



U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of General Counsel

CFTC Letter No. 08-05
March 6, 2008
No-Action
Office of General Counsel

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Washington, DC 20004

Re: Eurex Deutschland's Request for No-Action Relief in Connection with the Offer and Sale in the United States of its Futures Contract Based on the RDXxt USD-RDX Extended Index

Dear Mr. Architzel:

This letter is in response to letters, attachments, facsimiles and electronic mail dated from April 10, 2007 to November 16, 2007, requesting on behalf of Eurex Deutschland ("Eurex") that the Office of General Counsel ("Office") of the Commodity Futures Trading Commission ("Commission" or "CFTC") issue a "no-action" letter concerning the offer and sale in the United States ("U.S.") of Eurex's futures contract based on the RDXxt USD-RDX Extended Index ("RDXxt" or "Index").

We understand the facts to be as follows. Eurex is a futures and options exchange located in Frankfurt, Germany and operated by Eurex Frankfurt AG.¹ Eurex is regulated by and subject to active market surveillance by German regulatory agencies, including the Exchange Supervisory Authority in the State of Hesse, where Eurex is located, and by the German Federal Financial Supervisory Agency (Bundesanstalt für Finanzdienstleistungsaufsicht) (the "BaFin"). Pursuant to the German Securities Trading Act, the BaFin has responsibility for the supervision of German securities and derivatives trading and has the authority to cooperate with competent authorities of other countries in connection with the supervision of securities and derivatives

¹ This Office previously has granted no-action relief to Eurex in connection with the offer and sale in the U.S. of a number of Eurex's futures contracts based on non-narrow-based security indices, most recently *see* CFTC Staff Letter No. 08-03 (Feb. 6, 2008).

markets and trading activity thereon, including by sharing non-public market surveillance information.²

The RDXxt is a broad-based, modified market capitalization weighted security index composed of at least 15 of the most highly capitalized and actively traded American Depositary Receipts/Global Depositary Receipts³ on Russian blue chip companies traded on the London Stock Exchange's ("LSE's") International Order Book ("IOB").⁴ The Index is calculated by Wiener Börse AG ("WBAG"), Austria, which operates and manages Wiener Börse (the Vienna Stock Exchange), a securities and general commodity exchange authorized by the Austrian Ministries of Finance and Economic Affairs under the Austrian Stock Exchange Act. WBAG employs a selection committee to determine Index composition.⁵

² See letter from Paul M. Architzel, Alston & Bird LLP to Elizabeth L. Ritter, Deputy General Counsel, CFTC, dated April 10, 2007, at 7.

³ An American Depositary Receipt ("ADR") is used to trade the stock of a foreign company in the U.S. Each ADR is issued by a U.S. depositary bank and represents one or more shares of a foreign stock or a fraction thereof. If investors own an ADR they have the right to obtain the foreign stock it represents. The price of an ADR is often close to the price of the foreign stock in its home market, adjusted for the ratio of ADRs to foreign company shares. According to the LSE, ADRs listed in London are fungible and compatible with U.S.-listed ADRs, and U.S. investors may trade them. A Global Depositary Receipt ("GDR") is a bank certificate issued in more than one country for shares in a foreign company. The shares are held by a foreign branch of an international bank. The shares trade as domestic shares, but are offered for sale globally through the various bank branches. *Id.* at 1-2 n.1.

⁴ The IOB is a facility of the LSE for the trading of developing market depositary receipts. It is a public order limit order book. IOB trades may be matched electronically. These trades are known as "Automatic" trades. Off-order book trades may also be negotiated directly between members (usually over the telephone) and reported by the members. Only Automatic trades are used in calculating the RDXxt. *Id.* at 4, 7 and n.6.

⁵ The selection committee is composed of a chairperson and representatives of WBAG, members of Wiener Börse, financial institutions that issue financial products based on the Index, academic consultants and local market experts. The selection committee is required to act objectively, for the benefit of investors and investor protection. Selection of underlying securities for inclusion in the Index by the selection committee is not automatic, but is guided by selection rules adopted and published by WBAG. The most important selection criteria are market capitalization and liquidity; additional criteria include price availability of the depositary receipt, sector representativeness, market interest and exchange listing. The selection committee meets quarterly to review and adjust the weighting factors and meets semi-annually in March and September to make changes to index composition. On an as needed basis, the selection committee may adjust the Index periodically and for unusual events, such as stock-splits, mergers, spinoffs, de-listings and bankruptcies, but the Index is not adjusted for dividend payments. All resolutions of the committee are made publicly available immediately after a decision has been made. Rule 7.2.2 of the Wiener Börse, as recently amended, requires that

