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REGULATORY DEFICIENCIES IN INVESTOR PROTECTION ON THE CFD MARKET IN POLAND

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ABSTRACT

The purpose of the article. Retail investors in capital markets have enhanced accessibility to a broad spectrum of financial instruments via online trading platforms operated by investment firms. However, these instruments are inherently complex and high-risk, making independent analysis and informed decision-making particularly challenging for non-professional investors. Leveraged products amplify both gains and losses, posing heightened risks in volatile markets like cryptocurrencies. This article critically examines the limitations of the current regulatory framework governing contracts for difference (CFDs) in Poland, following regulations introduced (Decision No. DAS.456.2.2019) by the Polish Financial Supervision Authority (KNF). This decision established restrictions on the offering, distribution, and sale of CFDs to retail clients.

Methodology. This study adopts a regulatory and market analysis approach to identify critical deficiencies and challenges in investor protection within the Polish CFD market. It relies on a review of legal frameworks, supervisory reports, and publicly available data from CFD brokers. Key areas of analysis include supervisory reports from the KNF, assessment of risk disclosures, examination of brokerage models, evaluation of cross-border activities, and review of marketing strategies.

Results of the research. The analysis highlights persistent issues such as the circumvention of restrictions by cross-border brokers, the continued use of aggressive marketing strategies, and unresolved conflicts of interest within brokerage models. By reviewing legal frameworks, reports, and CFD broker data highlights regulatory shortcomings in investor protection. The findings suggest that while regulatory interventions have introduced certain protective measures, significant loopholes allow brokers to maintain high-risk practices. The article calls for enhanced regulatory oversight and provides recommendations for strengthening investor protection in the Polish financial market.

Keywords: CFD, ESMA, MIFID II, Capital markets.

JEL Class: G15, G24, G41, K22.

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Regulatory Deficiencies in Investor Protection on the CFD Market in Poland

Individual investors in the capital markets have an increasingly easy access to a wide range of financial instruments offered by online trading platforms operated by investment firms. However, the financial instruments offered through these brokerage platforms are inherently high-risk and complex, posing significant challenges for retail clients attempting independent analysis and evaluation (UKNF, 2020). Such financial instruments frequently incorporate leverage mechanisms, wherein the underlying assets are often subject to significant price fluctuations, particularly in highly volatile markets such as cryptocurrencies. Concurrently, there has been a notable rise in fraudulent activities involving the impersonation of entities within the broader financial sector, targeting investment products and services (CSIRT KNF, 2023, p. 7).

In recent years, substantial efforts have been undertaken at both the European level and within individual EU member states to enhance the protection of individual investors, including those engaged in CFD trading. CFDs have gained significant popularity over the past decade, largely due to the potential for exceptionally high returns, amplified by extensive promotional campaigns led by both licensed brokerage entities and unlicensed brokers operating outside regulatory frameworks.

The Markets in Financial Instruments Directive 2014 (hereafter MiFID II), incorporated into Polish legislation through an amendment to the Act of July 29, 2005, on trading in financial instruments, alongside the Markets in Financial Instruments Regulation (MiFIR) and other delegated acts, introduced substantial enhancements to investor protection within the European Union. Under these regulatory frameworks, all communications by investment firms to clients must be fair, clear, and non-misleading (MiFID II, 2014, Art. 24, sec. 3). Additionally, firms are obligated to execute orders under conditions most favourable to the client (MiFID II, 2014, Art. 27, sec. 1) and to effectively manage conflicts of interest (MiFID II, 2014, Art. 23, sec. 1).

On May 22, 2018, pursuant to Article 40 of MiFIR, the European Securities and Markets Authority (ESMA) implemented a temporary product intervention, which included leverage limit restrictions and safeguards against negative account balances (ESMA, 2018a). This decision was subsequently renewed three times, extending its validity until July 31, 2019, through successive ESMA renewals (ESMA, 2018c; ESMA 2019a; ESMA 2019b). These measures were subsequently adopted by the national supervisory authorities of most member states, including Poland. Currently, efforts are focused on the EU Commission's Retail Investment Strategy, which is expected to substantially influence the regulation and promotion of CFD trading (European Commission, 2023). Based on the literature review and the regulatory context, the following research hypotheses are formulated:

- H1: The current regulatory framework in Poland does not provide adequate protection for participants in the capital market;

- H2: The regulatory measures introduced in Poland as a result of ESMA’s and subsequent KNF’s product intervention contributed to a measurable decline in retail investor losses associated with CFD trading;
- H3: Cross-border operations of CFD brokers increase the risk of regulatory circumvention and limit the effectiveness of national enforcement mechanisms;
- H4: The Market Maker model used by CFD brokers creates a conflict of interest detrimental to clients;
- H5: Aggressive marketing practices, including affiliate schemes, persist despite regulatory restrictions

Literature review

The literature review was divided into two segments:

1. Characteristics of contracts for differences.
   This section will discuss the characteristics of CFDs, their structure and mechanisms of operation.
2. ESMA's product intervention and its implications for Polish regulation of CFD brokers.
   This section presents the actions of the ESMA regarding the regulation of the CFD market and their further implications for the Polish law.

Characteristics of contracts for differences

Contracts for Difference (CFDs) are derivative financial instruments that do not meet the criteria for classification as transferable securities (Act on Trading, 2005, Art. 2, Sec. 1, Pt. 2, Letter h). These instruments are inherently complex and lack standardization, posing significant risks to individual participants in the capital market (ESMA, 2018a). The primary sources of risk stem from the leverage mechanism, which amplifies both potential gains and losses, and the fact that CFDs are traded over-the-counter (OTC), exposing investors to counterparty risk and reduced market transparency (Brown, Dark & Davis, 2010, p. 1109).

CFDs are generally understood as contracts between a buyer and a seller based on the difference between the current price of the underlying asset and its price at the contract’s close (Gołębiowski, 2012, p. 26). These instruments are predominantly utilized for speculative purposes, effectively representing a “bet” between the investment firm and the speculator on whether the underlying asset's price will rise (resulting in a gain for the long position holder) or fall (benefiting the short position holder).

Investment firms often promote CFDs as a convenient alternative to traditional securities investments, frequently employing aggressive marketing strategies that fail to comply with relevant legal standards (European Commission, 2016 – Regulation 2017/565, Art. 44 sec. 2 letter b). Advertisements for CFDs commonly lack a balanced presentation of potential benefits and associated risks, instead presenting a one-sided narrative aimed at encouraging clients to purchase these instruments, irrespective of their suitability for the individual investor (ESMA, 2018a, sec. 2.5, pts. 41–52; KNF, 2019, p. 7).

