

<p>Title: The Resolution of Central Counterparties: (Modified Application of Corporate Law and Consequential Amendments) Regulations 2023</p> <p>SI (Statutory Instrument) No: 2023/1313</p> <p>Other departments or agencies: None</p> <p>Contact for enquiries: Edward.Henley@hmtreasury.gov.uk</p>	<p>De minimis assessment</p> <p>Date: 25/09/2023</p> <p>Type of regulation: Domestic</p> <p>Date measure comes into force: 31/12/2023</p>
<p>Cost of Preferred (or more likely) Option</p> <p>Under £5m</p>	<p>Equivalent Annual Net Direct Cost to Business per year (EANDCB in 2019 prices) None</p>

1. What is the problem under consideration? Why is Government intervention necessary?

Schedule 11 of the Financial Services and Markets (FSM) Act 2023 introduced an expanded resolution regime for central counterparties (CCPs). CCPs are entities used by firms to reduce certain risks that arise when trading on financial markets, such as derivatives and equities markets. They sit between the buyers and sellers of financial instruments, providing assurance that contractual obligations will be fulfilled. There are three CCPs in scope of this expanded resolution regime and they are integral to the UK's financial system.¹

Schedule 11 provides the Bank of England (the Bank), as the UK's Resolution Authority, with an expanded toolkit to mitigate the risk and impact of a CCP failure and the subsequent risks to financial stability and public funds. This toolkit allows the Bank to allocate losses to clearing members and the CCP itself, avoiding the loss falling to the taxpayer and aiming to prevent contagion within the financial sector.

As part of this expanded regime, HMT must lay regulations which amend corporate law, and make the necessary consequential amendments to ensure the regime functions as intended, therefore protecting financial stability in the event of a failure of a CCP.

2. What are the policy objectives and the intended effects?

This legislation makes the necessary amendments to corporate law (as defined in Schedule 11 of the FSM Act) and other legislation to ensure that the CCP resolution regime functions as effectively as possible.

The legislation is designed to ensure that provisions under the expanded CCP regime in Schedule 11 of the FSM Act are treated in the same ways as their equivalents under the Banking Act 2009 therefore ensuring the new CCP regime operates as effectively as possible. It does so by making the following amendments:

- Disapplies the takeover rules in Part 28 of the Companies Act 2006, to the extent that they would have applied to share transfers or other transactions effected by a resolution action.
- Disapplies the provision in the Companies Act 2006 (Commencement No. 8 Transitional Provisions and Savings) Order 2008 which provides that directors of certain private

¹ ICE Clear Europe, LME Clear and LCH Ltd.

companies with only one class of shares may allocate shares if the members of the company wish for them to have this power for the purposes of Schedule 11.

- Amends certain provisions on shareholders and shareholder rights in the Companies Act 2006, such as the ability to call general meetings and amend the articles of associations.
- Applies modifications made to Companies Act 2006 in Schedule 4 to the Bank Recovery and Resolution (No.2) Order 2014.
- Amends the Finance Act 1986 and the Finance Act 2003, to exempt 'involuntary' share transfers made under Schedule 11 powers which would otherwise result in stamp duty and Stamp Duty Land Tax applying.
- Amends the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 to ensure that information received in connection with functions under Schedule 11 is included.
- Amends the Financial Services and Markets Act 2000 to ensure that provision made in respect of CCPs is applied in respect of Schedule 11.
- Amends the Corporation Tax Act 2009 to ensure that instruments made under Schedule 11 are treated in the same way as their equivalents made under the Banking Act 2009.
- Amends the Taxation (International and Other Provisions) Act 2010 to ensure that instruments made under Schedule 11 are treated in the same way as their equivalents made under the Banking Act 2009.
- Amends the Companies Act 1989, to allow information to be disclosed in connection with civil litigation arising in relation to compensation regulations made under Schedule 11.
- Amends the Bank of England Act 1998 to allow the Bank to make a direction excluding a bridge CCP from the application of certain accounting and reporting requirements under the Companies Act, and to specify that the Financial Policy Committee may not make recommendations in relation to the exercise of the Bank's powers under Schedule 11.
- Amends the Financial Services Act 2012 to ensure that the Treasury's power of direction under section 61 is exercisable in respect of Schedule 11.
- Amends the Financial Collateral Arrangements (No. 2) Regulations 2003 to ensure that actions taken under Schedule 11 are treated in the same way as their equivalents under the Banking Act 2009.

The UK bank resolution regime contains similar provisions amending corporate law (Part 17 of the Bank Recovery and Resolution (No.2) Order 2014), and relevant provisions have been mirrored in this legislation as far as possible.

