

AMF's decision of 2 July 2019 prohibiting the marketing, distribution or sale, in France or from France, of binary options to retail investors

I. Background

1. Poor practices in the distribution in France of binary options to retail clients¹, likely to raise a significant risk for investor protection, are established². These products are inherently risky, complex, often traded for speculative purposes and characterized by a lack of transparent information that do not allow retail clients investors to understand the risks underlying these products. The 'Autorité des marchés financiers' (AMF), as well as other national competent authorities (NCAs), observes that binary options offered to retail clients generate high and systematic losses, and intrinsic risks of conflicts of interest for the providers of these products. These products, unsuitable for retail clients, have been widely distributed within this clientele, mostly through online platforms and providers using aggressive marketing techniques.
2. The offer of these speculative products to retail clients led the AMF to implement over the past years a range of measures such as the organisation of mystery shopping campaigns³, the setting up of systematic monitoring tools⁴, the publication of dedicated press releases⁵ as well as a « black list » of unauthorised binary options providers⁶. The AMF closely monitors the offer to retail clients of these speculative products, which gave rise to numerous complaints⁷. Their number has decreased further to the legislative⁸ and regulatory⁹ changes that have occurred in France in order to ban online advertisement relating to such offers, but remained significant prior to the adoption and the renewal by ESMA of a measure to temporarily ban the marketing, distribution or sale of binary options to retail clients¹⁰. Although these measures have had positive effects, the AMF considers that there remains an important problem of investor protection.
3. The significant investor protection concerns identified by the AMF in relation to the marketing, distribution or sale of binary options in France to retail clients are in particular likely to materialize again if the measures adopted by ESMA, which are only temporary, are not taken-over and

¹ Defined as clients who do not meet the conditions laid down in paragraph 2 of Article L. 533-16 of the French Monetary and Financial Code, as specified by Article D. 533-11 of the same code.

² See the scientific working paper published in May 2017 by the AMF in cooperation with the « *laboratoire de psychologie sociale* » of Aix-Marseille University (Analysis of techniques used to market speculative trading in Forex and binary options with regard to research on compliance without pressure, persuasion techniques and nudges).

³ On 29 websites in 2014 and 15 websites in 2016.

⁴ The AMF continuously monitors advertising on financial placements. Media subject to monitoring include the press, websites, mobile phone applications and social networks (specific pages of the websites of financial institutions and emailings on social networks).

⁵ See AMF press release published on 28 July 2017 (Forex, binary options: a market to avoid).

⁶ See AMF press release published on 4 May 2018 (Forex, binary options: the AMF has obtained the closure of 138 website addresses in three years) and the black list of unauthorised binary options providers, lastly updated on 19 July 2018.

⁷ Near 1200 complaints in 2015, more than 600 complaints in 2016, more than 250 complaints in 2017 and, in 2018, 63 complaints.

⁸ Article 72 of Law n°2016-1691 of 9 December 2016 creating a new article L. 533-12-7 of the French Monetary and Financial Code.

⁹ Article 314-of the AMF General Regulation.

¹⁰ ESMA Decision (EU) 2018/795 of 22 May 2018 to temporarily prohibit the marketing, distribution or sale of binary options to retail clients in the Union ; ESMA Decision (EU) 2018/1466 of 21 September 2018 renewing and amending the temporary prohibition in Decision (EU) 2018/795 on the marketing, distribution or sale of binary options to retail clients ; ESMA Decision of 14 December 2018 renewing the temporary prohibition on the marketing, distribution or sale of binary options to retail clients and Decision (EU) 2019/509 of 22 March 2019 renewing the temporary prohibition on the marketing, distribution or sale of binary options to retail clients.

maintained by the NCAs at a national level. In order to mitigate these risks, the adoption of a decision prohibiting the marketing, distribution and sale, in France or from the France, of binary options to retail clients is necessary, in accordance with Article 42 of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 "on markets for financial instruments and amending the Regulation (EU) No. 648/2012" (**MiFIR**), as supplemented by the provisions of Article 21 of Regulation (EU) 2017/567 of the Council of 18 May 2016 "supplementing Regulation (EU) No. 600/2014 of the European Parliament and the Council with regard to definitions, transparency, compression of portfolio and monitoring measures relating to the intervention on the products and positions" (**MiFIR Delegated Regulation**). MiFIR expressly grants to the AMF a direct intervention power enabling it to prohibit or restrict the marketing, distribution or sale of certain financial instruments or financial instruments with certain specified features or certain financial activities or practices, which give rise to significant investor protection concerns or poses a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system.

4. The adoption by the AMF of a restriction or prohibition based on MiFIR is subject to the conditions laid down in Article 42 of MiFIR, as specified by MiFIR Delegated Regulation and detailed below.

II. The existence of a significant investor protection concern in relation to the marketing, distribution and sale of binary options to retail clients (Article 42(2)(a) of MiFIR)

5. One of the conditions set forth under Article 42(2)(a) of MiFIR is the existence of a significant investor protection concern. In accordance with Article 21(2) of MiFIR Delegated Regulation, the AMF has assessed the relevance of a number of factors and criteria and in particular those listed under points a), b), c), d), e), f), j) and v) of this Article. After taking these factors and relevant criteria into consideration, the AMF concludes that there exists a significant problem for the protection of investors, for the following reasons.
6. Several NCAs have raised concerns about the marketing, distribution and sale to retail clients of binary options, which do not meet any genuine investment needs for retail clients unlike other types of options, which can serve a valuable role in hedging exposure to certain assets and present risks related to in-built and unmanageable conflicts of interest. These risks are often amplified by the very aggressive and manipulative marketing techniques used by binary option providers. While several NCAs have indicated that these products attract compulsive gambling behaviour, the AMF observes that these offers reach very diverse populations and put some investors in financial distress such as over-indebtedness. The AMF is strongly committed to alert and implement tools to address these concerns, like other NCAs such as the FSMA in Belgium.

