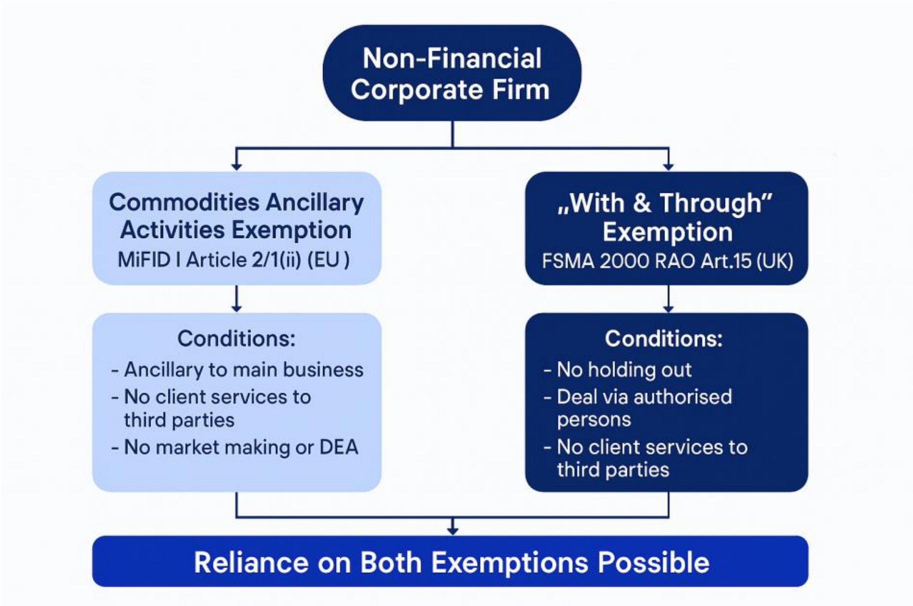
Question 1: Do you agree with the approach outlined above to allow firms to choose one of the following tests: i) annual threshold test ii) trading test iii) capital employed test? If not, please explain why.

No, we disagree with the premise of the approach outlined by the FCA in Chapter 3 on the basis that it is disproportionately complex and uncompetitive. Rather, the most important issues lie in Chapter 2 and therefore under wider UK architecture than that solely under FCA competency. In order to comply with its objectives under the principles of good regulation as well as the regards to competitiveness we would endorse the FCA first establishing whether their proposals pass the tests for being simpler and more effective than either the approach in the UK prior to MiFID II; whether they utilise the legal instruments available; and if they converge to the approaches in other G20 jurisdictions. If not, the matter should be returned to the UK regulatory architecture rather than to consultation around implementation,

Essentially Chapter 2 of the consultation clearly sets out the overarching UK framework, notably Article 15 RAO *'with or through'* exclusion. Whilst the FCA sets out certain hazy preconditions around the operation of this turning on whether the "*MiFID override*[1]" does, or does not, allow firms to be excluded from authorisation where exclusions from the RAO are wider than those in MiFID. This opportunity should be taken to correct and simplify into a linear process.



[1] **Key Conditions of the Exclusion (Article 15 RAO);** To qualify, the person must:

1. **Not hold themselves out** as:
    - Making a market in investments, or
    - Being in the business of dealing in investments.
2. **Not regularly solicit members of the public** to induce them to deal.
3. **Deal only with or through authorised or exempt persons**, such as:
    - FCA-authorised investment firms
    - Exempt persons acting in the course of a regulated activity

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At this point, we consider that the FCA should have considered and recommended the removal of the overlap of those exclusions prior to the "*MiFID override*" with those exemptions they seek to restate subsequent to the "*MiFID override*" and the ineffective outcomes of duality. Moreover, and more importantly, since MiFID II and under the Edinburgh reforms, the UK has put into place the parallel process to the RAO in the shape of the Designated activities regime | FCA[2] ["DAR"] for such 'Designated non-core financial activities'.

The proper outcome of such a consideration should have considered that any proposals to take forward and evolve from the MiFID II regime, even under a less quantitative approach, fails to match the effective simplicity of that which preceded it under the application of MiFID I Article 2(1)(i), (j), (k) – the commodities ancillary activities exemption, and PERG 13 Q44.

