BaFin

Bundesanstalt für Finanzdienstleistungsaufsicht

Federal Financial Supervisory Authority

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Ref. no.: WA 35-Wp 5427/00001#00273 (please quote in all correspondence)

This translation is furnished for information purposes only. The original German text is binding in all respects.

General Administrative Act - Product intervention regarding Futures

Dear Sir or Madam,

The following

General Administrative Act is adopted:

1. I am ordering a restriction on the marketing, distribution and sale of futures within the meaning of Article 4 (1)(15) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directives 2002/92/EC and 2011/61/EU (MiFID II), in conjunction with numbers 4 to 7 and 10 of Section C of Annex I to MiFID II, to retail clients domiciled in Germany by investment firms within the meaning of Article 1(1)of MiFID II in conjunction with Article 4(1)(1) of MiFID II.

   Investment firms are prohibited from marketing, distributing and selling futures to retail clients within the meaning of Article 4(1)(11) of MiFID II domiciled in Germany, unless they are subject to the exceptions addressed in paragraph 2.

   The restriction becomes effective as at 1 January 2023.

2. Exceptions to the prohibition in accordance with paragraph 1 sentence 2 of the measure are cases in which

   a. investment firms contractually exclude an additional payment obligation for retail clients and the loss of retail clients is therefore limited to the funds they deposit with the investment firm for futures trading, or

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b. before entering into the transaction, retail clients confirm to the investment firm for each futures transaction that they are purchasing the future or the futures contracts solely for hedging purposes.

c. Futures are sold with purpose to settle or to close out existing (open) futures positions that were purchased before the General Administrative Act took effect (offsetting transaction for settling an open futures position).

3. "Additional payment obligations" within the meaning of paragraph 2(a) relate to a contractual obligation of the retail client to compensate the investment firm for a loss after the forced liquidation of open futures contracts by the investment firm by providing additional funds from the retail client's other assets.

4. "Hedging transactions" within the meaning of paragraph 2(b) are futures transactions that are executed to hedge a specific underlying transaction or hedged item or a portfolio.

5. The measure in form of a General Administrative Act is deemed to be published on the day following its announcement.

6. I reserve the right to withdraw this General Administrative Act.

1. Factual and legal situation

For the purposes of this General Administrative Act, "brokers" or "intermediaries" mean investment firms within the meaning of Article 4(1)(1) of MiFID II that give retail clients access to futures and are therefore also providers of these products. "Investment firms" mean investment services enterprises within the meaning of section 2 (10) of the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG).

"Retail clients" within the meaning of Article 4(1)(11) of MiFID II are clients within the meaning of section 67 (3) of the WpHG.

A "manufacturer" for the purposes of this General Administrative Act means anyone who manufactures, creates, develops or issues futures. Manufacturers are thus primarily futures exchanges.

1.1 General description of how futures work

Futures are unconditional exchange-traded forward transactions. In the case of futures, there is therefore a binding performance requirement for all contractual parties. Both purchasers and sellers must fulfil their delivery or acceptance and payment obligations.[1] In particular, "financial futures" (futures with underlying instruments such as currencies or equities) are usually not fulfilled through effective delivery and acceptance. In these cases, the commitment entered into is usually satisfied by a corresponding offsetting transaction.[2]

Futures are standardised forward contracts that, among other things, reference financial instruments and commodities, that involve a contractual obligation to deliver (short position) or receive (long position) a certain quantity of an underlying instrument at a price determined at the time the contract is entered into and at a later date agreed at the time the contract is entered into.[3] The profit potential from long futures is theoretically unlimited, and the maximum loss is limited to the amount of the futures (contract value). In the case of short positions, however, the risk of loss is unlimited.[4]

Futures are traded on a stock exchange (futures exchange). This exchange (in Germany, for example, the European Exchange – EUREX Frankfurt AG (EUREX) or the European Energy Exchange (EEX)) determines standardised features for futures contracts, such as the contract size, in order to enable trading.[5]

The contract size determines the quantity of an underlying instrument that must be delivered for a contract. Most of the equity futures traded on EUREX have a contract size of 100 shares. In the case of indices, by contrast, the contract value is given per index point. For example, a DAX future has a contract value of EUR 25 per point and, with an index level of 16,000 points, it therefore has a contract value of EUR 400,000.

The futures exchanges require trading participants to deposit collateral in the form of capital injections (margins) before they can trade in futures. The futures exchange requires the trading participants to deposit this collateral in order to ensure that the transaction entered into can be fulfilled in the future. Theoretically, the collateral deposited should large enough so that the central

[1] See Grill, W.; Perczynski, H., *Wirtschaftslehre des Kreditwesens*, 2021, p. 353.
[2] See Grill, W.; Perczynski, H., *Wirtschaftslehre des Kreditwesens*, 2021, p. 357.
[3] See Grill, W.; Perczynski, H., *Wirtschaftslehre des Kreditwesens*, 2021, p. 354.
[4] See Grill, W.; Perczynski, H., *Wirtschaftslehre des Kreditwesens*, 2021, p. 357.
[5] See Hull, J., *Optionen, Futures und andere Derivate*, 2019, p. 31 *et seq.*

counterparty (CCP) can close out the position in question on the next trading day and any resulting losses are covered by the collateral deposited.[6] The amount of the required collateral is defined by the futures exchange itself. In principle, the higher the risk or volatility of an underlying instrument in the futures contract, the higher the margin that must be deposited.

However, retail clients cannot trade futures directly through the futures exchange, but only through an intermediary. For this reason, trading by retail clients described in the following means with the involvement of intermediaries.[7]

At the beginning (opening of the futures contract or purchase of the future), the investor must pay an "initial margin" to a "margin account" with the intermediary. This is generally revalued at the end of each trading day. This valuation is also termed "marking to market".[8]

In addition to the initial margin, the futures exchange determines a certain margin account amount below which the account balance may not fall (maintenance margin).[9] The maintenance margin is slightly below the initial margin. The brokers treat the additional payment obligations of the futures exchange at least as a lower limit for the amount of collateral to be provided by the retail client. If the balance of the margin account falls below the maintenance margin, the retail client generally receives a margin call. They must top up the account – partly within a certain specified time frame – to the level of the initial margin. This additional payment is also termed a "variation margin". If the retail client does not make an additional payment, the broker closes out the position by liquidating the contract.[10] This is also termed "forced liquidation" or "automatic close-out".

Retail clients can themselves decide following a margin call whether they want to increase their "stake" or whether the contract should be (forcibly) closed out by the broker. If the loss arising when the contract is closed out is not covered by the margin, the intermediary can require the retail client to

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[6] See Bösch, M., *Derivate - Verstehen, anwenden und bewerten*, 2020, p. 178.

[7] Note: Retail clients are restricted from trading directly on futures exchanges. As a rule, only institutional investors are admitted as clearing members or non-clearing members as trading participants in a futures exchange.

[8] See Hull, J., *Optionen, Futures und andere Derivate*, 2019, p. 58.

[9] See Möhl, E., *Optionen und Futures*, 2002, p. 33.

[10] See Hull, J., *Optionen, Futures und andere Derivate*, 2019, p. 58.

make an additional payment (compensation for the loss by transferring additional funds).

Although many intermediaries have implemented such a margin call procedure and actively tell investors about potential insufficient coverage or impending negative balances on the margin account, this is not the case with all intermediaries. In their general terms and conditions, intermediaries also do not normally undertake to make a margin call, but see this as an (optional) service offering for retail clients. In addition, in particular in the event of strong price movements, it may not be possible to make a margin call in good time and the position may have to be forcibly closed out before the retail client is informed.

An additional payment obligation for the purposes of this General Administrative Act arises if the capital held by the retail client (capital paid to or deposited with the intermediary for the purposes of futures trading) is insufficient to compensate for losses incurred, even after any forced liquidation or the liquidation of other futures contracts, and the retail client must make good these losses from their other assets. The additional payment obligation is thus a call on the retail client to offset losses. Any voluntary increase in the variation margin by the retail client to avoid forced liquidation of open contracts therefore does not constitute an additional payment obligation for the purposes of this General Administrative Act.

In some cases, the margin obligations are determined by the intermediaries at the portfolio level. In such cases, all additional payment obligations in futures or options trading are offset against each other. In the event of insufficient coverage in a futures contract, for example, the intermediary could then not only forcibly close out futures positions, but also other positions, until the (additional payment) obligation is fulfilled by liquidating other transactions.

In the past, especially in the case of special market events ("black swan" events) and associated unexpected, significant price fluctuations that ran counter to retail clients' expectations, it was evident that considerable additional payment obligations could arise that could have existential consequences for retail clients. Prominent "black swan" events are the slump in oil prices in spring 2020 or the "Swiss franc crash" in January 2015.

In these situations, the collateral provided by retail clients was often insufficient to cover the losses incurred. Because of strong price fluctuations, retail clients mostly did not have time to voluntarily increase their collateral, so

brokers had to forcibly close out positions. Since the liquidation of other (futures) positions or contracts – to the extent they existed – could not cover all of the losses, retail clients were forced to settle the outstanding amounts from their other assets. In such cases, the losses resulting from the transactions in question often exceeded the amount invested by a multiple. The amount of any possible additional payment obligation and the amount that then has to be reimbursed is not limited to the original amount, but can be far more. This results in the risk that retail clients in particular are not aware of the extent of the actual risk of loss or significantly underestimate it.

Due to the way futures are designed, there is also the risk of additional payment obligations when the overall market develops normally, for example if individual underlying instruments such as shares or commodities move strongly in a different direction in the short term than investors expect. additional payment obligations therefore arise not only in the case of the special market events described above, but also typically in the case of volatility or market developments affecting specific underlying instruments.

In this case, the multiplier (the loss may exceed the capital paid in by a multiple) results from the leverage effect, as only a fraction of the contract value of the future is required to be held by the retail client in the form of the margining requirements. In the example of a EUREX contract, it is not necessary to invest the entire contract total of EUR 400,000 for a DAX future with an assumed index level for the underlying instrument of 16,000 points, but only EUR 31,200 must be deposited. This corresponds to a margin of 7.8% of the contract value (see also example in Table 1). The ratio of the contract value to the required (initial) margin also indicates the level of the leverage. Retail clients do not have to invest the entire amount, but essentially speculate on credit.

In principle, futures have a defined term because they have a fixed maturity date. Retail clients can trade contracts at any time through intermediaries. Additionally, before or at the maturity of the future, retail clients have the option to extend their investment by "rolling" the contract. The investment is extended by entering into a new contract with the same underlying instrument. Depending on the way the market develops (contango or backwardation), losses or gains can be generated by rolling futures.

