



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of General Counsel

CFTC letter No. 06-06  
March 14, 2006  
No-Action  
Office of General Counsel

Dr. Ekkehard Jaskulla  
Head of Section, Legal Affairs and Membership  
Section Markets and Regulatory  
Eurex Deutschland  
Neue Börsenstraße 1  
60485 Frankfurt/Main  
FEDERAL REPUBLIC OF GERMANY

Re: Eurex Deutschland's Request for No-Action Relief in Connection with the Offer and Sale in the United States of its MDAX® Futures Contract

Dear Dr. Jaskulla:

This letter is in response to letters, attachments, facsimiles and electronic mail dated from August 18, 2005 to November 23, 2005, 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 ("US") of Eurex's futures contract based on the MDAX® Index ("MDAX®" 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.<sup>1</sup> Eurex

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<sup>1</sup> This Office previously has granted no-action relief to Eurex in connection with the offer and sale in the US of its futures contracts based on the Dow Jones Italy Titans 30 Index, see CFTC Staff Letter No. 05-23 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,168 (Nov. 23, 2005); the Dow Jones Global Titans 50 Index, see 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, see 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, see CFTC Staff Letter No. 00-52 [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,114 (April 6, 2000) and the DAX Index, see CFTC Staff Letter No. 94-98 [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,277 (Dec. 20, 1994).

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 and the Frankfurt Stock Exchange (“FSE”) are located, and by the German Federal Financial Supervisory Agency (Bundesanstalt für Finanzdienstleistungsaufsicht) (the “BaFin”).<sup>2</sup> 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.<sup>3</sup>

The MDAX® is a broad-based, modified-free-float-market-capitalization-weighted, total-return security index maintained by Deutsche Börse AG.<sup>4</sup> The MDAX® generally consists of 50 “mid-cap” stocks of German and non-German companies that are listed on the FSE’s Prime Standard market segment and continuously traded on the FSE’s Xetra® trading system.<sup>5</sup> The component stocks of the MDAX® rank in terms of market capitalization and turnover below the 30 stocks in the German “blue chip” security index, the Deutsche Aktienindex (DAX®).<sup>6</sup> Index rules provide for a minimum of 35

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<sup>2</sup> On May 1, 2002, the Federal Banking Supervisory Office (Bundesaufsichtsamt für das Kreditwesen) (“BAKred”), the Federal Securities Supervisory Office (Bundesaufsichtsamt für den Wertpapierhandel) (“BAWe”) and the Federal Insurance Supervisory Office (Bundesaufsichtsamt für das Versicherungswesen) (“BAV”) were merged into the BaFin, which has federal responsibility for the supervision of credit institutions, financial services institutions and insurance companies. All activities previously regulated by the BAKred, the BAWe and the BAV are now regulated by the BaFin. See letter from Dr. Ekkehard Jaskulla, Head of Section (Legal Affairs and Membership, Section Markets and Regulatory), Eurex, to Richard A. Shilts, Director, Division of Market Oversight, CFTC, dated August 18, 2005, at 7.

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

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 4-5. The Prime Standard market segment is the highest of three market segments (Prime Standard, General Standard and Entry Standard) used to classify a company in terms of its reporting transparency. Prime Standard includes companies conducting or intending to conduct business internationally. Companies in the Prime Standard market segment must use international accounting standards and meet higher financial transparency standards (including quarterly reporting both in German and English, publication of a corporate calendar, and staging at least one analyst conference per year), which go beyond those of the General Standard and Entry Standard market segments. See Deutsche Börse AG’s website at [http://deutscheboerse.com/dbag/dispatch/en/kir/gdb\\_navigation/listing/10\\_Market\\_Structure/15\\_transparency\\_standards](http://deutscheboerse.com/dbag/dispatch/en/kir/gdb_navigation/listing/10_Market_Structure/15_transparency_standards).

<sup>6</sup> See Guide to the Equity Indices of Deutsche Börse, Version 5.7 (June 2005), at 6.

stocks in the MDAX®.<sup>7</sup> The composition of the MDAX® is reviewed quarterly in March, June, September and December.<sup>8</sup> If the weight of any component security in the MDAX® exceeds 10% of the Index at the quarterly review, it is reduced to 10%.<sup>9</sup>

Based on data supplied by Eurex, the total adjusted market capitalization of the MDAX® was approximately US\$ 84 billion as of June 30, 2005.<sup>10</sup> Also as of that date, the largest single security by weight represented 10.48%, and the five most heavily-weighted securities represented 33.93%, of the MDAX®.<sup>11</sup> The securities comprising the lowest 25% of the Index had a six-month aggregate dollar value of average daily trading volume in excess of US\$ 30 million: approximately US\$ 91.7 million for the 6-month period ending June 2005.<sup>12</sup> The Index is calculated in real time and is disseminated by electronic means through major data vendors, including Bloomberg and Reuters.<sup>13</sup>

Eurex's MDAX® futures contract provides for cash settlement.<sup>14</sup> Prices are quoted in Index points with each Index point equal to 5 euros per contract. The minimum price movement is one Index point. 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

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<sup>7</sup> *Id.* at 12.