3. What policy options have been considered, including any alternatives to regulation?

Please justify preferred option

Option 1: Do nothing. Proceed without making the necessary consequential amendments and modifications to corporate law. Not making the necessary amendments will impede a resolution by creating unintended legislative consequences and significant lack of clarity when the Bank takes certain actions. It will also create a difference in outcome between a bank and a CCP resolution, meaning there will be unequal tax consequences (for example) to comparable transfers of property or shares.

Option 2: Proceed with making the necessary consequential amendments and modifications to corporate law. The proposed amendments apply across a range of legislation, with distinct effects relating to, for example, the application of tax to transfers, and the ability for regulators to disclose information relating to a resolution.

Given option 1 would cause inconsistencies between the regimes and risks reducing the operational effectiveness of the regime, HMT will therefore be proceeding with option 2.

4. Please justify why the net impacts (i.e., net costs or benefits) to business will be less than £5 million a year.

The below lays out the costs and benefits of introducing these regulations.

Costs

It is estimated that there will be minimal annual direct costs to business in the form of a one-off direct cost as a result of this legislation, associated with the costs of businesses familiarising themselves with this legislation. There are no significant ongoing or ad hoc direct costs associated with the Regulations. Ad hoc costs are defined as costs that are neither annual nor one-off and may occur when necessary or needed. The reasoning for this estimation is as follows:

Direct costs

These regulations do not impose any direct costs on businesses. They serve to make amendments to legislation to allow the functioning of the CCP resolution, broadly disapplying certain legislation that would be a hindrance to resolution action.

However, whilst the amendments to legislation do not primarily concern firms, the Government estimates that there may be a one-off direct cost to clearing members familiarising themselves with these Regulations. Following the FCA’s methodology for calculating familiarisation costs we estimate a one-off cost of £998.40 would arise for clearing members (4 compliance staff to read ~8 pages of legal text [approx. 0.64 days each – 5.2 hours] at a cost of £48 per hour).²

Based on Futures Industry Association (FIA) data, there are a maximum of 215 clearing members currently with memberships of CCPs within the scope of the CCP resolution regime.³ However, this figure is likely to far exceed the actual number of clearing members, given that some clearing members will likely be members of different clearing services within the same CCP. There are also 3 CCPs within scope of the regime. Therefore, the estimated cost would be, at most, approximately £217,651 as the total one-off familiarisation costs for that year. However, the actual figure is likely to be lower given there will likely be far fewer firms, and it is unlikely they will need to be fully familiar with the detail of the legislation.

	Number of entities	Familiarisation Cost
Clearing members	215	£214,656
CCPs	3	£2,995
Total	218	£217,651

Indirect costs

As above, these regulations do not impose any indirect costs on businesses.

In any case, the CCP resolution regime is subject to the ‘No Creditor Worse Off’ (NCWO) safeguard. Under the NCWO safeguard, if clearing members bear a higher cost because of resolution action than they would have if the CCP had entered regular insolvency proceedings, then they are entitled to compensation. Costs for clearing members during resolution, when

² <https://www.fca.org.uk/publication/corporate/how-analyse-costs-benefits-policies.pdf>. Estimate of £48 per hour taken from PESAR England and Wales Rules Impact Assessment.
https://www.legislation.gov.uk/ukxi/2021/1178/pdfs/uksiod_20211178_en.pdf

³ <https://www.fia.org/fia/clearing-members-and-concentration>

compared to the CCP going into insolvency, are therefore assumed to be zero. This was outlined in the full impact assessment conducted for the wider CCP resolution regime as part of the FSM Act 2023.⁴

Benefit

It is not possible to quantify the monetised benefits of the Regulations as these will depend on the specific circumstances in which the resolution regime is being used. However, ensuring resolutions can be conducted as effectively and efficiently as possible will benefit the financial markets by limiting contagion risks, minimising market disruption and reducing legal uncertainty.

5. Please confirm whether your measure could be subject to call-in by BRE (Better Regulation Executive) under the following criteria. If yes, please provide a justification of why a full impact assessment is not appropriate:

- a) **Significant distributional impacts (such as significant transfers between different businesses or sectors)**
None
- b) **Disproportionate burdens on small businesses**
None
- c) **Significant gross effects despite small net impacts**
None
- d) **Significant wider social, environmental, financial or economic impacts**
None
- e) **Significant novel or contentious elements**
None

Sign-off for de minimis assessment: SCS

I have read the de minimis assessment and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

SCS of Banking Assets and Resolution Strategy

Signed: ***George Barnes***

Date: 22/09/2023

SCS of Better Regulation Unit

Signed: ***Phil Witcherley***

Date: 25/09/2023

Sign-off for de minimis assessment: Minister

I have read the de minimis assessment and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

Andrew Griffith MP, Economic Secretary to the Treasury

Signed: ***Andrew Griffith***

Date: 11/10/2023

⁴ <https://bills.parliament.uk/publications/49053/documents/2621>