1.2 Trading futures in Germany – market survey

Futures are traded on futures exchanges such as EUREX or EEX in Germany. Trading participants who want to trade directly on EUREX must be admitted

as EUREX trading participants. Private individuals cannot obtain EUREX membership.[11] Retail clients therefore depend on a member of the exchange so that they can trade on EUREX through this intermediary. The intermediary purchases or sells the futures under the terms of a principal broking transaction.

In Germany, intermediaries (investment firms) currently also offer retail clients the ability to trade in futures. As a rule, offering futures transactions to retail clients is only a sideline for the providers, who often offer a wide range of financial instruments (including CFDs) for retail clients. Especially since the CFD product intervention measure entered into force, however, futures are regularly promoted to retail clients by intermediaries as an alternative to CFD trading. Intermediaries also use partner or affiliate marketing to acquire new clients for futures trading.

Since the contract sizes in futures trading are usually six-figure, EUREX[12] also offers "mini" or "micro" futures contracts, for example. These were launched by futures exchanges to make futures trading more attractive for retail clients.[13] For example, EUREX[14] advertises mini DAX futures as being particularly suited for experienced retail clients and smaller securities portfolios.[15]

Retail clients generally purchase futures for hedging and speculation: investors can offset price losses in underlying instruments (on the spot market) using futures. Futures are used in particular in the commodity and agricultural markets to hedge price risks of physical underlyings. Losses from the futures transaction are generally offset by gains in the underlying if the future was purchased as a hedging instrument to reduce price risks. Losses from any forced liquidation of the futures position are also offset by the corresponding – mostly physical – position (underlying). In this situation, compensation does not happen on an account basis, but generally only in substance. Retail clients who carry out such hedging transactions are in particular small and medium-sized undertakings from the agricultural and energy supply sectors.

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[11] See EUREX, https://www.eurexchange.com/exchange-de/handel/boersenmitgliedschaft, accessed: 26 September 2022.

[12] Note: Mini or micro futures contracts are offered by some futures exchanges.

[13] See Hull, J., *Optionen, Futures und andere Derivate*, 2019, p. 55.

[14] Note that, in contrast to these mini contracts, "mini futures" offered by other market participants are not actually futures, but rather leverage certificates and thus bearer bonds.

[15] See EUREX, https://www.eurex.com/ex-de/maerkte/idx/mini-dax, accessed: 26 September 2022.

Moreover, retail clients who do not hold any underlyings to be hedged and trade futures for speculative purposes can exploit market changes in the underlying instrument for only a small stake due to the low capital required (the margin) and the resulting leverage effect.[16] Retail clients can therefore essentially speculate on the performance of a variety of underlyings using futures on credit, because they only actually need to hold a fraction of the contract value.

Micro and mini futures in particular make it easier for retail clients to enter the market, since the investors can avoid the normally high contract sizes and thus also the comparatively high collateral they are required to deposit. For retail clients, these forms of futures have the advantage that the absolute amount of the margin that must be deposited is smaller than in the case of conventional futures contracts.

This is illustrated by the following example of DAX futures contracts with an initial margin of 7.8 %[17] and an assumed DAX level of 16,000 points:

Futures contract	Contract value	Contract equivalent	Initial margin
DAX future	EUR 25	EUR 400,000	EUR 31,200
Mini DAX future	EUR 5	EUR 80,000	EUR 6,240
Micro DAX future	EUR 1	EUR 16,000	EUR 1,248

Table 1: Illustrative comparison of different DAX futures contracts[18]

For instance, based on the example shown above, when they trade a micro DAX future, retail clients are only required to deposit 4 % of the margin in absolute terms that would be required if they were trading a conventional DAX future.[19] These designs therefore also make futures trading attractive for investors who want to, or can only, invest a relatively small volume.

The Federal Financial Supervisory Authority (BaFin) conducted a market survey of futures trading in Germany to obtain further information that it can

[16] See Grill, W.; Perczynski, H., *Wirtschaftslehre des Kreditwesens*, 2021, p. 359.
[17] Based on: https://www.eurex.com/ex-de/maerkte/idx/mini-dax.
[18] See https://www.eurex.com/ex-de/maerkte/idx/dax/Micro-DAX-Futures-2627906, accessed: 26 September 2022.
[19] Note: In relation to the contract equivalent, the margin (in this case 7.8 %) remains the same.

use as a basis for assessing significant investor protection concerns with regard to retail clients. For this purpose, BaFin asked a selection of intermediaries[20] in Germany that are considered to be significant to provide information about customers and their trading behavior.

In addition, BaFin requested information about how futures are marketed and distributed. The survey period for the market survey was July 2019 to June 2020.[21]

The market survey showed that the volume of futures trading by retail clients at the intermediaries surveyed averaged around EUR 20 billion per quarter during the survey period. On average, more than half of the retail clients incurred losses in futures trading. The loss rate of the investors varies greatly depending on the reference period and the provider. In some cases, however, loss rates in excess of 75 % are evident. This leads to the conclusion that, in some cases, three out of four retail clients suffer futures trading losses.[22] Significant losses arise not merely in respect of individual futures positions, but also when the entire futures portfolio of retail clients is analysed.

According to BaFin's observations made in the course of its supervisory activities, the number of retail clients trading in futures is considerably higher than the number of professional clients. Both the volume of trading and the number of retail clients trading in futures increased by around 15 % over the observation period of the market survey. In total, the volume of futures traded by retail clients in Germany in the survey period was around EUR 78 billion.[23]

It is also clear that retail clients in particular trade "mini" or "micro" contracts, for which lower absolute additional payment obligations are common.

Additionally, BaFin performed an analysis on the basis of the reporting data required by Article 26 of MiFIR following the consultation.[24] This revealed that

[20] Note: Intermediaries that are specialised in hedging, in particular for the agricultural sector, were not part of the market survey.
[21] Note: Some of the providers were also asked to provide additional information on additional payment obligations between January 2018 and June 2021.
[22] Note: Refers to individual positions, not to portfolios. No distinction with regard to the motive for investing.
[23] Note: The sum of the four quarters surveyed at the intermediaries concerned in the course of the market study, not the trading volume of the total market.
[24] Note: The analysis included only futures contracts that are traded on EUREX.

the number of clients[25] who traded futures contracts on EUREX rose by a factor of almost three between 2018 and 2021. For example, around 70,000 clients traded EUREX futures in 2021, based on the data collected.

It is also already evident that the number of clients who trade mini and micro futures will continue to increase this year compared with 2021. Approximately one-quarter of futures transactions by clients in EUREX products involve mini or micro futures.

Based on the findings of the market survey, the number of professional clients who trade futures with intermediaries is considerably lower than the number of retail clients doing so. Because of the growing volume of futures trading in Germany, the increasing advertising activities of intermediaries and the greater range of mini and micro futures on offer, BaFin assumes that market growth in the retail client sector will continue to rise and that the overall volume of futures being traded by retail clients will further increase in future in line with the number of retail clients. There is a trend towards a larger number of retail clients and the popularity of futures.

BaFin assumes that in future, intermediaries will continue to advertise the products or will even step up their efforts to do so, and that future investment firms will offer futures trading for retail clients and will expand their offerings accordingly. Dialogue with market participants, and in particular with futures exchanges, additionally confirmed BaFin's assumption. They are also anticipating growing demand for futures products for retail clients, and hence also a growing number of retail clients who trade in futures. For example, some market participants are planning to expand their product portfolio with regard to futures.

Additionally, BaFin presumes that even more intermediaries, including those from other countries in the European Economic Area (EEA) that were not the subject of the market survey, give retail clients in Germany access to futures.

Based also on the growing advertising activities by the providers and the increased offering of mini and micro futures, BaFin assumes that the number of retail clients who trade in futures will also continue to rise. For example, on the basis of an analysis performed by BaFin after the consultation, it can be assumed that the number of clients who trade in mini and micro futures will also grow further this year compared with 2021. Approximately one-quarter of futures transactions by clients in EUREX products already involve

[25] Note: The Article 26 reporting data does not distinguish between "retail clients" and "professional" clients as defined by MiFID II.

mini or micro futures. The analysis also revealed that clients who traded in mini or micro futures also trade in conventional futures contracts. For this reason, it can be assumed that the number of retail clients who trade in conventional futures will also continue to grow this year.

During the analysis period of the market survey, the intermediaries surveyed stated that additional payment obligations were required from a low number of investors overall at the time. However, some of the requests for additional payments were for six-digit EUR amounts. Based on the additional insights gained, it can be assumed that, as the number of retail clients who trade in futures or who trade in larger volumes of futures increases, the number of additional payment obligations will also increase overall in absolute terms.

Although the survey of the intermediaries showed that, as a rule, retail clients trade futures with leverage of less than 50, the intermediaries also said there was leverage of up to 1,000 in isolated cases, depending on the underlying instrument. It is also clear that retail clients in particular trade "mini" or "micro" contracts, for which lower absolute additional payment obligations are common.

The market survey showed that some providers have established mechanisms that positively affect investor protection. For example, one provider rules out any additional payment obligation for retail clients in futures trading in its general terms and conditions. Other providers increase the additional payment obligations for the client specified by the futures exchange to create a kind of security buffer. This means that the retail client must deposit a higher margin with the provider than the margin required by the futures exchange. The intention is to reduce the risk of additional payment obligations, since there is already a higher level of collateral than required by the futures exchange. However, no homogeneity as regards these mechanisms was observed in this respect.

1.3 Restrictions on additional payment obligations already in force

By way of a General Administrative Act of 23 July 2019, BaFin restricted the marketing, distribution and sale of "contracts for difference" (CFDs). In Germany, CFDs may only be marketed, distributed and sold to retail clients if certain conditions are met. One of these conditions is that there must be an assurance that investors do not have to make any additional payments and any loss is limited to the amount invested (negative balance protection). This now appears in the terms and conditions of the CFD providers.

In its General Administrative Act of 8 May 2017, BaFin had already prohibited the marketing, distribution and sale of CFDs with an additional payment obligation to retail clients in Germany. The background to this product intervention measure were the at times significant margin payment obligations in connection with the "Swiss franc crash" in January 2015.

Additional payment obligations for various financial instruments are additionally excluded by law: investment products with additional payment obligations are not permitted under section 5b (1) of the German Capital Investment Act (*Vermögensanlagengesetz* – VermAnlG). Section 152 (1) of the German Investment Code (*Kapitalanlagegesetzbuch* – KAGB) also rules out any obligation to make an additional payment obligation for limited partners of an investment limited partnership (*Investmentkommanditgesellschaft*).

