

CFTC Letter No. 00-52

April 6, 2000

No-Action

Office of General Counsel

Edward J. Rosen, Esq.
Cleary, Gottlieb, Steen & Hamilton
One Liberty Plaza
New York, NY 10006-1470

Re: No-Action Request to Permit the Offer and Sale in the U.S.
of Futures Contracts on the Dow Jones STOXX 50 Index and
Dow Jones EURO STOXX 50 Index Traded on the Eurex
Deutschland

Dear Mr. Rosen:

This is in response to your letters and facsimiles dated from May 18, 1999, through March 17, 2000, requesting that the Office of the General Counsel of the Commodity Futures Trading Commission ("Commission" or "CFTC") issue a "no-action" letter concerning the offer and sale in the United States (the "U.S.") of the Eurex Deutschland's ("Eurex Deutschland" or "Eurex") futures contracts based on the Dow Jones STOXX 50 Index ("STOXX 50 Index") and the Dow Jones EURO STOXX 50 Index ("EURO STOXX 50 Index") (collectively "Indices").

We understand the facts to be as follows. The Eurex Deutschland is a futures and options exchange located in Frankfurt, Germany and has been in operation since 1990.¹ The trading of securities and derivatives is subject to the Securities Trading Act. The Securities Trading Act established the Federal Supervisory Office for Securities Trading ("BAWE") which has comprehensive authority for the supervision of the German securities and derivatives markets with respect to the prevention of abuses which impair the orderly conduct of securities and derivatives trading or may disrupt the securities or derivatives market. Eurex also is subject to state oversight. The Hessian Ministry for Economics, Transport and Development (the "Exchange Supervisory Authority") has immediate oversight responsibility with respect to the ongoing operations of Eurex. Eurex is required to submit information regarding rule and procedural changes to the Exchange Supervisory Authority. Further, the investigation and prosecution of the fraudulent manipulation of trading practices is the responsibility of the public prosecutor and the German courts with the cooperation of Eurex.

On February 26, 1998, Deutsche Börse entered into a joint venture with SBF-Paris Bourse, Dow Jones, and Schweizer Börse to form a Swiss company, STOXX Limited, to develop and maintain a new group of

indices. Among others, STOXX Limited has developed and maintains the STOXX 50 Index, a capitalization-weighted index comprised of 50 blue-chip stocks selected from the Dow Jones STOXX Index,² and the EURO STOXX 50 Index, a capitalization-weighted index comprised of 50 blue-chip stocks selected from the Dow Jones EURO STOXX Index.³

Both the STOXX 50 Index and the EURO STOXX 50 Index are broadly diversified. As of October 5, 1999, the STOXX 50 Index includes stocks from nine European countries and eighteen industry sectors,⁴ and the EURO STOXX 50 Index includes stocks from seven countries and nineteen industry sectors.⁵ The market capitalization as of October 5, 1999 of the STOXX 50 Index was 2.83 trillion euros (U.S. \$3.023 trillion)⁶ and the EURO STOXX 50 Index was 1.925 trillion euros (U.S. \$2.057 trillion).⁷ No single stock comprised more than 5.94% of the STOXX 50 Index's value, and the five most heavily weighted stocks in the STOXX 50 Index accounted for 22.91% of the STOXX 50 Index's value. No single stock comprised more than 6.27% of the EURO STOXX 50 Index's value, and the five most heavily weighted components accounted for 26.15% of the EURO STOXX 50 Index's value. The Indices are designed to reflect the leaders in each industry sector, and no single stock may constitute greater than 10% of the value of either of the Indices. The component stocks in the Indices are revised annually on the third Friday of September. Component weights are adjusted as part of the revision to ensure representation of the relevant underlying market. To maintain market continuity, an adjustment is made to the index divisor. STOXX Limited calculates and disseminates the value of the Indices in real-time every 15 seconds from 8:00 A.M. to 5:45 P. M. (Central European Time), using the last sale price for each component stock and the latest currency exchange rates. The index values are disseminated through newspapers and quotation vendors, including Bloomberg, Instinet and Reuters.