The weighting of each of the underlying depositary receipts within the RDXxt is determined by its weighted market capitalization, which is calculated by multiplying the number of shares outstanding by the current price of the depositary receipts on the LSE and the relevant conversion factor for depositary receipts, multiplied by the weighting factors. The number of shares outstanding used in this weighting is the number of shares declared deliverable on the Russian Trading System (“RTS”), the Moscow Interbank Currency Exchange (“MICEX”), or any other reliable source. The conversion factor for depositary receipts is defined as the conversion ratio of depositary receipts divided by the underlying shares of common stock. The weighting factors include a “free float,” which is determined by WBAG based on information from the market on which a stock is listed to reduce the influence that a stock with a high capitalization but a relatively small free float may have on the Index, and a representation factor, which ensures that no constituent security will exceed 10% of the weighting of the Index.⁶

As of February 19, 2008, the RDXxt included 17 depositary receipts and had a total adjusted market capitalization of approximately U.S.\$ 135.5 billion.⁷ The largest single component security by weight represented approximately 11.62%, and the five most heavily-weighted component securities represented 47.15%, of the RDXxt. The securities comprising the lowest 25% by weight of the RDXxt had a six-month aggregate dollar value of average daily trading volume of approximately U.S.\$ 67.6 million for the six-month period ending February 2007.⁸ The RDXxt is calculated in real time in both euros and U.S. dollars and disseminated by electronic means through major data vendors, by daily e-mail service and on WBAG’s website at www.wienerborse.at or www.indices.cc.⁹

Eurex’s futures contract is based on the U.S. dollar calculated version of the RDXxt and provides for cash settlement. Prices for Eurex’s contract are quoted in Index points, with each Index point equal to U.S.\$ 25 per contract. The minimum price movement is one-half of one Index point, representing a value of U.S.\$ 12.50. Eurex lists for trading the three nearest months of the March quarterly cycle (March, June, September and December). The last trading day of the contract is the third Friday of the relevant expiration month (or, if such day is not a trading

"[a]ll members of the RDXxt Committee must preserve the confidentiality of all matters discussed before they are disseminated to the public, act in good faith and with a view to the interest of investors and investor protection." Trading in Eurex’s RDXxt futures contract by members of the committee is considered to be trading in material, non-public information, which is prohibited by Article 48b of the Austrian Exchange Act. See letter from Mr. Architzel to Ms. Ritter, dated April 10, 2007 at 5-6 and electronic mail from Mr. Architzel to Julian E. Hammar, Assistant General Counsel, CFTC, dated September 10, 2007.

⁶ See letter from Mr. Architzel to Ms. Ritter, dated April 10, 2007, at 5-6 and Appendix A.

⁷ Market capitalization and weighting data were obtained from Wiener Börse’s website.

⁸ See letter from Mr. Architzel to Ms. Ritter, dated April 10, 2007, at Appendix D.

⁹ *Id.* at 7.

day, the trading day immediately preceding such Friday). Cash settlement occurs on the first trading day after the last trading day of the contract. The final cash settlement price is the closing level of the RDXxt on the last trading day based on closing prices at 5:00 p.m. CET at the LSE's IOB.¹⁰

The Commodity Exchange Act (“CEA”),¹¹ as amended by the Commodity Futures Modernization Act of 2000 (“CFMA”),¹² provides that the offer or sale in the U.S. of futures contracts based on a group or index of securities (including those contracts traded on or subject to the rules of a foreign board of trade) is subject to the Commission's exclusive jurisdiction,¹³ with the exception of security futures products,¹⁴ over which the Commission shares jurisdiction with the Securities and Exchange Commission (“SEC”).¹⁵ Thus, the Commission’s jurisdiction remains exclusive with regard to futures contracts on a group or index of securities that is broad-based pursuant to CEA Section 1a(25).¹⁶

CEA Section 2(a)(1)(C)(iv) generally prohibits any person from offering or selling a futures contract based on a security index in the U.S., except as permitted under CEA Section 2(a)(1)(C)(ii) or CEA Section 2(a)(1)(D).¹⁷ By its terms, CEA Section 2(a)(1)(C)(iv) applies to futures contracts on security indices traded on both domestic and foreign boards of trade. CEA Section 2(a)(1)(C)(ii) sets forth three criteria to govern the trading of futures contracts on a group or index of securities on designated contract markets and registered derivatives transaction execution facilities (“DTEFs”):

- (1) the contract must provide for cash settlement;
- (2) the contract must not be readily susceptible to manipulation nor to being used to manipulate any underlying security; and

¹⁰ *Id.* at 9 and Appendix C.