1.4 Consultation on the product intervention measure

On 17 February 2022, BaFin published a draft general administrative act restricting trading in futures by retail clients in Germany and gave the parties involved an opportunity to submit comments by 25 March 2020 in accordance with section 28 (1) of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz* – VwVfG).

BaFin received comments within the meaning of section 13 (1) no. 2 of the VwVfG from a total of four involved parties in the course of the consultation. It also received feedback from 47 parties that are not involved parties in the legal sense. These related to submissions by stock exchanges, stakeholder associations of the banking and agricultural industries, and citizens.

The comments by the petitioners were mainly as follows:

Petitioners are calling for an exception for retail clients who trade futures exclusively for hedging purposes. The measure should only be limited to speculative transactions. They argue that commercial investors in particular use futures as an instrument to hedge the risks of price fluctuations relating to an underlying as part of their real economic activity. These futures traders also own the (physical) underlying themselves, so that the risk of additional payment obligations is offset by gains in the relevant underlying. In particular, petitioners from the agricultural sector are calling for the exemption of farmers and other undertakings from the agricultural sector, as using futures as a hedging instrument for prices on agricultural commodity markets is of great importance and existential for them. It is argued that these persons or

companies trade futures exclusively for hedging purposes against fluctuations in the price of the underlying and not as an investment, but do not meet the criteria for classification as professional clients and therefore also trade as retail clients.

Some petitioners argue that retail clients who trade futures as a legal entity effectively do not bear the risk of unlimited loss because their liability is limited per se and does not generally extend to private assets. In their opinion, retail clients with the form of legal entities should therefore be exempt from the measure.

With regard to the addressees of the product intervention measure, two petitioners argue that BaFin did not specify the client group in sufficient detail. They are calling for an internal differentiation of clients.

Petitioners criticise the market survey carried out by BaFin. On the basis of this survey, they claim that it was not possible to prove any significant risk for retail clients in futures trading with additional payment obligations. They argue that there is no systematic evidence to support the proposition that retail clients are confronted to a particular extent with margin calls in highly volatile market phases. Although both the slump in oil prices and the "coronavirus crash" occurred during the period of the market survey, they claim that the market survey was unable to identify any accumulation of margin calls for retail clients. The six-digit additional payment obligations described above are merely outliers. There was therefore no sufficient evidence of any special risk for retail clients in extreme situations. Nor was the market survey able to demonstrate any unusually high loss rates in futures trading by retail clients.

Petitioners describe alternatives to the product intervention measure that they believe could represent more moderate means. As an example, petitioners would prefer regulated margin requirements or the implementation of standardised margin call procedures over restricting futures trading for retail clients. Overall, many petitioners call for better financial education and suggest introducing testing or screening procedures as a condition for futures trading. Some petitioners regard limiting the product intervention measure to futures with risky underlyings or short trades as a more moderate means. Others are calling for limiting the loss to the contract value of the future, or that, alternatively, investors should consent to an additional payment obligation. In addition, petitioners argue that increased supervision of compliance with information and conduct of business obligations by intermediaries or

imposing narrower target market criteria would eliminate investor protection concerns.

Petitioners argue that the product intervention measure is not proportionate. It would lead to higher costs for retail clients and higher margin requirements. Petitioners argue, further, that the measure would curtail the freedom of retail clients. Additionally, excluding the additional payments obligation would lead to additional risks for retail clients because they would have to switch to more risky offerings. Furthermore, petitioners fear that intermediaries will not bear these costs or the risk of margin requirements themselves and will no longer offer futures to retail clients. Retail clients would then be forced to switch to other products such as leverage certificates or CFDs.

One petitioner argues that, in some cases, futures have longer maturities than the intended three-month transitional arrangement. To avoid negative consequences for investors, futures transactions used to settle existing positions should therefore be excluded, since closing out an open position usually happens using an offsetting transaction (grandfathering).

2. Legal assessment

The present General Administrative Act is a restriction on marketing, distribution and sale of futures within the meaning of the 2nd alternative of Article 42(1) of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 14 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012 (MiFIR). The marketing, distribution and sale of futures to retail clients domiciled in Germany will not be prohibited without restriction. For example, the restriction generally only applies with regard to the client group of retail clients who are resident in Germany.

Additionally, under the conditions (exceptions) referred to in paragraph 2 of the operative part, it will still be possible to market, distribute and sell futures to retail clients. Because of these exceptions, the present General Administrative Act is less intrusive than planned in the draft made available for consultation.

According to the factual and legal situation on which this General Administrative Act is based, the present restriction on marketing, distributing and selling futures to retail clients domiciled in Germany is lawful, expedient and proportionate.

2.1 Criteria for the application of the enabling provision (Article 42 of MiFIR)

The present restriction issued by BaFin is based on Article 42(1) and (2) of MiFIR. Under the first sentence of Article 42(2) of MiFIR, BaFin may prohibit or restrict the marketing, distribution and sale of financial instruments with certain specified features if it has justified reasons for ascertaining that the financial instrument gives rise to significant investor protection concerns, that existing regulatory requirements under Union law applicable to the financial instrument do not sufficiently address the risks referred to in the first sentence of Article 42(2) of MiFIR, that the issue would not be better addressed by improved supervision or enforcement of existing requirements, and that the action is proportionate, taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors or market participants.

The criteria described above are met in the present case.

2.1.1 Financial instrument with certain specified features

Futures are financial instruments with certain specified features. They are defined as financial instruments in Article 4(1)(15) of MiFID II in conjunction with numbers 4 to 7 and 10 of Section C of Annex I of MiFID II or in section 2 (3) no. 1 and no. 2 of the WpHG in conjunction with section 2 (4) no. 4 of the WpHG, which transposes these MiFID II provisions into German law.

Futures are defined as unconditional exchange-traded forward transactions. Over-the-counter (OTC) forward transactions therefore do not fall within the scope of this General Administrative Act.

2.1.2 Significant investor protection concerns

The marketing, distribution and sale of futures to retail clients gives rise to significant investor protection concerns within the meaning of Article 42 of MiFIR. The significant investor protection concerns arise from the specific inherent features of futures and the fact that the legal and economic consequences resulting from additional payment obligations for the client group of retail clients are particularly detrimental and associated with incalculable risks of loss.

MiFIR introduced a directly applicable right of product intervention in the EU Member States effective 3 January 2018. Based on Article 42(7) of MiFIR, the

European Commission set out criteria and factors in Article 21 of Delegated Regulation (EU) 2017/567 of 18 May 2016 (Delegated Regulation) that must be taken into account by the competent authorities when exercising their product intervention powers. On the basis of Article 42 MiFIR, I am making use of this (non-exhaustive) list of criteria. On the basis of an analysis of the criteria and factors referred to in Article 21(2) of the Delegated Regulation, I have justified reasons for ascertaining that the marketing, distribution and sale of futures to retail clients domiciled in Germany gives rise to significant investor protection concerns within the meaning Article 42(2) (a)(i) of MiFIR.

In determining whether these financial instruments give rise to significant investor protection concerns, I have in particular taken into account the following criteria and factors listed in Article 21(2) of the Delegated Regulation:

- the degree of complexity of the financial instrument in relation to the type of clients to whom the financial instrument is marketed or sold, taking into account, in particular, the complexity of the performance calculation and the nature and scale of any risks (point (a) of Article 21(2) of the Delegated Regulation);

- the size of any detrimental consequences, considering in particular the number of clients, investors or market participants involved, the relative share of the product in investors' portfolios, the probability, scale and nature of any detriment, including the amount of loss potentially suffered, the volume of the issuance, the growth of the market and the average amount invested by each client in the financial instrument (point (b) of Article 21(2) of the Delegated Regulation);

- the type of clients to whom a financial instrument is marketed or sold, taking into account, in particular, whether the client is a retail client, a professional client or an eligible counterparty (point (c) of Article 21(2) of the Delegated Regulation);

- the particular features or components of the financial instrument, including any embedded leverage, taking into account, in particular, the leverage inherent in the product (point (e) Article 21(2) of the Delegated Regulation);

- the existence and degree of disparity between the expected return or profit for investors and the risk of loss in relation to the financial instrument, taking into account, in particular, the risk-return profile (point (f) of Article 21(2) of the Delegated Regulation);

- the selling practices associated with the financial instrument, in particular the communication and distribution channels used and the information, marketing or other promotional material associated with the investment (point (j) of Article 21(2) of the Delegated Regulation).

After taking into account the relevant criteria and factors, I have come to the conclusion that futures give rise to significant investor protection concerns for retail clients for the following reasons.

In particular, because of the risk that retail clients can lose more capital than they have invested, there are considerable investor protection concerns with regard to futures. In an overall assessment, these are also reinforced by the leverage inherent in the product or by speculation that is essentially on credit, as well as by the selling and distribution practices in connection with futures trading.

2.1.2.1 Risk of unlimited loss

The scale of potential detrimental consequences and the disparity between the expected profit and the risk of loss is significant for futures in particular because of the risk of additional payment obligations. Because of the fact that the loss from investing in such a financial instrument may exceed the amount invested by a multiple, the risk-return ratio is considered to be highly detrimental to retail clients. The potential loss may be unlimited and is not limited to the amount invested.

Although BaFin's market survey indicated that additional payment obligations occur relatively rarely in a conventional market environment, the risk of additional payment obligations mainly arises in the case of atypical, special market events ("black swan" events). In such highly volatile market phases or in the case of sharp price movements, there is a risk that retail clients will have to make the additional payments from their other assets. The market survey revealed that, in some cases, six-figure amounts were being demanded from retail clients after forced liquidation.

Furthermore, there is no compulsion for intermediaries to make a margin call, and they can do so voluntarily. Retail clients cannot therefore rely on intermediaries exercising their initiative to inform them in the event of imminent insufficient coverage.

It may also happen that, even after they receive a margin call, the retail client may only have a few minutes left to voluntarily increase the collateral. In theory, this means that the retail client must be reachable at all times so they can respond to a margin call and so they can also have the opportunity to make the funds available promptly.

The intermediary will try to close out the contract if there is insufficient coverage in the margin account. If the collateral deposited by the retail client is not sufficient to offset the losses, the intermediary will require the retail client to deposit the outstanding excess amount.

As a rule, forced liquidation does not happen in the interest of the retail client, but is executed by the intermediary in its own interest. Although other existing positions are usually liquidated initially in the event of insufficient coverage until the required margin level is reached, there is a risk of additional payment obligations if retail clients have only opened a few positions or even only a single position. Liquidating or closing out other (forward) positions above and beyond the relevant contract subject to the additional payment obligation can also be detrimental for the retail client. It may result in losses being incurred for transactions that are not directly related to futures trading or the specific futures contract in question.

