



## U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581  
Telephone: (202) 418-5120  
Facsimile: (202) 418-5524

Office of General Counsel

CFTC letter No. 04-24  
August 30, 2004  
No-Action  
Office of General Counsel

Michael M. Philipp, Esq.  
Katten Muchin Zavis Rosenman  
525 West Monroe Street, Suite 1600  
Chicago, IL 60661-3693

Re: Request for No-Action Relief in Connection with the Offer and Sale in the United States of the S&P/MIB Index Futures Contract and miniFutures Contract Traded on the Mercato Italiano dei Derivati

Dear Mr. Philipp:

This is in response to letters, attachments, facsimiles and electronic mail dated from June 24, 2004 to July 28, 2004, requesting on behalf of Borsa Italiana S.p.A. ("Borsa"), 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 the Mercato Italiano dei Derivati's ("IDEM") futures contracts based on the S&P/MIB Index ("S&P/MIB" or "Index")--the S&P/MIB futures contract and the miniFutures contract.

We understand the facts to be as follows. The Borsa is a privately-owned organization responsible for the management and surveillance of the Italian Stock Exchange ("ISE") and its equity derivatives division, the IDEM.<sup>1</sup> Both the ISE and IDEM, as well as the Borsa, are regulated by the Commissione Nazionale per le Società e la Borsa ("Consob"). The Consob is an independent agency of the Italian government

---

<sup>1</sup> Commission staff previously issued no-action relief to the Borsa with respect to the IDEM's mini futures contract based on the MIB 30 Index, known as the "miniFIB," CFTC Staff Letter No. 01-42 [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,543 (May 16, 2001), and to the Borsa's predecessor in interest, the Italian Stock Exchange Council, with respect to IDEM's futures contract on the MIB 30 Index, known as the "FIB 30," CFTC Staff Letter No. 95-74 [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,555 (Aug. 30, 1995). We understand that after September 20, 2004, the S&P/MIB futures contract and miniFutures contract will replace IDEM's futures contracts on the MIB 30 Index.

responsible for the prevention of market manipulation and has regulatory oversight authority over both the securities and derivatives markets in Italy. The Cassa di Compensazione e Garanzia (“Cassa”) is the clearinghouse for the IDEM, and is subject to the supervisory authority of both the Bank of Italy and Consob.<sup>2</sup>

The S&P/MIB is a broad-based, free-float-adjusted, market-capitalization-weighted security index designed to reflect the overall performance of the Italian equity market.<sup>3</sup> The Index currently tracks the performance of 40 highly capitalized securities traded on the ISE.<sup>4</sup> Based on data supplied by the Borsa, the total adjusted market capitalization of the S&P/MIB was approximately U.S. \$282.4 billion as of May 13, 2004.<sup>5</sup> Also as of that date, the largest single security by weight represented 18.1%, and the five most heavily weighted securities represented 51.8%, of the S&P/MIB.<sup>6</sup> The securities comprising the lowest 25% of the S&P/MIB had a six-month aggregate dollar value of average daily trading volume in excess of U.S. \$30 million: approximately U.S.\$ 873.5 million for the 6-month period ending June 30, 2004.<sup>7</sup> The S&P/MIB is calculated in real time and is disseminated by electronic means through major data vendors, such as Bloomberg and Reuters.<sup>8</sup>

IDEM’s S&P/MIB futures contract and miniFutures contract commenced trading on March 22, 2004. Both contracts provide for cash settlement. Prices are quoted in Index points with each Index point equal to 5 euros for the S&P/MIB futures contract and 1 euro for the miniFutures contract. The minimum price fluctuation for both contracts is five Index points per contract. Both contracts are listed for trading from 9:00 AM to 5:40 PM Central European Time (“CET”), with the exception of the last trading day, when trading occurs between 9:00 AM and 9:10 AM CET. The last trading day for both contracts is the third Friday of the expiration month. Contract expiration months are four months in the March quarterly cycle for the S&P/MIB futures contract and the two nearby March quarterly cycle months for the miniFutures contract. Cash settlement occurs on the first business day after the last trading day. The final cash settlement

---

<sup>2</sup> See letter from Michael M. Philipp, Esq., Katten Muchin Zavis Rosenman, to Harold L. Hardman, Senior Assistant General Counsel (Regulation), CFTC, dated June 24, 2004.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See electronic mail from Michael M. Philipp, Esq., Katten Muchin Zavis Rosenman, to Harold L. Hardman, Senior Assistant General Counsel (Regulation), and Julian E. Hammar, Counsel, CFTC, dated July 20, 2004.