¹¹ 7 U.S.C. § 1 *et seq.*

¹² Appendix E of Pub. L. No. 106-554, 114 Stat. 2763 (2000).

¹³ *See* CEA Section 2(a)(1)(C)(ii).

¹⁴ Security futures products are defined as a security future or any put, call, straddle, option, or privilege on any security future. *See* CEA Section 1a(32). A security future is defined as a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, with certain exceptions. *See* CEA Section 1a(31).

¹⁵ *See* CEA Section 2(a)(1)(D).

¹⁶ *See* CEA Section 2(a)(1)(C)(ii).

¹⁷ CEA Section 2(a)(1)(D) governs the offer and sale of security futures products.

- (3) the group or index of securities must not constitute a narrow-based security index.¹⁸

While Section 2(a)(1)(C)(ii) provides that no designated contract market or DTEF may trade a security index futures contract unless it meets the three criteria noted above, it does not explicitly address the standards to be applied to a foreign security index futures contract traded on a foreign board of trade. This Office has applied those same three criteria in evaluating requests by foreign boards of trade to allow the offer and sale within the U.S. of their foreign security index futures contracts when those foreign boards of trade do not seek designation as a contract market or registration as a DTEF to trade those products.¹⁹

Accordingly, Commission staff has examined the RDXxt, and Eurex's futures contract based thereon, to determine whether the Index and the futures contract meet the requirements enumerated in CEA Section 2(a)(1)(C)(ii). Based on the information noted herein and as set forth in the letters, attachments, facsimiles and electronic mail noted above, we have determined that the RDXxt, and Eurex's futures contract based thereon, conform to these requirements.²⁰

¹⁸ The first two criteria under CEA Section 2(a)(1)(C)(ii) were unchanged by the CFMA. With regard to the third criterion, an index is a "narrow-based security index" under both the CEA and the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a *et seq.*, if it has any one of the following four characteristics: (1) it has nine or fewer component securities; (2) any one of its component securities comprises more than 30% of its weighting; (3) the five highest weighted component securities in the aggregate comprise more than 60% of the index's weighting; or (4) the lowest weighted component securities comprising, in the aggregate, 25% of the index's weighting, have an aggregate dollar value of average daily trading volume of less than \$50 million (or in the case of an index with 15 or more component securities, \$30 million). *See* CEA Section 1a(25)(A)(i)-(iv); Exchange Act Section 3(a)(55)(B)(i)-(iv). Thus, an index that does not have any of these elements is not a narrow-based security index for purposes of CEA Section 2(a)(1)(C)(ii). *See also* CEA Section 1a(25)(B); Exchange Act Section 3(a)(55)(C).

¹⁹ With regard to the third criterion, the CFTC and SEC jointly promulgated Rule 41.13 under the CEA and Rule 3a55-3 under the Exchange Act, governing security index futures contracts traded on foreign boards of trade. These rules provide that "[w]hen a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market or registered derivatives transaction execution facility." CFTC Rule 41.13, 17 C.F.R. § 41.13; Exchange Act Rule 3a55-3, 17 C.F.R. § 240.3a55-3.

²⁰ In making this determination, Commission staff has concluded that the RDXxt does not have any of the elements of a narrow-based security index as enumerated in CEA Section 1a(25)(A), and accordingly the RDXxt would not be a narrow-based security index if traded on a designated contract market or DTEF.

In determining whether a foreign futures contract based on a foreign security index is not readily susceptible to manipulation or being used to manipulate any underlying security, one preliminary consideration is the requesting exchange's ability to access information regarding the securities underlying the index. All of the securities underlying the RDXxt are ADRs/GDRs on Russian blue chip companies that are traded on the LSE's IOB. Both the BaFin and the United Kingdom's ("U.K.'s") regulator, the Financial Services Authority ("FSA"), are members of the Committee of European Securities Regulators ("CESR"). Members of CESR have entered into a Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance Activities that provides for sharing of certain market surveillance data among CESR members. Both BaFin and the FSA also are signatories to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information of the International Organization of Securities Commissions ("IOSCO MOU"). Moreover, the BaFin entered into a bilateral information sharing memorandum of understanding ("MOU") with the Russian Federation's regulator in 2001. BaFin also entered into an MOU with the Russian Federation's Central Bank in 2006, the scope of which includes cooperation on "all violations of law on financial markets."²¹ Eurex may request that BaFin obtain information from the U.K. and Russian regulators pursuant to these arrangements, as necessary, with regard to trading of the ADRs/GDRs on the LSE and the underlying Russian equities, respectively. In addition, Eurex's Trading Surveillance Office is authorized under the German Exchange Act to obtain information directly from, and share information directly with, similar trading surveillance offices of other exchanges or regulators inside and outside of Germany.²²

Through these arrangements, Eurex should have access to information necessary to detect and deter manipulation. In the event that Eurex is unable to obtain access to adequate surveillance data in this regard, or is unable, either directly or through the BaFin, to share such data with the CFTC, this Office reserves the right to reconsider the position we have taken herein.²³

²¹ See electronic mail from Mr. Architzel to Mr. Hammar, dated September 10, 2007.