II.1. The degree of complexity and transparency of binary options (Articles 21(2)(a) and (d) of MiFIR Delegated Regulation)

7. A binary option is a financial instrument, traded or not on a trading venue, that (i) must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, (ii) only provides for payment at its close-out or expiry and (iii) the payment of which is limited to (a) a predetermined fixed amount or zero if the underlying of the derivative meets one or more predetermined conditions and (b) a predetermined fixed amount or zero if the underlying of the derivative does not meet one or more predetermined conditions.
8. Binary options are complex financial instruments, which enable investors to bet on the occurrence of a specified event in relation to the price, level or value of one or more underlying (for example a share, a currency, a commodity or an index). If the event occurs, the option pays out or, if the event does not occur, the investor loses their money. In this sense, binary options can be regarded

as ‘yes/no propositions’. Despite this apparent simplicity, binary options have complex structure that a retail client is not able to understand. Often, the answer to this proposal depends on whether the price of the underlying is above or below a given price (the strike price). In some cases, the exercise price corresponds to the market price of the underlying at the time of entering into the contract or at a future specified time.

9. It is appropriate to clarify that all binary options, although marketed, distributed or sold under other names, fall within the scope of application of this Decision. Reference is made, for example, to all-or-nothing options, up-or-down options, trend options, digital options and one-touch options. It is also appropriate to ensure that this Decision includes binary options that have several different predetermined conditions, which have to be met (or not met) before the payment is provided. Therefore, a binary option that offers (i) a payment of a predetermined amount if the underlying meets a certain predetermined condition (for example the value of the underlying rises on a specific date), as well as (ii) an additional predetermined amount (a ‘bonus’) if the underlying meets another predetermined condition (for example the value of the underlying rises above a certain percentage). In this and similar cases, the payment of the sum of the two predetermined amounts in points (i) and (ii) would amount to the payment of a predetermined fixed amount.
10. This pricing structure of binary options is complex and presents a significant risk of asymmetrical information between binary options providers and retail clients, which leads to important risks in terms of investor protection. Binary options present a certain number of inherent features making them complex, difficult to value and less transparent for retail clients.
11. Binary option providers typically price binary options based on the market-implied or otherwise modelled probability of a specified event occurring before applying a spread or other form of transaction fee to each option such that it yields a negative expected return for the client. In order to price these products, providers use a variety of factors such as the distance from the strike price or the volatility of the underlying. Once estimated the probability of occurrence of the event, the provider receives a bonus or occasionally transaction costs in relation to the facilitation of the transaction.
12. Binary options offer a comparatively large return for a statistically less likely event and vice-versa¹¹.
13. This pricing structure presents a number of challenges for retail clients. In particular, the pricing structure requires retail clients to accurately assess the value of the option in relation to the expected probability of the reference event occurring. Retail clients are placed in situation of significant asymmetric information towards providers, who have much greater access to information and systems to properly price and value these products. In particular, binary options providers have access to historical price data — for example, recorded price feeds from an exchange or commercial data provider in relation to a given underlying — which is not generally available to retail clients. Binary options providers also have much more experience in pricing contracts than retail clients typically do and are more likely to have developed sophisticated pricing methodologies. Furthermore, given the very short-term of most transactions retail clients face difficulties to accurately value options, even when using available pricing tools. Moreover, due to the application of spreads and other transaction fees, retail clients need to outperform expected returns on investment significantly on a regular basis to achieve profits from trading. Retail clients

¹¹ For example, for a binary option offered at a distance from the strike price, the provider may offer the client the right to purchase the option at EUR 22 for a return of EUR 100 for an event that is likely to occur 20 % of the time (equating to a fair value of EUR 20).

have for the vast majority of them no knowledge or experience of financial markets, which implies that it is difficult for them to assess the risk/return profile of the product.