<sup>8</sup> See letter from Mr. Philipp to Mr. Hardman, dated June 24, 2004.

price for the contracts is determined based on the value of the S&P/MIB calculated using the opening prices of the constituent stocks on the last trading day.<sup>9</sup>

The Commodity Exchange Act (“CEA”),<sup>10</sup> as amended by the Commodity Futures Modernization Act of 2000 (“CFMA”),<sup>11</sup> 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,<sup>12</sup> with the exception of security futures products,<sup>13</sup> over which the Commission shares jurisdiction with the Securities and Exchange Commission (“SEC”).<sup>14</sup> Thus, the Commission’s jurisdiction remains exclusive with regard to futures contracts on a group or index of securities that are broad-based pursuant to CEA Section 1a(25).<sup>15</sup>

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).<sup>16</sup> 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”):

---

<sup>9</sup> *Id.*

<sup>10</sup> 7 U.S.C. § 1 *et seq.*

<sup>11</sup> Appendix E of Pub. L. No. 106-554, 114 Stat. 2763 (2000).

<sup>12</sup> See CEA Section 2(a)(1)(C)(ii).

<sup>13</sup> 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).

<sup>14</sup> See CEA Section 2(a)(1)(D).

<sup>15</sup> See CEA Section 2(a)(1)(C)(ii).

<sup>16</sup> CEA Section 2(a)(1)(D) governs the offer and sale of security futures products.

- (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.<sup>17</sup>

While Section 2(a)(1)(C)(ii) provides that no board of trade 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.<sup>18</sup>

Accordingly, this Office has examined the S&P/MIB, and IDEM's futures contracts based thereon, to determine whether the Index and the futures contracts meet

---

<sup>17</sup> 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).

<sup>18</sup> 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.

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 S&P/MIB and IDEM's S&P/MIB futures contract and miniFutures contract based thereon, conform to these requirements.<sup>19</sup>

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 underlying the S&P/MIB are traded on the ISE.<sup>20</sup> Both the ISE and IDEM are managed and subject to surveillance by the Borsa and regulated by the Consob. Thus, the Borsa and IDEM should have access to information necessary to detect or deter manipulation. In the event that either the Borsa or IDEM is unable to obtain access to adequate surveillance data in this regard, or is unable to share such data with the CFTC either directly or through the Consob, this Office reserves the right to reconsider the position we have taken herein.<sup>21</sup>

---

<sup>19</sup> In making this determination, Commission staff has concluded that the S&P/MIB does not have any of the elements of a narrow-based security index as enumerated in CEA Section 1a(25)(A), and accordingly the Index presently would not be a narrow-based security index if traded on a designated contract market or DTEF.

<sup>20</sup> One stock in the Index, ST Microelectronics, is listed on Euronext Paris in addition to being listed on the ISE. The Borsa represents that through an information sharing agreement between the Consob and the French Autorité des Marchés Financiers ("AMF"), namely the Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities signed by the members of the Forum of European Securities Commissions, Consob will be able to obtain information required to investigate suspected manipulation or other trading abuses with respect to ST Microelectronics from AMF. In addition, the Borsa represents that seven stocks underlying the Index are the subject of American Depositary Receipts listed on the New York Stock Exchange, and that the Consob signed on May 3, 1993 an information sharing arrangement with the SEC. See letter from Raffaele Jerusalemi, Executive Director, Borsa, to Harold L. Hardman, Senior Assistant General Counsel (Regulation) and Julian E. Hammar, Counsel, CFTC, dated July 20, 2004.

<sup>21</sup> The Consob, in its market surveillance activity, has the authority to obtain information from intermediaries operating on the Borsa markets, including the identity of the customer to the ultimate transaction. The Borsa represents that such information regarding the S&P/MIB futures contract and miniFutures contract will be made available to the CFTC by the Consob, in accordance with the Memorandum on Consultation and Mutual Assistance for the Exchange of Information signed by the CFTC and Consob on June 22, 1995, and the Supplemental Memorandum of Understanding signed by the CFTC and Consob on September 11, 2000. See letter from Mr. Jerusalemi to Mr. Hardman and Mr. Hammar, dated July 20, 2004. In addition, the Borsa represents that Italy does not have any blocking statutes that would prevent the provision of information

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 IDEM's S&P/MIB futures contract and miniFutures contract 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 IDEM and the Borsa with all regulatory requirements imposed by the Consob, and the applicable laws and regulations of Italy. 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.

The offer and sale in the U.S. of IDEM's futures contracts on the S&P/MIB 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.<sup>22</sup>

Sincerely,

Patrick J. McCarty  
General Counsel

---

to the Commission concerning trading in the S&P/MIB futures and miniFutures contracts. See letter from Mr. Philipp to Mr. Hardman, dated June 24, 2004. Also, the Consob is a signatory to the Declaration on Cooperation and Supervision of International Futures Markets and Clearing Organizations, signed on March 15, 1996, at Boca Raton, Florida.

<sup>22</sup> See 17 C.F.R. Part 30.