

<p><b>Title:</b> The Financial Services and Markets Act 2023 (Resolution of Central Counterparties: Partial Property Transfers and Safeguarding of Protected Arrangements) Regulations 2023</p> <p><b>SI (Statutory Instrument) No:</b> 2023/1316</p> <p><b>Other departments or agencies:</b> None</p> <p><b>Contact for enquiries:</b> Edward.Henley@hmtreasury.gov.uk</p>	<p><b>De minimis assessment</b></p>
<p><b>Cost of Preferred (or more likely) Option</b></p> <p>Under £5m</p>	<p><b>Date:</b> 25/09/2023</p> <p><b>Type of regulation:</b> Domestic</p> <p><b>Date measure comes into force:</b> 31/12/2023</p> <p><b>Equivalent Annual Net Direct Cost to Business per year</b> (EANDCB in 2019 prices) <b>None</b></p>

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

Schedule 11 of the Financial Services & 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.<sup>1</sup>

Schedule 11 provides the Bank of England (the Bank), as the UK's Resolution Authority and supervisor of CCPs, 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, the Bank is enabled to transfer property or shares of a CCP to a private sector purchaser or, a bridge CCP (an institution owned by the Bank, created for the purpose of maintaining access to critical clearing services and (in due course) selling on a CCP's property or shares. It is also able, by virtue of a separate power as set out in paragraph 34 of Schedule 11, to 'write-down' (adjust the value of) unsecured liabilities. It is possible that, through the use of these powers, the Bank could disrupt protected arrangements or disrupt set-off or netting arrangements by only transferring or writing down part of an arrangement.

The Government has deemed it necessary to legislate for the necessary safeguards to ensure that various protected arrangements, which are vital to the continued operation of a CCP and its clearing members, are protected. This is one of a number of SIs which intend to fully implement the CCP resolution regime, and mirrors equivalent legislation laid under the Banking Act 2009, which introduced the resolution regime for banks. It also ensures that regulations that currently apply to the previous CCP resolution regime continue to apply, ensuring continuity with existing policy.

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

<sup>1</sup> ICE Clear Europe, LME Clear and LCH

This legislation will apply the necessary safeguards to restrict the making of partial property transfers, and certain liabilities cannot be written down during the course of a resolution by the Bank. The regulations will ensure that a partial property transfer may not modify or render unenforceable a market contract or default rules of a recognised investment exchange or clearing house (including default and non-default rules). The regulations also provide that protected liabilities may not be written down. This will minimise market disruption, ensuring as far as possible that markets continue to function normally during the course of a resolution.

This SI uses existing statutory instruments made in relation to the special resolution regime under Part 1 of the Banking Act 2009 as a model. One of these SIs applies to partial property transfers made in respect of CCPs under the previous resolution regime, whilst the other applies safeguards for the write-down power under the banking resolution regime.<sup>2</sup>

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

#### **Please justify preferred option**

**Option 1: Do nothing. Proceed without ensuring the safeguards protecting these arrangements are in place.** Not taking action would mean that there is no protection in place to ensure that the Bank's powers do not disrupt normal market procedure. This would lead to sub-optimal outcomes if a resolution were to be conducted, whereby normal market practice may be disrupted. The risk of any such disruption could impede users of CCPs' services being able to obtain clean netting opinions for the CCP, which could have material consequences for the viability of their business-as-usual use of the clearing services provided by that CCP.

**Option 2: Ensure necessary safeguards relating to partial property transfers and write down powers are in place.**

Option 1 is not considered practical as it increases the chances of resolution action damaging the continuation of a CCP's services, potentially leading to a negative impact on financial stability and causing wider disruption to financial markets. 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 a potential minimal annual direct cost to businesses 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 only add safeguards to restrict the use of powers already established under Schedule of the FSM Act 2023 – namely, property transfer powers under paragraphs 27(2), 29(3), 67, 68, 69, 70, 71 or 72, share transfer powers under paragraph 30(3), and write-down

<sup>2</sup> The Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014 (S.I. 2014/1828), and the Banking Act 2009 (Restriction of Special Bail-in Provision, etc.) Order 2014.

instruments under paragraph 34 of Schedule 11. As such, these regulations themselves ensure continuity with the effect of existing regulations do not carry any direct costs.

The powers above would also only be utilised in the unlikely scenario of a central counterparty entering resolution. As such, there is no inherent annual impact of these regulations.

However, the Government estimates that there will be a potential one-off direct cost to clearing members and CCPs familiarising themselves with these Regulations. Following the FCA's methodology for calculating familiarisation costs, we estimate a one-off cost of £1,229 would arise for clearing members and CCPs (4 compliance staff to read ~10 pages of legal text [approx. 0.8 days each – 6.4 hours] at a cost of £48 per hour).<sup>3</sup>

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. 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 resolution regime. Therefore, the estimated cost would be, at most, approximately £267,922 as the total one-off familiarisation costs for that year. However, the actual figure is likely to be lower.

	Number of entities	Familiarisation Cost
Clearing members	215	£264,235
CCPs	3	£3,687
<b>Total</b>	<b>218</b>	<b>£267,922</b>

### Indirect costs

As above, these regulations provide further safeguards to powers that the Bank of England already holds under Schedule 11 of the FSM 2023 Act. These will not impact any potential costs imposed by the regulations but will avoid the disruption of protected arrangements.

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 as a result of resolution action, when compared to the CCP going into insolvency, then they are entitled to compensation. Costs for clearing members during resolution, when 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.<sup>4</sup>

### Benefit

It is not possible to quantify the monetised benefits of the Regulations as these will depend on the specific circumstances of the resolution regime and the nature of the arrangements. However, these regulations will provide greater certainty and clarity for industry that existing market contracts and arrangements will be protected during the course of a resolution, minimising market disruption as far as possible.

<sup>3</sup> <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/ukxi0d\\_20211178\\_en.pdf](https://www.legislation.gov.uk/ukxi/2021/1178/pdfs/ukxi0d_20211178_en.pdf)

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

**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