CFDs are leveraged financial instruments that require traders to commit only a fraction of the total position value as margin. Leverage allows traders to control larger amounts than they actually possess, which can lead to significantly higher profits but also amplifies potential losses. Given the high volatility of underlying assets, investors face the risk of rapidly losing their entire invested amount (AMF, 2019, pp. 6–7, pts 21–30). Consequently, CFDs are suitable only for investors with a high capacity for loss absorption. Unlike similar financial instruments, such as non-deliverable forwards (Sobol & Szmelter, 2022, pp. 112–113), CFDs are characterized by leverage and the absence of an expiration date, enabling traders to maintain open positions indefinitely. This feature, however, may lead to additional costs, including transaction commissions, bid-ask spreads, and overnight swap fees for holding positions overnight (Barnes, 2018, p. 6).

The settlement of a CFD is contingent upon changes in the value of the un-derlying asset (for instance, the level of a stock market index) over the contract's duration, with settlement occurring at the contract’s closing price. ESMA highlights the common practice among CFD brokers of requiring clients to acknowledge that the reference prices for contracts may deviate from those available in the market where the underlying asset is traded. This discrepancy can complicate clients’ ability to verify the reliability of prices used for contract settlement (ESMA, 2018a, sec. 2.1, pts 14–16).

ESMA's product intervention and its implications for Polish regulation of CFD brokers.

Before 2015, CFDs were not subject to specific regulation in Poland. The Polish Financial Supervision Authority (KNF) recognized the growing popularity of this market and addressed some relevant issues in its Position of July 17, 2013, regarding the conduct of investment firms in the Forex market (UKNF, 2013). This Position highlighted the aggressive advertising and promotional practices within this market and emphasized that derivatives are complex financial instruments associated with high levels of investment risk. The KNF discussed the inherent risks of leverage mechanisms and noted that, based on its research conducted in 2011, 82% of active customers using online Forex trading platforms experienced financial losses. Due to statutory and constitutional limitations on its authority, the KNF’s Position was restricted to clarifying the existing legal framework and providing a non-binding interpretation of the relevant law.

The first regulatory restrictions affecting CFDs in Poland were introduced in 2015, establishing a maximum leverage of 1:100 for derivatives (including CFDs) by requiring a minimum margin of at least 1% of the nominal value of the financial instrument (Amendment of Act on Trading, 2014). Despite this leverage re-striction, instances of regulatory circumvention were reported, with traders declaring foreign residency based on varying levels of documentation reliability. This workaround was noted by anonymous contributors on a Polish Forex trading forum (Forex Forum Navigator, 2015).

In 2016, ESMA issued a warning regarding CFDs, expressing concerns about the unsuitability of this financial instrument, particularly in terms of advertising and offering it to clients who may not fully comprehend the associated risks (ESMA, 2016). On March 27, 2018, ESMA invoked Article 40 of the MiFIR Regulation to introduce temporary intervention measures on binary options and CFDs (ESMA, 2018b).

These measures formally took effect on August 1, 2018 (ESMA, 2018a) and remained in place until July 31, 2019 (ESMA, 2020, p. 3). In its decision on product intervention, the European regulator highlighted several key concerns:

- significant increase in the popularity of CFDs within the EU;
- speculative, complex, and high-risk nature of this financial instrument;
- widespread use of high leverage levels, reaching up to 1:500;
- complexity of fee structures and lack of standardization in CFDs;
- potential discrepancies between the quotes provided by contract issuers and actual market quotes;
- aggressive marketing strategies employed by CFD brokers;
- numerous complaints from retail clients;
- the high rate of losses among retail clients;
- Instances where higher leverage was offered to retail clients than to professional clients;
- absence of suitability assessments to match the client's knowledge, alongside insufficient risk warnings,
- inadequacy of existing EU regulations in providing sufficient investor protection.

As part of its product intervention, ESMA established detailed requirements for the minimum initial margin in Annex I to its Decision (ESMA, 2018a, Appx. 1), resulting in a substantial reduction in permissible leverage. The regulation linked allowable leverage levels to the volatility of the underlying instrument, effectively limiting the maximum investment risk. The maximum allowable leverage was set at 1:30 for major currency pairs, while the lowest limit applied to cryptocurrencies, with a maximum leverage of 1:2. This intervention marked a substantial reduction in leverage, particularly considering that, prior to its implementation, leverage levels in some EU countries reached up to 1:500, and in Poland, 1:100 across all underlying instruments.

Standardized risk warnings were defined in terms of both content and visual format, depending on the medium of display. For example, if published information is delivered in websites and durable media, a more detailed format is required (Figure 1). In the further part of the article, the obligation to publish risk disclosures is used to analyse the percentage of losing clients among European CFD brokers.

Figure 1

Durable medium and webpage provider-specific risk warning

CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage.
[insert percentage per provider] % of retail investor accounts lose money when trading CFDs with this provider.
You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.

Source: ESMA (2018a, Appx. 2 sec. B).

As part of these standardized warnings, CFD providers are required to disclose the percentage of retail client accounts that have incurred losses, updated quarterly and based on a rolling 12-month period. An account is classified as "losing" if the net sum of all realized and unrealized transactions within this period is negative, inclusive of all associated CFD costs (ESMA, 2018a, Appx. 2, Sec. A, Pt 4). As part of its product intervention decision, ESMA established requirements for retail customer protection, including safeguards against negative balances, automatic position closing, and a ban on monetary and non-monetary incentives in the offering of CFDs. No additional granular rules were introduced regarding best execution, conflict of interest management, crossborder activities of non-EU firms, or specifically, the inducements regime established by MIFID II.

