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17 February 2022

Consumer Protection

Consultation on a planned General Administrative Act pursuant to Article 42 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR)

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Please note:
German version is binding

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

Dear Sir or Madam,

I intend adopting a measure under Article 42 of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012 (MiFIR). In accordance with section 28 of the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*), I am giving you an opportunity to comment on this until

17 March 2022.

(Update: time extended until 25 March 2022)

(date of receipt by the Federal Financial Supervisory Authority)

Comments can also be sent electronically to Anhoerung-Produktintervention@bafin.de.

The measure I intend to take is planned to be worded as follows:



"The following

General Administrative Act is adopted:

1. I am ordering a restriction on the marketing, distribution and sale of futures with additional payment obligations within the meaning of Article 14 (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 of Section C of Annex I to MiFID II, to retail clients 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 with additional payment obligations to retail clients within the meaning of Article 4 (1) (11) of MiFID II in Germany. The restriction takes effect on XX.XX.2022 (3 months after its enactment).

2. In the case of additional payment obligations within the meaning of number 1, this is a requirement to compensate a loss after the forced liquidation of other trading positions by providing additional funds from other assets. A voluntary increase in the margin by the retail client in order to avoid a forced liquidation does not constitute an additional payment obligation in the sense of this order. Additional payment obligations exist if retail clients can incur losses that go beyond the capital they have invested.
3. The General Administrative Act is deemed to be published on the day following its announcement.
4. I reserve the right to withdraw this General Administrative Act.

1. Set of facts

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, which 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” are clients within the meaning of section 67 (3) no. 2 of the WpHG.

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

1.1 General description of how futures work

Futures are unconditional forward transactions. In the case of futures, there is therefore a binding performance requirement for all contractual parties. Both buyers 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 an offsetting transaction.²

Futures are standardised forward contracts, among other things relating to 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

As a rule, futures are traded on a stock exchange (futures exchange). This exchange (in Germany, for example, the European Exchange – EUREX Frankfurt AG (EUREX)) establishes 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

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.



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.⁶ 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 be large enough so that the futures exchange, which also acts as a central counterparty (CCP), can close out the position in question on the next trading day and any resulting losses are covered by the collateral deposited.⁷ 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.

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 margin requirements 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 investor generally receives a margin call. He must top up the account – partly within a certain specified time frame – to the level of the initial margin. This margin payment is also termed "variation margin". If the

⁶ 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.

⁷ See Bösch, M., *Derivate - Verstehen, anwenden und bewerten*, 2020, p. 178.

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

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



investor does not make a variation margin, the broker closes out the position by closing out the contract.¹⁰ This is termed “forced liquidation” or “automatic close out”.

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

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

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 investors. 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.

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 closing out other transactions.

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

In the past, especially in the case of special market events and associated unexpected, significant price fluctuations that ran counter to investor expectations, it was evident that considerable additional payment obligations could arise. Prominent examples of such “black swan” events include the slump in oil prices in spring 2020 or the “Swiss franc crash” in January 2015.

In these situations, the collateral provided by investors was often insufficient to cover the losses incurred. Because of strong price fluctuations, investors mostly did not have time to voluntarily increase their collateral, so brokers forcibly closed out positions. Since the liquidation of other positions – to the extent they existed – could not cover all of the losses, investors were forced to settle the outstanding amounts from their private 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 obligation when the overall market develops normally, for example if individual underlying instruments such as shares or commodities move strongly in a different direction than investors expect. Additional payment obligations therefore arise not only in the case of the special market events described above, but also, for instance, 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 investor 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. Investors do not have to invest the entire amount, but essentially speculate on credit. In some cases, leverage in excess of 1,000 is possible.

Retail clients buy futures for hedging and speculation. Investors can offset price losses in underlying instruments (on the spot market) using futures.