14. The combined effect of the pricing structure and the application of transaction fees to each trade is that a large majority of retail client accounts lose money in aggregate even though they may make short-term profits and providers, which are typically direct counterparties to the trade, make a profit from clients in the long term through their losses from trading and through transaction fees.
15. Some providers offer continual two-way pricing and the ability for clients to enter and exit the trade over the course of the term of a binary option. In such a case, a client can exit their position prior to the binary option's expiry by selling it back to the provider or otherwise forfeiting the conditional payment at expiry. In return, the client receives some payment from the provider, as per the continual price offered by the provider depending on the difference between the current market price and the fixed strike price of the underlying and the time to expiry. Continual two-way pricing is an additional feature that may be offered by binary option providers. This feature adds a further layer of complexity, which makes it difficult for retail clients to value these products accurately or make a positive return on investment. This is because retail clients would need to continuously monitor the pricing and estimate the expected outcome. Furthermore, exiting a trade and entering a new one comes at an additional cost to the client due to the application of a spread to the offer price or through transaction fees.
16. Binary options are complex products, which are generally traded over the counter. As such the pricing, performance and settlement of binary options is not standardised. This impairs retail clients' ability to understand the terms of the product. The differences in the type of propositions that form the basis of a binary option, the complex pricing structure, the possible existence of continual two-way pricing and the existence of even more complex offerings such as options that package together a set of binary options, may add to the complexity of these products and further undermine retail clients' ability to understand them
17. Binary options providers are typically the counterparty to their retail clients' trades, with the provider determining the price at execution and the payment at expiry. In addition, providers often require clients to acknowledge that the prices used to determine the value of the binary option may differ from the price available in the respective underlying market. This means that it may not always be possible for retail clients to check the accuracy of the prices received from the provider. These factors make it extremely complex for retail clients to value binary options objectively. The high level of complexity and poor degree of transparency associated with binary options therefore confirms that a significant investor protection concern exists.
18. The features and characteristics of binary options, which are the fundamental source of the identified detriment to retail clients, remain the same whether or not these products are traded on a trading venue or securitised. Binary options traded on a trading venue would still present a negative expected return to investors, while offering a payoff structure that is not well suited to hedging or to performing other economic functions that could form a compensating benefit. Notably, these properties hold true at any time prior to the expiry of the option. The existence of a secondary market in particular, therefore, does not change the fundamental characteristics that cause detriment to retail clients.

II.2. The particular features or components of binary options (Article 21(2)(e) of MiFIR Delegated Regulation)

19. Binary options are typically very short-term investments, in some cases expiring minutes after being entered into, which makes them extremely speculative in nature.

20. The binary outcome nature of binary options mean that they are primarily used for speculative purposes. The payment of a fixed monetary amount or zero limits the value of binary options as a hedging tool in contrast to traditional options, which allow the client to manage their risk by setting a ceiling or floor for a specific asset that they may have direct exposure to. This feature is exacerbated by the typical short term of binary options.
21. Furthermore, binary options are priced according to the probability of an event occurring, in a similar manner as traditional fixed-odds bets (for example on sporting events). This feature, in addition to the very short term of transactions and to the fact that investors stand either to make a very large return or to lose their entire investment, may lead to investors' addictive behaviour, as also found in relation to gambling products.
22. As mentioned above, binary options providers usually act as direct counterparty to the client's trade, hence placing these to their advantage. This business model places the provider's interests in direct conflict with those of its clients, which increases the risk that the provider may manipulate the price of the underlying at expiry of the binary option or extend the term of the binary option by seconds or milliseconds so as to avoid having to pay out on the option contract. The risk of conflict of interest is particularly acute for binary options, as the payment structure of these products is determined by whether the underlying has reached the specified strike price at expiry. Practices have been observed whereby binary options providers apply an asymmetrical or inconsistent mark up to core spreads on the underlying, which results in the option being 'out of the money' where it otherwise would be 'in the money' at expiry. In addition, the distribution models observed in this sector of the market bear certain and sometimes inherent conflicts of interest and the pressure to maintain a pipeline of new clients increase the potential for conflicts of interest to occur.
23. Given that binary options structurally have negative expected returns, the more positions an investor takes, the more likely they are to lose money on a cumulative basis¹².
24. The high risk of binary options being traded speculatively as well as of conflict of interests between binary options providers and their clients confirm the existence of a significant investor protection concern.

II.3. The size of potential detrimental consequences and the degree of disparity between returns for investors and the risk of loss (Articles 21(2)(b) and (f) of MiFIR Delegated Regulation)

25. Considering the speculative and short-term nature of binary options, expected negative returns associated with binary options are a major concern for the AMF. Furthermore, as mentioned above, binary options do not provide any hedging benefit for investors and these inherently speculative products give rise to significant risks of financial loss for retail investors. Based on data gathered by ESMA from a number of NCAs, ESMA estimates that the number of retail clients' trading accounts from EEA-based CFD and binary option providers increased from 1,5 million in 2015¹³ to approximately 2,2 million in 2017¹⁴. These data are supported by those provided by NCAs

¹² For instance, for a binary option with a 50 % win probability and a return of 80 % of the amount invested if at expiry the option is 'in-the-money', an investor faces around a 75 % probability of suffering a cumulative loss over 20 trades. See ESMA's Product Intervention Analysis: Measure on Binary Options, 2018.

¹³ Given the frequent cross-border dimension of the activity of product providers, this figure may include clients from non-EEA States. With particular regard to the UK, the number of CFD funded client accounts has risen from 657 000 in 2011 to 1 051 000 at end-2016. However, these figures do not exclude dormant client accounts or multiple accounts used by the same retail client. The figures provided by the CY-CySEC have been compiled on the basis of accounts opened in CY-CySEC authorised providers offering these products.

to ESMA¹⁵. Information available to the AMF also shows that the number of retail clients investing in these products and the number of providers offering or selling them remains important, even though a decline has been observed as a result of the legislative and regulatory measures adopted at national level and of the measures adopted subsequently by the ESMA.

