

金融機構(處置機制)條例(第628章)：
受保障安排規例

Financial Institutions (Resolution) Ordinance
(Cap. 628):

Protected Arrangements Regulation

立法會財經事務委員會會議：2017年4月

Legislative Council Panel on Financial Affairs

Meeting: April 2017

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背景

BACKGROUND

《金融機構（處置機制）條例》》(第628章)(「《處置條例》」) Financial Institutions (Resolution) Ordinance (Cap. 628) (“FIRO”)

- 《處置條例》於2016年6月由立法會通過，為受涵蓋的金融機構設立了一個跨界別的處置機制

The FIRO was enacted by LegCo in June 2016, establishing a cross-sector resolution regime for within scope financial institutions (“FIs”)

- 《處置條例》的目的是符合金融穩定理事會《有效的金融機構處置機制主要元素》(「《主要元素》」)中所載的國際標準，以提供處置不再可持續經營的具系統重要性的金融機構所須的權力

The FIRO is designed to meet international standards set by the Financial Stability Board, i.e. the *Key Attributes of Effective Resolution Regimes for Financial Institutions* (“Key Attributes”), so as to provide the necessary powers to effect the orderly resolution of a failed systemically important FI

《處置條例》(續)

FIRO (cont'd)

- 多個司法管轄區（包括英國、美國、歐盟成員國）均已依據《主要元素》設立金融機構處置機制

A number of jurisdictions (including the United Kingdom, United States and member states of the European Union) have already established resolution regimes for FIs designed to meet the Key Attributes

- 根據《處置條例》第75條，財經事務及庫務局局長可以附屬法例形式制訂規例，以保障若干金融安排(「受保障安排」)於處置行動中的經濟效益

Under section 75 of the FIRO, the Secretary for Financial Services and Treasury may make regulations, as subsidiary legislation, to safeguard the economic effect of certain financial arrangements (“protected arrangements”) in resolution

就受保障安排規例進行的公眾諮詢

Public Consultation on Protected Arrangements Regulation (“PAR”)

- 財經事務及庫務局，連同香港金融管理局、保險業監督及證券及期貨事務監察委員會，已就擬議的受保障安排規例聯合進行了為期兩個月的公眾諮詢(由2016年11月22日起至2017年1月21日止)

The Financial Services and the Treasury Bureau, Hong Kong Monetary Authority, the Insurance Authority and the Securities and Futures Commission jointly conducted a two-month public consultation (from 22 November 2016 to 21 January 2017) on the proposed PAR

- 在諮詢期間，我們曾與主要持份者會面，並共收到11份意見書，分別來自業界組織、專業團體及金融市場基建

We engaged with key stakeholders during the consultation period, and received 11 submissions from industry associations, professional bodies and financial market infrastructures

就受保障安排規例進行的公眾諮詢(續)

Public Consultation on PAR (cont'd)

- 回應者普遍同意於諮詢文件中提出有關受保障安排規例的建議做法，並提出具建設性及技術性的意見，以提高規例的有效性

Respondents generally agreed with the approach to the PAR proposed in the consultation paper, whilst providing constructive, technical comments to enhance its efficacy

立法建議 – 受保障安排規例及《處置條例》

Legislative Proposal – PAR and FIRO

- 我們計劃在受保障安排規例的先訂立後審議的程序完成後，隨即讓《處置條例》生效

We plan to commence the FIRO shortly after completion of the negative vetting procedure for the PAR

- 我們將於2017年第2季把受保障安排規例及《處置條例》的生效公告提交立法會進行先訂立後審議的程序，讓《處置條例》於2017年內生效

We will table before LegCo the PAR and the commencement notice of the FIRO for negative vetting in Q2 2017, such that the FIRO could commence within 2017

受保障安排規例

**PROTECTED ARRANGEMENTS
REGULATION**

受保障安排規例

PAR

- 有關受保障安排規例的建議做法大致以英國採用的做法，以及歐洲聯盟的《銀行恢復及處置指令》所採取的方法作為藍本

The proposed approach to the PAR is largely modelled on that adopted by the United Kingdom and that required by the European Union's Bank Recovery and Resolution Directive

- 受保障安排規例，旨在確保處置機制當局在行使處置權力時，須保障「受保障安排」於處置行動中的經濟效益

PAR designed such that an RA should exercise resolution powers in a manner that safeguards the economic effect of a protected arrangement in resolution

