number of challenges for retail clients. In particular, the pricing structure requires retail clients to accurately assess the value of the option in relation to the expected probability of the reference event occurring. Although retail clients may use common research and pricing tools to price binary options, retail clients face significant information asymmetries compared to providers. The reason being that providers have much greater access to information and systems to properly price and value these products. In particular, binary option providers have access to historical price data - for example, recorded price feeds from an exchange or commercial data provider in relation to a given underlying value - which is not generally available to retail clients. Furthermore, retail clients may not appreciate that if a trade has a very short term, or if a position is closed close to expiry, factors used to price options such as historic volatility have little impact on the option's value. This limits the ability of retail clients to properly value the option, even when using available pricing tools. Moreover, due to the negative expected value, spreads and other transaction fees, retail clients would need to outperform expected returns on investment significantly ('beat the odds') on a regular basis to achieve profits from trading.
- 21) The combined effect of the negative expected value, the spreads and the transaction fees is that a large majority of retail client accounts lose money in the long term (even though they may make short-term profits) and providers, which are typically direct counterparties to the trade, make a profit from clients in the long term through their losses from trading and through transaction fees.
- 22) Some providers offer continual two-way pricing and the ability for clients to enter and exit the trade over the course of the term of a binary option. In such a case, a client can exit their position prior to the binary option's expiry by selling it back to the provider or otherwise forfeiting the right to conditional payment at expiry. In return, the client receives some payment from the provider, as per the continual price offered by the provider depending on the difference between the current market price and the fixed strike price of the underlying value and the time to expiry.
- 23) Continual two-way pricing is an additional feature that may be offered by binary option providers. This feature adds a further layer of complexity, which makes it even more difficult for retail clients to value these products accurately or make a positive return on investment. This is because retail clients would need to continuously monitor the pricing and estimate the expected outcome. Furthermore, exiting a trade and entering a new one comes at an additional cost to the client due to the application of a spread to the offer price or through transaction fees.
- 24) Furthermore, Dutch retail clients typically invested in over-the-counter (OTC) binary options prior to the ESMA Decision. This means that the pricing, performance and settlement of binary options is not standardised and differ for each binary option, which makes it difficult for retail clients to understand the terms of the product. This, in addition to the differences in the type of 'yes/no propositions' that form the basis of a binary option, the complex pricing structure (sometimes including two-way pricing) and the existence of even more complex offerings (such as binary options that package together a set of binary options), add to the complexity of these products for retail clients.

- 25) In addition, binary option providers are typically the counterparty to their retail clients' trades, with the provider determining the price at execution and the payment at expiry. In addition, providers often require clients to acknowledge that the price used to determine the value of the binary option may differ from the price available in the respective underlying market. This means that it may not always be possible for retail clients to check the accuracy of the prices received from the provider. These factors make it extremely complex for retail clients to value binary options objectively. The high level of complexity and poor degree of transparency associated with binary options therefore confirm that a significant investor protection concern exists.
- 26) In response to the Call for Evidence, a number of firms and trade organisations questioned whether ESMA should distinguish between binary options traded OTC and the ones that are traded on a trading venue. Some trade organisations asked for an explicit exclusion for securitised derivatives, touch-options and digital options, on the grounds that these products were used as an alternative for a stop-loss order or could serve as a hedge.
- 27) ESMA has duly considered these responses in the ESMA Decision. However, the features and characteristics of binary options, which are the fundamental source of the identified detriment to retail clients, remain the same whether or not these products are traded on a trading venue or securitised. In other words, binary options on a trading venue would still present a negative expected return to investors, while offering a payoff structure which is not well-suited to hedging or to performing other economic functions that could form a compensating benefit. These properties hold true at any time prior to the expiry of the option. The AFM agrees with ESMA that the mere existence of a secondary market does not alter the fundamental characteristics that are so detrimental to retail clients.