26. Thus, the AMF received 63 investors' complaints in 2018 in relation to binary options (compared to circa 320 in 2017, 600 in 2016 and circa 1200 in 2015). The AMF also registered nearly 300 websites and entities offering binary options without authorisation¹⁶.
27. Data from other NCAs help establishing that, on average, retail clients record losses in more than 80% of the cases when investing in binary options¹⁷. These data are further corroborated at international level, in particular by IOSCO¹⁸ and ESMA¹⁹.
28. Within the framework of the renewal of its product intervention measure, ESMA obtained new information relating to binary options that are sufficiently long-term, are accompanied by a prospectus and are fully hedged by the provider or another entity in the provider's group, and are therefore unlikely to give rise to the significant investor protection concern identified in Decision (EU) 2018/795. While the degree of complexity of this specific type of binary option is comparable to that of binary options generally, the minimum term requirement ameliorates the negative effects of complexity and opacity for investors. Investors can more reasonably take an informed view of the market over a period of 90 days or longer from the date when the product was first issued than over the very brief terms characteristic of the wider binary options market. A term of 90 days or longer reduces the scope for frequently repeated speculative trades that worsen losses and are associated with addictive behaviour. The publication of a prospectus ensures a minimum level of transparency around these longer-term products. It ensures that in relation to the marketing, distribution or sale of these products to retail clients, prescribed information on the provider, including its business model and financial statements, and the risks and characteristics of the product, is made available to investors. Furthermore, the prospectus is subject to the scrutiny of the relevant NCA²⁰. Accordingly, binary options that fulfil all these three criteria should be explicitly excluded from the scope of the national intervention measure decided by the AMF. In addition, in the context of the renewal of its product intervention measure and further to the report of an increase in the number of clients treated as professional clients on request since the entry into force of its measure, ESMA also specified that retail clients may request to be treated as professional clients when, in particular, clients submit a request in writing in accordance with all the requirements set out in the applicable legislation. Providers should ensure that they comply at all times with those requirements. In addition, ESMA noted that some third-country firms were actively approaching Union clients or were marketing the possibility for retail clients to move their accounts to an intra-group third-country entity and recalled that, without authorisation or registration in the Union, third-country firms are only allowed to offer services to clients established or situated in the Union at the client's own exclusive initiative. Finally, ESMA also stated to be aware that firms were starting to provide other speculative investment products. In

¹⁴ As far as the UK is concerned, this figure does not include non-UK clients of UK authorised firms which in 2016 was estimated at approximately 400 000. For the other Member States which provided the data to ESMA, the figure may include clients from non-EEA States.

¹⁵ See ESMA Decision (EU) 2018/795 of 22 May 2018.

¹⁶ 336 as of 30 April 2019.

¹⁷ See ESMA Decision (EU) 2018/795 of 22 May 2018.

¹⁸ IOSCO - *Final Report - Report on the IOSCO Survey on Retail OTC Leveraged Products*, December 2016.

¹⁹ ESMA, *Product Intervention Analysis: Measure on Binary Options*, 2018.

²⁰ See ESMA Decision (EU) 2018/1466 of 21 September 2018 renewing and amending the temporary prohibition in Decision (EU) 2018/795 on the marketing, distribution or sale of binary options to retail clients, recitals 13 to 18.

this context, the AMF will continue to monitor the offer of products subject to this decision so as to ensure that providers comply with their obligations.

29. ESMA also obtained information on existing products that at the end of the term have one of two predetermined payouts, neither of which is less than the initial investment. The payout for this type of binary option could be the higher or the lower one, but in both circumstances, the investor would not lose money compared to its total investment in the product²¹. Taking into account those elements, which demonstrate that the potential detrimental consequences for investors of products with such characteristics is limited, and in view of its objective, the national intervention measure decided by the AMF should explicitly exclude whose payoff structure does not put the investor's capital at risk.

II.4. The type of clients involved (Article 21(2)(c) of MiFIR Delegated Regulation)

30. Prior to the adoption by ESMA of a product intervention measure, binary options were widely marketed, distributed or sold to the retail mass market. However, the complexity of binary options, as described in this Decision, makes it difficult for the majority of retail (unlike professional) clients to properly understand and assess the actual risk they incurred when dealing with these products. The evidence of losses observed in retail client accounts and described in this Decision demonstrates that binary options are unsuited to retail clients.

II.5. Marketing and distribution practices in relation to binary options (Article 21(2)(j) of MiFIR Delegated Regulation)

31. Marketing and distribution practices in relation to binary options, in particular the distribution networks used, the lack of information on risks and the promotional offers raise important concerns for investor protection, as further detailed below.
32. Although binary options are complex products, they are offered to retail clients most commonly via electronic trading platforms, without the provision of investment advice or portfolio management. An assessment of appropriateness is required in such cases pursuant to Article 25(3) of MiFID 2. However, this assessment does not prevent binary options providers or their clients or potential clients proceeding with a transaction, subject to a simple warning to the client. This can occur where the client has provided no or insufficient information to the provider as to their knowledge and experience in the investment field relevant to the specific type of product as well as where the provider has concluded that the product is not appropriate for the client. This enables retail clients to access products, such as binary options, which, by their features, should not be distributed to them.
33. The AMF also noted that, for 2016, the number of new advertisements (TV, radio, internet) for speculative trading (binary options, CFDs, forex) represented 36 % of all new advertisements in the financial sector, and 45 % of all new advertisements for financial instruments. The AMF has also observed that the marketing and distribution of binary options implies in most cases aggressive marketing practices, such as commitment and persuasion techniques²². Comparable practices are also observed by other NCAs²³.
34. A common feature of marketing and sales techniques adopted by the binary option industry is the offer of trading (monetary and non-monetary) benefits, such as bonuses to attract and encourage

²¹ See ESMA Decision (EU) 2018/1466 of 21 September 2018, recital 20.

²² AMF, Analysis of techniques used to market speculative trading in Forex and binary options with regard to research on compliance without pressure, persuasion techniques and nudges, 10 May 2017.