受保障安排規例

PAR

- 根據《處置條例》第74條，六大類別獲識別為「受保障安排」的金融安排為：

Six types of financial arrangements identified as protected arrangements under section 74 of FIRO:

- (a) 結算及交收系統安排 (clearing and settlement systems arrangements) ;
- (b) 抵押保證安排(secured arrangements) ;
- (c) 結構式金融安排(structured finance arrangements) ;
- (d) 淨額結算安排(netting arrangements) ;
- (e) 抵銷安排(set-off arrangements) ;
- (f) 所有權轉讓安排(title transfer arrangements)

受保障安排規例(續)

PAR (cont'd)

- 受保障安排規例攸關重要，是因為金融市場參與者倚賴該等受保障安排，作為風險緩減工具(如抵銷/淨額結算)及資金來源(如有抵押貸款)
PAR is important because financial market participants rely on such protected arrangements as risk mitigation tools (e.g. set-off/netting) and as financing sources (e.g. secured lending)
- 受保障安排規例將為金融市場參與者提供適度保障
PAR will provide appropriate degree of protection for financial market participants

受保障安排規例(續)

PAR (cont'd)

- 受保障安排規例中所採用的方法，是為分別為各類受保障安排提供適度保障，並從若干安排下的有關保障中剔除特定的權利及負債項目，以期：

PAR provides appropriate degree of protection for each type of protected arrangement, with specific “carve-outs” for certain rights and liabilities under certain arrangements, designed to provide:

- (a) 為金融市場參與者提供信心，關鍵風險緩減措施及資金安排會在明確和可以預知的情況下得到保障；及

confidence for financial market participants that critical risk mitigation and funding techniques will be protected with certainty and predictability; and

- (b) 賦予處置機制當局適當程度的靈活性，行使處置權力，以達致有秩序處置

an appropriate degree of flexibility for RA to exercise resolution powers, in order to achieve orderly resolution

受保障安排規例(續)

PAR (cont'd)

- 在以下情況中，受保障安排的經濟效益被削弱的風險最有可能發生：
The risk of the economic effect of a protected arrangement being undermined is most likely to occur:
 - (a) 處置機制當局進行局部財產轉讓時，把某實體的部分而非全部資產、權利及負債轉讓予第三方；或
where a partial property transfer (“PPT”) is made by an RA through which some, but not all, of an entity’s assets, rights and liabilities are transferred to a third party; or
 - (b) 進行內部財務重整時，負債在沒有計及在書面協議下可被抵銷或進行淨額結算的相連資產或權利的情況下，被減記及／或轉換
on bail-in, where liabilities are written down and / or converted without taking into account linked assets or rights entitled to be set off or netted under documented agreements

局部財產轉讓：結算及交收系統安排

PPT: Clearing & Settlement Systems Arrangement

擬提供的保障 Proposed protection

- 在局部財產轉讓下，處置機制當局應在有關情況適用的範圍內，力求將某實體屬結算及交收系統安排的一部份的全部(而非部分)資產、權利或負債轉讓。有關情況，即假若並不如上所述轉讓該等資產、權利及負債的話，該結算及交收系統安排便會受到干擾

RA to seek to transfer all, but not some, of the assets, rights or liabilities of an entity that are part of a clearing and settlement systems arrangement to the extent that not to do so would disrupt the operation of a clearing and settlement systems arrangement

- 受保障安排規例訂明，結算及交收系統安排為《證券及期貨條例》(第571章)下的認可結算所或《支付系統及儲值支付工具條例》(第584章)(“《支付條例》”)下的指定結算及交收系統的結算及交收安排

Specified in the PAR, a clearing and settlement systems arrangement is an arrangement under a Recognized Clearing House (“RCH”) (under the Securities and Futures Ordinance (Cap. 571) (“SFO”)) or a designated clearing and settlement system (“DCSS”) (under the Payment Systems and Stored Value Facilities Ordinance (Cap. 584) (“PSSVFO”))

- 在進行局部財產轉讓時，不應被干擾的在認可結算所或指定結算及交收系統下的指定安排，為分別在《證券及期貨條例》第45(1)條及《支付條例》第20(1)條下，在破產清盤程序中獲賦予特定保障的有關安排

The specific arrangements of an RCH or DCSS that should not be disrupted in a PPT are those protected by the insolvency override in sections 45(1) and 20(1) of the SFO and PSSVFO respectively