3.1.2 The particular features or components of binary options (Article 21, second paragraph, under (e), Delegated Regulation)

- 28) Binary options are typically very short-term investments, in some cases expiring minutes after being entered into. This makes them extremely speculative in nature.
- 29) The binary outcome nature of binary options mean that they are primarily used for speculative purposes. The payment of a fixed monetary amount or zero limits the value of binary options as a hedging tool in contrast to traditional options, which allow the client to manage their risk by setting a 'ceiling' or 'floor' for a specific asset that they may have direct exposure to. This is exacerbated by the typical short term of binary options.
- 30) Furthermore, binary options are priced according to the probability of an event occurring, quoting payoffs in a similar manner as traditional fixed-odds bets (for example bets on sporting events or election outcomes). Trades are mostly very short term and investors stand either to make a very large return on or lose their entire investment. These fundamental features are also found in gambling products, which are linked with addictive behaviour and poor outcomes for consumers.
- 31) As mentioned above, binary option providers usually act as direct counterparty to the client's trade, hence taking the client's trade onto their own book. This business model places the

provider's interests in direct conflict with those of its clients, which increases the risk that the provider may manipulate the price of the underlying value at expiry of the binary option or extend the term of the binary option by seconds or milliseconds so as to avoid having to pay out on the option contract. The risk of conflict of interest is particularly acute for binary options, as the payment structure of these products is determined by whether the underlying value has reached the specified strike price at expiry. NCAs have also identified practices whereby binary options providers apply an asymmetrical or inconsistent mark up to core spreads on the underlying value, which results in the option being 'out of the money' where it otherwise would be 'in the money' at expiry. In addition, the distribution models observed by the AFM in this sector of the market bear certain and sometimes inherent conflicts of interest and the pressure to maintain a pipeline of new clients increase the potential for conflicts of interest to occur.

- 32) Given that binary options structurally have negative expected returns, the more positions an investor takes, the more likely they are to lose money on a cumulative basis.

3.1.3 The size of potential detrimental consequences and the degree of disparity between returns for investors and the risk of loss (Article 21, second paragraph, under (b) and (f), Delegated Regulation)

- 33) Client numbers in relation to these products are fluid due to the relatively short life span of binary options client accounts and the cross-border nature of activities. Based on data gathered by ESMA from a number of NCAs, ESMA estimates that the number of retail clients' trading accounts from EEA-based CFD and binary option providers increased from 1.5 million in 2015 to approximately 2.2 million in 2017. Part of these trading accounts is used to trade binary options. The ESMA Decision mentions 401,378 active clients in Cyprus, 30,000 clients in Germany and 40,000 clients in the United Kingdom who trade in binary options.
- 34) The binary options market segment has grown over the past years throughout the entire Union. By way of an illustration, the AFM refers to recital 34 of the ESMA Decision. The Cyprus Securities and Exchange Commission (**CY-CySEC**), the NCA in Cyprus, estimated the total number of active clients in Cyprus in binary options at the end of the second quarter 2017 to be 401,378 compared to 140,205 in 2015. A relatively large part of the providers of binary options of retail clients in the Netherlands have their registered office in Cyprus.
- 35) In 2017 and 2018, the AFM requested the figures of providers of binary options with their registered office in the Netherlands as well as the figures of providers with their registered office in another Member State that focus on retail clients in the Netherlands. The information obtained from market parties and the relevant NCAs in other Member States shows that these providers have approximately 4,000 retail clients in the Netherlands who trade actively.
- 36) It is also evident from the ESMA Decision that several NCAs have reported to ESMA that binary options are widely marketed and sold in their jurisdictions. As also follows from the ESMA Decision, nearly all NCAs reported that binary option providers passporting from other Member States are providing services in binary options in their jurisdictions. Some NCAs also mentioned binary option providers using branches or tied agents to passport to host jurisdictions. And finally, it follows from the ESMA Decision that the NCAs noted an increase in the number of requests for authorisation for investment firms offering binary options.

37) Further, the International Organization of Securities Commissions (**IOSCO**) performed a survey of OTC leveraged products.¹¹ According to the IOSCO report, amongst the most common complaints across jurisdictions with regard to authorised providers are those related to product performance (investor losses incurred), clients not understanding the product or service provided (and its risks), difficulties in withdrawing funds, aggressive/misleading marketing, and price or trade manipulation.¹²

38) The fact that retail clients predominantly sustained a loss when purchasing binary options is evident from the figures from the NCAs. The AFM's abovementioned request for information in 2017 and 2018 shows that 87% of retail clients in the Netherlands sustained a loss trading binary options. This loss figure is in line with the loss figures reported to ESMA by NCAs in other Member States, which vary from 81% to 87%.¹³