²³ See ESMA Decision (EU) 2018/795 of 22 May 2018, recital 40.

retail clients to invest in binary options, the offer of gifts, trading tutorials or reduced transaction costs.

35. These offers may distract investors from the high-risk nature of the product. They are typically targeted to attract retail clients and incentivise trading. Retail clients can consider these promotions as a central product feature to the point they may fail to properly assess the level of risks associated with the product.
36. These practices are directly inspired by the online betting industry. Some providers marketing the relevant products offer 'welcome bonuses' for any account opening as well as bonuses based on the invested amounts (volume bonuses).
37. Supervisory work by several NCAs discovered that the terms and conditions on promotional offers are often misleading and that many clients reported difficulties in withdrawing funds when trying to use such bonuses or are unaware that their access to the bonus offer or funds depends on a specified volume of trades. Given the feature of negative expected returns associated with trading in binary options, this often means that clients lose more money from trading more frequently than they otherwise would have without receiving a bonus offer²⁴.
38. In this regard, analysis led by the AMF notably allows to demonstrate that the client typically has to invest 20 or 30 times the amount of the bonus to have the right to withdraw the money²⁵.
39. Marketing and distribution practices in relation to binary options also raise concerns about the compliance of providers of binary options with their obligations to give clients fair, clear and not misleading information or act in the best interests of clients. The quality of information provided to retail clients about binary options, for example on providers' websites, raise questions as regards the functioning of these products and the risks involved.
40. Some examples that are not compliant with the obligation for information to be fair, clear and not misleading and which use techniques drawing clients' attention but not necessarily reflecting the suitability of the product relate to:
 - (i) website content or information presented in a language that is not a national language of the Member State where the services are to be provided, or presented in the official language but based on translations of insufficient quality, such that this is likely to hamper the comprehension of the information presented; and
 - (ii) presenting information that emphasises the possible benefits associated with investing in binary options without also giving a fair and prominent indication of the relevant risks, suggesting that these speculative products are suitable or appropriate for all investors or that making a return is a simple task.
41. The marketing and distribution practices associated with binary options described above confirms the existence of a significant investor protection concern.

II.6. Risks related to the threat to investors' confidence in the financial system (Article 21(2)(v) of MiFIR Delegated Regulation)

42. The combination of factors such as the degree of complexity and lack of transparency of binary options, the high risk of loss of a substantial part or, often, of all of the investment, the negative expected return of the product for investors, the misleading and aggressive nature of many

²⁴ See ESMA Decision (EU) 2018/795 of 22 May 2018, recital 46 and 47.

²⁵ See ESMA Decision (EU) 2018/795 of 22 May 2018, recital 47(1) and IOSCO Report on the Survey on Retail OTC Leveraged Products, page 32.

marketing and distribution activities, as well as the size of potential detrimental consequences, all contribute to increase the probability that retail clients may lose confidence in the financial system.

43. Given the high probability of clients suffering losses on investments made in binary options, investors who have no other experience of investing in financial instruments and have been attracted by the aggressive marketing conducted by binary option providers may conclude that these products are representative of all financial instruments. Given the high number of retail clients having invested in binary options and the number of complaints in respect of these products, one may consider that these products are likely to adversely affect investors' confidence in the financial system.

III. The insufficiency of regulatory requirements under Union law to address identified concerns (Article 42(2)(b) of MiFIR)

44. As required under Article 42(2)(b) of MiFIR, the AMF has considered the existing regulatory requirements in the Union that are applicable to binary options in order to determine, on reasonable grounds, whether or not these requirements do sufficiently address the significant investor protection concerns identified in relation to binary options distributed to retail clients and if the issue would not be better addressed by improved supervision or enforcement of existing requirements. In this regard, the provisions set out in MiFID 2, in Regulation (EU) No 600/2014 (**MiFIR**) and Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (**PRIIPs Regulation**) appear as the relevant provisions applicable to marketing, distribution and sale of binary options to retail clients²⁶. The most relevant requirements set out in these regulations are recalled below, accompanied by explanations about the fact that they do not, directly, or as appropriate, take into account the important concerns identified in relation to the marketing of binary options to retail clients.
45. The provisions arising from MiFID 2 and MiFIR applicable to binary options are, in their scope and content, similar to those existing under Directive 2004/39/EC (**MiFID**). While the adoption of MiFID 2 and MiFIR aimed to improve several notable aspects of investment services and activities to strengthen investor protection (including through product intervention powers), the improvements in a number of relevant provisions do not address the specific concerns described in this Decision. From the perspective of the risks and the investor detriment addressed in this decision, several provisions have therefore remained substantially unchanged.
46. The requirements to provide appropriate information to clients have been further detailed in MiFID 2, with a significant improvement in the area of the disclosure of costs and charges, with investment firms required to provide clients with aggregated information on all costs and charges in connection with the investment services and the financial instruments. However, disclosure-based rules alone — including improved information on costs — are clearly insufficient to tackle the complex risk arising from the marketing, distribution or sale of binary option to retail clients.
47. In particular, Article 24(3) of MiFID 2 requires inter alia investment firms to ensure that all information, including marketing communications, addressed to clients or potential clients is fair, clear and not misleading. Article 24(4) of MiFID 2 further requires investment firms to give