In particular, in the event of very high price gyrations, the outstanding margin may exceed the amount already invested. There is no upper limit for the additional payment. Theoretically, the margin – and thus also the possible loss – may be unlimited, at least in the case of short futures contracts.

By contrast, the risk of unlimited loss and thus also the considerable investor protection concerns do not exist if investment firms or intermediaries exclude additional payment obligations in binding contracts with the retail client. This is reflected in paragraph 2(a) of the operative part, which includes an exception for the case of a contractual exclusion of any additional payment obligation.

Nor are there any significant investor protection concerns if retail clients use futures for hedging purposes and hold the corresponding underlying or an underlying transaction to be hedged. The reason for this is that it can be assumed that losses or settlement requirements from futures trading will be offset by gains or proceeds from the underlying transaction to be hedged. In substance, the risk of loss in the context of margin calls does not crystallise because active market participants engage in "side-by-side risk management" with the relevant physical underlying. In substance, any losses from

forced liquidation of a futures position will be offset by the corresponding physical position or by gains from the offsetting transaction. This is reflected in paragraph 2(b) of the operative part, which excludes purely hedging transactions from the General Administrative Act. The significant investor protection concerns thus relate to cases where futures are not traded by retail clients for hedging purposes, or where there is no contractual exclusion by the investment firm of additional payment obligations.

2.1.2.2 Type of clients and market development

Retail clients use intermediaries to gain access to a market they would otherwise be restricted from accessing. In principle, retail clients are restricted from trading directly in futures on a futures exchange. Retail clients can only trade in futures if they use intermediaries who in turn operate directly on futures exchanges.

However, despite existing requirements (target market identification, assessment of appropriateness or suitability), it cannot be ruled out that retail clients who do not have the necessary level of knowledge and experience, or only do so insufficiently, might also trade in futures.

In particular for retail clients who do not have extensive experience and knowledge of trading on futures exchanges, the functioning and the risk-return profile of futures with additional payment obligations are generally too complex and difficult to understand. In addition, even experienced retail clients are rarely able to identify the risk of an additional payment obligation and are not protected against the dangers of "black swan" events or the ensuing negative financial consequences. Increased complexity arises above all from the risk of an additional payment obligation. Additional complexity arises from the margining requirements and the requirement for permanent accessibility or monitoring of the custody account or margin accounts in order to avoid forced liquidation that is often associated with this. Continuous market monitoring is necessary when trading in futures. These are not "buy and hold" investments. For retail clients, the rolling processes described above and their impact on the return are also generally complex.

However, in terms of both the volume and the number of futures trading by retail clients, double-digit positive growth rates can be observed during the period of the market survey conducted by BaFin. Additionally, an analysis of reporting data by BaFin revealed that the number of clients who traded in EUREX futures grew by a factor of around three between 2018 and 2021. Further growth in and an increasing spread of futures trading in future

among retail clients can be expected, especially because of the greater number of mini and micro futures contract offerings. For example, BaFin expects the number of clients trading in mini and micro futures contracts will grow further in 2022.

It can therefore be expected that, as the number of retail clients who trade in futures increases, the number of margin calls will also increase. Because of this growing market importance – both in terms of the trading volume and the number of retail clients – it can be assumed that, in absolute terms, even more retail clients will have to make additional payments, and will therefore lose more than the amount they have invested in futures trading. These observations are also confirmed by other market participants, for example the futures exchanges. They assume that, as the number of trading retail clients grows, there will also be rising demand from retail clients for futures products, accompanied by growth in the product offering in future.

Additionally, BaFin saw that futures are sometimes advertised as an alternative to CFD trading by both intermediaries and "affiliated partners". It can therefore also be assumed that, because of the increasing advertising activities of intermediaries and other market participants, there will also be growth in the spread of futures as an investment instrument for retail clients.

It is precisely because of the advertising activities and the increasing spread or launch of micro and mini futures contracts that retail clients who may not have a sufficient level of knowledge and experience in trading such complex products will continue to be introduced to futures trading. Investors are increasingly seeking new investment opportunities, especially in light of a low interest rate environment and investors' desire to achieve a return on capital that is above market levels. This also increases the risk that retail clients are letting themselves be distracted from the above-average risk (the additional payment obligation) because of advertising claims and promised returns, with the result that they invest in high-risk products that are fundamentally unsuitable for them. Futures are expressly not designed as long-term (cash) investments, but merely for hedging or as a speculative instrument.

The growing proliferation is mainly due to retail clients who trade futures for speculative purposes. This is not only because of the design of the advertising, but also to the fact that it cannot be assumed that the demand for hedging instruments from retail clients is constantly increasing to the sort of extent observed in the market survey. Otherwise, the number of underlying transactions and the hedging requirements of retail clients would have to have risen steadily to the same extent, which cannot be assumed. Rather,

retail clients are seeking opportunities to achieve above-market returns with futures trading. That is why futures are also regularly mentioned by petitioners in the consultation procedure in the same breath as other speculative financial instruments such as CFDs or leverage certificates.

Trading futures for speculative purposes by retail clients using the shell of a limited liability company, such as a GmbH, does not – contrary to the comments of petitioners – offer sufficient protection against the risks described above. Although the other private assets of the retail client are not generally affected, the entire assets of the company are at risk, up to and including insolvency.

2.1.2.3 Complexity of performance and speculation that is essentially on credit

Leveraged products must by their very nature be classified as extremely complex because retail clients normally find it difficult to assess the performance of these products, in particular due to their increased volatility. The additional payment obligation further increases and intensifies the complexity of calculating performance. The maximum loss or the maximum amount of any loss and thus the risk of such an investment cannot be determined by the retail client because of the additional payment obligation, since the loss is not limited exclusively to the amount invested. The actual risk of loss of such an investment cannot therefore be assessed by retail clients in futures with an additional payment obligation. This applies in particular to the case of short positions in which the loss is not limited at least to the contract value.

Since retail clients only have to deposit a margin and thus only a fraction of the traded contract value, margin trading is a form of speculation on credit. Retail clients do not have to have the entire contract value at their disposal, and only a fraction of it is more than enough. As a result, retail clients are exposed to the economic consequences of speculation through an investment amount that they only have to put up to a small extent. This is equivalent to a leveraged investment strategy and can even lead to existential risks (insolvency) for retail clients.

The lawmakers believe that this form of leveraged speculation has a particularly high risk potential. This is shown by the fact, for example, that Article 62 (2) of Regulation (EU) 2017/565 supplementing Directive 2014/65/EU imposes a special reporting obligation on the asset manager in the case of a leveraged financial portfolio. Where the management of retail client accounts

relates to a transaction involving an uncovered position in a contingent liability transaction, investment firms must also report uncovered losses on contingent liabilities or losses that are not fully covered to the retail client.

In addition, the lawmakers classify granting loans to others under Article 4 (1)(3) of MiFID II in conjunction with Annex 1 Section B(2) to MiFID II[26] as an ancillary service subject to supervision if the loans are granted to carry out investment services in which the undertaking granting the loan is itself involved. This shows that the lawmakers only consider it permissible to enable leveraged speculation by retail clients under certain conditions, which makes it necessary to establish specific arrangements to protect retail clients. These assessments by the lawmakers justify protecting a retail client investor who purchases futures, who is economically equivalent to a borrower in this respect, against such losses that exceed the amount invested, and can thus spill over into the other assets of the retail client, by adopting a product intervention measure. The present General Administrative Act is appropriate for protecting protect retail clients against losses that exceed the amount paid by the retail client into their trading accounts and thus spill over into to the other assets of the retail clients.

Contrary to the comments of petitioners, the market survey carried by BaFin revealed that leverage of over 1,000 is also possible for retail clients in the case of futures. In this case, the retail client only has to deposit one-thousandth of the actual investment total as collateral. Retail clients can do this to move huge investment amounts with only a small stake, since only a fraction of the actual investment total has to be paid in and they do not have ready capital equal to the entire contract value. For retail clients, there is therefore a risk that they will lose capital that they did not have to hold at the beginning of the investment, and which they may not have at all.

Banning the additional payment obligation (paragraph 2(a) of the operative part) limits the risk of retail clients from essentially leveraged speculation, which has a particularly high risk potential according to the lawmakers' assessment in Article 4(1)(3) of MiFID II, to the amount actually invested (possibly plus a voluntary variation margin), and hence reduces the risk.

If retail clients use futures as a hedging instrument and correspondingly hold the underlying instrument or underlying transaction to be hedged, it can be assumed that this does not involve leveraged speculation.

[26] Note: Transposed into German law in section 2 (9) no. 2 of the WpHG.

2.1.2.4 Selling practices and information provided

Especially since the CFD product intervention measure entered into force, futures are regularly promoted by intermediaries to retail clients as an alternative to CFD trading. These providers are evidently encouraging retail clients to trade the futures for speculative purposes or generally pursuing the objective of speculation. Reference is often made to the sometimes higher and theoretically unlimited leverage in futures trading or this is part of the advertising strategy. This difference compared with CFDs is put in a positive light, often without mentioning the unlimited risk of loss.

As in the case of CFD trading, some intermediaries rely on partner or affiliate marketing in connection with futures. Bonus or discount promotions are also regularly used to win new clients. Affiliate partners advertise futures trading on behalf of the intermediaries essentially indirectly. In return, affiliate partners receive a commission or bonus for each client they pass on to the intermediary. In some cases, payment of this commission is tied to various criteria, such as the number of contracts opened or the amount of the retail client's paid-in capital.

Affiliate advertisers regularly focus on retail clients who do not have the necessary level of knowledge and experience with futures transactions. In many cases, the way the risks are presented by the advertisers is inadequate, for example it is rare for attention to be drawn to the risk of additional payment obligations. In most cases, this affiliate advertising is also not identified as such, but rather dressed up to look like an informative article or a comparison portal.

In particular mini and micro futures contracts are actively advertised. They are often are often described as being suitable for retail clients. This suitability for retail clients is often stressed. Retail clients could therefore get the impression that these products are generally suitable for them or for conventional retail clients. As a rule, however, no reference is made to the risk of an additional payment obligation. The advertisers' target group is usually retail clients who pursue a speculative or trading strategy, and less those who purchase futures for hedging purposes.

Overall, the advertisements draw a picture that in particular highlights the advantages of futures trading for retail clients and is intended to make it attractive as an alternative investment especially for retail clients, reflecting the market and product development of mini and micro futures. At the same

time, however, there is a growing danger that the unlimited risk of loss inherent in the products – something which is completely atypical compared with other investment products – is often overlooked or underestimated, especially by this less experienced client group.