剔除項目 Exclusions

- 不適用
Not applicable

局部財產轉讓：抵押保證安排

PPT: Secured Arrangement

擬提供的保障 Proposed protection	剔除項目 Exclusions
<ul style="list-style-type: none">處置機制當局應轉讓全部而非部分同屬某一抵押保證安排的組成部分(即資產、負債及抵押的利益)。抵押保證安排包括以固定或浮動押記方式提供抵押保證的安排 <p>RA should transfer all, but not some, of the constituent parts of a secured arrangement (i.e. assets, liabilities and benefit of security) (where security is by means of either a fixed or floating charge)</p> <ul style="list-style-type: none">若境外財產為抵押保證安排的一部分，但處置機制當局未能於有關轉讓文書下轉讓該境外財產，則不會被視為與受保障安排規例的目標不符，也不會觸發在受保障安排規例中訂定的相關後果 <p>If foreign property forming part of a secured arrangement is unable to be effectively transferred under the transfer instrument, this would not be deemed to be inconsistent with the objectives of the PAR and not trigger the relevant consequence as specified in the PAR</p>	<ul style="list-style-type: none">不適用 <p>Not applicable</p>

局部財產轉讓：結構式金融安排

PPT: Structured Finance Arrangement

擬提供的保障 Proposed protection	剔除項目 Exclusions
<ul style="list-style-type: none"> • 受保障安排規例適用於屬證券化一類的結構式金融安排 PAR applies to the class of structured finance arrangements that are securitizations • 處置機制當局應轉讓全部而非部分屬於或組成結構式金融安排一部分的財產、權利及負債 RA should transfer all, but not some, of the assets, rights and liabilities which are, or form part of, a structured finance arrangement • 若境外財產為結構式金融安排的一部分，但處置機制當局未能於有關轉讓文書下轉讓該境外財產，則不會被視為與受保障安排規例的目標不符，也不會觸發在受保障安排規例中訂定的相關後果 If foreign property forming part of a structured finance arrangement is unable to be effectively transferred under the transfer instrument, this would not be deemed to be inconsistent with the objectives of the PAR and not trigger the relevant consequence as specified in the PAR 	<ul style="list-style-type: none"> • 屬結構式金融安排一部分的任何存款 Any deposits which form part of a structured finance arrangement

局部財產轉讓：抵銷、淨額結算及所有權轉讓安排

PPT: Set-off, Netting & Title Transfer Arrangements

<p>擬提供的保障 Proposed protection</p>	<p>剔除項目 Exclusions</p>
<ul style="list-style-type: none"> 當抵銷、淨額結算或所有權轉讓安排以書面合約形式或以書面為憑(包括以電子方式持有)進行，而被處置實體為合約其中一方時，處置機制當局應轉讓該等安排下全部而非部分權利及負債 <p>RA should transfer all, but not some, of the rights and liabilities that may be set off or netted under set-off, netting or title transfer arrangements that are documented or otherwise evidenced in writing (including where held electronically), to which the entity in resolution is a party</p> <ul style="list-style-type: none"> 若境外財產為抵銷、淨額結算或所有權轉讓安排的一部分，但處置機制當局未能於有關轉讓文書下轉讓該境外財產，則不會被視為與受保障安排規例的目標不符，也不會觸發在受保障安排規例中訂定的相關後果 <p>If foreign property forming part of a set-off, netting or title-transfer arrangement is unable to be effectively transferred under the transfer instrument, this would not be deemed to be inconsistent with the objectives of the PAR and not trigger the relevant consequence as specified in the PAR</p> <ul style="list-style-type: none"> 若書面合約的條款容許非違約對手方不向違約方(即使違約方為淨債權人)付款(或只作有限度付款)或載有廣泛涵蓋性條文，則受保障安排規例並不會保障該合約賦予的抵銷或淨額結算權 <p>Clauses which provide for “walk-away” or broad “sweeper” clauses under set-off, netting or title transfer arrangements not to be treated as part of a protected arrangement</p>	<p>關乎以下的權利及負債： Rights and liabilities which relate to:</p> <ul style="list-style-type: none"> 存款 Deposits 存款人所欠負的應收賬目 (除非該應收賬目關乎「金融合約」) Receivables owed by depositors, unless related to a “financial contract” 後償債務 Subordinated debt 可轉讓證券(除非被明文識別為某安排下的標的事宜) Transferable securities (unless explicit subject matter under an arrangement) 「營運」權利及負債 “Operating” rights and liabilities 與從事「金融活動」相關的損害賠償裁決或在彌償下的申索 An award of damages or a claim under an indemnity relating to the undertaking of “financial activity”