²⁶ In particular, they include: (i) the requirement to provide appropriate information to clients in Article 24(3) and (4) of Directive 2014/65/EU (51); (ii) the suitability and appropriateness requirements in Article 25(2) and (3) of Directive 2014/65/EU (52); (iii) the best execution requirements in Article 27 of Directive 2014/65/EU (53); (iv) the product governance requirements in Articles 16(3) and 24(2) of Directive 2014/65/EU; and (v) the disclosure requirements in Articles 5 to 14 of Regulation (EU) No 1286/2014.

appropriate information in good time to clients and potential clients with regard to the firm and its services, the financial instruments and proposed strategies, execution venues and all costs and related charges, including notably guidance on and warnings of the risks associated with investing in those financial instruments and whether the financial instrument is intended for retail or professional clients. Based on the description of investor protection concerns in relation to binary options (in particular their complexity, riskiness and expected negative return), it is clear that such investor detriment cannot be entirely and adequately controlled through the mere application of these rules. This type of disclosure does not sufficiently draw clients' attention to the concrete consequences (negative expected returns) of investing in these products and does not address concerns inherent to the product's features.

48. The AMF has also taken into consideration the relevance of the disclosure rules under PRIIPs Regulation. This regulation lays down uniform rules on the format and content of the key information document to be provided by manufacturers of packaged retail and insurance based investment products ('PRIIPs') to retail investors in order to help them understand and compare the key features and risks of a PRIIP. In particular, Article 5 of this regulation sets out inter alia a methodology for the presentation of the summary risk indicator and accompanying explanations including whether the retail investor can lose all invested capital or incur additional financial commitments. However, this type of disclosure does not sufficiently draw retail clients' attention to the consequences of investing in binary options in particular. For example, the performance ratio only relates to the individual binary option product and does not provide the client with the overall percentage of retail client accounts that lose money.
49. More generally, a disclosure-based regulatory solution is inappropriate for these products, which are in themselves unsuitable for retail clients.
50. MiFID 2 also strengthened the requirements on suitability by requiring the delivery of a suitability report to the client and refining the suitability assessment. In particular Article 25(2) of MiFID 2 requires binary options providers to obtain the necessary information regarding the client's or potential client's knowledge or experience in the investment field relevant inter alia to the specific type of product, the client's or potential client's financial situation including their ability to bear losses, and their investment objectives including their risk tolerance so as to enable the binary options provider to recommend the client or potential client financial products that are suitable for them and are in accordance with their risk tolerance and ability to bear losses. However, the suitability requirements are only applicable to the provision of investment advice and portfolio management and hence they are usually irrelevant in relation to the marketing, distribution or sale of binary options, which mostly occurs via electronic platforms, without the provision of investment advice or portfolio management.
51. Furthermore, the objectives of the suitability assessment (considering products against clients' knowledge and experience, financial situation and investment objectives) are substantially unchanged compared to the regime in MiFID and, as evidenced in this Decision, have not been sufficient to avoid the investor detriment identified.
52. MiFID 2 also strengthened the requirements on appropriateness, mainly by narrowing down the list of non-complex products and therefore restricting the scope of products for execution-only services. Article 25(3) of MiFID 2 requires binary options providers to ask their clients or potential clients to provide information regarding their knowledge and experience in the investment field relevant inter alia to the specific product offered or demanded so as to enable the provider to determine whether that product is appropriate for the client or potential client. If the provider considers the product inappropriate for the client or potential client, the provider shall warn them.

Binary options qualify as complex financial products and therefore are subject to the appropriateness test pursuant to Article 25(3) of MiFID 2.

53. However, that was already the case under MiFID, which provided for substantially the same appropriateness test as the one set out in MiFID 2. As evidenced in this Decision and as NCAs' supervisory experience has demonstrated²⁷, the appropriateness test has not been sufficient to address the investor protection concerns described in this Decision.
54. Both the suitability and appropriateness tests under the existing regulatory requirements therefore are unlikely to prevent retail clients from trading binary options in a way that ensures that the significant investor protection concern is addressed.
55. With regard to best execution, most of the best execution rules by themselves already existed under MiFID. However, these rules have been strengthened under MiFID 2. In particular, Article 27 of MiFID 2 provides that investment firms must take 'all sufficient steps' (and no longer 'all reasonable steps') to obtain the best possible result for their clients when executing orders. Furthermore, additional information has to be published by market participants and in particular investment firms are required to disclose the top five venues where they executed client orders and the outcomes achieved when executing those orders.
56. The AMF has considered whether the revised best execution rules could address at least some of the concerns identified in relation to the marketing, distribution or sale of binary options to retail clients. Increased transparency around order execution helps clients to better understand and to evaluate the quality of the firm's execution practices and thus to better assess the quality of the overall service provided to them. In addition, improved information on how firms execute clients' orders, assists clients when monitoring that the firm has taken all sufficient steps to achieve the best possible results for the client. The requirements in relation to best execution also strengthen the best execution standard in relation to OTC products by requiring firms to check the fairness of the price proposed to the client when executing orders or taking decisions to deal in OTC products, including bespoke products. The requirements in MiFID 2 imply gathering market data to use for the estimation of the price of such products and, where possible, by comparing with similar or comparable products. However, the best execution rules by themselves do not address the risks linked to the product's features, other than execution, and to the wide marketing, distribution or sale of these products to retail clients.
57. In respect of these substantially similar existing regulatory requirements, ESMA has repeatedly noted the risks described above in investor warnings²⁸, Questions and Answers (Q&As)²⁹ and its opinion on 'MiFID practices for firms selling complex products'³⁰. Despite the use of such instruments designed to ensure a consistent and effective application of existing regulatory requirements, the investor protection concerns persists. This highlights that these requirements do not address the concern identified.
58. The AMF has also considered the potential impact of the product governance rules set out in Articles 16(3) and 24(2) of MiFID 2. These rules require providers manufacturing financial instruments (including therefore binary options) for sale to clients to ensure that the products are designed to meet the needs of an identified target market of end clients within the relevant

²⁷ See ESMA decision (EU) 2018/795 of 22 May 2018, recital 62.