In Poland, a key regulation governing CFDs is the KNF's Decision of August 1, 2019, which imposes restrictions on the marketing, distribution, and sale of contracts for differences (CFDs) to retail clients (KNF, 2019). Under this Decision, issued pursuant to Article 42(1)(A) of the MiFIR Regulation, the KNF limits the distribution and sale of CFDs to retail customers by setting specific conditions for CFD providers. This action by the KNF continues the European Securities and Markets Authority's (ESMA) earlier product intervention in this area and aligns with similar product interventions implemented across Europe. Under these regulations, CFD providers must fulfill several conditions to offer their services. Thus, they are forced to introduce specific measures to protect the retail client, in particular by:

- requirement to establish an initial margin (the inability to open positions without blocking certain funds in the account);
- requirement to protect the client from negative balances (preventing the client from incurring a loss exceeding the value of the deposited funds);
- requirement to apply leverage limits for specific types of underlying assets:
  - major currency pairs – 1:30;
  - major stock market indices, other currency pairs, gold – 1:20;
  - commodities or other stock market indices – 1:10;
  - equities and unlisted stocks – 1:5;
  - cryptocurrencies – 1:2;

- requirement to close a customer's most loss-making transactions if the value of deposited funds falls below a certain level;
- requirement to include standardized warnings in advertising materials about risks;
- prohibition on providing the client with any benefits beyond the realized profits from the delivered CFDs ("prohibition on offering bonuses").

The above regulations are analogous to those applied by ESMA under the now-defunct product intervention.

Methods

This study adopts a regulatory and market analysis approach to identify key gaps and challenges in investor protection related to CFDs in Poland. The research is based on a review of legal frameworks, supervisory reports, and publicly available data from CFD brokers. The key areas of analysis include:

- supervisory reports and industry data – review of KNF publications on CFD market activity, with attention to investor losses, compliance trends, and enforcement actions between 2011 and 2023;
- risk disclosure assessment – comparison of standardized risk warnings from 26 EU-based CFD brokers and 5 brokers registered in Poland, focusing on reported loss rates among retail clients as of Q2 2024;
- analysis of brokerage models – examination of execution practices used by CFD providers, particularly the Market Maker (MM) and Straight-Through Processing (STP) models, and their implications, including conflicts of interest;
- cross-border activity evaluation – investigation of the presence of 739 investment firms notified to the KNF, including 398 entities permitted to offer CFDs, to explore potential regulatory arbitrage;
- marketing strategies review – identification of promotional techniques used by CFD brokers, including aggressive advertising, social media outreach, brand recognition and the role of influencers.

The study does not employ econometric modeling due to limited access to data but instead provides a structured examination of regulatory developments and market practices. The findings highlight persistent regulatory loopholes and the need for stronger enforcement mechanisms to enhance investor protection in the Polish financial market.

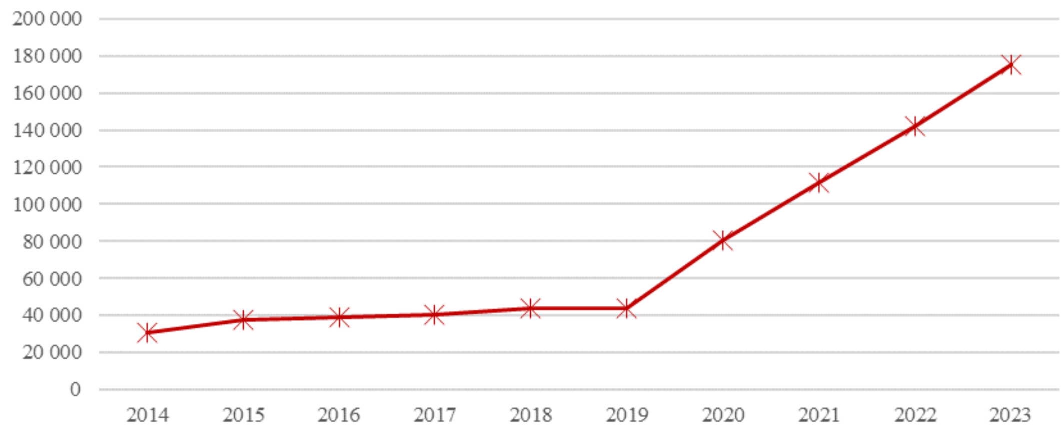
Results

Traders' results in relation to CFD trading before and after ESMA product intervention

ESMA's product intervention initially faced criticism from the Polish brokeage community. A 2019 survey by the Polish Chamber of Brokerage Houses (IDM) and Comparic.pl (n=459) suggested that the measures did not improve trading outcomes (IDM, 2019, p. 1). The study linked leverage restrictions to increased trader migration to non-ESMA jurisdictions, where regulatory arbitrage allowed easier access to higher leverage. Despite these restrictions, the number of clients trading OTC derivatives grew, highlighting the ongoing challenge of cross-border brokerage oversight (see Figure 2).

Figure 2

Number of active clients trading OTC derivatives in Poland



Source: own study based on UKNF data.

From a legal perspective, it is important to note that current regulations do not prohibit clients residing in EU Member States from entering into agreements with investment firms that operate exclusively outside the EU. According to Article 42 of MIFID II: »Member States shall ensure that where a client (…) established or located in the Union causes, on its own exclusive initiative, the provision of an investment service or investment activity by a firm from a third country, the requirement to obtain an authorisation (…) shall not apply«. Without the requirement to obtain authorization, these entities are not subject to oversight by EU supervisory authorities and are not obligated to comply with provisions implementing MiFID II.

Recital 111 of MiFID II provides a key interpretative framework for the provision of financial services by third-country firms within the EU. It clarifies that services initiated solely at the request of an EU-based client are not considered to be provided within the EU. However, if a non-EU firm engages in solicitation, advertising, or marketing targeting EU clients, these services cannot be deemed as client-initiated, serving as a safeguard against regulatory circumvention under Article 42 of the Directive. While this provision aims to prevent third-country firms from bypassing EU regulations by falsely attributing service initiation to clients, its effectiveness is undermined by the global nature of digital marketing and online platforms. The internet enables firms to reach EU-based clients through indirect promotion, algorithmic targeting, and affiliate partnerships, making enforcement of this rule challenging.