<sup>8</sup> See letter from Dr. Jaskulla to Mr. Shilts, dated August 18, 2005, at 4. The Working Committee for Equity Indices ("Committee") advises Deutsche Börse AG on all issues related to the composition of the MDAX® at these quarterly reviews. Its recommendations are made based on selection criteria outlined in the "Guide to Equity Indices of Deutsche Börse," although Deutsche Börse retains discretion to accept or reject any of the Committee's recommendations. The MDAX®'s composition also may be adjusted at other times for extraordinary corporate events, including delistings, bankruptcies, mergers and takeovers. *Id.* Changes to the MDAX®'s composition are published through press release and are made available on the Deutsche Börse AG website, [www.deutsche-boerse.com](http://www.deutsche-boerse.com). *Id.*

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

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 9 and Annex B.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 8.

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 contract. The final cash settlement price for the contract is calculated based on the opening prices of the component stocks in the MDAX® on the last trading day.<sup>15</sup>

The Commodity Exchange Act (“CEA”),<sup>16</sup> as amended by the Commodity Futures Modernization Act of 2000 (“CFMA”),<sup>17</sup> provides that the offer or sale in the US 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>18</sup> with the exception of security futures products,<sup>19</sup> over which the Commission shares jurisdiction with the Securities and Exchange Commission (“SEC”).<sup>20</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>21</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 US, except as permitted under CEA Section 2(a)(1)(C)(ii) or CEA Section 2(a)(1)(D).<sup>22</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”):

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<sup>15</sup> *Id.*

<sup>16</sup> 7 U.S.C. § 1 *et seq.*

<sup>17</sup> Appendix E of Pub. L. No. 106-554, 114 Stat. 2763 (2000).

<sup>18</sup> See CEA Section 2(a)(1)(C)(ii).

<sup>19</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>20</sup> See CEA Section 2(a)(1)(D).

<sup>21</sup> See CEA Section 2(a)(1)(C)(ii).

<sup>22</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>23</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 US 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>24</sup>

Accordingly, this Office has examined the MDAX®, and Eurex's futures contract based thereon, to determine whether the Index and the futures contract meet the

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<sup>23</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>24</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.

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 MDAX®, and Eurex's futures contract based thereon, conform to these requirements.<sup>25</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. The MDAX® currently includes the securities of 48 German companies and 2 non-German companies.<sup>26</sup> However, all of the securities underlying the MDAX®, including the securities of the non-German companies, are listed and traded on the FSE.<sup>27</sup> Pursuant to the German Exchange Act, Eurex's Trading Surveillance Office and the FSE's Trading Surveillance Office are authorized to share surveillance information with each other.<sup>28</sup> Thus, 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,

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<sup>25</sup> In making this determination, the Commission staff has concluded that the MDAX® 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 would not be a narrow-based security index if traded on a designated contract market or DTEF.

<sup>26</sup> See electronic mail from Julius W. A Seiffert, Legal Counsel, Eurex, to Julian E. Hammar, Counsel, CFTC, dated November 23, 2005.

<sup>27</sup> *Id.* The two non-German companies currently represented in the MDAX® are based in Ireland and the Netherlands, respectively. The securities regulators from both Ireland and the Netherlands, along with the BaFin, are signatories to the Forum of European Securities Commissions' Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance Activities (the "FESCO MOU"). The FESCO MOU provides for sharing of certain market surveillance data among FESCO members, including the identity of the ultimate customer in a transaction. Although the functions of FESCO have been assumed by the Committee of European Securities Regulators, the FESCO MOU remains in effect. See letter from Dr. Jaskulla to Mr. Shilts, dated August 18, 2005, at 7.

<sup>28</sup> See electronic mail from Mr. Seiffert to Mr. Hammar, dated November 23, 2005. The German Exchange Act also authorizes Eurex's Trading Surveillance Office to obtain information directly from, and share information directly with, similar trading surveillance offices of other exchanges or regulators outside of Germany. See letter from Dr. Jaskulla to Mr. Shilts, dated August 18, 2005, at 7. The BaFin and its predecessor, the BAWe, have also entered into bilateral memoranda of understanding with regulators in a number of countries. *Id.*

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.<sup>29</sup>

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 MDAX® is offered or sold in the US. 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 MDAX® futures contract available for trading through the electronic trading terminals of its US members in accordance with the terms of the August 10, 1999 foreign terminals no-action letter ("August 10, 1999 letter") issued by Commission staff to Eurex.<sup>30</sup> 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 MDAX® will be traded in accordance with the terms and conditions of the August 10, 1999 letter.<sup>31</sup> We have consulted with the Commission's Division of Market Oversight

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<sup>29</sup> In this regard, 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 MDAX® futures contract. See letter from Dr. Jaskulla to Mr. Shilts, dated August 18, 2005, at 7. 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. The BaFin also is a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information of the International Organization of Securities Commissions ("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.

<sup>30</sup> See CFTC Staff Letter No. 99-48 [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27.572 (Aug. 10, 1999).

<sup>31</sup> See letter from Mr. Rosen to Mr. Shilts, dated August 18, 2005, at 1.

("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 MDAX® futures contract 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 MDAX® futures contract.

The offer and sale in the US of Eurex's futures contract on the MDAX® 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 US.<sup>32</sup>

Sincerely,

Nanette R. Everson  
General Counsel

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<sup>32</sup> See 17 C.F.R. Part 30.