3.1.4 The type of clients involved (Article 21, second paragraph, under (c), Delegated Regulation)

39) Before the ESMA Decision entered into effect, binary options were widely marketed, distributed or sold to retail clients. The financial threshold for purchasing binary options is low. Clients can already purchase binary options if they deposit a small amount of money (€100 for example). This means that they are accessible to a wide public. In addition, binary options were often offered via platforms that could reach a wide public (such as internet search engines, social media platforms or large football clubs). This contrasts sharply with the complexity of binary options, which, as considered above in 3.1.1, is very difficult to understand for retail clients. The fact that binary options are mainly sold without advice or portfolio management means that providers of binary options have limited insight into the personal situation or core objectives of the client. This contributes to the significant risk that binary options wind up with a wide audience rather than with a specifically-described target group. The evidence of losses sustained by retail clients mentioned in 3.1.3 constitutes a strong indication to the AFM that binary options are unsuited to retail clients.

3.1.5 Marketing and distribution activities in relation to binary options (Article 21, second paragraph, under (j), Delegated Regulation)

40) Although binary options are complex products, they are offered to retail clients most commonly via electronic trading platforms, without the provision of investment advice or portfolio management. An assessment of appropriateness is required in such cases pursuant to Article 4:24 Wft. Providers are obliged to warn clients if they assess that the service or product is not suitable. However, this assessment does not prevent binary options from winding up with clients to whom they are patently unsuited. It is possible that an assessment of appropriateness is incorrect due to the fact that client did not inform the provider or informed the provider

¹¹ Report on the IOSCO Survey on Retail OTC Leveraged Products (available at: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD550.pdf>).

¹² IOSCO report, page 46.

¹³ See recital 36 to the ESMA Decision, which does not account for the loss figure provided by IT-CONSOB, because this loss figure does not concern the percentage of clients that sustains a loss, but rather the loss rate realised by clients.

insufficiently of his relevant knowledge and experience. In addition, the client and the provider may decide to proceed with the transaction despite the fact that the binary option is not suitable.

- 41) Similarly to NCAs in other Member States, the AFM has observed aggressive marketing practices as well as misleading marketing communications in this sector of the market. These undesirable marketing practices resulted inter alia in the fact that social media platform Facebook introduced policy on 30 January 2018 that advertisements "must not promote financial products and services that are frequently associated with misleading or deceptive promotional practices, such as binary options".¹⁴ Sponsorship arrangements or affiliations with major sports teams are also examples of undesirable marketing practices, because the promotion of general brand name awareness creates the misleading impression that complex and speculative products such as binary options are suitable for the retail mass market.
- 42) Furthermore, and as also follows from the ESMA Decisions, NCAs in several Member States have highlighted not only the regular use of misleading marketing materials, but also the extensive and intensive nature of the marketing activities in this sector:
 - the Autorité des Marchés Financiers (**FR-AMF**), the NCA in France, has reported that for 2016, the number of new advertisements (TV, radio, internet) for speculative trading (binary options, CFDs, forex) represented 36% of all new advertisements in the financial domain, and 45% of all new advertisements for financial instruments;
 - the Bundesanstalt für Finanzdienstleistungsaufsicht (**DE-BaFin**) has noted that investment firms based in another European Union jurisdiction, although small in size, may use up to 200 introducing brokers simultaneously; and
 - some NCAs have noted that the distribution of binary options can occur through electronic gaming or slot machines.
- 43) The developments observed by NCAs in other Member States are also relevant to the Dutch retail market, because the majority of providers of binary options in the Netherlands has its registered office in another Member State. These developments are of particular concern given the increase in retail clients participating in this sector of the market prior to the ESMA Decision.
- 44) Also in this context, some NCAs have also raised concerns about the 'churning' nature of the business models. The relatively short life span of a client account in this sector can place pressure on providers to maintain a steady stream of new clients. This means that providers could be obliged to adopt aggressive marketing and sales techniques that are not in the retail client's best interests.
- 45) The ESMA Decision furthermore shows that the binary option industry often apply marketing and sales techniques that concern the offer of trading (monetary and non-monetary) benefits, such as bonuses to attract and encourage retail clients to invest in binary options, the offer of gifts (for example holidays, cars, electronic goods), trading tutorials or reduced costs (for example spread or fees).

¹⁴ <https://www.facebook.com/business/news/new-ads-policy-improving-integrity-and-security-of-financial-product-and-services-ads>.