Moreover, due to the low capital required (the margin) and the resulting leverage effect, investors can exploit market changes in the underlying instrument for only a small stake.¹¹

In principle, futures have a defined term because they have a specified maturity date. Investors can trade contracts at any time through intermediaries. Additionally, before or at the maturity of the future, investors 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 in Germany. Trading participants who want to trade directly on EUREX must be admitted as EUREX trading participants. Private individuals cannot obtain EUREX membership.¹² Investors therefore depend on a member of the exchange so that they can trade on EUREX through this intermediary. The intermediary buys 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. Since the contract sizes in futures trading are usually six-figure, EUREX¹³ also offers “mini” or “micro” futures contracts, for example. These were launched by futures exchanges to make futures trading more attractive for retail clients as well.¹⁴ For example, EUREX¹⁵ advertises mini DAX futures as being particularly suited for experienced retail clients and smaller securities portfolios.¹⁶

BaFin conducted a market survey of futures trading in Germany to obtain further information that it can use as a basis for assessing significant investor protection concerns with regard to retail clients. For this purpose, BaFin asked a selection of intermediaries in Germany that are considered to be significant

¹¹ See Grill, W.; Perczynski, H., *Wirtschaftslehre des Kreditwesens*, 2021, p. 359.

¹² See EUREX, <https://www.eurex.com/exchange-de/handel/boersenmitgliedschaft>, accessed: 26 January 2022.

¹³ Note: Mini or micro futures contracts are offered by some futures exchanges.

¹⁴ See Hull, J., *Optionen, Futures und andere Derivate*, 2019, p. 55.

¹⁵ 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.

¹⁶ See EUREX, <https://www.eurex.com/ex-de/maerkte/idx/mini-dax>, accessed: 26 January 2022.

to provide information about customers and their trading behaviour. In addition, BaFin requested information about how futures are marketed and distributed. The survey period for the market survey was July 2019 to June 2020.¹⁷ Additionally, BaFin presumes that other 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 with additional payment obligations.

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 also evident. This leads to the conclusion that, in some cases, three out of four retail clients suffer futures trading losses.¹⁸ Significant losses arise not merely in respect of individual futures positions, but also when the entire futures portfolio of retail clients is analysed.

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.

It is also evident that the number of professional clients who trade futures with the corresponding intermediaries is considerably lower than the number of retail clients doing so.

In addition, there is a trend towards a larger number of retail clients and the popularity of futures. For example, both the trading volume of retail investors and the number of active retail investors who trade futures in Germany have increased in recent years. During the analysis period of the market survey, both the volume traded by retail clients and the absolute number of retail clients trading futures grew by around 15 %.

The intermediaries are, in part, assuming that the number of clients will continue to increase. The concept of mini or micro futures contracts is also contributing to further growth and the increasing attractiveness of futures for retail clients. They make it easier for retail clients to enter the market, since

¹⁷ Note: Some of the providers were also asked for additional information on additional payment obligations between January 2018 and June 2021.

¹⁸ Note: Refers to individual positions, not to portfolios.

the investors can avoid the normally high contract sizes and thus also the comparatively high collateral they are required to deposit.

This is illustrated by the following example of DAX futures contracts with an initial margin of 7.8 %¹⁹ 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 contracts²⁰

For instance, based on the example shown above, when they trade a micro 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.²¹ These designs therefore also make futures trading attractive for investors who want to, or can only, invest relatively small volumes.

Although the survey of the intermediaries showed that, as a rule, futures are traded by retail clients with leverage of less than 50, in some cases leverage of up to 1,600 is possible, depending on the underlying instrument. It is also clear that retail clients in particular trade “mini” or “micro” contracts, for which lower absolute margin requirements are common.

During the analysis period of the market survey, the intermediaries surveyed stated that additional payment obligations were currently required from a low number of investors overall. However, some of the additional payment obligations were for six-digit EUR amounts.

The market survey showed that some providers have established mechanisms that positively affect investor protection. For example, one provider rules out any additional payment obligations for retail clients in futures trading in its general terms and conditions. Other providers increase the margin

¹⁹ Based on: <https://www.eurex.com/ex-de/maerkte/idx/mini-dax>.

²⁰ See <https://www.eurex.com/ex-de/maerkte/idx/dax/Micro-DAX-Futures-2627906>, accessed: 26 January 2022.

²¹ Note: In relation to the contract equivalent, the margin (in this case 7.8 %) remains the same.



requirements for the customer specified by the futures exchange to create a kind of security buffer. This means that the investor 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 market homogeneity was observed in this respect.

Especially since the CFD product intervention measure entered into force, futures are regularly promoted to retail clients by intermediaries as an alternative to CFD trading. The market survey also showed that intermediaries also use partner or affiliate marketing to acquire new clients for futures trading.