The terms and conditions for the STOXX 50 Index and EURO STOXX 50 Index futures contract are identical, with the exception of the underlying index. Both contracts provide for cash settlement. The notional value of each futures contract is determined by multiplying the relevant index by 10 euros. Prices for the futures contracts are quoted in index points with each index point equal to 10 euros per contract. The minimum price fluctuation is one index point. Settlement months for the futures contracts on the Indices are the three nearest months of the March, June, September, December cycle, and the last trading day for the contracts is the third Friday of the settlement month. Cash settlement occurs on the first exchange trading day after the last trading day. The final settlement price for each contract is calculated on the last day of trading and is the average value of the relevant STOXX 50 Index or EURO STOXX 50 Index calculated on the last trading day.

The offer and sale in the U.S. of futures contracts traded on or subject to the rules of a foreign exchange is subject to the Commission's exclusive jurisdiction.⁸ Section 2(a)(1)(B)(v) of the Act, 7 U.S.C. § 2a(v) (1994), generally prohibits any person from offering or selling a futures contract based on a securities index except as permitted under Section 2(a)(1)(B)(ii), 7 U.S.C. § 2a(ii) (1994), which sets forth three criteria to govern Commission designation of futures contracts on a group or index of securities:

- (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 index must be predominately composed of the securities of unaffiliated issuers and reflect the market for all publicly traded securities or a substantial segment thereof.

See H.R. Rep. No. 565, Part 1, 97th Cong., 2d Sess. 39 (1982).

Section 2(a)(1)(B)(ii) also provides that the Commission shall not designate a board of trade as a contract market unless the Commission finds that the board of trade meets the criteria enumerated therein. Although we understand that Eurex does not seek designation as a contract market, the Committee on Agriculture of the U.S. House of Representatives ("House Committee") suggested that a foreign board of trade like Eurex could apply to the Commission for "certification" that its stock index contract conforms with the requirements of the Act established for a specifically identified contract and therefore could be offered and sold in the U.S. See H.R. Rep. No. 565, Part 1, 97th Cong., 2d Sess. 85 (1982). The House Committee explained, for example, that a foreign exchange could seek certification from the Commission that its futures contract based upon an index of U.S. securities meets the requirements set forth in Section 2(a)(1)(B)(ii). Id.

As noted above, we understand that the securities in the Indices are issued by European companies only. With respect to futures contracts based on such foreign securities indices, the House Committee suggested that the Commission may use such criteria as it deems appropriate to determine whether such futures contracts may be offered and sold in the U.S. Id. In this regard, the requirements of Section 2(a)(1)(B)(ii) of the Act were designed to permit futures trading in "broad-based . . . indices that are not conducive to manipulation or disruption of the market for the underlying securities." S. Rep. No. 390, 97th Cong., 2d Sess. 6 (1982). See H.R. Rep. No. 565, Part 1, 97th Cong., 2d Sess. at 39. Accordingly, we have examined the STOXX 50 Index and the EURO STOXX 50 Index futures contracts in light of these criteria. Based on the information noted herein and as set forth in the letters, attachments and facsimiles noted above, we have determined that these futures contracts conform to these requirements.

In evaluating whether a foreign futures contract based on a foreign stock index is not readily susceptible to manipulation or to being used to manipulate any underlying security, this Office inquires whether surveillance-sharing arrangements exist between the requesting futures exchange and the securities exchanges which are the home securities exchanges for the stocks underlying the index. The STOXX 50 Index and EURO STOXX 50 Index contain stocks that are traded on securities exchanges in nine and seven European countries, respectively.