- 46) Bonuses and other trading benefits can act as a distraction from the high-risk nature of the product. They are typically targeted to attract retail clients and incentivise trading. Retail clients might consider these promotions a central product feature to the point where they might fail to properly assess the level of risks associated with the product.
- 47) The practice of bonus systems is inspired by the online betting industry. Some providers marketing the relevant products offer 'welcome bonuses' (for any account opening) as well as bonuses based on the invested amounts (volume bonuses), for example, or as additional amounts of 'virtual cash' under certain conditions.
- 48) Supervisory work by several NCAs has discovered that the terms and conditions on promotional offers are often misleading and that many clients reported difficulties in withdrawing funds when trying to use such bonuses or are unaware that their access to the bonus offer or funds depends on a specified volume of trades. Given the feature of negative expected returns associated with trading in binary options, this often means that clients lose more money from trading more frequently than they otherwise would have without receiving a bonus offer.
- 49) The AFM also refers in this connection to the following findings included in the ESMA Decision and that are also relevant to the present measure:
- FR-AMF has pointed out that one of the main issues about bonuses is that the client typically has to invest 20 or 30 times the amount of the bonus to have the right to withdraw the money;
 - the Financial Services and Markets Authority, the Belgian NCA, has noted that it has received many complaints from investors unable to recover their money due to the conditions applicable to bonuses;
 - the Komisja Nadzoru Finansowego, the NCA in Poland, has reported that providers offer gifts like tablets or phones to attract new clients, and that providers claim the gifts enhance the client's ability to contact the investment firm; and
 - DE-BaFin has stated that in the majority of cases involving bonuses observed so far, bonuses are offered by binary option providers acting on a cross-border basis to persuade inexperienced retail clients to speculate in the relevant products, which they may not fully understand.
- 50) Furthermore, the AFM together with NCAs in other Member States, has voiced concerns in the formulation of the ESMA Decision about the compliance of providers of binary options with their obligations to give clients fair, clear and not misleading information or act in the best interests of clients. In addition, the AFM and NCAs are also concerned about the quality of information provided to retail clients (for example on providers' websites) about how binary options work, and in particular information presented about the risks involved. Some examples that are not compliant with the obligation for information to be fair, clear and not misleading and which use techniques drawing clients' attention but not necessarily reflecting the suitability or overall quality of the financial instrument or practice relate to:
- website content or information presented in a language that is not a national language of the Member State where the services are to be provided, or presented in the official language but

based on translations of insufficient quality, such that this is likely to hamper the comprehension of the information presented; and

- presenting information that emphasises the possible benefits associated with investing in binary options without also giving a fair and prominent indication of the relevant risks, suggesting that these speculative products are suitable or appropriate for all investors or that making a return is a simple task. For example: Trading binary options is as easy as 1-2-3'; 'Trading has never been so easy', 'Start your career as a trader right now', 'Gain up to 85% return every 60 seconds', '95% return in a few minutes', and 'What can you do in 60 seconds? Trade binary options and double your money'.

3.1.6 The degree to which binary options may threaten investors' confidence in the financial system (Article 21, second paragraph, under (v), Delegated Regulation)

51) The combination of the degree of complexity and lack of transparency of binary options, the negative expected return of the product for investors, the lack of reasonable investment objectives; the misleading and aggressive nature of many marketing and distribution activities, conflicts of interest for providers as well as the size of potential detrimental consequences, all contribute to retail clients losing confidence in the financial system.

52) Given the high probability of clients suffering losses as evidenced in this decision, investors who had no other experience of investing in financial instruments and had been attracted by the aggressive marketing conducted by binary option providers may conclude that these products are representative of all financial instruments.

3.2 Applicable requirements do not address the investor protection concern (Article 42, second paragraph under b, MiFIR)

53) As required under Article 42, paragraph 2, under b, MiFIR, the AFM has considered whether existing regulatory requirements in the Union that are applicable to the provision of investment services pertaining to binary options avert the above concern and whether it would not be better to deal with the issue on the basis of improved supervision or enforcement of the existing requirements. The relevant, applicable requirements when offering financial instruments such as binary options are laid down in among other places MiFID II and the implementation thereof in the Wft and the Decree on Conduct of Business Supervision of Financial Undertakings under the Wft (**BGfo**) and Delegated Regulation (**MiFID II Delegated Regulation**).¹⁵ In this decision, the AFM will discuss in particular several statutory requirements that could address the investor protection concern. The AFM concludes that in the present case investor protection concerns cannot be removed with improved supervision and enforcement of these requirements because of the risks identified above and due to the detrimental effect of binary options for retail clients.

