



U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of General Counsel

CFTC Letter No. 08-03
February 6, 2008
No-Action
Office of General Counsel

Paul M. Architzel, Esq.
Alston & Bird LLP
950 F Street, N.W.
The Atlantic Building
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 Contracts Based on the following Security Indices:

Dow Jones STOXX Large 200 Index
Dow Jones STOXX Small 200 Index
Dow Jones STOXX 600 Industrial Goods & Services Index
Dow Jones STOXX 600 Insurance Index
Dow Jones STOXX 600 Media Index
Dow Jones STOXX 600 Personal & Household Goods Index
Dow Jones STOXX 600 Travel & Leisure Index
Dow Jones STOXX 600 Utilities Index

Dear Mr. Architzel:

This letter is in response to letters, attachments, facsimiles and electronic mail dated from May 8, 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 contracts based on the eight above-referenced Indices.¹

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.² Eurex is regulated by and

¹ Eurex also submitted a request with respect to its futures contract on the Dow Jones STOXX 600 Retail Index. That request will be considered separately.

² This Office previously has granted no-action relief to Eurex in connection with the offer and sale in the U.S. of its futures contracts based on the Dow Jones STOXX 600 Index and Dow

subject to active market surveillance by German regulatory agencies, including the Exchange Supervisory Authority in the State of Hesse, where Eurex and the Frankfurt Stock Exchange are 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 markets and trading activity thereon, including by sharing non-public market surveillance information.³

The eight above-referenced Indices are all derived from the Dow Jones STOXX 600 Index, which was the underlying index of a Eurex futures contract for which this Office issued a no-action letter in July 2007.⁴ Each of the above-referenced Indices is a broad-based, free-float-market-capitalization-weighted, total-return security index. The Dow Jones STOXX Large 200 Index consists of the largest 200 stocks of the Dow Jones STOXX 600 Index. The Dow Jones STOXX Small 200 Index consists of the next 200 stocks after the 200 mid-cap stocks in the Dow Jones STOXX 600 Index.⁵ The remaining above-referenced Indices include stocks that represent a supersector of the Dow Jones STOXX 600 Index (collectively, the “Supersector Indices”) and

Jones STOXX Mid 200 Index, CFTC Staff Letter No. 07-11, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,579 (July 18, 2007); the MDAX, CFTC Staff Letter No. 06-06 [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,203 (Mar. 14, 2006); the Dow Jones Italy Titans 30 Index, CFTC Staff Letter No. 05-23 [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,168 (Nov. 23, 2005); the Dow Jones Global Titans 50 Index, CFTC Staff Letter No. 02-81 [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,094 (June 28, 2002); the STOXX 600 Banking Sector Index and EURO STOXX Banking Sector Index, CFTC Staff Letter No. 02-38 [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,999 (April 2, 2002); the STOXX 50 Index and the EURO STOXX 50 Index, CFTC Staff Letter No. 00-52 [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,114 (April 6, 2000); and the DAX Index, CFTC Staff Letter No. 94-98 [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,277 (Dec. 20, 1994).

³ See letter from Paul M. Architzel, Alston & Bird LLP to Terry S. Arbit, General Counsel, CFTC, dated May 8, 2007, at 9.

⁴ See CFTC Staff Letter No. 07-11, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,579 (July 18, 2007). A subset of the Dow Jones STOXX Total Market Index, the Dow Jones STOXX 600 is comprised of 600 highly capitalized and actively traded stocks listed and traded on stock exchanges from 17 European countries including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom. *Id.*

⁵ See letter from Paul M. Architzel, Alston & Bird LLP to Terry S. Arbit, General Counsel, CFTC, dated November 7, 2007, at 2.

are selected based on each stock's Industry Classification Benchmark ("ICB").⁶ As of December 27, 2007 with regard to the Supersector Indices, the Dow Jones STOXX 600 Industrial Goods & Services Index had 91 stocks, the Dow Jones STOXX 600 Insurance Index had 34 stocks, the Dow Jones STOXX 600 Media Index had 35 stocks, the Dow Jones STOXX 600 Personal & Household Goods Index had 28 stocks, the Dow Jones STOXX 600 Travel & Leisure Index had 27 stocks and the Dow Jones STOXX 600 Utilities Index had 32 stocks.

The respective characteristics of each of the above-referenced Indices are as follows:

1. The Dow Jones STOXX Large 200 Index had a total adjusted market capitalization of approximately US\$ 6.096 trillion as of October 22, 2007. The largest single component security by weight represented approximately 2.861%, and the five most heavily-weighted component securities represented 12.061%, of the Dow Jones STOXX Large 200 Index. The securities comprising the lowest 25% by weight of the Dow Jones STOXX Large 200 Index had a six-month aggregate dollar value of average daily trading volume of approximately US\$ 18.596 billion for the six-month period ending October 22, 2007.⁷