Particularly in times of low interest rates, retail clients are increasingly crowding into the capital markets so they can still make profitable investments. It can therefore be assumed that products that theoretically offer high profit potential appear to be increasingly attractive for retail clients. Awareness of futures is enhanced by appealing to or mentioning retail clients as a client group and by targeted advertising activities aimed at them. This is leading to an increase in retail clients who are trading in these financial instruments and are exposed to the risk of an unlimited loss due to the additional payment obligation. This is clearly shown and supported by the noticeably sharp increase in the number of clients who traded EUREX futures between 2018 and 2021, based on the Article 26 MiFIR reporting data.

This is how the selling practices described above are helping the number of retail clients who trade in futures and can therefore potentially lose more than their invested capital to increase further in future. In light of the increasing marketing activities with regard to micro and mini futures, which make it easier overall for retail clients to enter the futures market, BaFin was able to determine in an analysis of reporting data that the number of clients trading in these forms of futures will also increase again in 2022 compared with the previous year.

Although Regulation (EU) No. 1286/2014 on key information documents for packaged retail and insurance-based investment products (the PRIIPs Regulation) requires futures manufacturers to prepare a key information document, or requires providers of futures to make this document available to retail clients, this does not eliminate the risk that retail clients may incur a loss in excess of their invested amount because of the additional payment obligation.

The reference to potential losses that have to be settled using private assets does not prevent retail clients from having to make additional payments.

Despite attention being drawn to the risk of an additional payment obligation, this risk is regularly underestimated by retail clients.

2.2 No sufficient other options to address the risks referred to in point (a) of the first sentence of Article 42(1) of MiFIR and to address the issue by improved supervision or by enforcing existing requirements (point (b) of sentence 1 of Article 42(2) of MIFIR)

Existing regulatory requirements under EU law that are applicable to the marketing, distribution and sale of futures do not sufficiently address the risks referred to in point (a)(i) of the first sentence of Article 42(2) of MiFIR. Neither the requirements of EU nor national requirements – as laid down in the WpHG, for example – can sufficiently address the risks to investors in connection with additional payment obligations for futures, as described above.

In accordance with the requirements of point (b) of sentence 1 of Article 42(2) of MiFIR, BaFin has examined whether there are other sufficient other options to address the risks referred to in point (a) of sentence 1 of Article 42(2) of MiFIR and to address the issue by improved supervision or enforcement of existing regulatory requirements under EU law. The applicable existing regulatory requirements are laid down in MiFID II, the Delegated Directive on MiFID II (EU) 2017/593, the Delegated Regulation on MIFID II (EU) 2017/565, MiFIR and Regulation (EU) No. 1286/2014 of the European Parliament and of the Council, as well as national implementing acts in the WpHG and the Regulation Specifying Rules of Conduct and Organisational Requirements for Investment Services Enterprises (*Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen* – WpDVerOV).

These include the following requirements:

2.2.1 Adequate provision of information

BaFin has examined whether the provisions on fair client information under Article 24(3) and (4) of MIFID II[27] sufficiently address the risks referred to in point (b) of the first sentence of Article 42(2) of MiFIR and whether the problem would be better solved by improved supervision or enforcement of the requirements under those provisions. This is not the case.

However, the rules aimed at ensuring transparency to the client are not suitable for countering in particular the unlimited risk of loss inherent at least in short futures. A transparent and understandable presentation of the unlimited risk of loss does not prevent retail clients from being exposed to the risk

[27] Note: Transposed into German law in section 63 (1) (6) and (7) of the WpHG.

of an additional payment obligation in futures trading. The provision of adequate information required by law in the sense of the above-mentioned legal requirements cannot prevent the risk of a mandatory additional payment obligation and hence the risk of a loss in excess of their invested amount that retail clients will have to settle using their other assets.

2.2.2 Suitability and appropriateness requirements

When they provide investment advice or portfolio management, Article 25(2) of MiFID II[28] requires investment firms to obtain the necessary information about the knowledge and experience of the client or potential client in respect of transactions in certain types of financial instruments, about their financial situation, including their ability to bear losses, and about their investment objectives, including their risk tolerance (suitability assessment).

However, since the marketing, distribution and sale of futures is normally performed through electronic platforms without the provision of investment advice and portfolio management, and since retail clients therefore generally remain unprotected by the related protection mechanisms in the area of very risky futures , recourse to Article 25(2) of MiFID II does not offer a sufficient other option to address the risks referred to in point (a) of the first sentence of Article 42(2) of MiFIR.

In accordance with Article 25(3) of MiFID II[29], an assessment of the appropriateness of the financial instrument for the client is required when offering futures via electronic trading platforms without the provision of investment advice or portfolio management ("non-advised business") (appropriateness assessment).

For the assessment of appropriateness, the first subparagraph of Article 25(3) of MiFID[30] requires investment firms to ask their clients or potential clients to provide information regarding their knowledge and experience relevant to the specific type of product or service offered or demanded so as to enable an assessment of whether the investment service or product envisaged is appropriate for the client. However, the financial instruments may be traded with the client after issuing a warning in accordance with the second subparagraph of Article 25(3) of MiFID II[31], even if the assessment of appropriateness

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[28] Note: Transposed into German law in section 64 (3) of the WpHG.
[29] Note: Transposed into German law in section 63 (10) of the WpHG.
[30] Note: Transposed into German law in section 63 (10) sentence 1 of the WpHG.
[31] Note: Transposed into German law in section 63 (10) sentence 3 of the WpHG.

has previously led to the conclusion that the financial instrument is not appropriate for the client or potential client. Similarly, the financial instruments may also be traded with the client in accordance with the third and fourth subparagraphs of Article 25(3) of MiFID II[32] after issuing a simple warning to the client in cases where the client has not previously provided any information or has provided only inadequate information and an assessment of appropriateness is therefore not possible. In such cases, the client must merely be informed accordingly.

As a result, even a proper appropriateness assessment cannot prevent the risk of an additional payment obligation and thus a potential loss exceeding the amount invested. Even retail clients who have the appropriate experience and knowledge must also bear the risk of being obliged to make unlimited additional payments, which they may have to pay out of their other assets. An assessment of the appropriateness of the financial instrument for the retail client therefore does not reduce the potential risk of losses exceeding the amount invested. Furthermore, failure to identify appropriateness does not automatically exclude the retail client from the envisaged transaction.

There is therefore not any sufficient other option for countering the risks described above and for addressing the issue by improved supervision or enforcement of existing requirements by means of an effective suitability or appropriateness assessment.

2.2.3 Product monitoring

BaFin has also examined whether the provisions governing product monitoring in accordance with Article 24(2) of MiFID II[33], the fourth subparagraph of Article 16(3) of MiFID II[34] and Articles 9 and 10 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[35] sufficiently address the risks referred to in Article 42(2)(1)(b) of MiFIR and whether the

[32] Note: Transposed into German law in section 63 (10) sentences 3 and 4 of the WpHG.
[33] Note: Transposed into German law in section 63 (4) and (5) of the WpHG.
[34] Note: Transposed into German law in section 80 (9) of the WpHG.
[35] Note: Transposed into German law in section 81 (4) of the WpHG and sections 11 and 12 of the WpDVerOV.

problem would be better solved by improved supervision or enforcement of the requirements of these provisions.

When manufacturers and distributors of financial instruments identify a target market, together with other features, they must specify the client category (retail client, professional client or eligible counterparty) with which the financial instrument is compatible. Because of the features of futures, BaFin believes that the particular consideration must be given to retail clients when identifying the target market for these financial instruments. The client category of retail clients who do not trade in futures for hedging purposes must be excluded from the target market.

Counter to the views of the petitioners, BaFin's efforts to consistently enforce the product monitoring requirements cannot also be equivalent to the restriction set out in this General Administrative Act for preventing retail clients from losing more than their invested capital through futures. Target market identification, meaning ruling out retail clients from the positive target market or including retail clients in the negative target market[36], could certainly be used to ensure that futures traded for speculative purposes are not distributed to retail clients.

However, this is an insufficient option for BaFin to act: it indirectly requires several intermediate steps which have to be monitored in each individual case in further various intermediate steps and, if necessary, enforced by individual measures if the compliance by the undertakings concerned at their own responsibility fails. In addition, it can be expected that, nevertheless, further retail clients will purchase futures for speculative purposes and that there will continue to be a risk that retail clients will suffer losses in excess of their invested amount.

With the present General Administrative Act, BaFin is directly creating standardised requirements and a consistent level of protection for retail clients in Germany against the risk of being required to make additional payments in futures trading that must be paid out of other assets, unless these transactions are being used for hedging purposes. The General Administrative Act is the most efficient way to achieve the required level of protection and to eliminate the significant investor protection concerns described above. By contrast, target market identification would not be an equally suitable more moderate means.

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[36] See BT 5.4.1 in Circular 5.4/1 (WA) – Minimum Requirements for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organisation and Transparency (MaComp).

2.2.4 Key information documents

Articles 5 to 14 of Regulation (EU) No. 1286/2014 (PRIIPS Regulation) contain disclosure requirements. The Regulation lays down uniform rules on the format and content of key information documents that manufacturers of packaged investment products and insurance-based investment products must provide to retail clients so that they can understand and compare the key features and risks of a PRIIP (packaged retail and insurance-based investment product).

In particular, Article 5 of the PRIIPs Regulation, which has been further clarified in Commission Delegated Regulation (EU) 2017/653, lays down, among other things, a methodology for presenting the summary risk indicator and accompanying explanations, including information on whether retail clients can lose all of the invested capital or whether they incur additional financial obligations. However, this type of disclosure does not prevent the risk of additional payment obligations for retail clients. Contrary to the petitioners' assumption, this risk cannot be eliminated by increased supervision of the key information documents.

A more transparent presentation of the additional payment risk is therefore not a suitable means. The PRIIPs Regulation does not contain any requirements over and above this that would eliminate or sufficiently address the issue.

2.2.5 Voluntary measures by intermediaries

The measures already established in part by intermediaries, such as increasing the margin requirement specified by the futures exchange in the client relationship by a certain percentage, cannot, in an overall assessment, eliminate the significant investor protection concerns to the extent that no product intervention measure is necessary.

Requiring intermediaries to have reliable margin call procedures, as suggested by petitioners, cannot have any effect here either.

