FMA Regulation on Product Intervention Measures

(*FMA-PIV; FMA-Produktinterventionsverordnung*)

Full title

Regulation of the Financial Market Authority (FMA) on Product Intervention Measures (FMA-Produktinterventionsverordnung – FMA-PIV)

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Preamble / Promulgation Clause

Based on Article 90 para. 3 no. 15 in conjunction with para. 8 of the Securities Supervision Act of 2018 (WAG 2018; Wertpapieraufsichtsgesetz 2018) published in Federal Law Gazette I No. 107/2017 most recently amended by Federal Act in Federal Law Gazette I No. 37/2018, and Article 4 paras. 3 and 4 of the PRIIP Enforcement Act (PRIIP-VollzugsG; PRIIP-Vollzugsgesetz), published in Federal Law Gazette I No. 15/2018 in the version of the corrigendum published in Federal Law Gazette I No. 27/2019, the following shall be determined by Regulation:

Text

Subject of the Regulation

Article 1. This Regulation shall serve to determine product intervention measures

1. pursuant to Article 42 of Regulation (EU) No 600/2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173, 12.06.2014, p. 84, in the version amended by Regulation (EU) 2016/1033, OJ L 175, 30.06.2016, p. 1, and the corrigendum in OJ L 278, 27.10.2017, p. 54, in accordance with Article 90 para. 3 no. 15 in conjunction with para. 8 of the Securities Supervision Act 2018 (WAG 2018; Wertpapieraufsichtsgesetz 2018) published in Federal Law Gazette I No. 107/2017, most recently amended by Federal Act in Federal Law Gazette I No. 37/2018, and
2. pursuant to Article 17 para. 1 of Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products, OJ L 352, 12.06.2014, p. 1, as amended by the corrigendum in Regulation (EU) 2016/1033, OJ L 358, 13.12.2014, p. 50, and Regulation (EU) 2016/2340, OJ L 354, 23.12.2016, p. 35, in accordance with Article 4 paras. 3 and 4 of the PRIIPs Enforcement Act (PRIIP-VollzugsG; PRIIP-Vollzugsgesetz) published in Federal Law Gazette I No. 15/2018, as amended by the corrigendum by Federal Act in Federal Law Gazette I No. 27/2019,

provided that product intervention measures have not be determined by means of administrative decision.

Definitions

Article 2. For the purposes of this Regulation the following definitions apply:

1. "binary option" means a derivative that fulfils the following conditions, irrespective of whether it is traded at a trading venue pursuant to Article 1 no. 26 WAG 2018:
   - a) the derivative 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, and
   - b) the derivative only provides for payment at its close-out or expiry, with payment being limited to
     - aa) a predetermined fixed amount or zero if the underlying of the derivative meets one or more predetermined conditions; and
     - bb) a predetermined fixed amount or zero if the underlying of the derivative does not meet one or more predetermined conditions.
2. "retail clients" means retail clients pursuant to Article 1 no. 36 WAG 2018.

3. "Contracts for Difference (CFDs)" means derivatives in the form of a financial contract for differences, the purpose of which exists in providing the holder with a long or short position with regard to fluctuations of price, exchange rate or value of an underlying, and which fulfils the following conditions, irrespective of whether or not it is traded at a trading venue pursuant to Article 1 no. 26 WAG 2018:
   a) the contract for differences does not at the same time fulfil the conditions for an option, a future, swap or forward rate agreement and
   b) the contract for difference 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.
4. "virtual currency" means a virtual currency pursuant to Article 3 (18) of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 and repealing Directive 2005/60/EC and Directive 2006/70/EC, OJ L 141, 05.06.2015, p. 73, in the version of Directive (EU) 2018/843, OJ L 156, 19.06.2018, p. 43.

Prohibition and Restrictions

Article 3. (1) The marketing, distribution or sale to retail clients of binary options to retail clients shall be prohibited pursuant to Article 90 para. 3 no. 1 in conjunction with para. 8 WAG 2018, provided that the binary option does not fulfil one of the following conditions:

1. the lower of the two predetermined fixed amounts pursuant to Article 2 no. 1 lit. b is at least equal to the total payment made by a retail client for the binary option, including any commission, transaction fees and other costs related to the binary option, or
2. the binary option fulfils the following conditions:
   a) the term from issuance to maturity is at least 90 calendar days,
   b) a prospectus that has been drawn up and approved in accordance with the applicable law on prospectus is available to the public,
   c) the binary option does not expose the provider to market risk due the use of hedging transactions throughout the term of the binary option, and
   d) the provider 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.

(2) The marketing, distribution or sale of contracts for difference (CFDs) to retail clients shall only be permissible where all of the following conditions defined pursuant to Article 90 para. 3 no. 15 in conjunction with para. 8 WAG 2018 are met:

1. the provider guarantees that it demands an initial margin from the retail client for the following amount in relation to the nominal value of the contract for differences:
   a) the underlying is a currency pair composed of any two of the following currencies: US dollar, Euro, Japanese yen, Pound sterling, Canadian dollar or Swiss franc: 3.33%
   b) the underlying is one of the following equity indices: Financial Times Stock Exchange 100 (FTSE 100), Cotation Assistée en Continu 40 (CAC 40), Deutsche Börse AG German Stock Index 30 (DAX 30), Dow Jones Industrial Average (DJIA), Standard & Poors 500 (S&P 500), NASDAQ Composite Index (NASDAQ), NASDAQ 100 Index (NASDAQ 100), Nikkei Index (Nikkei 225), Standard & Poors / Australian Securities Exchange 200 (ASX 200) or EURO STOXX 50 Index (EURO STOXX 50): 5%
   c) the underlying is gold: 5%
   d) the underlying is a currency pair that consists of at least one currency, which is not listed in lit. a: 5%
   e) the underlying is an equity index that is not listed in lit. b, or a commodity that is not listed in lit. c: 10%
   f) the underlying is a share: 20%
   g) the underlying is not listed in lits. a to f or h: 20%

h) the underlying is a virtual currency: 50%;