The BAWE has entered into bilateral memoranda of understanding ("MOUs") and exchange of letters with five of the countries represented by stocks in the Indices: France, Italy, Spain, Switzerland and Portugal (representing approximately 34.95% of the capitalization of the STOXX 50 Index, 56.68% including Germany, and representing approximately 39.92% of the capitalization of the EURO STOXX 50, 68.55% including Germany). In addition, BAWE, as the primary federal regulator for both the securities and derivatives markets, has direct access to information regarding trading on the underlying German securities

included in the Indices. Moreover, BAWE has entered into the Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities with the other members of the Forum of European Securities Commission ("FESCO MOU") which covers all of the countries represented by stocks in the Indices, other than Switzerland. The information sharing mechanisms of the FESCO MOU would cover countries that represent approximately 87.58% of the capitalization of the STOXX 50 Index and 100% of the capitalization of the EURO STOXX 50. Eurex has represented that the FESCO MOU enables the BAWE and other regulatory authorities to obtain a wide range of information relating to the monitoring of compliance with and enforcement of applicable laws, including information concerning the ultimate customer to a particular transaction.⁹ Further, Eurex represents that the Trading Surveillance Office of Eurex is able to obtain information about the ultimate customer directly from another exchange's trading surveillance office.¹⁰ Finally, Eurex has represented that the European Union's Investment Services Directive may be used by European member regulatory authorities to obtain information about the activities of financial services firms in connection with such authorities general regulation of such firms but that the directives do not directly provide for information-sharing relating to surveillance of exchange trading.

In consideration of the various bilateral and multilateral information-sharing arrangements to which Germany is a party, as noted herein, we have concluded that Eurex will have sufficient access to the information it may need to detect and deter manipulation. In making this determination, we have considered the diversification, capitalization, and the liquidity of the component securities of the Indices. Nevertheless, this Office continues to advocate that exchange-to-exchange surveillance-sharing arrangements are preferable as the most expedient means to obtain the detailed information required for an effective surveillance program to detect manipulation. Therefore, we encourage Eurex to continue to pursue forging exchange-to-exchange surveillance agreements with regard to the stocks underlying these Indices. In the event that Eurex is unable to obtain access to adequate surveillance data under the means that it has cited, this Office reserves the right to reconsider its position taken herein.¹¹

In light of the foregoing, the Office of the General Counsel will not recommend any enforcement action to the Commission based on Sections 2(a)(1)(B)(v), 4(a), or 12(e) of the Commodity Exchange Act, as amended, if the STOXX 50 Index Futures Contract and the EURO STOXX 50 Index Futures Contract traded on the Eurex are offered and sold in the U.S.¹² Because this position is based upon facts and representations contained in the above-noted letters, attachments and facsimiles, 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 the Eurex with all regulatory requirements imposed by the BAWE and the applicable laws and regulations of Germany and the State of Hesse.

The offer and sale in the U.S. of the STOXX 50 Index Futures Contract and the EURO STOXX 50 Index Futures Contract is, of course, subject to the Part 30 regulations adopted by the Commission to govern the offer and sale of foreign futures and foreign option contracts in the U.S.¹³

Yours
truly,

David
R.
Merrill
Deputy
General
Counsel

cc: Ms. Annette L. Nazareth
Director
Division of Market Regulation
Securities and Exchange Commission

1 Eurex Deutschland was originally named the Deutsche Terminbörse ("DTB") but changed its name on June 8, 1998, in anticipation of a business combination between DTB's administrative and operating institution, Deutsche Börse AG and the Swiss Exchange. That business combination occurred on September 28, 1998. As a result of the business combination, DTB was renamed Eurex Deutschland and the Swiss Exchange was renamed Eurex Zürich. Eurex Deutschland and Eurex Zürich remain legally separate exchanges, although they share a common electronic trading platform, and transactions on both exchanges are cleared through Eurex Clearing. The instant no-action request encompasses only Eurex Deutschland's STOXX 50 Index and EURO STOXX 50 Index futures contracts. The Commission staff recently discussed the corporate structure of Eurex Deutschland, the regulatory structure in Germany and the regulation of Eurex and its members in connection with the relief granted to Eurex to make available its electronic trading system in the United States. See CFTC Staff Letter No. 99-48, 2 Comm. Fut. L. Rep. (CCH) ¶ 27,917 (August 10, 1999).