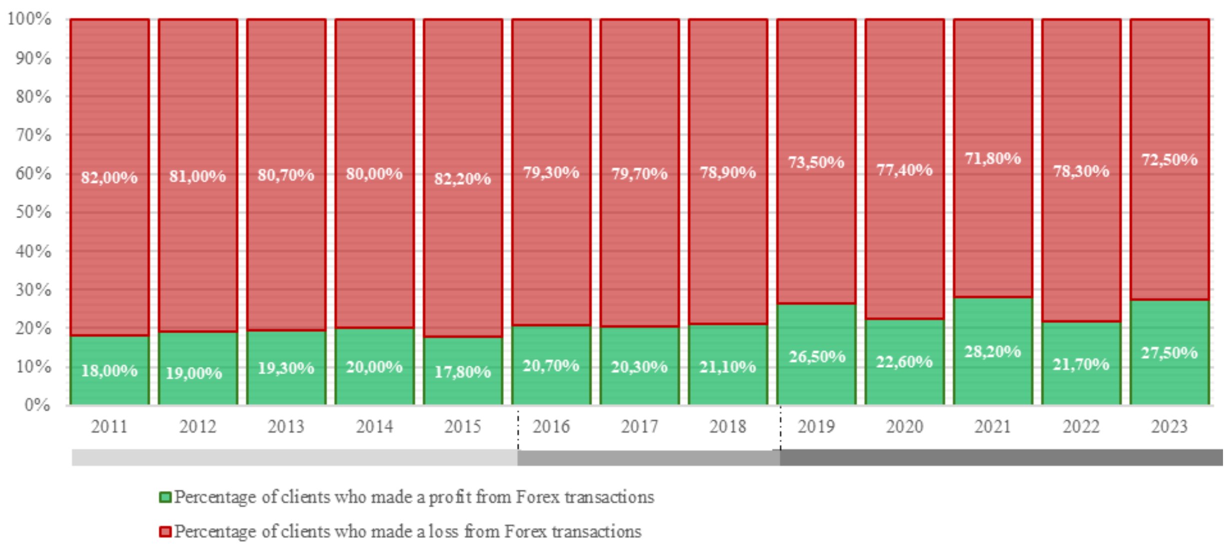
Addressing the IDM study's conclusions, it reported that most traders did not perceive an improvement in their CFD trading outcomes following ESMA's product intervention, with 36% even claiming a deterioration in results. However, this perception is inconsistent with more reliable data from the Office of Polish Financial Supervision Authority (UKNF) regarding capital market paticipants' losses in Poland associated with CFD trading (see Figure 3).

In the period under review (2011–2023), three additional periods were marked;

1. period before the ban on leverage higher than 1:100, i.e. before the amendment of the Act on Trading in Financial Instruments (2011–July 16, 2015);
2. period from the entry into force of the amended Act, but before ESMA intervention and the subsequent decision of the KNF (July 16, 2015–August 1, 2018) (Amendment of the Act on Trading, 2014, Art. 73. changes).
3. period starting from the date of application of the aforementioned ESMA intervention, with continued regulation in connection with the 2019 KNF Decision (from August 1, 2018).

Figure 3

Ratio of booked annual losses or profits of capital market participants in Poland in 2011–2023 from transactions using over-the-counter derivatives



Source: own study based on UKNF data available in annual publications.

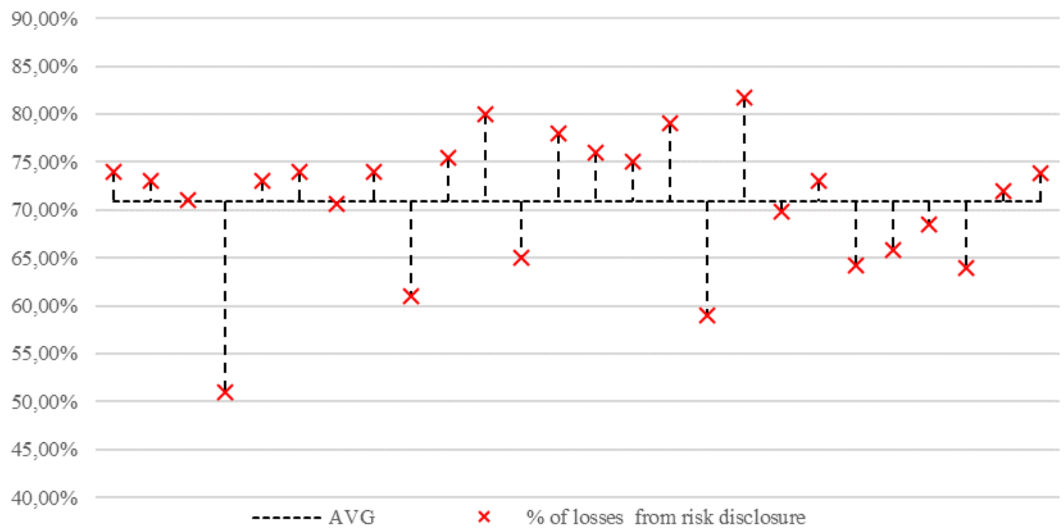
Prior to the introduction of leverage-limiting regulations, losses among individual clients using derivatives consistently exceeded 80% of all such clients. After leverage was restricted to 1:100, the percentage of individual market participants incurring losses from these transactions decreased slightly, fluctuating between just below 80% and slightly above 78%. A significant reduction in retail investor losses became evident only following ESMA's product intervention. Notably, even during the heightened market volatility of the COVID-19 pandemic, losses among retail investors remained lower than in the pre-intervention period. Since the implementation of these regulatory measures, the proportion of retail clients in Poland concluding the calendar year with a net loss from OTC derivatives, including CFDs, has declined, despite an overall increase in the number of active users of these instruments (see Figure 2).

In 2023, retail clients represented 99.8% of Forex transaction participants through brokerage houses and offices, accounting for 87.1% of the nominal value of transactions (UKNF, 2024a, p. 1). A similarly high proportion of retail client participation in the Forex market has been observed in prior years, according to UKNF data. Over the period from 2014 to 2023, client losses totaled PLN 9.316 billion.

An analysis of 26 standardized risk disclaimers concerning the percentage of retail clients who incurred losses with a given broker through CFD trading over the past 12 months shows that major brokers registered in the EU reported a comparable average loss rate of 70.86% (Figure 4.). According to ESMA data from various EU jurisdictions, this average was between 74% and 89% prior to the product intervention. EU-based brokers were included in this analysis because they have the capability to serve Polish clients, a factor not covered in KNF statistics, whichis limited to data from CFD brokers based in Poland. During the analyzed period, there were only five such brokers operating domestically.

Figure 4

Percentage of losing clients from CFD trading with 26 selected brokers based inthe EU excluding Poland



Source: own study based on data from brokers offering CFDs in the EU. As of June 30, 2024.

