



IRISH FINANCIAL SERVICES
REGULATORY AUTHORITY

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Date: 1 November 2004

No of pgs (incl. cover): 5

Remarks: Urgent For Review For Reply For Comment

Thank you for confirming that the proposed amendments to the NYMEX Europe Addendum to Membership Application which were e-mailed to you earlier today have been agreed by the CFTC and NYMEX

Further to Dr O'Reilly's fax to the CFTC of 9:47 am today, please find attached a replacement letter from Dr O'Reilly (pursuant to the CFTC's request) which reflects the fact that the Irish Financial Services Regulatory Authority has now received legal advice from its external advisors concerning the enforceability of the agreement to submit to the US jurisdiction in the NYMEX Europe Addendum to Membership Application (as amended by agreement).

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Ms Jean Webb
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1 November 2004

Dear Ms Webb

I refer to the application under Chapter VIII of the Central Bank Act, 1989 by New York Mercantile Exchange, Inc (NYMEX) to establish an Irish branch, NYMEX Europe.

The Irish Financial Services Regulatory Authority ('Financial Services Regulator') notes that NYMEX has filed a written self-certification with the CFTC in respect of proposed changes to its rules in connection with the proposed establishment of an Irish branch. It is also noted that NYMEX has lodged the rule amendments for the approval of the CFTC and we ask that you inform the Financial Services Regulator when such approval is issued.

Supervision by CFTC of the Irish branch

The Financial Services Regulator confirms that it is in agreement with the NYMEX Addendum to Membership Application ('the agreement'). The agreement entered into by the NYMEX participants is broadly similar to the jurisdictional agreement referred to in the Central Bank of Ireland's letter of 17 June 1994. Consequently the Financial Services Regulator's legal advisors have indicated that the agreement would appear to apply so as to enable an Irish court to take the view that a member who has signed the membership addendum agreement has validly accepted US jurisdiction as a condition of trading on the Dublin Floor.



On the question of the liability in Ireland of the CFTC, previous legal advice obtained and referred to above, indicated that as a matter of Irish law, the function of the CFTC in Ireland would arise by virtue of contract under the rules of NYMEX and the membership addendum agreement referred to above. Ignoring defences of immunity which may exist, any liability would be confined to circumstances where the CFTC had improperly or negligently applied the provisions of any relevant US legislation and the regulations thereunder. It is unlikely that CFTC would owe any general duty of care under Irish Law such as would expose it to liability for negligence in tort (rather than in contract) to third parties (unless in the particular circumstances it has taken some steps to establish a relationship giving rise to that duty). Under Irish law, the duty of care in this regard rests with the Financial Services Regulator, but it is given an express statutory immunity from liability in respect of losses incurred through the insolvency or default of the exchange or of any of its members (Section 101(3) of the Central Bank Act, 1989 (as amended)).

The Financial Services Regulator has made it a condition of approval of NYMEX Europe rules that NYMEX Europe must comply at all times with the regulations and requirements of the CFTC and any relevant US legislation.

Under Section 105 of the Central Bank Act, 1989 ('the Act') the Financial Services Regulator may direct the suspension of trading or dealing if a member has failed to comply with conditions or requirements which are attached to the approval of rules of a futures and options exchange ('the Exchange'). Section 106 of the Act allows the Financial Services Regulator to revoke its approval of the rules in certain circumstances and Section 107 provides for certain offences and penalties where a member (i) commits by act or omission a breach of a condition or requirement which relates to the approval given by the Financial Services Regulator to the rules of the Exchange or (ii) fails to comply with a direction given by the Financial Services Regulator. The provisions relating to breaches of CFTC legislation by the Exchange are therefore already brought within the jurisdiction of the Financial Services Regulator and those relating to breaches by members will be brought within the Financial Services Regulator's jurisdiction in a



similar way. It follows that a breach of CFTC legislation would be a breach of a condition attaching to the Financial Services Regulator's approval of the rules of the Exchange and the Financial Services Regulator can therefore exercise its powers under Chapter VIII of the Central Bank Act, 1989 as amended¹ to issue directions to the Exchange and/or its members and its powers under the Central Bank Act, 1942 as amended². You should be aware that the Financial Services Regulator has been given new administrative sanctioning powers under the Central Bank and Financial Services Authority of Ireland Act, 2004.

In this context, as with any such breach of a condition, the Financial Services Regulator would examine the circumstances of the breach and would decide on the appropriate action on a case by case basis. The Financial Services Regulator could not, for reasons of sovereignty and public policy, agree to initiate its own action automatically at the request of CFTC. However, the Financial Services Regulator agrees to consult with the CFTC in advance of such action and to be mindful of any CFTC request for action from the Financial Services Regulator.

The CFTC has previously identified a number of issues related to the interface of Irish and US legislation whereby the Financial Services Regulator recognises the CFTC as the lead regulator in ensuring compliance with relevant statutes. However, the Financial Services Regulator is agreeable to act as lead regulator to conduct periodic floor surveillance on an as-needed basis.

There is no difficulty arising from CFTC staff being present on the Dublin Floor.

Exchange of Information

With regard to the exchange of information (including non-public information) between the Financial Services Regulator and the CFTC such exchange will be in accordance

¹ By the Central Bank and Financial Services Authority of Ireland Act, 2003

² By the Central Bank and Financial Services Authority of Ireland Act, 2004



with the Statement of Intent which was entered into by the Financial Services Regulator and the CFTC on 17 March 2004 and the related correspondence between the Financial Services Regulator and the CFTC.

Yours sincerely

A handwritten signature in black ink, appearing to be a cursive name, located below the text "Yours sincerely".