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 payment obligations 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 a variation margin requirement for limited partners of an investment limited partnership (*Investmentkommanditgesellschaft*).

2. Legal assessment

According to the factual and legal situation on which this General Administrative Act is based, the present restriction on marketing, distributing and selling futures with variation margin requirements 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) 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 with additional payment obligations are “financial instruments with certain specified features.” They are defined as financial instruments Article 4 (1) (15) of MiFID II in conjunction with numbers 4 to 7 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.

2.1.2 Significant investor protection concerns

The marketing, distribution and sale of futures with additional payment obligations to retail clients gives rise to significant investor protection concerns within the meaning of Article 42 of MiFIR. The significant investor protection concerns arise in the present case from the properties of futures inherent in the product and the fact that the legal and economic consequences resulting from the additional payment obligation 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 futures with additional payment obligations for retail clients give rise to significant investor protection concerns within the meaning of 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 (Article 21 (2) (a) 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 (Article 21 (2) (b) 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 (Article 21 (2) (c) 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 (Article 21 (2) (e) 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 (Article 21 (2) (f) 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 (Article 21 (2) (j) of the Delegated Regulation).

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

In particular, because of the risk that retail investors can lose virtually unlimited amounts of capital, and thus more than they have invested, there are significant investor protection concerns with regard to futures with additional payment obligations. 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 with additional payment obligations. Because of the fact that the loss from investing in such a financial instrument may exceed the amount invested, the risk-return ratio is considered to be highly detrimental to investors. 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 investors will be required to make the additional payments from their other private assets. The market survey revealed that, in some cases, six-digit amounts were being demanded from retail clients after forced closing out.

Additionally, high leverage in particular increases the probability of having to pay additional capital or incurring losses.



Furthermore, there is no compulsion for intermediaries to make a margin call, and they can do so voluntarily. Investors 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 investor may only have a few minutes left to voluntarily increase the collateral. In theory, this means that the investor must be reachable at all times so he can respond to a margin call and so he 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 investor is not sufficient to offset the losses, the intermediary will require the investor to deposit the outstanding excess amount.

As a rule, forced liquidation does not happen in the interest of the investor, 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 investors have only opened a few positions or even only a single position. Liquidating or closing out other positions above and beyond the relevant contract subject to the additional payment obligations 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.

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 variation margin. Theoretically, the margin – and thus also the possible loss – may be unlimited.

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 investors 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 addition, even experienced investors 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. In particular for investors 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. Increased complexity arises above all from the risk of an additional payment obligation. Moreover, 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 closing out 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 investor’s 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 at least during the period of the market survey conducted by BaFin. Growth in and an increasing spread of futures trading among retail clients can be expected, especially because of the greater number of mini and micro futures contract offerings.

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 obligations) 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.



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 investors normally find it difficult to assess the performance of these products, in particular due to their increased volatility. The additional payment obligations 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 investor because of the additional payment obligations, 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 investors in futures with additional payment obligations. This applies in particular to the case of short positions in which the loss is not limited at least to the contract value.

Since investors 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. Investors do not have to have the entire contract value at their disposal, and only a fraction of it is sufficient. As a result, investors 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 (private insolvency) for retail investors.

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, an investment firm must also report uncovered losses on contingent liabilities or losses that are not fully covered to the retail investor.

In addition, the lawmakers classify granting loans to others under section 2 (9) no. 2 of the WpHG 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 an investor in a future with additional payment obligations, 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 investor, by adopting a product intervention measure. The present General Administrative Act is appropriate for protecting retail clients against losses that exceed the amount paid by the retail client into their trading accounts and thus spill over into the other assets of the retail client.

This because for futures, leverage of over 1,000 is also possible for retail clients. In this case, the investor 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 investors, 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 obligations limits the risk of retail clients from essentially leveraged speculation, which has a particularly high risk potential according to the lawmakers' assessment in section 2 of the WpHG, to the amount actually invested (possibly plus a voluntary variation margin), and hence reduces the risk.

2.1.2.4 Selling practices and information provided

In the overall assessment, there are also significant investor protection concerns from the selling practices relating to futures with additional payment obligations.

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. 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 investor's paid-in capital.

Affiliate advertisers regularly focus on investors who do not have the necessary level of knowledge and experience with futures transactions. Attention is rarely drawn to the risk of additional payment obligations, or the presentation of risks insufficient. 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.