¹⁵ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L 87, pp. 1-83.

- 54) The AFM is of the opinion that the following requirements in particular are relevant to the present measure:
- the requirement to provide appropriate information to clients in accordance with Articles 4:19, 4:20 and 4:22 Wft, and further elaboration thereof in Article 58 BGfo,¹⁶ as well as the requirements included in Chapter III, Section 1 of the MiFID II Delegated Regulation and the requirements that investors are provided with information in accordance with Articles 5 up to and including 14 of Regulation (EU) No. (PRIIPS Regulation);
 - the suitability and appropriateness requirements as laid down in Articles 4:23 and 4:24 Wft;¹⁷
 - the best execution requirements in accordance with Articles 4:90a et seq. Wft¹⁸; and
 - the product governance requirements in accordance with Articles 4:14 and 4:90 Wft and Articles 32 up to and including 32d BGfo.¹⁹
- 55) This decision discusses in particular the requirements included in the Wft and the BGfo. These requirements arise from MiFID II and equivalent requirements apply in all other Member States as well in view of the maximum harmonisation intended by means of MiFID II. Where the AFM refers to existing requirements in the Wft and the BGfo that would not provide a better solution to the matter, the AFM also aims to refer to the requirements arising from MiFID II and the national implementation in other Member States as these apply to investment firms with their registered office in those other Member States or investment firms with their registered office in the Netherlands that offer binary options via a branch or the freedom to provide services (European Passport).

3.2.1 Provision of information

- 56) The Wft imposes requirements with respect to the provision of information to (potential) clients. Those requirements concern among other things the provision of correct, clear and non-misleading information²⁰ and the (timely) provision of certain information.²¹ That information includes in particular appropriate information and warnings about the risks inherent in investment in financial instruments and whether the financial instrument is intended for retail clients or professional investors. Investment firms are also obliged to provide their clients with information concerning all costs and additional fees related to the investment services and the financial instruments.

¹⁶ Article 24, third, fourth and fifth paragraph, MiFID II.

¹⁷ Article 25, second, third, fourth and sixth paragraph, MiFID II.

¹⁸ Article 27 MiFID II.

¹⁹ Article 16, third paragraph, and Article 24, second paragraph, MiFID II and Chapter III of Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits.

²⁰ Article 4:19, first subsection, Wft.

²¹ Article 4:20 Wft in conjunction with Article 58 BGfo and Articles 44 up to and including 51 of the MiFID II Delegated Regulation.

- 57) There are also requirements with respect to the provision of information of investors on the basis of the **PRIIPs Regulation**.²² The PRIIPs Regulation imposed uniform rules regarding the shape and content of the key information document to be drawn up by PRIIP²³ developers as well as with respect to the provision of the key information document to retail clients in order to enable them to understand and compare the key characteristics and risks of a PRIIP. Specifically, Article 5 of the PRIIPs Regulation, as implemented further by Commission Delegated Regulation (EU) 2017/653, sets out a methodology for the presentation of the summary risk indicator and the related explanation, for example concerning the question whether the retail client could lose the entire amount in invested capital or whether he has to assume further financial obligations.
- 58) The AFM is of the opinion that compliance with the requirements concerning the provision of information cannot address the significant cause for investor protection concern. Firstly, the provision of information does not have an influence on the specific characteristics or components of binary options as described in paragraph 3.1.2. In particular, improving information does not reduce the significant risk of loss or the negative expected value of binary options. Secondly, the complexity of binary options as described in paragraph 3.1.1 is such that even if the legal requirements to provide information are satisfied, the products will still be difficult to understand for retail clients.