2 The Dow Jones STOXX Index is a capitalization-weighted index composed of 650 highly-capitalized and liquid stocks from 16 European countries and 19 industry sectors as of October 22, 1999.

3 The Dow Jones EURO STOXX Index is a capitalization-weighted index that is a subset of the STOXX Index and as of October 22, 1999 includes the stocks of companies from 10 countries that have adopted the European single currency, the euro.

4 The countries represented in the STOXX 50 Index are Finland, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland and the United Kingdom.

5 The countries represented in the EURO STOXX 50 Index are Belgium, Finland, France, Germany, Italy, the Netherlands and Spain.

6 The euro/U.S. dollar spot rate was 1.0737 euro per U.S. dollar on October 5, 1999.

7 As of October 5, 1999, the aggregate weighting of securities in the STOXX 50 Index by country was the following: (1) the United Kingdom (12 stocks, 30.99%); (2) Germany (9 stocks, 17.47%); (3) the Netherlands (8 stocks, 12.71%); (4) Switzerland (6 stocks, 13.69%); (5) France (7 stocks, 11.15%); (6)

Italy (3 stocks, 4.35%); (7) Spain (3 stocks, 3.91%); (8) Finland (1 stock, 3.83%); and (9) Sweden (1 stock, 1.90%). For the EURO STOXX 50 Index, the aggregate weighting was: (1) Germany (14 stocks, 31.30%); (2) France (6 stocks, 26.99%); (3) the Netherlands (8 stocks, 18.68%); (4) Spain (5 stocks, 7.88%); (5) Italy (4 stocks, 7.58%); (6) Finland (1 stock, 5.63%); and (7) Belgium (2 stocks, 2.01%).

8 The terms "any other board of trade, exchange, or market" in Section 2(a)(1)(A)(i) make clear the Commission's exclusive jurisdiction includes futures contracts executed on a foreign board of trade, exchange or market. Section 2(a)(1)(A), 7 U.S.C. § 2 (1994); 120 Cong. Rec. 34497 (1974) (statement of Senator Talmadge).

9 Eurex represents that the FESCO MOU supersedes any bilateral MOU between FESCO MOU signatories with less comprehensive information-sharing provisions than the FESCO MOU. Bilateral MOUs otherwise remain unaffected. See letter from Edward J. Rosen, Cleary, Gottlieb, Steen & Hamilton, to C. Robert Paul, General Counsel, CFTC, dated March 17, 2000.

10 Id.

11 On October 17, 1997, a MOU between the BAWE and the CFTC was entered into with respect to the sharing of confidential information among agencies and mutual assistance in investigation and enforcement matters. See Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Futures Laws. Further, the BAWE is a signatory to the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations for the sharing of large exposure information, as amended, March, 1998 ("Boca Declaration"). The Eurex has represented that it is able and willing to cooperate through information sharing and other means with the CFTC in relation to the STOXX 50 and EURO STOXX 50 futures contracts traded on Eurex. See letter from Mr. Rosen to Daniel Waldman, General Counsel, CFTC, and I. Michael Greenberger, Director, Division of Trading and Markets, CFTC, dated May 18, 1999. Finally, the Eurex also is a signatory to the International Information Sharing Memorandum of Understanding and Agreement signed on March 15, 1996 at Boca Raton, Florida.

12 The staff of the Securities and Exchange Commission ("SEC") has informed us that they would have no objection to the offer and sale of these futures contracts to U.S. persons. See letter dated March 30, 2000 from Belinda Blaine, Associate Director, Division of Market Regulation, SEC, to C. Robert Paul, General Counsel, CFTC.

13 See 17 C.F.R. Part 30.