2. The Dow Jones STOXX Small 200 Index had a total adjusted market capitalization of approximately US\$ 518 billion as of October 22, 2007. The largest single component security by weight represented approximately 0.93%, and the five most heavily-weighted component securities represented 4.373%, of the Dow Jones STOXX Small 200 Index. The securities comprising the lowest 25% by weight of the Dow Jones STOXX Small 200 Index had a six-month aggregate dollar value of average daily trading volume of approximately US\$ 1.545 billion for the six-month period ending October 22, 2007.⁸

3. The Dow Jones STOXX 600 Industrial Goods & Services Index had a total adjusted market capitalization of approximately US\$ 984 billion as of December 27, 2007.⁹ The largest single component security by weight represented approximately 15.17%, and the five most heavily-weighted component securities represented 37.35%, of the Dow Jones STOXX 600 Industrial Goods & Services Index. The securities comprising the lowest 25% by weight of the Dow Jones STOXX Industrial Goods & Services Index had a six-month aggregate dollar value

⁶ See letter from Mr. Architzel to Mr. Arbit, dated May 8, 2007, at 2. Dow Jones Indexes and FTSE created the ICB classification system. The system is supported by the ICB Universe Database, which contains over 40,000 companies and 45,000 securities worldwide. More information is available at <http://www.icbenchmark.com/>.

⁷ See letter from Mr. Architzel to Mr. Arbit, dated November 7, 2007, at 4 and Attachment B.

⁸ *Id.* at 5 and Attachment C.

⁹ Market capitalization and weighting data for the Supersector Indices were obtained through Bloomberg Professional Services.

of average daily trading volume of approximately US\$ \$137.4 million for the six-month period ending March 31, 2007.¹⁰

4. The Dow Jones STOXX 600 Insurance Index had a total adjusted market capitalization of approximately US\$ 719 billion as of December 27, 2007. The largest single component security by weight represented approximately 14.72%, and the five most heavily-weighted component securities represented 53.30%, of the Dow Jones STOXX 600 Insurance Index. The securities comprising the lowest 25% by weight of the Dow Jones STOXX 600 Insurance Index had a six-month aggregate dollar value of average daily trading volume of approximately US\$ 166.3 million for the six-month period ending March 31, 2007.¹¹

5. The Dow Jones STOXX 600 Media Index had a total adjusted market capitalization of approximately US\$ 286 billion as of December 27, 2007. The largest single component security by weight represented approximately 21.16%, and the five most heavily-weighted component securities represented 45.55%, of the Dow Jones STOXX 600 Media Index. The securities comprising the lowest 25% by weight of the Dow Jones STOXX 600 Media Index had a six-month aggregate dollar value of average daily trading volume of approximately US\$ 129.1 million for the six-month period ending March 31, 2007.¹²

6. The Dow Jones STOXX 600 Personal & Household Goods Index had a total adjusted market capitalization of approximately US\$ 562 billion as of December 27, 2007. The largest single component security by weight represented approximately 13.72%, and the five most heavily-weighted component securities represented 51.20%, of the Dow Jones STOXX 600 Personal & Household Goods Index. The securities comprising the lowest 25% by weight of the Dow Jones STOXX 600 Personal & Household Goods Index had a six-month aggregate dollar value of average daily trading volume of approximately US\$ 43.1 million for the six-month period ending March 31, 2007.¹³

7. The Dow Jones STOXX 600 Travel & Leisure Index had a total adjusted market capitalization of approximately US\$ 184 billion as of December 27, 2007. The largest single component security by weight represented approximately 11.79%, and the five most heavily-weighted component securities represented 38.04%, of the Dow Jones STOXX 600 Travel & Leisure Index. The securities comprising the lowest 25% by weight of the Dow Jones STOXX 600 Travel & Leisure Index had a six-month aggregate dollar value of average daily trading volume of approximately US\$ 61.3 million for the six-month period ending March 31, 2007.¹⁴

¹⁰ See letter from Mr. Architzel to Mr. Arbit, dated May 8, 2007, at 13.

¹¹ *Id.*

¹² *Id.* at 14.

¹³ *Id.*

¹⁴ *Id.*

8. The Dow Jones STOXX 600 Utilities Index had a total adjusted market capitalization of approximately US\$ 1.132 trillion as of December 27, 2007. The largest single component security by weight represented approximately 17.92%, and the five most heavily-weighted component securities represented 50.85%, of the Dow Jones STOXX 600 Utilities Index. The securities comprising the lowest 25% by weight of the Dow Jones STOXX 600 Utilities Index had a six-month aggregate dollar value of average daily trading volume of approximately US\$ 155.3 million for the six-month period ending March 31, 2007.¹⁵

All of the above-referenced Indices are calculated in real time and are disseminated by electronic means through major data vendors, including Bloomberg and Reuters.¹⁶