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. Investors 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.

Overall, the advertisements draw a picture that in particular highlights the advantages of futures trading for investors 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.

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 investors, this does not eliminate the risk that investors may incur a loss in excess of their invested amount because of the additional payment obligations.

The reference to potential losses that have to be settled using private assets does not prevent investors from having to make additional payments. Precisely because of the selling practices described above, it can be assumed that the number of retail clients who trade in futures with additional payment obligations and can therefore potentially lose more than their invested capital will increase. 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 Article 42 (1) (a) of MiFIR and to address the issue by improved supervision or by enforcing existing requirements (Article 42 (2) (b) of MiFIR)

Existing regulatory requirements under EU law that are applicable to the marketing, distribution and sale of futures with additional payment obligations do not sufficiently address the risks referred to in Article 42 (2) (a) (i) 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 Article 42 (2) (b) of MiFIR, BaFin has examined whether there are other sufficient other options to address the risks referred to in Article 42 (2) (a) 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 section 63 (1), (6) and (7) of the WpHG²² 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.

However, the rules aimed at ensuring transparency to the client are not suitable for countering the unlimited risk of loss inherent in futures with additional payment obligations entail. A transparent and understandable presentation of the unlimited risk of loss does not prevent retail clients from being

²² Note: As the national implementing act for Article 24(3) and (4) of MiFID II.



exposed to the risk 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 services, section 64 (3) of the WpHG 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 with additional payment obligations is normally performed through electronic platforms without the provision of investment advice and portfolio management, and since retail clients therefore generally remain unprotected by investment advice or portfolio management, particularly in the area of very risky futures subject to an additional payment obligation, recourse to section 64 (3) of the WpHG does not offer a sufficient other option to address the risks referred to in Article 42 (2) (a) of MiFIR.

In accordance with section 63 (10) of the WpHG, 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, section 63 (10) sentence 1 of the WpHG 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 section 63 (10) sentence 3 of the WpHG, even if the assessment of appropriateness 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 section 63 (10) sentences 3 and



4 of the WpHG 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 private 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 investor 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 sections 63 (4) and (5), 80 (9) to (13), 81 (4) of the WpHG and sections 11 and 12 of the Investment Services Conduct of Business and Organisation Regulation (*Wertpapierdienstleistungs-Verhaltens- und Organisationsverordnung* – WpDVerOV²³) sufficiently address the risks referred to in Article 42 (2) (b) of MiFIR and whether the 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. In light of the features of futures with additional payment obligations, BaFin believes that the client category of retail

²³ Note: Interpreted in accordance with BT 5 of Circular 05/2018 (WA) Minimum Requirements for the Compliance Function and Additional Requirements of Conduct, Organisation and Transparency – MaComp (as the national implementing act for Article 16 (3) and Article 24(2) of MiFID II and Articles 9 and 10 of the Delegated Directive (EU) 2017/593).



investors must be ruled out when identifying the target market for these financial instruments.

In BaFin's opinion, its efforts to consistently enforce the product monitoring requirements would also not 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 with additional payment obligations. Target market identification, meaning ruling out retail clients from the positive target market or including retail clients in the negative target market²⁴, could certainly be used to ensure that futures with additional payment obligations are not distributed to retail clients.

However, this is an insufficient option for BaFin to act: it indirectly requires several intermediate steps which would 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 in the meantime, further retail clients will buy futures with additional payment obligations 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 private assets. 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.

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).

²⁴ 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).

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.

A more transparent presentation of the additional payment obligation 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 the 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.

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 has to be forcibly closed out, this instrument does not sufficiently protect retail clients. This is because even closing out 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

In BaFin's opinion, without restricting futures trading through product intervention under Article 42 of MiFIR, the significant investor protection concerns cannot be eliminated in the same way even by enforcing all of the requirements described above.

BaFin therefore takes the view that there is no sufficient other option to counter the risks referred to in Article 42 (2) (a) of MiFIR and to address the issue through improved supervision or enforcement of the existing requirements.



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

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.

2.3 Consultation of competent authorities of other Member States

The competent authorities of other Member States have also been consulted by BaFin about the present measure pursuant to Article 42 (2) (d) of MiFIR so far they may be significantly affected.