Both data from the 2024 risk disclosures of European CFD brokers and UKNF data from the post-ESMA intervention period (2019–2023) indicate a reduction in the percentage of losing CFD traders following the introduction of regulatory measures. However, studies suggest that traders with a higher risk tolerance may, due to the reduced availability of financial leverage, shift toward using higher risk underlying instruments to achieve similar levels of volatility, potentially limiting the intervention's effectiveness (Pelser, 2024, p. 21). Furthermore, significant gaps remain in safeguarding individual investors within the financial market concerning CFDs. According to the ESMA TRV Risk Monitor report for Q3 2023, a quarter of all customer complaints to NCAs in the EU pertained to CFDs (data from 13 NCAs, excluding the Netherlands and Poland both key CFD markets). The proportion of complaints related to CFD trading has been declining since the COVID-19 pandemic, when record complaints were driven by heightened market volatility (ESMA, 2024a, p. 20; ESMA, 2024b, p. 26).

CFD brokers' order execution models and related conflicts of interest

Contracts for difference (CFDs) are not classified as transferable securities and are therefore not subject to registration in the deposit systems managed by central securities depositories (CSDs). These contracts are typically executed outside of regulated markets (such as stock exchanges), often directly between two financial parties without the involvement of a Central Counterparty (CCP). In most cases, one party is a broker operating under the market maker ("MM") model. In this model, the broker profits not only from standard brokerage fees and commissions but also from client losses upon contract settlement and position closure, as the broker functions both as the market maker and a counterparty to the transaction.

According to Article 33(a) of Commission Delegated Regulation (EU) 2017/565, identifying potential conflicts of interest in the provision of investment services involves assessing situations in which an investment firm, or individuals directly or indirectly associated with it, could gain a financial benefit or avoid a financial loss at the client's expense. These conditions suggest that the market maker model is particularly vulnerable to conflicts of interest, necessitating effective risk management and control measures (European Commission – Regulation 2017/565, p. 34, pt. 2b). However, neither the current regulations nor subsequent product interventions provide specific guidance on how this management should be implemented.

An alternative to the MM model is the ECN (Electronic Communication Network) model, in which the broker does not act as a counterparty to the transaction but serves as an intermediary, routing orders to a network of liquidity providers and charging a transaction commission for this service (Mackiewicz, 2016). In this model, the pricing of underlying instruments is derived from transaction rates within the ECN network, which generally align closely with rates on the interbank market. Additionally, this model facilitates access to the interbank market by enabling transactions from ECN network participants (e.g., investment banks) to be transmitted directly to that market.

In the STP (Straight Through Processing) model, brokers transmit client orders directly to specific liquidity providers with whom they have established relationships, rather than routing them through an ECN network. The pricing offered by STP brokers is typically derived from the quotes of these affiliated liquidity providers, and brokers may apply a markup to the spread. Consequently, while an order processed by an STP broker might reach the interbank market, it could also be executed by a liquidity provider functioning as a market maker broker (Solanki, 2024).

The order execution models presented, with the exception of the ECN model, raise significant concerns regarding their compliance with applicable regulations. Pursuant to Article 27 paragraph 1 of MIFID II: »Member States require investment firms to take all sufficient steps to obtain, when executing orders, the best possible results for the client, taking into account price, costs, speed, probability of execution and settlement, size, nature or any other aspects related to the execution of the order«. By independently executing orders under the Market Maker (MM) model or exclusively routing them to a predetermined liquidity provider, as may occur under the Straight Through Processing (STP) model, an investment firm disrupts competitive market dynamics, potentially leading to suboptimal client outcomes. This practice is unlikely to satisfy the requirements of the best execution principle, which mandates that firms take all reasonable steps to achieve the most favorable terms for their clients.

Table 1

List of all CFD brokers based in Poland Q2 2024.

Name	% of losses from risk disclosures	Model
OANDA TMS Brokers S.A.	72,00%	Market Maker
X-Trade Brokers (XTB S.A.)	77,00%	Market Maker
Brokerage House of Bank Ochrony Środowiska S.A.	70,00%	Market Maker
mBank SA (mForex)	77,00%	ECN
Alior Bank SA	75,00%	ECN

Source: own study based on broker websites and KNF data. As of June 30, 2024.

Table 2

List of the most popular CFD brokers in the EU excluding PL Q2 2024

Name	% of losses from risk disclosures	Model
Admirals Europe Ltd	74,00%	STP
CMC Markets Germany GmbH	73,00%	MarketMaker
Dukascopy Europe IBS AS	71,03%	ECN
eToro (Europe) Ltd.,	51,00%	Market Maker
FXCM (Stratos Europe Limited)	73,00%	Market Maker
FxPro Financial Services Ltd	74,00%	Market Maker
IC Markets (EU) Ltd	70,64%	Market Maker
IG Europe GmbH	74,00%	Market Maker
LYNX B.V. (“LYNX”)	61,00%	STP
Pepperstone	75,50%	Market Maker
Plus500	80,00%	MarketMaker
Saxo Bank (Saxo Bank A / S)	65,00%	MarketMaker
Trading 212	78,00%	MarketMaker

Source: own study based on CFD broker websites and broker popularity rankings in Europe, excluding entities on the KNF warning list or illegal risk discolsure (e.g. Teletrade). As of June 30, 2024.

Given the above, it is noteworthy that the market maker model is the most offered execution model among CFD brokers, both for those based in Poland (see Table 1) and for the most popular brokers across the EU (see Table 2). This prevalence is further substantiated by the comprehensive list compiled by the authors (Appendix A).

It is notable that brokers offering accounts in the market maker model often also provide clients with the option to open an account with access to the ECN network (or similar direct market access – DMA). However, such accounts typically require higher minimum trading amounts and apply a commission fee, allowing clients to trade at the market spread rather than the spread set by the CFD broker (Mosionek, 2020).

The problem of supervision over the cross-border activity of CFD brokers

The authors analyzed data on 739 investment firms that operate or have reported their willingness to operate in Poland (notified entities) based on UKNF data, including:

- 688 entities with KNF notification that conduct brokerage activity on cross-border basis, without opening a branch pursuant to permits obtained in an EU/EEA country (of which 57.85% [398 pcs.] with a permit to offer CFDs in accordance with Annex I, Section C9 to MiFID II (2014));
- 13 entities with KNF notification that opened a branch in Poland with a registered office in an EU/EEA country (of which 61.54% [8 pcs.]with a permit to offer CFD);
- 29 brokerage houses based in Poland (of which 10.34% [3 pcs.] offer CFD),
- nine banks conducting brokerage activities through brokerage houses (of which 22.22% [2 pcs.] offer CFD).

