

Eurex Clearing AG

Frequently Asked Questions

- Legal Opinions –

Date January 2021



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I. General Questions¹

1. Where can I find the legal opinions?

In order to access legal opinions via the member section of Eurex Clearing (“**Eurex Clearing**”), a respective member section log in needs to be available. Log in data will be provided by Eurex Clearing during the onboarding process of a Clearing Member.

Weblink to member section: <https://member.eurexclearing.com/irj/portal>

2. Who are the addressees of the legal opinions provided by Eurex Clearing?

All legal opinions available on the website for download are prepared at the request by Eurex Clearing. In particular, the opinions constitute a legal advice only with respect to Eurex Clearing and do not constitute legal advice with respect to a Clearing Member, Basic Clearing Member or any Direct Client. The legal opinions shall not be relied upon by any Clearing Member, Basic Clearing Member or Direct Client or Indirect Client and cannot substitute the receipt of an own legal advice.

However, the CRR Opinions, the STM Opinions and the Chapter VIII Opinion can also be used by Eurex Clearing’s Clearing Members and Basic Clearing Members

- (i) to be presented to their respective relevant financial supervisory authorities,
- (ii) to be submitted upon such authorities' request, in order to obtain regulatory acceptance under the applicable capital adequacy rules or
- (iii) to their auditors for accounting purposes.

Further, Clearing Members may submit the CRR Opinions to their Direct Clients and affiliates, provided that

- (i) it may not be relied upon by those customers or affiliates,
- (ii) it may be made available to them solely for either information purposes or for the purpose of presenting the Memorandum to the respective relevant financial supervisory authorities of such customers or affiliates in order to satisfy

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prudential regulatory capital requirements in connection with applying a particular regulatory capital treatment to transactions affected by the netting provisions and insolvency law issues reviewed in this Memorandum and

- (iii) in the case of customers, Clearing Agreements or transactions corresponding to Transactions falling within the scope of the Clearing Conditions have been or will be concluded with such customers.

With respect to the CASS Memorandum, Eurex Clearing and the Clearing Member are entitled to pass on the CASS Memorandum to customers of the Clearing Member provided that

- (i) it is made available for information purposes only,
- (ii) transactions between the Clearing Member and the relevant customer have been or are about to be entered into corresponding to equivalent CCP Transactions, and
- (iii) the relevant customer has signed a client notification in the form attached to the CASS Memorandum.

3. **Which legal opinions does Eurex Clearing provide?**

Eurex Clearing provides the following legal opinions:

- (i) **STM - Art. 274 (2) (c) CRR Opinion (June 2018)**
Opinion provides for a legal analysis on whether the Settled-to-Market Model (“STM”), offered by Eurex Clearing with respect to OTC IRS Transactions, OTC FX Transactions and XCCY Transactions, complies with the requirements stipulated by Art 274(2) (c) of the CRR.
- (ii) **STM - Characterisation Memo (June 2018)**
Opinion provides for a legal analysis on the qualification of the payments under the STM Model Eurex Clearing arising from OTC IRS Transactions, OTC FX Transactions and XCCY Transactions under German civil law (both opinions under items (i) and (ii), the “STM-Opinions”).
- (iii) **Chapter VIII Opinion (February 2014)**
Legal memorandum in respect of the validity and enforceability of the provisions set forth in Chapter VIII of the Clearing Conditions Eurex Clearing with respect to OTC ORS Transactions under German law (“Chapter VIII Opinion”)
- (iv) **CASS Memorandum (March 2015)**
Legal analysis on the ability of Eurex Clearing to comply with certain obligations and requirements relating to relating to client money paid to Eurex Clearing by

Clearing Members being subject to the Client Assets Sourcebook (“CASS”) (the “CASS Memorandum”)