3.2.2 Assessment of the suitability and appropriateness of the investment service and product

- 59) The requirements with respect to the suitability of the financial instrument as referred to in Article 4:23 Wft were further strengthened under MiFID II with the obligation to provide a suitability report to the retail client as well as a further description of the suitability assessment. The objectives of the suitability assessment (considering products against clients' knowledge and experience, financial situation, risk tolerance and investment objectives) are substantially unchanged compared to the rules that applied under MiFID I²⁴. The requirement to obtain sufficient relevant information and assess the suitability of the investment service or financial instrument to be provided is elaborated further in Articles 54 and 55 of the MiFID II Delegated Regulation. Specifically, Article 4:23, first section, under a, Wft requires investment firms to obtain the necessary information regarding the client's or potential client's knowledge or experience in the investment field relevant inter alia to the specific type of product, the client's or potential client's financial situation including their ability to bear losses, and their investment objectives including their risk tolerance so as to enable the binary option provider to recommend the client or potential client financial products that are suitable for them and are in accordance with their risk tolerance and ability to bear losses.
- 60) However, the suitability requirements are only applicable to the provision of investment advice and portfolio management. They are usually irrelevant in relation to the marketing, distribution or sale of binary options, which mostly occurs via electronic platforms, without the provision of

²² Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

²³ Packaged retail and insurance-based investment product, as defined in Article 4, third paragraph, PRIIPs Regulation.

²⁴ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 3/22/EEC (OJEU L 145 of 30.4, 2004, page 1).

investment advice or portfolio management. These requirements are therefore insufficient to remove the significant cause for investor protection concern.

61) In addition, implementation of MiFID II has also led to strengthening of the suitability requirements, in particular by reducing the number of products designated as non-complex as well as the scope for execution-only services. Investment firms are obliged on the basis of Article 4:24, first section, Wft to obtain information from their (potential) clients concerning their knowledge and experience in the investment field relevant inter alia to the specific type of product that is offered or desired, so that the provider is able to assess whether that product is suitable for the client or potential client. The providers warns the client or potential client if the provider considers that the product is not suitable for the client or potential client.

62) Binary options qualify as complex financial products and are therefore subject to the suitability assessment in accordance with Article 4:24 first section Wft. However, this was already the case under MiFID I, which provided for a suitability assessment that does not differ essentially from the assessment under MiFID II. Failure to comply correctly with the requirements pertaining to suitability does not contribute or contributes to a very limited extent to the criteria and factors described in paragraphs 3.1.1 up to and including 3.1.6 that give cause for concern about investor protection. What is more, requirements with respect to suitability cannot prevent a retail client from trading in binary options even if non-suitability has been demonstrated. It is therefore not probable that improved supervision and enforcement of compliance with the requirements pertaining to suitability is able to remove the significant cause for concern about investor protection.

3.2.3 Best execution requirements

63) Most of the relevant rules with respect to best execution as referred to in Article 4:90a et seq. of the Wft already existed under MiFID I. Those rules were strengthened under MiFID II. For example, market participants must publish additional information and in particular investment firms are required to disclose the top five venues where they executed client orders and the outcomes achieved when executing those orders.²⁵

64) Best execution requirements clearly do not have an impact on the degree of complexity or the characteristics and components of the product itself. This means that supervision or enforcement of these requirements cannot lead to a change in the factors and criteria set out in paragraphs 3.1.1 and 3.1.2. Supervision and enforcement of these requirements do not have an impact either on the factors and criteria set out in paragraphs 3.1.3 up to and including 3.1.6. Supervision and enforcement of the abovementioned criteria therefore cannot remove the significant cause for concern regarding investor protection that has been identified.

3.2.4 Product governance requirements

65) The AFM has investigated the potential consequences of the product governance rules following from Article 4:14 Wft, Article 4:90 Wft and Articles 32 up to and including 32d BGfo. These rules

²⁵ See Article 4:90b, third paragraph, Wft.

require providers manufacturing financial instruments (including therefore binary options) for sale to clients to ensure that the products are designed to meet the needs of an identified target market of end clients within the relevant category of clients; that the strategy for distribution of the products is compatible with the identified target market; and that the providers take reasonable steps to ensure that the financial instruments are distributed to the identified target market and periodically review the identification of the target market and the performance of the product. Binary options providers shall understand the financial instruments they offer or recommend, assess the compatibility of the instrument with the needs of the client to whom it provides investment services, also taking into account the identified target market of end clients, and ensure that financial instruments are offered or recommended only when it is in the interest of the client. Furthermore, binary options providers that would distribute a financial instrument not manufactured by them shall have appropriate arrangements in place to obtain and understand the relevant information concerning the product approval process, including the identified target market and the characteristics of the product. Binary options providers distributing financial instruments manufactured by providers not subject to the product governance requirements in MiFID II or by third-country providers shall also have appropriate arrangements to obtain sufficient information about the financial instruments.