Most entities that can offer CFDs are companies located outside the country (98.78%), a trend that has been ongoing since at least 2016. It should be noted, however, that the presence of numerous foreign entities offering CFDs does not directly reflect their market share in terms of client numbers, and authorization to offer CFDs does not necessarily imply that the broker is actively promoting or engaging in such activities.

Nearly half of the entities authorized to offer CFDs in Poland through EU/EEA permits are registered in Cyprus, a jurisdiction often seen as less restrictive (Table 3). A significant number of Cypriot firms present a high risk of investor detriment due to their frequent engagement in speculative products paired with aggressive marketing practices (ESMA, 2022b).

Furthermore, non-EU/EEA firms may unlawfully extend their services to Polish clients by localizing their websites for Polish speakers, leveraging affiliate partnerships, or legally offering services through globally accessible online platforms. Notably, the actual number of entities operating in the Polish CFD market exceeds official figures, as foreign firms frequently provide brokerage services without the required authorization. This issue, underscored in NIK's audit report (NIK, 2017, p. 20), highlights the prevalence of unregulated market participants and the challenges of enforcing regulatory compliance.

Table 3

Entities notified to the Polish Financial Supervision Authority without opening a branch, with their registered office in the EU/EEA, offering contracts for differences "C9" in accordance with Annex 1 to Directive 2014/65/EU of the European Parliament and of the Council (MiFID II).

Country	National Competent Authority (NCA)	No. of entities	Share
Cyprus	Cyprus Securities and Exchange Commission (CySEC)	194	48,74%
Netherlands	Autoriteit Financiële Markten (NL-AFM)	33	8,29%
Germany	Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)	29	7,29%
Malta	The Malta Financial Services Authority (M-FSA)	21	5,28%
France	Autorité de contrôle prudentiel et de résolution (ACPR)	20	5,03%
Bulgaria	Bulgarian Financial Supervision Commission (B-FSC)	11	2,76%
Austria	Austrian Financial Market Authority (A-FMA)	9	2,26%
Luxemburg	Commission de Surveillance du Secteur Financier (CSSF)	9	2,26%
Irland	Central Bank of Ireland (CBI)	8	2,01%
Other (<2%)	others	64	16,08%

Source: own study based on data from the national supervisory authority (KNF).

It seems justified to exercise special supervision over brokerage activities provided by entities notified to the KNF, based in EU/EEA countries, including monitoring the relationship of such an institution with the client through appropriate reporting, as permitted by law (Act on Trading, 2005, Art. 88 & Art. 118). The prevalence of cross-border investment firms is not unique to Poland; many CFD firms operating across Europe choose to register in Cyprus under CySEC, even when their operations primarily target a local market (e.g., Conotoxia). This trend is driven by a comparatively less restrictive supervisory approach from certain authorities. Securing a license in one EU member state enables firms to operate across the EU/EEA on a passporting basis, which requires only a notification rather than authorization from each national authority.

The cross-border operations of investment firms pose substantial challenges for NCAs in enforcing regulations and overseeing these entities. In 2022, ESMA identified deficiencies in the effectiveness of NCA supervision over cross-border activities of regulated entities. CySEC, the supervisory authority for investment firms in Cyprus, was highlighted for its insufficient supervisory actions relative to the scale of the issue (see Table 4), and due to the high volume of complaints received from clients, companies, and other supervisory authorities concerning the cross-border activities of firms under its jurisdiction (ESMA, 2022a, pp. 8, 34).

Table 4

Summary of complaints received by NCAs subject to ESMA peer review 2021–2022

NCA	Country	Received complaints	Share
Cyprus Securities and Exchange Commission (CySEC)	Cyprus	4194	93,10%
The Malta Financial Services Authority (M-FSA)	Malta	147	3,26%
Commission de Surveillance du Secteur Financier (CSSF)	Luxemburg	96	2,13%
Autoriteit Financiële Markten (NL-AFM)	Netherlands	52	1,15%
Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)	Germany	15	0,33%
Czech National Bank (CNB)	Czech Republic	1	0,02%

Source: own study based on ESMA (2022a, p. 34).

The high volume of complaints received by CySEC is unsurprising, given that Cyprus is the primary jurisdiction for investment firms in Europe that aim to operate across the entire EU/EEA. The issue with cross-border CFD firms lies in their choice of favorable jurisdictions for such operations. ESMA has highlighted the large number of Cypriot firms offering speculative products alongside aggressive marketing strategies, creating significant risks for investors (ESMA, 2022a, p. 8). The German supervisory authority, BaFin, also reported that Cyprus-based CFD brokers accounted for the highest proportion of product intervention violations, representing 50% of all detected breaches (BaFin, 2020). However, BaFin lacks direct oversight authority over firms operating in other countries under the "European passport" framework, meaning that reports of violations must generally be relayed to the supervisory authority in the firm's home jurisdiction.

ESMA's review of five additional supervisory authorities in its report on the oversight of cross-border activities also revealed shortcomings, notably from the perspective of authorities in the target countries where entities, often registered in Cyprus, operate. These deficiencies include limited awareness of the extent of firms' cross-border activities and insufficient supervisory measures in identifying, assessing, and monitoring risks associated with cross-border operations (ESMA, 2022a, pp. 8–9).

Problems with CFD marketing

In its justification for product intervention, ESMA highlighted observations from the Belgian FSMA, the Spanish CNMV, the French AMF, and the Italian CONSOB regarding aggressive and misleading marketing practices related to CFDs. One such practice involved brands associating with or sponsoring major sports teams, creating a misleading impression that complex, speculative products like CFDs are suitable for the retail mass market by fostering general brand awareness (ESMA, 2018a, Sec. 2.5, Pt 44). This concern about brand promotion was echoed in ESMA's 2023 Final Report on the Common Supervisory Action and Mystery Shopping Exercise on marketing (ESMA, 2024c, p. 30).

More than five years after the ESMA product intervention and the KNF decision on CFDs, practices that seem to adhere to regulations yet exhibit traits of high-impact marketing are still observed in Poland. Such practices include, among others:

- creating associations between CFD trading and investing, despite the fact that contracts for differences are not a financial instrument with a long-term time horizon and using the term “CFD Investor” (Appendix B);
- using popular events, such as high-profile stock exchange debuts, to promote CFDs (Appendix C).