This is because the margin call procedure can only limit the risk of an additional payment obligation conditionally and cannot do so not reliably. Especially in situations where the price fluctuations of an underlying instrument are so high that the intermediary has no time for a margin call and the position or contract has to be forcibly closed out, this instrument does not suffi-

ciently protect retail clients. This is because even liquidating an existing position to limit losses can be significantly delayed to the detriment of the client if there are considerable market fluctuations. Additionally, the intermediaries are not obliged to launch a margin call procedure and structure the relevant provisions differently in their general terms and conditions.

2.2.6 Interim outcome

Without restricting futures trading through product intervention under Article 42 of MiFIR, the significant investor protection concerns cannot be eliminated in the same way by enforcing the requirements described above.

BaFin therefore takes the view that there is no sufficient other option to counter the risks referred to in point (a) of the first sentence of Article 42(2) of MiFIR and to address the issue through improved supervision or enforcement of the existing requirements. Nor can the voluntary investor protection measures adopted by intermediaries limit the risks of additional payment obligations to such an extent that there are no significant investor protection concerns.

The restrictions on the marketing, distribution and sale of futures to retail clients enacted with this General Administrative Act are therefore necessary to avert the significant investor protection concerns described above.

2.3 Consultation of competent authorities of other Member States

As a precaution, the competent authorities of other Member States have also been consulted by BaFin about the present measure under Article 42(2)(d) of MiFIR.

A significant concern within the meaning of the provision may arise from the location of the registered office of intermediaries or futures providers in other Member States if they offer futures to retail clients in Germany on a cross-border basis. However, the measure is solely restricted to the marketing, distribution and sale of futures in Germany to retail clients domiciled in Germany, As a result, offering these instruments in other Member States is not affected, at least not directly.

2.4 No discrimination

The product intervention measure restricts the marketing, distribution and sale of futures by prohibiting the marketing, distribution and sale of futures

to retail clients domiciled in Germany, subject to certain exceptions, and does not discriminate against services provided or offered from another (EU) Member State (Article 42(2)(e) of MiFIR). With regard to futures, there are significant investor protection concerns that justify a product intervention measure under Article 42 of MiFIR across the entire geographical scope of application. The free movement of capital is not restricted. The product intervention that is the subject of this General Administrative Act neither directly refers to the nationality of the addressees nor does it lead de facto to any discrimination with regard to the source of the capital, so that there is no nationality-based unequal treatment.

2.5 There is no significant risk to physical agricultural markets

Under Article 42(2)(f) of MiFIR, the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No. 1234/2007 must be properly consulted by BaFin before adopting a product intervention measure under Article 42 of MiFIR if a financial instrument or activity or practice poses a serious threat to the orderly functioning and integrity of physical agricultural market. This is not the case here.

This product intervention measure is justified by the existence of significant investor protection concerns within the meaning of Article 42(2)(a)(i) variant 1 of MiFIR. In BaFin's opinion, however, the marketing, distribution and sale of futures to retail client does not, in principle, pose a threat to the orderly functioning and integrity of the financial or commodity markets within the meaning of Article 42(2)(a)(i) variant 2 of MiFIR.

There was therefore no need in the present case for a formal consultation of the bodies responsible for the supervision, administration and regulation of the agricultural commodity markets. Nevertheless, the Federal Ministry of Food and Agriculture (BMEL) was informed about the planned product intervention measure during the consultation procedure and given an opportunity to comment.

2.6 Exercise of discretion

2.6.1 Discretion with regard to the adoption and content of the measure

I have exercised the discretion granted to me under Article 42(1) of MiFIR in the sense of adopting the above-mentioned measure. The measure is proportionate because it is suitable, necessary and appropriate.

The measure is a restriction, since futures may continue to be marketed, distributed and sold, taking into account the exceptions addressed in paragraph 2 of the operative part. BaFin is therefore not completely prohibiting futures trading, but is merely restricting it.

2.6.1.1 Suitability of the measure

The restriction on the marketing, distribution and sale of futures is suitable for achieving the legitimate purpose of the measure. Article 42 of MiFIR serves to protect collective investor protection interests. The measure is suitable for addressing the significant investor protection concerns described above.

Restricting the marketing, distribution and sale of futures to retail clients domiciled in Germany results in the specific investor protection concerns described above being eliminated.

2.6.1.2 Necessity for the measure

The measure is also necessary in the scope stated in the enacting part. No more moderate measure is available to me that would be equally appropriate for addressing the existing significant investor protection concerns.

In particular, the restriction is a more moderate measure than a complete prohibition on the marketing, distributing and sale of futures. The restriction only applies to those futures that can be marketed, distributed or sold by intermediaries to the retail client investor group without the exclusion of the additional payment obligation or that are not demonstrably acquired by retail clients for hedging purposes. In addition, the General Administrative Act does not apply to futures that are acquired to close out a corresponding position that is open at the time General Administrative Act enters into force. In contrast to a complete prohibition, the restriction also allows retail clients to continue trading in futures (either without additional payment obligations or for hedging purposes) and ensures that the significant investor protection concerns described above are sufficiently limited.

Merely strengthening the general information provided to retail clients by providers or manufacturers of futures about the risks associated with trading in futures, in particular the risk of losses exceeding the amount invested, cannot be considered to be a more moderate measure. Even total transparency about possible additional payment obligations and awareness of them does

not eliminate the risk for retail clients of losing more than their invested capital. And comprehensive education about the functioning, effect and dangers of a product cannot change its concrete design and the resulting risks. In particular, it cannot prevent retail clients nevertheless continuing to trade in futures. This is also the case in relation to the education and screening procedures for futures trading called for by petitioners in the course of the consultation. Even some confirmation of theoretical knowledge about the risk of additional payment obligations does not protect retail client from this risk to the same extent as the restriction ordered in this General Administrative Act. For this reason, even more in-depth educational and training measures are not suitable in the same way for countering the risks of an additional payment obligation outlined above. This would also apply to a corresponding warning by BaFin.

Additionally, any restriction such that futures can solely be purchased in conjunction with investment advice or portfolio management would not be appropriate to the same degree for preventing retail clients from having to bear the risk of the additional payment obligation inherent in the product and thus an unlimited risk of loss. Regardless of how futures are purchased, the risk of additional payments obligations still exists for retail clients.

Similarly, reducing leverage in futures trading or, alternatively, increasing the margin demanded by the futures exchange, would not be appropriate for countering the risk of unlimited additional payment requirements. A cap on the leverage permitted to retail clients through associated higher margin payments would reduce the risk of additional payment obligations, but it would not completely exclude them. In the case of higher volatility and higher stakes, the additional payment obligation can lead to incalculable risks of loss for the retail client, even if leverage is limited. In addition, a regulatory leverage limitation would also interfere with the professional freedom of providers and limit the investment opportunities open to retail clients. This also applies to any increase in the variation margin, which at best postpones the risk that additional payments will be required, since a security buffer is deposited that can be used. Both alternatives are therefore not appropriate in the same way as the restriction set out in the operative part for eliminating the risks inherent in the product that may arise from the additional payment obligation and for preventing retail clients from losing far more money than they actually invest and have available for trading.

Contrary to the assumption of the petitioners, even a mandatory margin call procedure would only give retail clients the opportunity to avoid or delay

forced liquidation by paying in additional funds, but would not be appropriate for generally protecting them from the additional payment obligation. Additionally, in the event of sudden, extreme price fluctuations – especially black swan events – it is to be expected that the margin call would mostly prove to be futile because only a few seconds – if any – would remain to react and provide further capital (see also 2.2.5). Any inability to meet the additional payment obligations promptly results in the automatic liquidation of the futures position. However, this specifically does not guarantee that the retail client's losses would be limited to their trading balance.

A purely marketing restriction, for example in the form of a prohibition on actively marketing futures, is also not an equally suitable means. Futures are mostly advertised and sold online, including across borders. Such a prohibition would only apply to advertising measures that are aimed at the German retail client market. This means that providers would still be able to distribute demo accounts, advertising videos, success stories, etc. online in German, for example by aiming them (solely) at Austrian retail clients. Overall, this sort of restriction or prohibition on advertising would by itself have only a very minor effect in protecting investors if purchasing futures were to continue to be permitted without restriction for retail clients. Nor would this in any way change the additional payment obligation and the resulting risks for retail clients.

In principle, limiting the measure solely to less experienced retail clients may be considered as a more moderate measure. However, it would not be equally suitable for achieving the objective pursued by this General Administrative Act. Retail clients who already have some trading experience are exposed to the incalculable risks of loss resulting from the additional payment obligation. Extreme volatility events can occur at discontinuous intervals and thus lie outside the horizon of experience of the retail client. The lawmakers have already taken into account the experience, knowledge and expertise of clients through the criteria in Article 4(1)(10) of MiFID II in conjunction with Annex II(II.1) of MiFID II[37] and clarified that classification as a professional client is only possible if at least two of these criteria relating to experience and knowledge are met. There is therefore no reason to disregard this statutory assessment and – as called for by petitioners – to introduce an additional subclassification of the group of retail clients or lower classification thresholds.

[37] Note: Transposed into German law in section 67 (6) nos. 1 and 3 of the WpHG.

In principle, restricting the measure to retail clients who are natural persons can be considered as a more moderate measure, but, contrary to the assumption of some petitioners, it is not suitable for addressing the identified significant investor protection concerns in the same way.

In Article 4(1)(10) and (11) of MiFID II[38], the lawmakers make a distinction between the retail client or private client and the professional client categories. By doing so, the lawmakers deliberately also include legal entities that do not meet certain criteria under Annex II(1)(2) of MiFID II[39] in the category of retail clients deserving protection. The General Administrative Act therefore also covers these legal entities.

Even in cases where the shareholder's liability is limited, for example in the case of a GmbH (limited liability company), the risk that the company will become insolvent or the risk that it will not be able to financially shoulder any loss exceeding the invested assets is significantly increased, especially in the case of small corporations or associations. In addition, those legal entities that trade futures for hedging purposes and are thus already protected to a certain extent are already exempted from the restriction by paragraph 2(b) of the operative part.

Contrary to the arguments of some petitioners, restricting the product intervention measure to a prohibition on short futures transactions for retail clients in Germany is also not a more moderate means. Although such a prohibition would ensure that retail clients do not lose more than the contract value of the future in such transactions and thus do not suffer unlimited losses, the loss would still not be limited to the amount they have invested voluntarily. Retail clients could thus trade futures contracts with high leverage, and thus potentially high contract sizes, with relatively low stakes. Speculating on credit would still be possible and retail clients could continue to lose many times their invested amount. Restricting the measure solely to short transactions would not have the same protective effect as the restriction set out in the operative part, and is thus not an equally suitable, more moderate means. The same applies to restricting the loss to the contract value.