- 66) The AFM notes that the product governance requirements arise from MiFID II. On 2 June 2017, ESMA published the 'Guidelines on MiFID II product governance requirements' in which guidance is provided to manufacturers and developers for the assessment of the target market.
- 67) The purpose of the product governance requirements is to narrow down the type of clients (that is, the target market) for which financial instruments would be appropriate and to which they should therefore be distributed. Considering the features of binary options (high degree of loss, negative expected return, short term of contracts, complexity of pricing structures, and in general the lack of reasonable investment objectives), the AFM is of the view that no positive retail target market could be determined.
- 68) The product governance requirements already applied before the ESMA Decision entered into effect. Several investment firms with their registered office in the Netherlands or in another Member State nevertheless marketed binary options to the Dutch retail market. The AFM considered whether improved supervision and enforcement of the product governance requirements could address the significant cause for concern regarding investor protection caused by binary options. The AFM concludes that such an approach is not effective and therefore insufficient to address the problem. The AFM explains this as follows.
- 69) Concern about investor protection pertains not only to an individual provider of binary options, but constitutes a market-wide issue. An enforcement process on the basis of product governance requirements is complex and intensive by its nature. Enforcement at all providers of binary options would therefore be disproportionately burdensome for both the providers concerned and the responsible NCAs. What is more, enforcement on the basis of product governance requirements cannot prevent newly-developed binary options from creating significant cause for concern about investor protection.

3.3 The decision is proportionate (Article 42, second paragraph, under c, MiFIR)

- 70) In view of the significant cause for concern about investor protection, the AFM considers it necessary and proportionate to introduce a prohibition of the marketing, distribution and sale of binary options to retail clients. This prohibition counters the significant cause for concern by realising a suitable and uniform level of protection for retail clients who are served by investment firms in or from the Netherlands.
- 71) The AFM took account in the present decision of the nature of the risks that were identified. Binary options entail the significant risk that the investor loses their investment. The negative expected return makes it unlikely that the investor will make a profit in the long term trading in binary options. The short term contributes to the fact that investors trade frequently and thus increases his losses. There is also a risk of a conflict of interest because the provider of binary options earns money as a result of the losses incurred by the investor. The losses referred to above in this decision incurred by retail clients with binary options demonstrate that the risks actually led to losses. The AFM considers it very important that retail clients are protected against such losses due to trading in binary options.
- 72) As explained in paragraph 3.1.4, binary options were available to a wide public and providers of binary options used platforms that reached a wide public for their marketing activities, which wide public is not specifically expert in the field of investment in general and binary options in particular. The prohibition takes account of the knowledge level of and expected impact on retail clients who trade in binary options.
- 73) A principal reason why the financial sector is highly regulated is that it serves important overarching interests and objectives. Special attention is devoted to the protection of retail clients in this connection.
- 74) The AFM has reached the limits of what is effective as regards the use of non-binding tools, such as public warnings against the risks of trading in binary options. What is more, the AFM acknowledges in this connection and specifically with respect to product governance that the principles of product governance already formed part of the supervisory culture in the financial sector within the Union before MiFID II entered into effect. The European Supervisory Authorities ('ESAs') issued a joint position on 'Manufacturers' Product Oversight and Governance Processes' setting out high-level principles applicable to the oversight and governance processes of financial instruments.²⁶ In February 2014, ESMA issued an opinion on 'MiFID practices for firms selling complex products' and, in March 2014, it issued an opinion on 'Structured Retail Products — Good practices for product governance arrangements'.²⁷
- 75) Despite these supervisory principles and the regulatory requirements described in this Decision, the detriment in relation to the marketing, distribution or sale of binary options to retail clients had continued to develop over the years prior to the entry into effect of the ESMA Decision.

²⁶ Joint Position on 'Manufacturers' Product Oversight and Governance Processes' (JC-2013-77).

²⁷ Opinion on MiFID practices for firms selling complex products of 7 February 2014 (ESMA/2014/146). This opinion specifically included references to CFDs and binary options.