CFD brokers within the EU increasingly employ innovative services to attract clients, with copy-trading and social-trading emerging as prominent elements of this strategy. Social-trading enables users to observe the investment and trading activities of other investors using contracts for difference, fostering a sense of community and transparency in trading behaviors. Conversely, copy-trading offers a distinct yet related service, allowing users to automatically replicate transactions in real-time based on the actions of a "followed" account (eToro, n.d.; AvaSocial, n.d.). These services represent significant technological advancements aimed at enhancing user engagement and participation in CFD markets.

Although these services were not explicitly included in the framework of MiFID II, the European Securities and Markets Authority (ESMA) issued supervisory guidelines for National Competent Authorities (NCAs) outlining supervisory expectations for firms offering copy-trading services. ESMA indicated that, in certain situations, copy-trading might be classified as portfolio management, a type of brokerage service (ESMA, 2023). Additionally, the Polish Financial Supervision Authority (UKNF) issued an interpretative position on this service, complementing ESMA’s guidelines by highlighting the diversity of services under the umbrella of copy-trading. The UKNF noted that certain operational schemes of copy-trading could have legal implications if they align with definitions of regulated services, such as portfolio management and investment advice, as specified under the law (Act on Trading, 2005, Art. 69). Moreover, the UKNF recognizes "social trading" as a distinct model within copy-trading, attributing features similar to investment advice to it (UKNF, 2024b).

A case exemplifying the application of the discussed service in Poland is the activity of the broker X-Trade Brokers SA, which, on March 28, 2024, introduced a "social trading" service. This service allowed account holders to view statistics and transactions conducted by other clients within the firm, as well as receive notifications on new transactions, though without the option to automatically copy them (XTB, 2024, p. 75). Following a KNFs position concerning copy-trading, the broker subsequently ceased offering the "social investing" service.

Nonetheless, foreign CFD brokers offering copy-trading and social-trading services continue to reach Polish clients by providing Polish-language website versions and promoting their offerings through sponsored media content via marketing agencies operating in Poland (Mosionek, 2024, p. 88). According to a UKNF announcement on social media, the regulator has observed the presence of entities in Poland that offer copy-trading services without being subject to Polish regulatory oversight. In response, the UKNF has engaged in EU-level actions to uphold regulatory equality among investment firms (Barszczewski, 2024). This case highlights the challenge of cross-border operations by CFD brokers, and the complexities involved in overseeing foreign firms.

Some jurisdictions have implemented more stringent regulations surpassing EU-wide standards in the marketing of CFD. The CNMV implemented a resolution on July 11, 2023, imposing further restrictions on CFD advertising in Spain due to previous limitations being deemed insufficient (CNMV, 2023, p. 1). This resolution bans advertising of CFDs to retail clients or the general public. Beyond standard marketing prohibitions, it extends to training, seminars, demo accounts, and tools related to CFDs. The ban applies universally to all CFD service providers, whether based in Spain or elsewhere. These regulations are particularly restrictive, prohibiting not only direct CFD marketing but also event sponsorships, brand advertisements, and use of public figures in advertising, even if promoting other products indirectly benefiting CFD promotion. The CNMV permits brand advertising by an investment firm offering CFDs only if it can demonstrate that the advertising or sponsorship is not aimed at promoting CFDs. Specifically, this is allowed if CFDs make up only a minimal part of the firm's offerings on its website relative to its broader activities (CNMV, 2023, p. 5). Restrictions have also been taken by similar bodies in individual EU countries. For example, the French AFM banned electronic advertising communication in the field of CFDs (AFM, 2019), while the Belgian FSMA completely banned the offering of CFDs to retail clients (FSMA, 2016).

Affiliate CFD marketing

One of the primary concerns regarding the marketing of investment services in Poland is the widespread use of affiliate and refer-a-friend programs (UKNF, 2023). Notably, affiliates engaged in promoting investment services are not subject to the same regulatory scrutiny as tied agents under Article 79 of the Act on Trading (IDM, 2016, p. 8), despite the KNF's guidelines to the contrary (KNF, 2016, Guideline 3). Unlike tied agents, who operate under the direct supervision and liability of an investment firm and must be registered with the KNF, affiliates act independently and are not required to be formally integrated into the firm's compliance framework. Although the general restriction preventing affiliates from directly targeting individual prospective clients (Act on Trading, 2005, Article 79 section 2b) mitigates some risks, it remains insufficient in addressing regulatory concerns, particularly given the potential for indirect solicitation and misleading marketing practices.

This regulatory gap enables affiliates to engage in aggressive or misleading marketing practices without being held to the same legal standards as tied agents. As a result, investment firms can leverage affiliate networks to bypass investor protection regulations, posing a significant compliance risk, particularly in the context of high-risk financial instruments such as CFDs. Affiliates are typically compensated through revenue-sharing or cost-per-action (CPA) models, which incentivize client acquisition rather than responsible investment practices. The KNF correctly identifies these compensation structures as inducements prohibited under MiFID II (UKNF, 2023, p. 5).

Affiliate schemes continue to pose a significant compliance risk within the financial sector. Equally concerning, however, is the growing influence of unregulated individuals providing investment recommendations via social media (ESMA, 2024c). Often incentivized by ongoing affiliate programs, these actors may promote high-risk financial instruments without regulatory oversight or real accountability, undermining investor protection. Their activities can facilitate misinformation and even market manipulation, further complicating efforts to enforce consumer safeguards and ensure fair market practices.

While the activities of self-proclaimed financial experts and social media influencers fall outside the scope of this article, they remain highly relevant to the broader discussion on investor protection. Even if case of decline in CPA or revshare-based affiliate programs, these individuals may find new ways to monetize their influence by charging clients for access to trading groups, exclusive signals, or investment courses-services previously subsidized by investment firms through affiliate schemes. This absence of regulatory oversight in that regard poses significant risks, as unverified advice and speculative strategies can mislead retail investors, often leading to substantial financial losses, particularly when trading CFDs, whose high-risk nature has been extensively analyzed in this paper.

Conclusion

The KNF's decision (after ESMA's intervention) has contributed to enhancing the financial security of individual investors in Poland's capital market. Despite these positive developments, numerous issues remain unresolved under current regulations or are challenging to enforce due to the limited scope of supervisory tools available. These include:

- cross-border, internet-based activity of brokers and the ability to use services from entities outside the EU, which facilitates the circumvention of EU regulations;
- lack of strict regulatory action concerning Market Maker (MM) execution models, particularly with respect to the best execution principle and conflict of interest management rules;
- aggressive or high-impact marketing practices, including affiliate marketing;
- increase in the number of new, inexperienced retail clients using CFDs, raising concerns about adherence to the principle of financial instrument appropriateness;
- rise of "financial gurus" whose operations are subject to only fragmented regulation (MAR rules on recommendations) and no supervision from competent authorities.

