

## Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – relief from certain requirements on the use of customer collateral by a regulated clearing agency under section 32(3) of National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* – Applicant seeking application of exceptions in section 32(3) to be extended to certain third-party permitted depositories – relief granted, subject to conditions.

## Applicable Legislative Provisions

Section 32(3) of NI 94-102; and  
Section 49(1) of NI 94-102.

**Citation: Re Eurex Clearing AG, 2020 ABASC 43**

**Date: 20200408**

In the Matter of  
The Securities Legislation of  
Alberta, Manitoba, Nova Scotia, Ontario And Québec (the **Jurisdictions**)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
Eurex Clearing AG (the **Filer**)

## Decision

## Background

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) in Alberta, Manitoba, Nova Scotia and Ontario pursuant to section 49 of National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (**NI 94-102**) and in Québec pursuant to section 86 of the *Derivatives Act* (Québec), CQLR, c. I-14.01, for a relief from certain requirements on the use of customer collateral by a regulated clearing agency under Part 5, paragraph 32(3) of NI 94-102. More specifically, the Filer seeks to hold Euro-denominated cash delivered by participants as customer collateral to the Filer in a TARGET2 account that is subject to a lien in favour of the permitted depository, and therefore requires the relief requested under paragraph 32(3) of NI 94-102 (the **Exemptive Relief Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a coordinated review application):

- (a) the Ontario Securities Commission (the **OSC**) is the principal regulator for this application, and
- (b) the decision is the decision of the principal regulator and evidences the decision of each other Decision Maker.

### **Interpretation**

Terms defined in National Instrument 14-101 Definitions and NI 94-102 have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

This decision is based on the following facts represented by the Filer:

1. The Filer is a stock corporation (*Aktiengesellschaft*) incorporated under German law and is a wholly owned subsidiary of Eurex Frankfurt AG and an indirect wholly owned subsidiary of Deutsche Börse AG, a publicly traded company listed on the Frankfurt Stock Exchange.
2. The Filer qualifies as a central counterparty (**CCP**) pursuant to Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories under European Markets Infrastructure Regulation (**EMIR**), which sets out clearing and bilateral risk-management requirements for over-the-counter (**OTC**) derivative contracts, reporting requirements for derivative contracts, and uniform requirements for the performance of activities of CCPs and trade repositories. It was granted authorization as a CCP under EMIR effective from April 10, 2014.
3. The Filer is exempt from the requirement to be recognized as a clearing agency in Ontario pursuant to a varied and restated Order of the OSC dated February 27, 2020 (the **Order**). The Order provides that the Filer's activities in Ontario will be limited to the clearing of transactions described in paragraph 1.10 of the Filer's representations set out in the Order, including OTC Interest Rate Derivative Transactions, OTC FX Transactions, OTC XCCY (cross-currency swap) Transactions and transactions that qualify as "swaps" as defined in section 1a(48) of the U.S. Commodity Exchange Act and CFTC Regulation 1.3, using the clearing models specified in paragraph 1.13 of the Filer's representations set out in the Order.
4. The Filer is a regulated clearing agency under NI 94-102.
5. The Filer is not in default of the Legislation and is in compliance in all material respects with applicable laws in Germany and under EMIR.
6. The Filer offers OTC derivatives clearing services in accordance with NI 94-102 under three types of clearing models: The Individual Segregated Account Model (**ISA**), the Elementary Clearing Model (**ECM**) and the CFTC-compliant Legally Segregated Operationally Commingled clearing model (**LSOC**). ISA and ECM are principal-to-principal clearing models. LSOC is an agency clearing model.

7. A local customer may elect to have its collateral segregated in accordance with an “individual client segregation” account structure under ISA, which offers additional protections pertaining to porting risk and enhanced segregation possibilities compared to an “omnibus client segregation” account structure under ECM.
8. Under ISA and ECM, the customer collateral delivered by participants to the Filer in cash denominated in Euro is held in the Filer’s TARGET2 account (**Euro Account**) maintained at the Deutsche Bundesbank (**DBB**).
9. Under the terms and conditions of DBB’s account opening documentation agreed with the Filer, DBB has a lien and set-off rights over amounts held in the Euro Account, which secures the Filer’s obligations to pay DBB’s fees for account maintenance and certain other limited services that DBB provides to the Filer in respect of the Euro Account.
10. Part 5, paragraph 32(3) of NI 94-102 allows a regulated clearing agency to permit a lien on customer collateral in respect of a cleared derivative that secures an obligation resulting from the cleared derivative in favour of the regulated clearing agency or a clearing intermediary. This provision does not, however, extend to liens in favour of a permitted depository that holds customer collateral, such as DBB.
11. In the event DBB exercises its lien in respect of the Euro Account, the Filer is obligated for any amount of any shortfall promptly to the local customer and is required to have sufficient liquid assets in order to do so. As part of its comprehensive risk management framework, the Filer maintains an appropriate minimum amount of financial resources, as required by the applicable regulatory requirements and regularly monitors its performance against financial resource requirements. Under no circumstance would the Filer distribute the shortfall across its customers, reflect a loss in a customer’s account, or require its customers to post additional customer collateral to cover the shortfall.
12. Further, the Euro Account is consistent with the Principles for financial market infrastructures (the **PFMI Principles**) issued by the Bank for International Settlement’s Committee on Payments and Market Infrastructure and the International Organization of Securities Commissions, and specifically with PFMI Principle 15. In accordance with PFMI Principle 15, the Filer maintains its own funds in excess of EUR 600 million in high-quality liquid assets in order to cover general business losses. Additionally, committed credit lines are available for short-term refinancing. Therefore, the Filer would be able to use this available capital to cover any fee payment to the DBB in respect of the Euro Account.
13. In order to fully comply with the applicable requirements of NI 94-102 and to ensure that ISA and ECM are available to local customers, the Filer requests that the Exemptive Relief Sought be granted.

### **Decision**

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemptive Relief Sought is granted, provided that the lien placed by DBB over the customer collateral (Euro-denominated cash) in the Euro Account is exclusively limited to unpaid fees owed by the Filer to DBB for services rendered by DBB in respect of the Euro Account.

“Kevin Fine”

Director, Derivatives Branch  
Ontario Securities Commission