²⁸ ESMA's investor warning on 'risks in investing in complex products' of 7 February 2014 and ESMA's investor warning on 'CFDs, binary options and other speculative products' of 25 July 2016.

²⁹ Questions and Answers (Q&As) relating to the provision of CFDs and other speculative products to retail investors under MiFID (ESMA35-36-794) as updated on 31 March 2017.

³⁰ Opinion on MiFID practices for firms selling complex financial products of 7 February 2014 (ESMA/2014/146).

category of clients; that the strategy for distribution of the products is compatible with the identified target market; and that the providers take reasonable steps to ensure that the financial instruments are distributed to the identified target market and periodically review the identification of the target market and the performance of the product. Binary options providers shall understand the financial instruments they offer or recommend, assess the compatibility of the instrument with the needs of the client to whom it provides investment services, also taking into account the identified target market of end clients, and ensure that financial instruments are offered or recommended only when it is in the interest of the client. Furthermore, binary options providers that would distribute a financial instrument not manufactured by them shall have appropriate arrangements in place to obtain and understand the relevant information concerning the product approval process, including the identified target market and the characteristics of the product. Binary options providers distributing financial instruments manufactured by providers not subject to the product governance requirements in MiFID 2 or by third-country providers shall also have appropriate arrangements to obtain sufficient information about the financial instruments.

59. The product governance requirements have been introduced for the first time in Union law under MiFID 2 and have been further clarified by ESMA³¹.
60. The purpose of these requirements is to narrow down the type of clients (that is, the target market) for which financial instruments would be appropriate and to which they should therefore be distributed. Considering the features of binary options (high degree of losses, negative expected return, short term of contracts, complexity of pricing structures, and in general the lack of reasonable investment objectives), NCAs and ESMA are of the view that no positive retail target market could be determined. Several firms, after implementation of MiFID 2 and the product governance requirements, still market binary options to the mass market.
61. Considering the foregoing, and in accordance with the provision of Article 42(2)(b) of MiFIR, the AMF is satisfied that existing regulatory requirements applicable under Union law do not sufficiently address the risks for investor protection identified in relation to the marketing, distribution and sale of binary options to retail clients should ESMA decide not to renew its product intervention measure.

IV. Absence of disproportionate effect (Article 42(2)(c) of MiFIR)

62. The various measures adopted under French law, such as the prohibition of digital marketing communication relating to the provision of investment services on certain financial contracts defined under the General Regulation of the AMF³² or the publication of a « black list » of websites unauthorized to distribute binary options, have proven insufficient to adequately address identified investor protection concerns raised by the marketing distribution and sale of binary options to retail clients.
63. Taking into account the nature of these risks (in particular the high level of loss registered by retail clients investing in binary options, negative expected returns, complexity of pricing structures, embedded conflicts of interests between binary options providers and investors), the relatively high number of investors exposed to these products and the level of knowledge of investors investing in binary options, which are complex products difficult to understand for retail investors, the AMF is satisfied, in accordance with the provisions of Article 42(2)(c) of MiFIR, that a prohibition of the marketing, distribution and sale of binary options to retail clients is justified and

³¹ ESMA, Guidelines on MiFID II product governance requirements, 2 June 2017 (ESMA35-43-620).

³² Articles L. 533-12-7 of the French Monetary and Financial Code and 314-7 of the AMF General Regulation, as further specified by AMF position 2017-01 ; Article L. 222-16-1 of the French Consumer Code.

proportionate in order to mitigate the insufficiency of existing regulatory requirements applicable under Union law and national law and provide an adequate protection to retail investors.

64. Furthermore, the AMF notes that, further to ESMA's call for evidence on potential product intervention measures on contracts for differences and binary options to retail clients³³, ESMA decided on 22 May 2018 to prohibit, during three months, the marketing, distribution and sale of binary options to retail clients. This ban has been renewed by ESMA on 21 September 2018, on 14 December 2018 and on 22 March 2019. This prohibition of the marketing, distribution and sale of binary options to retail clients is in force since 2 July 2018. The adoption by the AMF of a national measure equivalent to the one adopted by ESMA, which aim at taking over ESMA's measure when expiring in order to ensure the continuity of such prohibition, should not have any significant impact on investors and market participants.
65. The adoption by the AMF, as well as other NCAs, of a national intervention measure on binary option is also necessary in order to address any possible resurgence of the investor protection concerns related to the marketing, distribution and sale of binary options to retail clients at the time where the measure adopted by ESMA, whose powers are only temporary, will come to expiry. In this regard, the AMF notes that the Netherlands, Poland and the United Kingdom have recently notified ESMA of their intention to implement their product intervention powers in order to adopt national measures. These measures gave rise to the issuing of an ESMA opinion considering such measures to be justified and proportionate and inviting other NCAs to adopt national measures at least as stringent as those adopted by ESMA³⁴.
66. Prior to the adoption of national product intervention measures on binary options and CFDs, the AMF has carried out a public consultation from 25 March to 15 April 2019 on its draft decisions in order to gather feedback from interested investors and market participants. The AMF has received 40 answers during this consultation, nearly half of which come from associations representing consumers and investors, the other replies being issued by professional associations or market participants active on the CFD and binary options markets. The vast majority of respondents expressed a favourable opinion on the draft national measures subject to consultation and regarding the approach taken by the AMF, consisting in the adoption of national measures having a similar nature and scope to that of ESMA's measures.
67. Considering the foregoing, the AMF considers that the adoption of a decision prohibiting the marketing, distribution and sale of binary options to retail clients in France or from France cannot be regarded as disproportionate, having regard to the nature of identified risks, to the level of sophistication of concerned investors or market participants and to the likely effect of this measure on investors or market participants who may hold, use or benefit from the concerned products.