In line with the study's research framework, the findings confirm that the current regulatory regime does not ensure adequate protection for retail investors (H1), despite partial improvements in investor outcomes following the implementation of domestic post-ESMA rules (H2). The analysis also highlights risks related to regulatory circumvention through cross-border activities of CFD brokers (H3), conflicts of interest under the Market Maker model (H4), and the continued use of aggressive promotional practices by brokers and affiliates (H5). While all five research hypotheses are supported by the evidence, it should be noted that H3 is only partially verified, as the study identifies conditions that facilitate regulatory circumvention but does not empirically assess the actual effectiveness of national supervision in cross-border contexts. This distinction reflects the limitations of the available data and the qualitative nature of the regulatory analysis.

The issues highlighted in this article illustrate some of the supervisory challenges confronting regulators. Nonetheless, as the authors suggest, this remains a research problem warranting further exploration.

In light of the above, it is recommended that joint actions be undertaken with other supervisory authorities to ensure legal equality among cross-border entities. The presence of restrictions imposed on domestic entities, while certain foreign entities simultaneously evade compliance with the same regulations, is concerning. Special attention should be directed toward the lack of standardized data collection on CFDs by the supervisory authorities, as this gap hinders the comprehensive study of these financial instruments and their effects on consumers.

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Appendix A

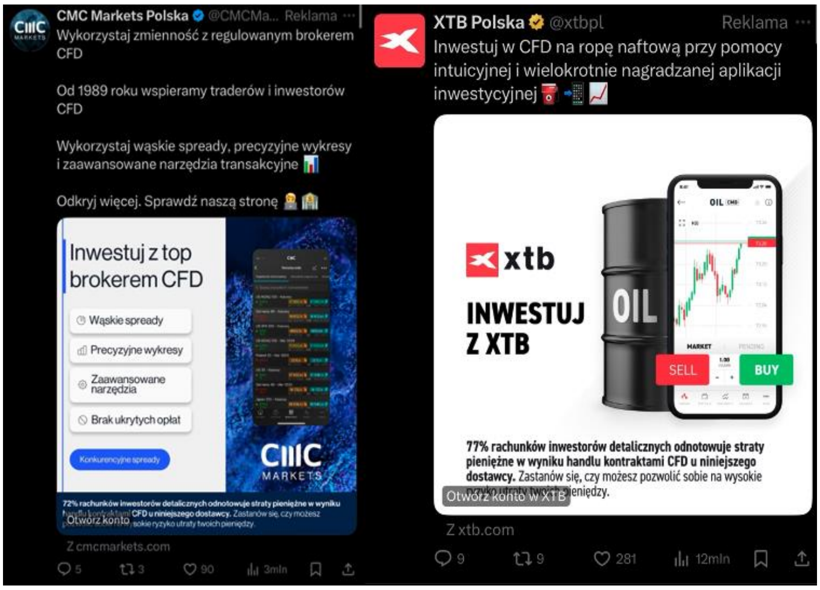
List of selected CFD brokers based in the EU excluding Poland

Name	% of losses from risk disclosure Q2 2024	Registration Country & NCA	Model
Admirals Europe Ltd.	74,00%	Cyrpus (CySEC)	STP
CMC Markets Germany GmbH	73,00%	Germany (BaFin)	Market Maker
Dukascopy Europe IBS AS	71,03%	Latvia (FKTK)	ECN
eToro (Europe) Ltd.,	51,00%	Cyrpus (CySEC)	Market Maker
FXCM (Stratos Europe Ltd.)	73,00%	Cyrpus (CySEC)	Market Maker
FxPro Financial Services Ltd.	74,00%	Cyrpus (CySEC)	Market Maker
IC Markets (EU) Ltd.	70,64%	Cyrpus (CySEC)	Market Maker
IG Europe GmbH	74,00%	Germany (BaFin)	Market Maker
LYNX B.V. (“LYNX”)	61,00%	Nederlands (NL-AFM)	STP
Pepperstone	75,50%	Cyrpus (CySEC)	Market Maker
Plus500	80,00%	Cyrpus (CySEC)	Market Maker
Saxo Bank (Saxo Bank A / S)	65,00%	Dennmark (D-FSA)	Market Maker
Trading 212	78,00%	Cyrpus (CySEC)	Market Maker
AVA Trade EU Ltd	76,00%	Ireland (CBI)	Market Maker
Capital Com SV Investments	75,00%	Cyrpus (CySEC)	Market Maker
Conotoxia Ltd.	79,03%	Cyrpus (CySEC)	STP
Deltastock AD	59,00%	Bulgaria (B-FSC)	Market Maker
Eightcap Global Ltd.	81,76%	Cyrpus (CySEC)	Market Maker
INSTANT TRADING EU LTD. (instaforex)	69,82%	Cyrpus (CySEC)	Market Maker
Just2Trader (Lime Trading Ltd)	73,00%	Cyrpus (CySEC)	Market Maker
JustMarkets ltd	64,29%	Cyrpus (CySEC)	Market Maker
Royal Financial Trading (Cy) Ltd (One Royal)	65,79%	Cyrpus (CySEC)	Market Maker
Solaris EMEA Ltd (AXI)	68,50%	Cyrpus (CySEC)	Market Maker
Spreadex Ltd	64,00%	UK (FCA)	Market Maker
Tickmill	72,00%	UK (FCA)	STP
Trading Point of Financial Instruments Limited (XM Group)	73,91%	Cyrpus (CySEC)	Market Maker

Above list excludes 5 significant CFD brokers from Poland, including one that is significant from the point of view of the European market (XTB). Data based on brokers' websites in Q2 2024. In the event that the broker offers CFD trading in the market maker model by default, it has been marked in this way, which does not exclude that the same broker also offers the possibility of participating in the ECN.

Appendix B

Example of CFD broker social media ads creating an association between investing and CFDs



Advertisement within the x website, accessed on 16/10/2024 and 17/07/2024. https://x.com the advertisements, which are reached between 3 and 12 million recipients on portal X (according to portal statistics). The advertisements mentioned are not isolated cases, and CFD marketing is directed at retail, non-professional customers.

Appendix C

Example of a CFD broker social media ad, using the popular IPO at Polish WSE

Advertising on the Facebook website accessed 20/10/2024.