A significant concern may arise from the location of the registered office of intermediaries or futures providers in other Member States. However, the measure is solely restricted to the marketing, distribution and sale of futures to retail clients 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 with additional payment obligations by prohibiting the marketing, distribution and sale of futures with additional payment obligations to retail clients in Germany and does not discriminate against services provided or offered from another (EU) Member State (Article 42 (2) (e) of MiFIR). With regard to futures with additional payment obligations, 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.

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.

In BaFin's opinion, this risk can be assumed not to exist in the present case.

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.

2.6.1.1 Suitability of the measure

The restriction on the marketing, distribution and sale of futures with additional payment obligations 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. The restriction on the marketing, distribution and sale of futures with additional payment obligations to retail clients in Germany prevents a financial instrument to which the significant investor protection concerns described in detail above apply from being offered to retail clients in Germany.

2.6.1.2 Necessity for the measure

The restriction is also necessary in the scope stated in the enacting part. No milder means are 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 of the marketing, distributing and sale of futures to retail clients. In contrast to a complete prohibition, the restriction allows retail clients to continue trading in futures, but 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. For



this reason, even in-depth education is not appropriate for countering the risks of additional payment obligations outlined above. This would also apply to a corresponding warning by BaFin.

Additionally, any obligation to sell and distribute futures solely in conjunction with investment advice or portfolio management would not be suitable to the same degree for preventing retail investors from having to bear the risk of additional payment obligations inherent in the product and thus an unlimited risk of loss.

Similarly, reducing leverage in futures trading or, alternatively, increasing the margin demanded by the futures exchange, would not be suitable for countering the risk of unlimited additional payment obligations. Whereas a cap on the leverage permitted to retail clients through associated higher margin payments would reduce the risk of additional payment obligations, it would not completely exclude them. In the case of higher volatility and higher stakes, the additional payment obligations can lead to incalculable risks of loss for the investor, 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 investors. 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 suitable in the same way as the restriction set out in the operative part for ensuring the sufficient limitation of the risks inherent in the product that may arise from additional payment obligations and for preventing retail clients from losing far more money than they actually invest and have available for trading.

Even a mandatory margin call procedure would only give investors the opportunity to avoid or delay forced closing out by paying in additional funds, but would not be appropriate for generally protecting them from additional payment obligations. Additionally, in the event of sudden, extreme price fluctuations, 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. Any inability to meet the additional payment obligations promptly results in the automatic closing out of the futures position. However, this specifically does not guarantee that the investor's losses would be limited to their trading balance. Furthermore, such a procedure would also have to be introduced, regulated and supervised by BaFin.

A marketing restriction, for example in the form of a prohibition on actively marketing futures with additional payment obligations, is also not an equally



effective 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 market and the client group of retail clients. However, there would be considerable difficulties in distinguishing between advertising aimed at the German market and advertising aimed, for example, at the Austrian market. This means that providers would still be able to distribute demo accounts, advertising videos, success stories, etc. online in German. Overall, this sort of restriction or prohibition on advertising would have only a very minor effect in protecting investors if buying futures with additional payment obligations continues to be permitted 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 effective in achieving the objective pursued by this General Administrative Act. Investors who already have some trading experience must also be protected from the incalculable risks of loss resulting from additional payment obligations. Extreme volatility events can occur at discontinuous intervals and thus lie outside the horizon of experience of the retail clients. The lawmakers have already taken into account the experience of clients using the criteria in section 67 (6) nos. 1 and 3 of the WpHG. If these experience-related criteria are met, classification as a professional client is possible. There is therefore no reason to disregard this statutory assessment and introduce an additional subclassification of the group of retail clients.

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, thereby taking into account the significant investor protection concerns such that deferral of the measure could be justified.

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

Restricting the marketing, distribution and sale of futures with additional payment obligations to retail clients 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. 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.

It should also be considered 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.

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, over a year, the volume of futures traded by retail clients in Germany was around EUR 78 billion.²⁵

As explained in 2.1.2.3, calculating the performance of futures is very complex and does not typically correspond to the level of knowledge to be found among retail clients. There is a significant disparity between the expected profit and the risk of loss in unrestricted futures trading, in particular because of additional payment obligations.

For the reasons set out in the following, the public interest in collective consumer protection outweighs the economic interest of the intermediaries in the unrestricted marketing, distribution and sale of futures with additional payment obligations to retail clients in Germany.

²⁵ 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.

