ASSOCIAZIONE INTERMEDIARI
MERCATI FINANZIARI - ASSOSIM

Milan, 5 February 2018

Prot. 08/18

ESMA
CS 60747
103 rue de Grenelle
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France

Re: ASSOSIM contribution to ESMA Call for evidence "*Potential product intervention measures on contracts for differences and binary options to retail clients*"

Assosim welcomes the opportunity to comment on the ESMA call for evidence in subject and is pleased to provide the following observations.

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We fully agree with ESMA that trading in contracts for differences (CFA) and binary options (BO) might imply exposure to very high level of risks for retail clients licking an appropriate level of knowledge and experience. Still we consider that the actions currently being considered by ESMA to address such a risk are:

a. Ineffective;
b. Disproportionate;
c. Unnecessary; and
d. Untimely.

More to the point, as regards ineffectiveness (point a. above) we believe that the actions set forth in the call for evidence fall short of the goal they are intended to achieve, as ESMA failed to consider that most of the trading in CFD and BO is currently carried out by retail investors on non-EU unauthorised platforms which fall outside the scope of the proposed restrictions and bans. Therefore, should ESMA persist in its purpose and finally adopt the proposed measures, we believe we would experience a decrease in the current level of investor protection in the EU.

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As a matter of fact, as a consequence of ESMA's intervention, an even larger share of EU business would move to these illegal off-shore trading facilities, which do not abide by the very strict investor-protection rules applying to EU investment firms and by the technical standards (such as leverage limits and stop losses) with which many EU investment firms have complying on a voluntary basis. In fact, compliance with these legal requirements and technical standards entails costs and limits to trading abilities which retail investors do not want to face and that they do not face when dealing with unauthorised non-EU service providers. Any restriction or ban which ESMA could impose under its product intervention powers would thus result in an additional discrimination against EU-investment firms and, at the same time, would further enhance the penetration power of unauthorised non-EU service providers in the EU market and thereby leave EU investors exposed to the full range of risks identified by ESMA in its call for evidence.

Under point b., we believe that the proposed actions are disproportionate in that ESMA should rather consider the possibility of increasing the actual level of retail protection by requiring national authorities to implement more effective supervisory procedures on the cross-border activities carried out by investment firms established in their respective countries and, in particular, by overseeing compliance by these firms with the provisions on suitability, appropriateness and product governance, including positive and negative target market. To this end, ESMA should consider whether the concerns it raised in the call for evidence had to be ascribed to ineffective supervision on cross border offers of CFD and BO and, in particular, on the specific provisions which require investment firms to restrict the offer of their services to retail customers who have the knowledge and experience to understand the characteristics and risks of the relevant instruments, including the margin and leverage mechanisms. If such an approach would not be considered sufficient by ESMA, it should then consider the possibility of inviting the EU Commission to amend the current legal framework to require investment firms to provide their clients with specific training activities to gain the knowledge necessary to access this market.

Under point c., we believe that the restrictions and bans proposed by ESMA are to be considered unnecessary in the light of the recently enhanced appropriateness and suitability requirements as well as of the newly introduced product governance regime applicable to EU investment firms. It is unquestionable that the currently in force investor-protection legal framework heavily limits the investment firms' ability to trade unsuitable financial instruments with retail investors which lack the knowledge and experience to take informed investment decisions. In fact, we believe that the specific concerns raised by ESMA in the call for evidence had to be considered adequately addressed also under the previously in force MiFID1 appropriateness and suitability regime.

By the same token, under point d. we believe that the use by ESMA of its product intervention powers is untimely due to the unfeasibility of any analysis on the effects of the recently entered into force investor protection provisions provided for by MiFID2/R. It is hard to believe that, having lapsed little more than 30 days from the entering into force of the above provisions, ESMA has already been able to collect evidence that the MiFID2/R provisions have failed to provide the level of protection to retail investors pursued by the EU legislator. As of today, any such analysis would be very hard (actually impossible) to conduct, and we therefore fear that the empirical evidence provided for by ESMA in the call for evidence might eventually refer, if any, to the pre-MiFID2/R world. Accordingly, we believe that ESMA currently lacks the power to make use of its temporary intervention powers to the extent that Article 40(2)(b) of MiFIR makes these powers conditional upon the failure by "*regulatory requirements under Union law that are applicable to the relevant financial instrument or activity …* [to] *address the threat*".

Finally, we would like to recommend ESMA to carry out an analysis on the sale, distribution and marketing methodologies which are common practice in the different member states, so as to verify whether there is room to differentiate its actions according to the different protection needs.

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We remain at your disposal for any further information or clarification.

Yours faithfully,

Gianluigi Gugliotta
Secretary General