V. Absence of discriminatory effect (Article 42(2)(e) of MiFIR)

68. Considering the identified risks, the type and number of concerned investors, the position previously expressed by ESMA regarding the marketing of binary options to retail clients and the measures adopted by ESMA or certain Member States in order to address the risks raised by binary options for retail investors and given the fact that the marketing, distribution or sale of binary options mainly occur cross-border and that, in accordance with Article L. 621-2, paragraph 2 and

³³ Call for evidence on potential product intervention measures on contracts for differences and binary options to retail clients of 18 January 2018 (ESMA35-43-904).

³⁴ ESMA, Press release of 2 April 2019 (*ESMA issues four positive opinions on national product intervention measures, ESMA71-99-1138*).

Article L. 621-13-7, I of the French Monetary and Financial Code, and Article 42 of MiFIR, the AMF is only entitled to restrict or prohibit the marketing, distribution and sale of certain products to the extent that this activity occurs in France or from France, the AMF considers that the envisaged prohibition measure provides for equal treatment of the marketing, distribution or sale of binary options regardless of the Member State from which those services or activities are carried out and does not have a discriminatory effect on services or activities provided from another Member State, in accordance with Article 42(2)(e) of MiFIR.

VI. Consultation and notice (Article 42(2)(d) and (f), 42(3) and 42(5) of MiFIR)

69. In accordance with Article 42(2)(d) of MiFIR, the AMF has properly consulted competent authorities in other Member States that the AMF considered likely to be significantly affected by its decision, namely the NCAs of Belgium, Cyprus, Latvia and the United Kingdom (the Cypriot and Latvian NCAs supervising actors having marketed and broadcasted advertisement for binary options in France in 2017 and the United Kingdom having a developed and active binary options industry).
70. In accordance with Article 42(3) of MiFIR, the AMF has, one month before the date on which the measure is intended to take effect, informed all other competent authorities and ESMA in writing of the details of: (a) the financial instrument to which the proposed action relates; (b) the precise nature of the proposed prohibition and when it is intended to take effect; and (c) the evidence upon which it has based its decision and upon which it is satisfied that each of the conditions in Article 42(2) of MiFIR are met.
71. In accordance with Article 42(2)(f) of MiFIR, the AMF did not consult public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, as the AMF has considered that binary options subject to this decision do not raise a serious threat to the orderly functioning and integrity of the physical agricultural markets. The AMF nonetheless informed these authorities of its decision.
72. In accordance with Article 42(3) of MiFIR, the AMF publishes on its website a notice of this Decision, specifying its details, the date on which it takes effect and the evidence upon which it is satisfied that each of the conditions laid down in Article 42(2) of MiFIR are met.

VII. Decision

73. On the basis of Article L. 621-13-7, I and Article L. 621-2, paragraph 2 of the French Monetary and Financial Code, and 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 and Article 21 of Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions, the AMF decides the following :

Article 1

Temporary prohibition on binary options in respect of retail clients

1. The marketing, distribution or sale to retail clients of binary options is prohibited.

2. « Binary options » means any derivative (within the meaning of Article 2(1)(29) of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments), irrespective of whether it is traded on a trading venue, that has the following features :

- (i) it must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;
- (ii) it only provides for payment at its close-out or expiry;
- (iii) its payment is limited to:
 - a) a predetermined fixed amount or zero if the underlying of the derivative meets one or more predetermined conditions; and
 - b) a predetermined fixed amount or zero if the underlying of the derivative does not meet one or more predetermined conditions.

3. The prohibition in paragraph 1 does not apply to:

- (i) a binary option that meets the following conditions:
 - a) the term from issuance to maturity is at least 90 calendar days;
 - b) a prospectus drawn up and approved in accordance with Directive 2003/71/EC is available to the public; and
 - c) the binary option does not expose the provider to market risk throughout the term of the binary option and the provider or any of its group entities do not make a profit or loss from the binary option, other than previously disclosed commission, transaction fees or other related charges;
- (ii) a binary option for which the lower of the two predetermined fixed amounts is at least equal to the total payment made by a retail client for the binary option, including any commission, transaction fees and other related costs.

4. « Retail clients » means clients not meeting the conditions set forth in paragraph 2 of Article L. 533-16 of the French Monetary and Financial Code.

Article 2

Prohibition of participating in circumvention activities

It shall be prohibited to participate knowingly in activities the object or effect of which is to circumvent the requirements in Article 1.

Article 3

Entry into application

1. This Decision enters into application on the day of its publication on the website of the AMF and only apply in relation to actions taken after this publication, in accordance with Article 42(5) of MiFIR.
2. This Decision shall apply until it is revoked by the AMF in accordance with the conditions set forth in Article 42(6) of MiFIR.