Restricting the product intervention measure to "particularly risky futures", as suggested by petitioners, also does not constitute an equally suitable more moderate means. Less risky futures usually have higher leverage due to the

[38] Note: Transposed into German law in section 67 of the WpHG.
[39] Note: Transposed into German law in section 67 (2) sentence 2 no. 2 of the WpHG.

inverse relationship between volatility or risk and leverage. They enable retail clients to trade high contract values even with limited funds (speculation on credit).

It is beyond dispute that the risk of additional payment obligations in futures trading exists regardless of the underlying instrument in question. In the past, it was also evident that relatively low volatility underlyings were subject to high fluctuations in extreme situations and led to additional payments. It is precisely the characteristic feature of black swan events that they cannot be predicted or calculated. Although an extreme price change is unlikely for current indices, for example, the risk of additional payment obligations cannot be ruled out even for less risky underlyings to be determined anew for each individual future. As a result, any restriction to "particularly risky futures" would not be equally suitable.

There is no extensive coverage of the market to the extent that providers have taken it upon themselves to exclude additional payment obligations for investor protection reasons or only enable futures trading for hedging purposes, thereby taking into account the significant investor protection concerns such that deferral of the measure could be justified. This was also confirmed during the public consultation on the product intervention measure.

Contrary to the arguments brought forward by petitioners in the consultation procedure, the merits of the measure were sufficiently clarified in accordance with section 24 of the VwVfG. The considerable investor protection concerns described above arise here from inherent characteristics of futures. As a result, the risk from additional payment obligations is undisputed. Apart from this, there were already obligations in the past, as explained above, for retail clients to make substantial additional payments in futures trading. It can also be expected that there will be a growing number of additional payment obligations in future, driven by the further growth in trading volumes.

This is also confirmed by BaFin's market survey: both the number of retail clients trading in futures and the volume they are trading are growing steadily. In addition, intermediaries and other market participants are anticipating further growth in this market for retail clients. It can be assumed that with the growth of the market, which is being fuelled by the creation of new product forms (mini or micro futures) and advertising activities of the intermediaries (affiliate marketing), the potential group of retail clients affected by additional payment obligations will also increase and thus the number of additional payments obligations will grow in the future.

2.6.1.3 Proportionality of the measure in the narrower sense (appropriateness)

Restricting the marketing, distribution and sale of futures to retail clients domiciled in Germany to the extent specified in the operative part is also appropriate.

It addresses the significant investor protection concerns described above by enabling an appropriate and consistent level of protection through guaranteed protection of the level of losses for retail clients who trade in futures in Germany for speculative purposes. It does not have any detrimental effect on the efficiency of financial markets, on providers, intermediaries or investors that is disproportionate to the benefits.

As part of the appropriateness assessment, an overall assessment must be made to weigh all the interests involved. In particular, according to Article 42(2)(c) of MiFIR, the extent and nature of the significant concerns identified with regard to investor protection, the level of sophistication of the investors or market participants concerned and the economic interest of the addressees, as well as the likely effect of the measure on investors and market participants, must be taken into account in this assessment.

With regard to the retail clients protected by the measure, it should also be considered – in addition to investor protection concerns – that the lawmakers attach particular importance to the protection of collective consumer interests. Under section 4 (1a) of the Act Establishing the Federal Financial Supervisory Authority (*Finanzdienstleistungsaufsichtsgesetz* – FinDAG), BaFin is obliged to protect the collective interests of consumers within its legal mandate. This legal mandate must be seen in the light of the economic importance of collective consumer protection.

In particular because of the additional payment obligation, there is a significant disparity between the expected profit and the risk of loss in unrestricted futures trading. Additionally, calculating the performance of futures is very complex and does not correspond to the typical level of knowledge to be found among retail clients.

For the reasons set out in the following, the public interest in collective investor protection and, additionally with regard to private individuals in collective consumer protection, outweighs the economic interest of the inter-

mediaries and other market participants in the unrestricted marketing, distribution and sale of futures to retail clients domiciled in Germany, as well as the individual interest of retail clients in purchasing futures.

2.6.1.3.1 Impact of the measure on the parties concerned

Specifically:

2.6.1.3.1.1 Impact of the measure on the addressees

The General Administrative Act will adversely affect the economic interest of intermediaries in the marketing, distribution and sale of futures to retail clients domiciled in Germany. Specifically, intermediaries may incur costs to implement the General Administrative Act, for example IT costs, consulting costs and costs in connection with updating their terms and conditions. In addition, it can be expected that intermediaries will hedge the market risk they assume in the amount of the additional payment obligation if they have to rule out the additional payment obligation in their contractual relationship with the retail client, which could cause additional costs for the intermediaries. However, these costs are not expected to arise to any considerable extent, especially because it is assumed that intermediaries will pass on the additional costs to retail clients, at least in part. For this reason, the relevant addressee interests must be subordinated.

In addition, BaFin's market survey showed that it is certainly possible to rule out the additional payment obligations at the level of the business relationship between the retail client and intermediary, and offering futures without additional payment obligation or used only for hedging purposes continues to appear economically viable for intermediaries.

Further, in light of paragraph 2(b) of the operative part, providers may incur further costs in implementing the General Administrative Act. For example, investment firms must establish procedures to document confirmation by the retail client for hedging transaction execution. However, the possible cost burden for providers due to the requirements of paragraph 2(b) of the operative part is proportionate, as it enables investment firms to continue marketing, distributing and selling futures for hedging purposes to retail clients domiciled in Germany. The measure is a more moderate means compared with an outright prohibition.

Furthermore, the futures covered by the restriction in the operative part of this General Administrative Act can continue to be distributed without any

restriction to professional investors within the meaning of Article 4(1)(10) of MiFID II.

It must also be considered that paragraph 2 of the operative part of the General Administrative Act provides for exceptions, so that marketing, distributing and selling futures to retail clients domiciled in Germany are therefore not entirely prohibited. Futures can continue to be marketed, distributed and sold to retail clients in Germany if investment firms contractually exclude any additional payment obligation or retail clients confirm to the investment firm that they are trading the futures for hedging purposes. There is therefore no need for intermediaries to make any changes to their business model, and the expense incurred will be limited to making design, organisation and legal adjustments affecting futures in relation to the client group of retail clients.

Restricting or prohibiting marketing, distribution and sale are intervention options open to BaFin as provided for by the lawmakers in point (a) of Article 42(1) of MiFIR. When introducing these intervention options, the lawmakers were aware that intervention could have economically adverse consequences for the affected providers. The lawmakers deliberately accepted these potential consequences in favour of better investor protection. According to the assessment by the lawmakers, the financial interests of the providers are subordinated in this respect to the interests of affording protection of retail clients.

Moreover, one of the main reasons that the financial sector is highly regulated is that it serves wider interests and objectives. The lawmakers give high priority to investor protection. Particular attention is paid to protecting investors in this context. According to this assessment by the lawmakers, the marketing, distribution and sale of a financial instrument should only be possible to the extent that a product is at least potentially able to serve those wider interests and objectives, and that the need to ensure a minimum level of investor protection is not disproportionately jeopardised by the product. By participating in the capital market, typical retail clients primarily pursue the purpose of capital accumulation. This is basically a savings or investment process. Financial instruments that inherently have both an unpredictable and unlimited potential for losses are therefore fundamentally incompatible with this and should be considered to be detrimental to investor protection.

However, the significant investor protection concerns described above clearly show that there is a risk that retail clients will lose more than their invested capital.

For these reasons, the economic interest of investment firms in the unrestricted marketing, distribution and sale of futures to retail clients domiciled in Germany must be considered less deserving of protection because of the public interest in collective investor protection and, additionally with regard to private individuals in collective consumer protection, and must be subordinated to the significant investor protection concerns described above.

2.6.1.3.1.2 Effects of the measure on other market participants

The present measure is also proportionate in respect of other market participants.

The General Administrative Act affects a limited group of addressees and is addressed to investment firms within the meaning of Article 1(1) of MiFID II, in conjunction with Article 4(1)(1) of MiFID II, that market, distribute or sell futures to retail clients domiciled in Germany. However, other market participants who are not investment firms may also be affected, at least indirectly, by the product intervention measure.

Specifically, these may be market operators as well as manufacturers of futures. Up to now, futures exchanges do not have any direct legal relationship with retail clients, so they are not prevented from offering futures to their professional clients (and eligible counterparties), as they have been doing until the present day. Moreover, trading in futures by retail clients who trade futures indirectly via intermediaries on futures exchanges represents only a fraction of the total volume of trading, so that even in the event of declining demand for futures contracts, the economic impact of such a restriction would be marginal.

Similarly, any costs that may be incurred from the need to adapt information and promotional material in relation to the target group of retail clients are not decisive compared with the importance of the uniform level of protection created by the present measure through limiting the risk of loss.

Any significant effects of the General Administrative Act on the financial sector as a whole can be ruled out. The interdependence between the retail client market for futures and other capital markets and the effects on stock exchange trading are low. Even assuming that the futures market for retail clients will continue to grow in future, effects of the measure on other markets can be ruled out.

BaFin already recognised that no such effects occurred on the market when it banned additional payment obligations in CFD trading through its General Administrative Order dated 8 May 2017. Since the largely uniform European CFD product intervention measure of 23 July 2019 took effect, no relevant effects on other capital markets were observed either in Germany or in the EU. This can also be assumed in the present case.

Overall, the benefits of eliminating the identified investor protection concerns outweigh the potential negative impact of the measure on other market participants.

2.6.1.3.1.3 Impact of the measure on investors

The impact of the measure on retail clients is proportionate.

The restriction relates to the marketing, distribution and sale of futures to retail clients domiciled in Germany, It should be considered that individual retail clients must decide for themselves whether futures are an investment that is suitable for them, taking into account their individual life situation and financial situation. The General Administrative Act restricts this autonomy because it at least indirectly limits the freedom of action of retail clients. However, this limitation is proportionate because the impact of the General Administrative Act on retail clients remains highly restricted.

Futures can continue to be made accessible to retail clients domiciled in Germany if, pursuant to paragraph 2 of the operative part, investment firms contractually exclude additional payment obligations by retail clients or retail clients trade futures for the purpose of hedging transactions. Additionally, the General Administrative Act does not apply to futures that are acquired to close out a corresponding position that is open at the time the General Administrative Act enters into force. Retail clients as defined in Article 4(1)(11) of MiFID II are thus not entirely prevented from accessing futures.