Even a broad reversal of the MiFID II regime which has always proven inappropriate for the institutional trading of commodities (and for currencies), whilst necessary would not be sufficient. We recall the rather upside-down discussions from 2012 concerning the scope and meaning of a "Non-MTF" which rapidly became pivotal to the regulation of commodities trading in the UK and carried on into the MiFID II regime via the C6 and C7 designations under perimeter guidance subject to great scrutiny from non-financial companies. There are two core problems here: firstly, that the definition and approach to "*risk reducing trades*" is subjective and contingent upon assumptions; and secondly that the definition of financial instruments via the derivative limb turns on that of the trading venue perimeter which has become equally subjective and contingent. Whilst in the first instance the UK should be taking this "*Edinburgh opportunity*" (now perhaps a "*Leeds opportunity*") to create a proper definition for a derivative that is objective and not reflexive on the locus of trading; in this case the assignment of non-financial companies outside the broad exclusion of RAO should not turn on either of these two concepts, but solely on the nature of the firm and its activities being carried out. At every turn we would recommend UK policy-makers to consider the words of former Bank of England governor Mervyn King and essentially ask, "*what's going on here*[3]."

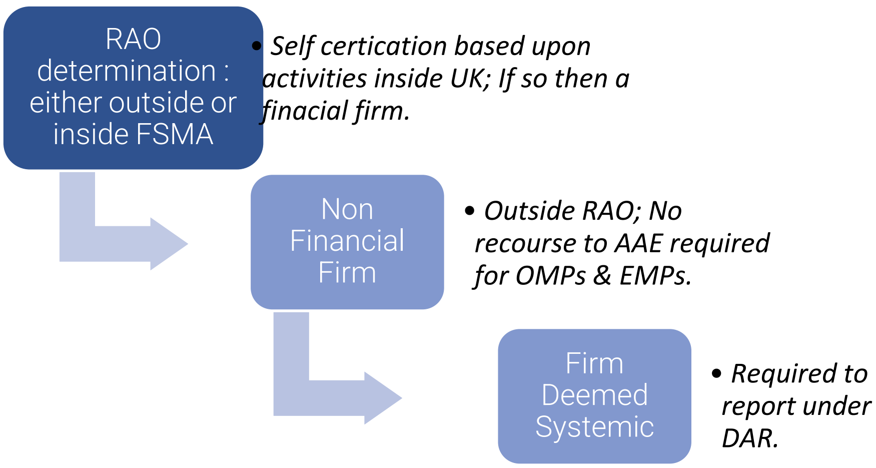
Furthermore, even this approach under MiFID I inadequately dealt with duality of the "*MiFID override*", whereas the introduction of the DAR now offers an opportunity for appropriate, simple and proportional treatment of non-financial firms and the application of the MiFID perimeter. This is an opportunity for the UK to unite the provisions under prior RAO 15 together with the intent of the prior ancillary activities exemption to provide for a clear and competitive pathway for Corporates to hedge their balance sheet risks.

[2] Designated activities regime | FCA; Introduced under the Financial Services and Markets Act 2023. Allows the FCA to regulate certain activities that are not regulated activities under FSMA but were previously covered by assimilated EU law with the activities as designated by HM Treasury.

- FCA can make rules, supervise, and enforce compliance even for unauthorised persons. No requirement for FCA authorisation to carry out a designated activity.
- Applies to both authorised and unauthorised persons.
- Enables proportionate regulation of activities not requiring full authorisation.
- Offers flexibility to regulate emerging financial practices without expanding the perimeter unnecessarily.

[3] Radical Uncertainty: Decision-Making for an Unknowable Future by John Kay and Mervyn King

In short, the current approach resembles the adage or riddle, "[*What's the difference between a Duck*]()". Article 15 RAO 'with or through' exclusion should reviewed, but should be the only relevant gateway (i.e. a single Boolean switch) such that all non-financial firms and corporates can declare themselves as "non-MiFID" and place their relevant activities under the DAR proportionately. This would provide for safe harbour from CRD and related financial rules, whilst providing for Reporting and Conduct requirements as appropriate for that firm, or its relevant intragroup segment. In this way, the UK could reconstitute and replace the intent behind the prior MiFID I established "*Oil Market Participant*" and "*Energy Market Participant*" regime ["*OMPs*" & "*EMPs*[4]"].



[4] The FCA's Oil Market Participant (OMP) and Energy Market Participant (EMP) regimes are specialized regulatory frameworks designed to accommodate the unique characteristics of firms active in UK commodity markets, particularly those dealing in oil and energy derivatives. These regimes were developed to provide proportionate regulation for firms whose activities straddle the boundary between physical and financial markets.

Oil Market Participant (OMP) Regime; Originally developed under the Financial Services Act 1986, and adapted under FSMA 2000. Designed for firms trading oil derivatives on own account, typically for commercial hedging rather than speculative or client-facing purposes.

- Applies to firms that are members of recognised investment exchanges (RIEs) or designated investment exchanges. Excludes MiFID investment firms.
- Allows for waivers from certain prudential requirements (e.g., IPRU(INV) Chapter 3) if the firm's trading is ancillary to its main business.