2. the provider guarantees that it will close one or several open financial contracts for difference of the retail client under the most favourable conditions for the client pursuant to Articles 47 and 62 WAG 2018, where the total of funds held in the CFD trading account and the unrealised net profits of all open financial contracts for difference that are associated with this CFD trading account falls below half the total amount of the initial margins, that is prescribed for all of these open financial contracts for difference (margin close-out protection);
3. the provider guarantees that the aggregate liability of a retail client for all financial contracts for difference associated with the same CFD trading account is limited to the amount of the balance in the CFD trading account (negative balance protection);
4. the provide neither directly nor indirectly grants a payment or another monetary benefit or non-monetary benefit in relation to the marketing, distribution or sale of a financial contract for difference (client incentive programmes); the aforementioned benefits do not include
   a) the realised profits of the retail client provided in relation to all financial contracts for difference and
   b) the provision of information and research tools, provided that they relate to contracts for difference;
5. the provider neither directly or indirectly sends a communication to the retail client for the marketing, distribution or sale of a financial contract for difference and also does not publish such information in an accessible manner for a retail client, unless the communication or information contains a risk warning pursuant **Annex 1**.

Temporal or Geographical Scope of Application

Article 4. (1) Article 3 para. 1 shall apply to binary options that are marketed, distributed or sold from 30 May 2019 in or from Austria.

(2) Article 3 para. 2 shall apply to contracts for difference that are marketed, distributed or sold from 30 May 2019 in or from Austria.

Entry into Force

Article 5. This Regulation shall enter into force on 15 May 2019.

Annex 1

Risk Warning

Section 1
Risk warning conditions

(1) Where the risk warning occurs

1. in a communication or information on a durable medium pursuant to Article 1 no. 64 WAG 2018 or on a website, it must correspond with **Section 2**,
2. in a communication or information on another medium other than those listed in no. 1, it must correspond with **Section 3**.

(2) Where a risk warning pursuant to para. 1 exceeds the restriction on the number of characters prescribed in the terms of business of an external marketing provider, it shall by way of derogation from para. 1 suffice, if

1. the format corresponds to **Section 4** and
2. the communication or information includes a direct electronic link (hyperlink) to the website of the CFD provider that contains a risk warning in a format that corresponds to Section 2.

(3) If the CFD provider has not provided any open financial contracts for difference in the relevant calculation period pursuant to para. 4 in conjunction with the CFD trading account of a retail client and therefore no provider-specific risk warning in accordance with para. 1 is able to be drawn up, then by deviation from paras. 1 and 2 the following shall be permitted:

a) instead of a provider-specific risk warning in accordance with Section 2 a standardised risk warning corresponding to Section 5,
b) instead of a provider-specific risk warning in accordance with Section 3 a standardised risk warning corresponding to Section 6, and
c) instead of a provider-specific risk warning in accordance with Section 4 a standardised risk warning corresponding to Section 7.

(4) A provider-specific risk warning which is required to correspond to Section 2, 3, or 4, must contain a current provider-specific loss percentage, which is based on a calculation of the proportion of CFD trading accounts, which have been provided to retail clients by the CFD provider and which have lost money, as a proportion to all CFD trading accounts, which have been provided to retail clients by the CFD provider. The calculation must be performed every three months (calculation interval) and shall capture the 12-month period preceding the day on which it is performed. The following shall apply for the purposes of the calculation:

1. an individual CFD trading account of a retail client shall be considered as having lost money, when the total of all realised and unrealised net receipts from financial contracts for difference in conjunction with this CFD trading account during the calculation period is negative;
2. All costs related to the financial contracts for difference in connection with the CFD trading account including all charges, fees and provisions are to be included in the calculation;
3. the following elements are not to be taken into account for the calculation:
   a) every CFD trading account that does not have any associated financial contracts for difference for the duration of the calculation period,
   b) all profits and losses in conjunction with the CFD trading account, which are obtained from other products than financial contracts for difference, and
   c) all payments of funds into, as well as withdrawals of funds from the CFD trading account.

Section 2
Provider-specific risk warning on a durable medium or a website

CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage.
[*Insert percentage pursuant to para. 3 of Section 1*] % of retail client accounts lose money when trading in CFDs with this provider.
You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.

Section 3
Abbreviated provider-specific risk warning

[*Insert percentage pursuant to para. 3 of Section 1*] % of retail client accounts lose money when trading in CFDs with this provider.
You should consider whether you can afford to take the high risk of losing your money.

Section 4
Provider-specific risk warning with character limit

[*Insert percentage pursuant to para. 3 of Section 1*] % of our CFD retail client accounts lose money!

Section 5
Standard risk warning on a durable medium or a website

CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage.
The vast majority of retail client accounts lose money when trading in CFDs.
You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.

Section 6
Abbreviated standard risk warning

The vast majority of retail client accounts lose money when trading in CFDs.
You should consider whether you can afford to take the high risk of losing your money.

Section 7
Standard risk warning with character limit

CFD retail client accounts generally lose money!