- 76) The AFM therefore considers that the present measure, which is a prohibition of the marketing, distribution or sale to retail clients of all types of binary options (whether traded on a trading venue or not) to be appropriate to address risks to investor protection. It should be mentioned that retail clients will be able to acquire similar products in the gambling sphere, when these products are allowed in accordance with the applicable relevant legislation.
- 77) The AFM is also of the opinion that measures less restrictive than a prohibition do not effectively address the significant cause for concern regarding investor protection.
- 78) The AFM furthermore considered the potential financial consequences and costs for providers of binary options due to the fact that they would have to set up their business operations in a different manner. The fact that providers of binary options have been subject to the prohibition under the ESMA Decision already since 2 July 2018 means that the financial consequences of the present measure will mainly be related to the permanent ban on selling binary options to retail clients, which naturally results or could result in a loss of revenue. The financial consequences cannot be related to the costs of adjusting the business operations as these adjustments were already implemented as a result of the ESMA Decision.
- 79) The AFM considers, however, that the following benefits gained from addressing the investor protection concern identified outweigh the potential negative impact of the measures:
- reduction of the miss-selling risk and its related financial consequences, which is a major benefit for retail clients and for the financial markets as whole; and
 - restoring retail clients' confidence in financial markets.

3.4 Consultation NCAs in other Member States (Article 42, second paragraph, under d, MiFIR)

80) The AFM notified all NCAs of the intention to implement the present decision via ESMA Investor Protection and Intermediaries Standing Committee prior to the adoption of the present decision. No NCA in another Member State responded to the effect that it or its Member State may suffer a significant impact from the present decision. For the sake of additional care, the AFM also consulted CySEC individually and directly, because a relatively large number of investment firms that sold binary options to retail clients in the Netherlands prior to the entry into effect of the ESMA Decision have their registered office on Cyprus. The reason being that the present decision could have an impact on CySEC due to its responsibility as home country supervisor in the event an investment firm with its registered office on Cyprus offers binary options to retail clients in the Netherlands via a branch office or a European passport despite the present decision.

3.5 No discriminatory effect on services and activities provided from another Member State (Article 42, second paragraph, under e, MiFIR)

81) This decision applies to the providers of binary options with their registered office in the Netherlands and to providers of binary options with their registered office in another Member State. Investment firms with their registered office in another Member State that provide investment services in the Netherlands are therefore covered by the scope of application of the

present measure as are investment firms with their registered office in the Netherlands. It is therefore not likely that the present decision will have a discriminatory effect on services and activities provided from another Member State.

3.6 Consultation with public bodies competent for the oversight, administration and regulation of physical agricultural markets (Article 42, second paragraph, under f, MiFIR)

82) The proposed measure may be related to agricultural commodities derivatives to a limited extent. The AFM consulted with the Ministry of Agriculture, Nature and Food Quality, European Agriculture and Fisheries Policy and Food Security. This consultation did not lead to insights that would lead to a decision different from the present decision.

4. Notification of NCAs in other Member States and ESMA (Article 42, third paragraph, MiFIR)

83) The AFM notified all NCAs in other Member States and ESMA in writing and in the agreed manner of the particulars referred to in Article 42, third paragraph, MiFIR, on 21 February 2019, which is at least one month before the measure takes effect. ESMA adopted and published an opinion on the ESMA website²⁸ in accordance with Article 43, second paragraph, MiFIR. The AFM took note of the opinion adopted by ESMA. The AFM concludes that the proposed measure is not contrary to the opinion adopted by ESMA.

5. Publication of the notice of the decision on the website (Article 42, fifth paragraph, MiFIR)

84) The AFM publishes a notice of this decision in the following location:
<https://www.afm.nl/nl-nl/professionals/onderwerpen/productinterventie>. The AFM's measure will enter into effect following publication of the notice of this decision on the AFM website and in the Government Gazette.

85) The AFM sees no reason to apply a transitional period, because the prohibition of the marketing, distribution or sale of binary options to retail clients has been in effect in the EU since 2 July 2018. Market participants therefore do not require time in the shape of a transitional scheme to make the necessary adjustments to their business operations. What is more, the AFM informed the market on 7 March 2019 of its intention to adopt at the national level the ban included in the ESMA Decision in the near future.

²⁸ 'ESMA opinion under Article 43(2) MiFIR (AFM_BO)', 2 April 2019, <https://www.esma.europa.eu/document/esma-opinion-under-article-432-mifir-afmbo>