內部財務重整：抵銷、淨額結算及所有權轉讓安排

Bail-in: Set-off, Netting & Title Transfer Arrangements

擬提供的保障 Proposed protection	剔除項目 Exclusions
<ul style="list-style-type: none"> 處置機制當局只應就被處置實體及其對手方根據某抵銷安排、淨額結算安排或所有權轉讓安排相關的合約所賦予的抵銷或淨額結算權而得出的「淨額」，訂定內部財務重整條文 <p>RA should only make bail-in provision in respect of the “net” amount that the entity in resolution and its counterparty are entitled by contract to set-off or net under a set-off arrangement, netting arrangement or a title transfer arrangements</p>	<ul style="list-style-type: none"> 因被處置實體發行的資本票據/後償債務/作為可轉讓證券的無抵押債務工具而產生的負債 Liabilities arising from any capital instrument/subordinated debt/unsecured debt instrument that is a transferable security issued by the entity in resolution 因任何符合以下各項的票據或合約而產生的無抵押負債：(1) 由發行當日起計具12個月或以上的期限的票據或合約；及(2)非「金融合約」 Unsecured liabilities arising from any instrument or contract which (1) at its issuance date, had ≥ 12 months maturity; and (2) is not a “financial contract” 對被處置實體的集團公司欠負的、但非因「金融合約」而產生的無抵押負債 Unsecured liabilities owed to group company which do not arise from a “financial contract” 不在《處置條例》附表5第2(b)或(c)條之列，未有從內部財務重整中豁除的存款 Deposits not excluded from bail-in under section 2(b) or (c) of Schedule 5 to the FIRO 關乎損害賠償申索、損害賠償裁決或根據彌償申索的負債 Liabilities relating to a claim for damages or an award of damages or a claim under an indemnity

與受保障安排規例的目標不符的行動的後果

Consequence of action inconsistent with PAR objectives

受保障安排的類別 Type of Protected Arrangement	與目標不符的行動的的後果 Consequence of inconsistent action
局部財產轉讓：結算及交收系統安排 PPT: Clearing & settlement systems arrangement	若處置機制當局進行局部財產轉讓時，只轉讓某結算及交收系統安排的部分而非全部相關的資產、權利或負債，在該安排的運作受干擾的範圍內，該項轉讓屬無效 PPT is void to the extent that the transfer of some, but not all, of related assets, rights or liabilities under a clearing and settlement systems arrangement disrupts the arrangement's operation
局部財產轉讓：抵押保證安排 PPT: Secured arrangement	受影響一方可作出通知，讓處置機制當局透過行使補充轉讓(予受讓方)或逆向轉讓(予轉讓方)的權力(視何者適用而定)，藉此修正受影響一方的情況 Affected party's position may be restored by the RA through the exercise of supplemental (to a transferee) or reverse (to a transferor) transfer powers as appropriate, upon notification by the affected party
局部財產轉讓：結構式金融安排 PPT: Structured finance arrangement	受影響一方可作出通知，讓處置機制當局透過行使補充轉讓(予受讓方)或逆向轉讓(予轉讓方)的權力(視何者適用而定)，修正受影響一方的狀況 Affected party's position may be restored by the RA through the exercise of supplemental (to a transferee) or reverse (to a transferor) transfer powers as appropriate, upon notification by the affected party
局部財產轉讓：抵銷、淨額結算及所有權轉讓安排 PPT: Set-off, netting & title transfer arrangements	容許受影響一方繼續根據有關安排抵銷或以淨額結算其欠負被處置實體的任何款額，以減低其風險承擔，程度就如原本在有關安排下所預計的一樣 Affected party permitted to continue to set-off or net any amounts it owes to the entity in resolution to reduce its exposure as originally envisaged under the relevant set-off, netting or title transfer arrangement
內部財務重整：抵銷、淨額結算及所有權轉讓安排 Bail-in: Set-off, netting & title transfer arrangements	受影響一方可通知處置機制當局，讓處置機制當局透過適當措施（如向受影響一方付款，以讓受影響一方的狀況恢復至如內部財務重整是基於淨額進行的狀況），修正受影響一方的情況 Affected party's position may be restored by appropriate measures by the RA e.g. a payment to the affected party to put them in the position they would have been had bail-in been effected on a net basis, upon notification to the relevant RA by the affected party