The terms and conditions for Eurex's futures contracts on the Dow Jones STOXX Large 200 Index and Dow Jones STOXX Small 200 Index are identical with the exception of the underlying index. A different set of terms and conditions applies to Eurex's futures contracts on the Supersector Indices and are identical with the exception of the underlying index. With regard to Eurex's futures contracts on the Dow Jones STOXX Large 200 Index and Dow Jones STOXX Small 200 Index, prices for each contract are quoted in index points, with each index point equal to 200 euros per contract. The minimum price movement is one-tenth of one index point, representing a value of 20 euros.¹⁷ Concerning Eurex's futures contracts on the Supersector Indices, prices for each contract are quoted in index points, with each index point equal to 50 euros per contract. The minimum price movement is one-tenth of one index point, representing a value of 5 euros.¹⁸

For all of its futures contracts on the above-referenced Indices, Eurex lists for trading the three nearest months of the March quarterly cycle (March, June, September and December). The last trading day of the contracts is the third Friday of the relevant expiration month (or, if such day is not a trading day, the trading day immediately preceding such Friday). Cash settlement occurs on the first trading day after the last trading day of the contracts. The final cash settlement price for each contract is the arithmetic mean of the relevant index levels that are calculated and disseminated every fifteen seconds between 11:50 a.m. and 12 noon (Central European Time) on the last trading day (41 values).¹⁹

The Commodity Exchange Act ("CEA"),²⁰ as amended by the Commodity Futures Modernization Act of 2000 ("CFMA"),²¹ provides that the offer or sale in the U.S. of futures

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 9 and letter from Mr. Architzel to Mr. Arbit, dated November 7, 2007, at 7.

¹⁷ *See* letter from Mr. Architzel to Mr. Arbit, dated November 7, 2007, at 8.

¹⁸ *See* letter from Mr. Architzel to Mr. Arbit, dated May 8, 2007, at 11.

¹⁹ *Id.* and letter from Mr. Architzel to Mr. Arbit, dated November 7, 2007, at 8-9.

²⁰ 7 U.S.C. § 1 *et seq.*

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,²² with the exception of security futures products,²³ over which the Commission shares jurisdiction with the Securities and Exchange Commission (“SEC”).²⁴ 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).²⁵

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).²⁶ 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
- (3) the group or index of securities must not constitute a narrow-based security index.²⁷

²¹ Appendix E of Pub. L. No. 106-554, 114 Stat. 2763 (2000).

²² See CEA Section 2(a)(1)(C)(ii).

²³ 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).

²⁴ See CEA Section 2(a)(1)(D).

²⁵ See CEA Section 2(a)(1)(C)(ii).

²⁶ CEA Section 2(a)(1)(D) governs the offer and sale of security futures products.

²⁷ 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

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.²⁸

Accordingly, Commission staff has examined the above-referenced Indices, and Eurex's futures contracts based thereon, to determine whether the Indices and the futures contracts 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 above-referenced Indices, and Eurex's futures contracts based thereon, conform to these requirements.²⁹

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 stocks in the above-referenced Indices are contained in the Dow Jones STOXX 600 Index which, as noted above, was the subject of a no-action letter from this Office in July 2007. In issuing that letter, this Office concluded that Eurex should have access to information necessary to detect and deter manipulation with respect to the

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).

²⁸ 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.

²⁹ In making this determination, Commission staff has concluded that the above-referenced Indices do not have any of the elements of a narrow-based security index as enumerated in CEA Section 1a(25)(A), and accordingly the above-referenced Indices would not be narrow-based security indices if traded on a designated contract market or DTEF.

securities underlying the Dow Jones STOXX 600 Index.³⁰ We see no reason to alter that conclusion based on the information submitted with regard to the applications for no-action relief concerning Eurex's futures contracts on the above-referenced Indices, all of which are based on the Dow Jones STOXX 600 Index. Of course, 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 taken herein.³¹

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 contracts based on the above-referenced Indices are 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 contracts on the above-referenced Indices 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.³² 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 contracts on the above-referenced Indices will be traded in accordance with the terms and conditions of the August 10, 1999 letter.³³ 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 contracts on the above-referenced Indices 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-

³⁰ See CFTC Staff Letter No. CFTC Staff Letter No. 07-11, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,579 (July 18, 2007).

³¹ Eurex has confirmed that it is willing and able to cooperate through information sharing and other means with the Commission in relation to the trading of Eurex's futures contracts on the above-referenced Indices. See letter from Mr. Architzel to Mr. Arbit, dated May 8, 2007, at 10, and letter from Mr. Architzel to Mr. Arbit, dated November 7, 2007, at 8.

³² See CFTC Staff Letter No. 99-48 [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,572 (Aug. 10, 1999).

³³ See letter from Mr. Architzel to Mr. Arbit, dated May 8, 2007, at 15 and Attachment E, and letter from Mr. Architzel to Mr. Arbit, dated November 7, 2007, at 11 and Attachment E.

action relief granted to Eurex in the August 10, 1999 letter extends to Eurex's futures contracts on the above-referenced Indices.³⁴

The offer and sale in the U.S. of Eurex's futures contracts on the above-referenced Indices 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.³⁵

Sincerely,

Terry S. Arbit
General Counsel

³⁴ Please be advised that if Eurex intends to list options on its futures contracts based on the above-referenced Indices, 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).

³⁵ *See* 17 C.F.R. Part 30.