²² See letter from Mr. Architzel to Ms. Ritter, dated April 10, 2007, at 8 and electronic mail from Mr. Architzel to Mr. Hammar, dated September 10, 2007.

²³ Eurex has confirmed that it is willing and able to cooperate with the Commission through information sharing and other means in relation to the trading of Eurex's RDXxt futures contract. See letter from Mr. Architzel to Ms. Ritter, dated April 10, 2007, at 8. Eurex also is a signatory to the International Information Sharing Memorandum of Understanding and Agreement signed on March 15, 1996, at Boca Raton, Florida. Moreover, the BaFin's predecessor, the BAWe, and the CFTC entered into a Memorandum of Understanding concerning Consultation and Cooperation in the Administration and Enforcement of Futures Laws on October 17, 1997. As noted above, the BaFin is a signatory to the IOSCO MOU, to which the Commission also is a signatory. In addition, the BaFin, through its predecessor, is a signatory to the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations for the sharing of large exposure information, signed on March 15, 1996, at Boca Raton, Florida.

In light of the foregoing, this Office will not recommend any enforcement action to the Commission based on Sections 2(a)(1)(C)(iv), 4(a), or 12(e) of the CEA, as amended, if Eurex's futures contract based on the RDXxt is offered or sold in the U.S. Because this position is based upon facts and representations contained in the letters, attachments, facsimiles and electronic mail cited above, it should be noted that any different, omitted or changed facts or conditions might require a different conclusion. This position also is contingent on the continued compliance by Eurex with all regulatory requirements imposed by the BaFin, and the applicable laws and regulations of Germany and the State of Hesse. In addition, this position may be affected by any rules that the Commission may adopt regarding futures contracts based on non-narrow-based security indices.

Eurex also has requested that, upon issuance of the relief granted herein, it be permitted to make the futures contract on the RDXxt available for trading through the electronic trading terminals of its U.S. members in accordance with the terms of the August 10, 1999 foreign terminals no-action letter, as amended ("August 10, 1999 letter"), issued by Commission staff to Eurex.²⁴ In this regard, Eurex has certified that it is in compliance with the terms of the August 10, 1999 letter and that Eurex's futures contract on the RDXxt will be traded in accordance with the terms and conditions of the August 10, 1999 letter.²⁵ We have consulted with the Commission's Division of Market Oversight ("Division"), which is the Division in the Commission that administers foreign terminal no-action letters. The Division has concluded that allowing Eurex to make its futures contract on the RDXxt available for trading pursuant to the August 10, 1999 letter would not be contrary to the public interest. Accordingly, on behalf of the Division, this Office hereby confirms that the no-action relief granted to Eurex in the August 10, 1999 letter extends to Eurex's futures contract on the RDXxt.²⁶

²⁴ See CFTC Staff Letter No. 99-48 [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,572 (Aug. 10, 1999).

²⁵ See letter from Mr. Architzel to Ms. Ritter, dated April 10, 2007, at 14.

²⁶ Please be advised that if Eurex intends to list options on its futures contract based on the RDXxt, it may offer and sell those options in the U.S. with no further action from this Office, *see* 61 Fed. Reg. 10891 (March 18, 1996). However, if Eurex intends to make such options available for trading via direct access from electronic trading terminals in the U.S., Eurex must so notify the Division in accordance with the Notice of Revision of Commission Policy Regarding the Listing of New Futures and Option Contracts by Foreign Boards of Trade That Have Received Staff No-Action Relief to Provide Direct Access to Their Automated Trading Systems From Locations in the United States, issued on April 18, 2006. *See* 71 Fed. Reg. 19877 (April 18, 2006).

The offer and sale in the U.S. of Eurex's futures contract on the RDXxt is, of course, subject to Part 30 of the Commission's regulations, which governs the offer and sale of foreign futures and foreign option contracts in the U.S.²⁷

Sincerely,

Terry S. Arbit
General Counsel

²⁷ See 17 C.F.R. Part 30.