On the other hand, it cannot be ruled out that the measure will lead to modifications in futures trading (in the wider sense), as intermediaries can expected to hedge against the market risk they assume in the amount of the additional payment obligation. As part of their risk management, intermediaries would above all incur ongoing costs as a result of additional capital requirements or hedging transactions, some of which could be passed on to investors. In some cases, as well as limiting the choice of underlying instruments, this may also lead to higher minimum balances on trading accounts,

a leverage limit or higher product costs. The restriction could affect retail clients at least indirectly in this respect. However, futures already offered on the market for which an additional payment obligation by retail clients is contractually excluded by the intermediary demonstrate that the product continues to be available to retail clients and that the measure will not significantly restrict their freedom to make investment decisions. Retail clients can therefore continue participating indirectly in the futures market without exposure to incalculable risks of loss as a result of the additional payment obligation.

A product intervention measure necessarily leads to a certain limitation of investment opportunities, but this is in line with the lawmakers' intention. Article 42 of MiFIR is supposed to provide BaFin with an opportunity to intervene if there are significant investor protection concerns.

Moreover, if the legal requirements are met, a retail client may be classified as a professional client and be granted access to unrestricted futures after obtaining this status. Classification as a professional client under Article 4(1)(10) of MiFID II[40] is open to retail clients if their experience, knowledge and expertise allows them to make investment decisions and thus adequately assess the associated risks. According to the lawmakers' intention, a change in the classification may only be considered if at least two of the criteria referred to in Annex II(II.) to MiFID II[41] are met. This subclassification is appropriate because it can be assumed in the case of such investors that they have the necessary knowledge and experience as well as sufficient financial means so that they can adequately assess and bear the risks associated with financial instruments, in particular the risks or the likelihood and extent of any additional payment obligation.

Overall, the benefits of eliminating the identified investor protection concerns outweigh the potential negative impact of the measure on investors.

2.6.1.3.2 Appropriateness in relation to paragraph 2 of the operative part

Paragraph 2 of the operative part governs exceptions from the prohibition on marketing, distributing and selling futures to retail clients domiciled in Germany and thus also takes into account the objections raised in the consultation procedure.

[40] Note: Transposed into German law in section 67 (6) of the WpHG.
[41] Note: Transposed into German law in section 67 (6) nos. 1 to 3 of the WpHG.

The conditions of the exceptions under paragraph 2 of the operative part are also appropriate because they ensure an appropriate balance between the affected interests of providers and individual retail clients on the one hand, and the public interest in protecting the collective interests of investors on the other.

The exclusion of the additional payment obligation creates a uniform level of protection retail clients who do not trade futures for hedging purposes, with futures trading no longer involving existential risks for them. Retail clients can continue to purchase futures (with additional payment obligations) if they are used for hedging purposes. Retail clients can also continue to purchase futures for speculative purposes if the investment firm contractually excludes an additional payment obligation for the retail client. Under a provision governing additional payments (paragraph 2(c) of the operative part), retail clients can also acquire futures with additional payment obligations if they serve solely to close out a corresponding futures position or a futures contract that was entered into before the General Administrative Act entered into force. Specifically, the need to protect retail clients as a whole outweighs any negative impact on the interests of futures providers, other market participants and individual retail clients.

Both the contractual exclusion of the additional payment obligation and the requirement of confirmation of the hedging purpose of the futures position are aimed in particular at protecting retail clients from unlimited and incalculably high losses. The presence of such circumstances is to be assumed in particular if there is an unforeseen change in the price of the underlying instrument that is of such an extent that it is no longer possible for the provider to close out the position (without any gains or losses). In addition, there must be a negative balance on the retail client's account as a result of the price change with the result that, after such events, clients owe considerably more than they had originally invested. This additionally applies in particular if there are exceptional circumstances (significant market fluctuations).

Specifically:

2.6.1.3.2.1 Contractual conclusion of the additional payment obligation

The purpose of the contractual conclusion of the additional payment obligation under paragraph 2(a) of the operative part is to ensure that the maximum losses that will be incurred by a retail client from speculative trading in futures, including all the associated costs, are limited to the total amount funds held for futures trading in the retail client's futures trading account. A

retail client who is not hedging a real underlying may not incur any additional liabilities in connection with speculative futures trading, as this would result in a significant drawback for investors. Such a situation is particularly detrimental for retail clients without any appreciable liquid assets.

A retail client may not incur any additional liabilities in connection with their futures trading. Other accounts may not be part of the investor's capital exposed to risk. If a trading account also includes other financial instruments (for example, CFDs or options), only the retail client's funds explicitly allocated to futures trading are at risk, and not the funds for trading in other financial instruments.

In this respect, the measure provides the necessary level of protection for retail clients against potential losses that exceed their "other assets", in particular in times of significant market volatility.

The contractual exclusion of additional payment obligations at the level of the intermediary directly protects the retail clients from additional payment obligations. Retail clients can continue to trade futures if additional payment obligations are contractually excluded by the investment firm. This sort of exclusion ensures that retail clients cannot incur additional payment obligations in connection with futures trading, addresses the identified significant investor protection concerns and is proportionate.

2.6.1.3.2.2 Exception for retail clients' hedging transactions

The confirmation by the retail client that the future is being acquired for hedging purposes aims to ensure that retail clients who state that they are already sufficiently protected themselves because they own negative correlating assets (financial instruments, commodities) can continue to trade futures without any additional "safety net". If futures are traded for hedging purposes, the risk resulting from the additional payment obligation does not exist to the same extent. It can therefore be assumed that losses from the futures transaction or any additional payment obligations will be offset by corresponding gains or proceeds from the underlying.

Only a confirmation by the retail client enables investment firms to decide whether the retail client may only purchase futures with a higher level of protection or whether the exclusion of the additional payment obligation can be waived in the specific individual case.

For example, this confirmation could be designed using the following template and integrated into the intermediary's order screen in the case of electronic order placement:

> "I hereby certify that this futures transaction is being entered into exclusively for hedging purposes and that I bear the risk of any additional payment obligations."

The retail client would then only have to confirm this statement with a click in the electronic order screen. In the case of phone orders, the retail client could confirm the hedging purpose orally if it has not been made in any other way before the transaction is entered into. This exemption from the restriction on marketing, distribution and sale allows retail clients to continue to enter into hedging transactions in futures as before.

If the confirmation is not made, futures may not be marketed, distributed or sold to retail client domiciled in Germany unless the investment firm has alternatively contractually excluded any additional payment obligation.

The conditions of the exemption under paragraph 2(b) of the operative part are thus also proportionate as they ensure an appropriate balance between the affected interests of providers and retail clients on the one hand, and the public interest in protecting the collective interests of investors on the other.

2.6.1.3.2.3 Exception for closing out open futures positions

The exception in paragraph 2(c) of the operative part exempts futures transactions from the prohibition on marketing, distribution and sale to retail clients domiciled in Germany that are purchased exclusively for the purpose of settling an existing futures position opened prior to the entry into force of this General Administrative Act.

This exception ensures that, even after the end of the three-month transitional period, retail clients will be able to close out open futures positions via a corresponding offsetting transaction. However, the exception only applies to futures positions opened by retail clients before the General Administrative Act enters into force.

This exception is proportionate, because it takes into account the interest of retail clients in the settlement of futures positions already opened before the

General Administrative Act enters into force and avoids negative consequences that could arise from the fact that retail clients may no longer be able to close them out with a corresponding offsetting transaction.

2.6.2 Selecting the addressees

The restriction on the marketing, distribution and sale of futures to retail clients domiciled in Germany is ordered in the form of a General Administrative Act within the meaning of section 35 sentence 2 of the VwVfG.

The addressees of the General Administrative Act are both investment firms within the meaning of Article 1(1) of MiFID II in conjunction Article 4(1)(1) of MiFID II that have their registered office in Germany and market, distribute or sell futures to retail clients domiciled in Germany or intend doing so in the future, and those that have their registered office in another Member State of the EEA and market, distribute or sell futures to retail clients domiciled in Germany or intend doing so in the future.

The restriction therefore does not apply to investment firms whose registered office is in Germany that market, distribute or sell futures to retail clients exclusively in other EEA Member States.

The restriction also does not cover market operators or manufacturers of futures. These fall within the scope of MiFID II and MiFIR and could therefore also be the addressee of a product intervention measure under Article 42 of MiFIR. However, it is primarily intermediaries who are being selected as addressees, since only they give the client group of retail clients to access futures trading within the framework of principal broking services, and the regulatory objective is achieved solely by restricting the ability of investment firms to market, distribute and sell futures. The adoption of the measure relating to investment firms as set out in the operative part is therefore the most efficient means of achieving the level of protection with regard to futures trading by retail clients domiciled in Germany.

The General Administrative Act is addressed to a group of addressees that can be defined but is not objectively known at the time of adoption of the measure. Although the majority of intermediaries whose registered office is in Germany are already known to BaFin from the market survey or the consultation procedure, it is also possible that this group has grown larger in the meantime, will grow larger in the future, and that further intermediaries will offer retail clients futures or distribute them to their clients as part of principal broking services. This applies in particular to foreign investment firms that

market, distribute or sell futures to retail clients across borders through the free movement of services in the EEA.

This is the only way of ensuring a uniform level of protection for retail clients in Germany. Regardless of the origin of the provider and the commencement of the marketing, distribution and sale of futures, retail clients in Germany cannot purchase futures with additional payment obligations for speculative purposes in Germany.

2.7 Implementation period

Paragraph 1. of the operative part sets an implementation deadline of three months after adoption of the measure. This time limit is reasonable.

Taking into account any necessary adaptation of intermediaries' business models or the terms and conditions of business in line with the present restriction, a transitional period is necessary. Weighing up the interests of the providers and those of investor protection, the chosen deadline is also appropriate. Within three months after the announcement of the General Administrative Act, it is reasonable for the addressees to implement their obligation under the General Administrative Act.

The deadline referred to above also does not run counter to the purpose of the measure. Rather, it is intended to give the addressees the option of adapting their business models and terms and conditions in line with the intended restriction.

2.8 Justification of the right of revocation

I reserve the right of revocation, in particular to be able to prevent this product intervention measure from running counter to uniform European regulation of futures in the event that futures are regulated at European level. In addition, the right of revocation is designed to make it possible to respond to a change in the market situation.

Notes:

Under section 15 (2) of the WpHG, objections and appeals against measures under Article 42 of MiFIR do not have any suspensory effect.

Under section 120 (2) no. 2b of the WpHG, any person who willfully or negligently contravenes an enforceable order under Article 42(1) of MiFIR commits an administrative offence.

Instruction on available remedies:

Objections to this General Administrative Act can be submitted to BaFin in Bonn or Frankfurt am Main within one month of its announcement.

Dr Thorsten Pötzsch