Specifically:

2.6.1.3.1 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 with additional payment obligations to retail clients 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 additional payment obligations if they have to rule out the additional payment obligation in their contractual relationship with the retail clients, which could cause additional costs for the intermediaries. However, these costs are not expected to be considerable and must therefore be subordinated in light of the improved investor protection.

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

Furthermore, the futures with additional payment obligations covered by the restriction in the operative part of this General Administrative Act can continue to be distributed without any restriction to professional clients within the meaning of Article 4 (1) (10) of MiFID II. It must also be considered that the General Administrative Act is limited to specific futures, namely those with additional payment obligations, meaning that marketing, distribution and sale of futures to retail clients in Germany is therefore not completely prohibited. Futures without additional payment obligations can continue to be marketed, distributed and sold to retail clients in Germany. There is therefore no need for intermediaries to make any changes to their business model, and all they need to do is make design and legal adjustments affecting futures with additional payment obligations in relation to the client group of retail client.

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 consumer 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 investors 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 with additional payment obligations to retail clients in Germany must be considered less deserving of protection because of the public interest in collective consumer protection, and must be subordinated to the significant investor protection concerns described above.

2.6.1.3.2 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 point (1) of Article 4 (1) of MiFID II, that market, distribute or sell futures with additional payment obligations to retail clients 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 and 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 with additional payment obligations 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 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. This is also the case because at least at present, the share of futures traded by retail clients is of no real consequence compared with the market as a whole, and futures without any additional payment obligations may continue to be marketed, distributed and sold to retail clients in Germany. The interdependence between the retail client market for futures with additional payment obligations and other capital markets and the effects on stock exchange trading are low.

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.

2.6.1.3.3 Impact of the measure on investors

The impact of the measure on retail clients is proportionate.

The restriction affects the marketing, distribution or sale of futures in Germany that could result in additional payment obligations for retail clients. It should be considered that individual retail clients must decide for themselves whether futures with additional payment obligations 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 be-



cause 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 without additional payment obligations can continue to be made accessible to retail clients in Germany. 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 expect 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 investors at least indirectly in this respect. However, futures already offered on the market without any additional payment obligations demonstrate that the product will continue 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 additional payment obligations.

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 investor may be classified as a professional client and be granted access to unrestricted futures after obtaining this status. Classification as a professional client under section 67 (6) of the WpHG 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 be considered if at least two of the criteria referred to in section 67 (6) nos. 1 to 3 of the WpHG 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 obligations.

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

The guaranteed protection for the amount of losses to which retail clients may be exposed by making futures with additional payment obligations no longer accessible to them is designed to protect retail clients in exceptional circumstances. 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 were owing considerably more than they had originally invested.

The purpose of the present restriction is to ensure that the maximum losses that will be incurred by a retail client from 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 may not incur any additional liabilities in connection with futures trading, as this would result in a significant drawback for consumers. Such a situation is particularly detrimental for retail clients without any appreciable liquid assets. In this respect, the measure provides a "safety net" or high level of protection for retail clients against potential losses, including in times of significant market volatility.

It is therefore appropriate to order the exclusion of additional payment obligations in order to remove the source of such potential significant disadvantages that may be caused by a variation margin requirement for retail clients in futures trading.

The measure is thus also appropriate taking into account and weighing up all the interests involved.

2.6.2 Selecting the addressees

The product intervention measure restricting the marketing, distribution and sale of futures to retail clients 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 with Article 4 (1) of MiFID II that have their registered office in Germany and market, distribute or sell futures with additional payment obligations to retail clients 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 with additional payment obligations to retail clients 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 with additional payment obligations 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 services enterprises to market, distribute and sell futures with additional payment obligations. The adoption of the measure relating to investment firms as set out in the operative part is therefore the most efficient measure of achieving the desired level of consumer protection with regard to futures trading by retail clients 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, 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 with additional payment obligations 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 consumer 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 buy futures with additional payment obligations 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 in line with the present restriction, it is reasonable for the addressees to fulfil the obligation before the expiry of a period of three months after the announcement of the General Administrative Act. Weighing up the interests of the providers and those of investor protection, the implementation deadline appears to be appropriate.

However, establishing a transitional period is necessary in the present case for reasons of proportionality. 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 with additional payment obligations in the event that futures with additional payment obligations 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.