- (v) **French Law CRR Memorandum (February 2015)**
Legal analysis on certain aspects of Articles 305 and 306 CRR under French law (“**French Law CRR Opinion**”)
- (vi) **English Law CRR Memorandum (July 2018)**
Legal analysis on certain aspects of Articles 305 and 306 CRR under English law (“**English Law CRR Opinion**”)
- (vii) **German Law CRR Memorandum (April 2020)**
Legal analysis on certain aspects of Articles 305 and 306 CRR under German law (“**German Law CRR Opinion**”)
- (viii) **English Law CRR Brexit Memorandum (February 2019)**
Legal analysis on the legal implications arising from the withdrawal of the United Kingdom from the European Union pertaining to the legal analysis under the English Law CRR Opinion (see “**English Law CRR Brexit Supplement**” - together with the French Law CRR Opinion, the English Law CRR Opinion and the German Law CRR Opinion, the “**CRR Opinions**”)

II. **Questions and Answers regarding CRR Opinions**

1. **What are the main contents of a CRR Opinion?**

The CRR Opinions provide a legal analysis on whether the clearing models offered by Eurex Clearing comply with the regulatory requirements stipulated by Art 300 *et seq.* of the CRR to enable Clearing Members, Basic Clearing Members and their Disclosed Direct Clients to achieve a beneficial regulatory capital treatment in respect of its regulatory capital exposure arising from Transactions cleared via Eurex Clearing.

2. **Which CRR Opinion is relevant for whom?**

Which CRR Opinion is relevant for whom depends on whether the entity intending to achieve a beneficial regulatory capital treatment is acting as Clearing Member, Basic Clearing Member or Disclosed Direct Client.

If the relevant entity is acting as Clearing Member or Basic Clearing Member, the German Law CRR Opinion is of relevance for such entity as such CRR Opinion includes statements on the treatment of the exposure arising from cleared Transaction entered into with Eurex Clearing and Eligible Margin Assets provided as Margin to Eurex Clearing.



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If the relevant entity is acting as Disclosed Direct Client, the applicable CRR Opinion depends on the jurisdiction in which the Clearing Member of such Disclosed Direct Client is established (e.g. the English Law CRR Opinion is relevant for all Direct Clients using a UK based Clearing Member). For the avoidance of doubt, the jurisdiction in which the Direct Client is established is irrelevant.

The CRR Opinions do not provide for statements with respect to Indirect Clients.

3. For which jurisdictions is a CRR opinion available and why?

As the vast majority of Clearing Members clearing via Eurex Clearing are incorporated under the laws of Germany, the United Kingdom and France, Eurex Clearing provides CRR Opinions with respect to German law, English law and French law.

If further market demands increase, Eurex Clearing may provide additional CRR opinions for other jurisdictions in the future as well.

4. How often is an update of the legal opinions available performed?

An update is usually performed on a yearly basis. Due to the circumstances around Brexit, the English Law CRR Opinion has not been recently updated. This update will take place once the legal framework of Brexit is clear.

5. Which exposures are covered by the CRR Opinions?

All CRR Opinions provide for legal statements with respect to the following exposures:

(i) Relationship Clearing Member towards Eurex Clearing

- Covers statements with respect to the CRR requirements for contractual netting agreements, single net sum, bankruptcy remoteness and no recourse.
- The German CRR opinion is applicable for all Clearing Members regardless of their place of incorporation.

(ii) Relationship Disclosed Direct Clients towards Clearing Member

- Covers statements with respect to the CRR requirements for single net sum, segregation, bankruptcy remoteness and default porting
- As the Clearing Conditions do not foresee any close-out mechanism with respect to the relationship between the Clearing Member and its Disclosed Direct Clients (see below under (iii)), the CRR Opinions are not able to provide for statements with respect to the enforceability of any close-out mechanism between Clearing Member and its Disclosed Direct Clients.

(iii) Relationship between Basic Clearing Member and Eurex Clearing

- The German Law CRR Opinion and the English Law CRR Opinion additionally provide for statements on the relationship between a Basic Clearing Member and Eurex Clearing.

Please note: as the Clearing Conditions do not foresee any close-out mechanism with respect to the relationship between the Clearing Member and its Disclosed Direct Clients, the CRR Opinions do not provide for statements with respect to the exposures of the Clearing Member towards its Disclosed Direct Clients in accordance with Art 304 CRR. The agreement on a close-out netting mechanism as well as collateral arrangements needs to be covered by the client clearing documentation to be entered into between the Clearing Member and its Disclosed Direct Client. This needs to be covered by separate CRR opinions (either available industry opinions or individual opinions mandated by the Clearing Member).

6. Does Eurex Clearing publish legal opinions stating the enforceability of close-out netting arrangements?

Eurex Clearing does not provide specific “netting opinions” anymore, as such opinions only covered statements with respect to the enforceability of certain aspects of the clearing services offered by Eurex Clearing, such as the enforceability of the close-out mechanism and the security interests granted in favour of Eurex Clearing with respect to the Eligible Margin Assets.

However, such statements are now covered by the three CRR Opinions Eurex Clearing offers for download. The CRR Opinions do not only provide for statements regarding the general enforceability of certain provisions under the Clearing Conditions, but also provide for statements with respect to the requirements stipulated by Art 300 *et seq.* of the CRR enabling the Clearing Members and its clients to benefit from certain reductions of the own funds requirements under the CRR.

With respect to the enforceability of close-out netting arrangements foreseen in the Clearing Conditions, the CRR Opinions provide for statements on the enforceability of the close-out mechanism in case of the default of Eurex Clearing and the close-out mechanism in case of the default of a Clearing Member.

7. Do the CRR Opinions provide for statements on the exposure of a Clearing Member towards its Disclosed Direct Clients in case of a default of a client?

Clearing Conditions do not provide for a close-out netting mechanism in case of a default of the Disclosed Direct Client. This needs to be regulated in the client clearing documentation to be entered into between the Clearing Member and its Disclosed Direct Clients.

8. If a Basic Clearing Member is outsourcing all or part of the operational functions to its Clearing Agent, does the outsourcing Basic Clearing Member have a negative effect on the statements in the German Law CRR Opinion with respect to the Basic Clearing Member?

Outsourcing does not change the status as a Basic Clearing Member since the responsibility with respect to the discharge of any liabilities under the Clearing Conditions and the cleared Transactions remains with the Basic Clearing Member. The German Law CRR Opinion and the English Law CRR Opinion also specifically cover this aspect with the result that through outsourcing the status of the Basic Clearing Member is not affected.

9. If collateral is provided to Eurex Clearing, can it be considered as being bankruptcy remote within the meaning of Art 306 (2) CRR? How will it be handled when calculating a Difference Claim? What would be the risk weight to be applied to a difference claim exposure?

In this regard, it needs to be differentiated between Eligible Margin Assets provided as Margin to Eurex Clearing in the form of a pledge or in form of a transfer of title.

(i) Margin provided via transfer of title

If the relevant Eligible Margin Assets are provided via a full title transfer, such Eligible Margin Assets are considered within the calculation of the Difference Claim. Therefore, the question whether an exposure arises from the Eligible Margin Assets provided to Eurex Clearing via a full title transfer depends on who is owing the Difference Claim.

If as a result of the calculation (considering the value of all Eligible Margin Assets provided to Eurex Clearing on basis of a full title transfer), a Difference Claim was owed by Eurex Clearing towards the Clearing Member, the close-out mechanism provided for in the Clearing Conditions would avoid any exposure arising from the Eligible Margin Assets provided to Eurex Clearing via a full title transfer.

If, however, as a result of the calculation considering the value of all Eligible Margin Assets provided to Eurex Clearing on basis of a full title transfer, a Difference Claim was owed to the Clearing Member by Eurex Clearing, the Clearing Member would have an exposure to Eurex Clearing (also considering the Eligible Margin Assets provided via full title transfer) and would, in accordance with Article 303 CRR, be required to calculate its own funds requirements in accordance with Article 301 paras 2 and 3 of the CRR.

(ii) Eligible Margin Assets in the form of securities provided to Eurex Clearing via pledge



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If the (Basic) Clearing Member provides any securities collateral (pledge) to cover margin requirements, the risk-weighting is 0%, as collateral provided via pledge is bankruptcy remote within the meaning of Art 306 (2) of the CRR.

10. Where can I find an overview of the risk weights to be applied when calculating Difference Claims for the Clearing Member's clients?

A summary is available on the website of Eurex Clearing at

<https://www.eurex.com/ec-en/rules-regs/regulations/legal-opinions>