Energy Market Participant (EMP) Regime; Introduced under FSMA 2000, partly in response to the loss of the "Permitted Persons" regime under the FS Act. Tailored for firms involved in energy generation, production, storage, distribution, or transmission. Developed alongside the restructuring of UK energy markets (e.g., NETA and NGTA reforms).

- EMPs are not MiFID investment firms.
- Subject to a special guide in the FCA Handbook (EMPS 1), which outlines applicable rules and potential waivers.
- May be granted waivers from:
    - Prudential rules (IPRU(INV) Chapter 3)
    - Transaction reporting (SUP 17A)
    - Integrated Regulatory Reporting (SUP 16.12)
    - Certain complaints and compensation rules (DISP, COMP)

Under such a self-declaration approach, those firms then deemed to be significant in the UK, either in terms of transparency outcomes, transactional data, conduct implications or for systemic purposes can be required to participate in relevant aspects of UK MiFID, MIFIR, MAR EMIR, SFTR without conferring those same obligations on all other corporates and without conferring those same obligations on other parts of the same corporate group where inappropriate. Recalling that the original intent for "OMPs" & "EMPs" Regime was firstly to avoid over-regulation of firms with non-financial core business; secondly to maintain market integrity and consumer protection where relevant; and finally, to align UK regulation with MiFID exemptions while preserving domestic flexibility. Essentially, "OMPs" & "EMPs" would be diverted from FSMA and redirected into the DAR.

We consider that the "*With or Through exclusion*[5]" should be broadened in scope and amended such that exempt firms can access UK trading facilities directly where they undertake the activity of dealing in investments as principal. Provisions available under the UK DAR enable such broadening-out to occur safely, and with the consequence that none of the three parallel and several mechanisms addressed by the FCA in Chapter 3 of the consultation need to be made into the FCA Handbook at all.

Turning to the tests proposed:

i. Annual Threshold Test: This intends to exempt commodity market participants whose in-scope trading activities are insignificant from a systemic risk perspective.
ii. Capital Employed Test: This facilitates the exemption of energy market group entities owning substantial real-economy assets, such as wind farms and power plants, by considering the capital invested in physical infrastructure relative to trading activities.
iii. Trading Test: Exempts those commodity market participants at the opposite end of te spectrum who hold limited physical assets, ensuring that their trading activities are evaluated in the context of their overall business operations.

Whilst these may be considered by OMPs and EMPs to collectively provide sufficient scope for them to continue with their current exemptions when available individually, the procedures are

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[5] **Key Conditions of the Exclusion (Article 15 RAO); To qualify, the person must not hold themselves out as:**

- Making a market in investments, or
- Being in the business of dealing in investments.
- Not regularly solicit members of the public to induce them to deal.
- Deal only with or through authorised or exempt persons, such as:
    - FCA-authorised investment firms
    - Exempt persons acting in the course of a regulated activity
- Use Case: Non-Financial Corporates; *A manufacturing or energy company using derivatives to hedge commercial risks may:*
    - Trade commodity derivatives with a bank or broker.
    - Avoid authorisation if it does not market itself as a dealer and only trades with or through authorised firms.
- Limitations; The exclusion does not apply if the firm:
    - Acts as a market maker.
    - Provides investment services to third parties.
    - Deals directly with the public.
    - It is activity-specific and must be assessed in context.

performative rather than substantial, and quickly reductive to a status quo and would adequately be replaced by a simple self-election to be an NFC at the outset given that the available activities after this election are clearly limited.

Question 2: Do you consider that trading conducted on a trading venue should be included in the annual threshold test? Please explain your rationale.

Notwithstanding our answer to Question 1, such that the annual threshold test should never be required by dint of RAO Article 15 exclusions for non-financial firms; clearly under the approach envisioned under Chapter 3, trading conducted on any trading venue should not be included under any threshold test.

As it stands, the ROA Article 15 "*With & Through*" test supposes that any NFC could only access any trading venue via an intermediary, so unless a form of ultimate chain execution logic is supposed by the FCA, adding in a measurement of direct market access ["DMA"] seems lopsided, illogical and easily circumvented by adding an intermediary into the execution chain. Adding in these conditions to expedite intermediation makes little sense; but the issue again highlights the circularity and complexity of seeking to add the same exemption inside FSMA as in parallel to that at the perimeter of the RAO. Furthermore, as we read the proposals, they are set in order to disadvantage UK trading venues in comparison to those competing in third countries which appears, *Prima facie*, to be in direct contravention to the FCA competition objective.

Referring to comments in answer to question 1 above, whilst the issue here should be the activity basis rather than any trading venue considerations; as set-out, the convoluted issues around the trading venue perimeter as well as the contract construction determine per-se the related definitions under the MiFID and MiFIR perimeters (therefore further consequential treatment under EMIR and the approach to Capital Regulations). These are all unhelpful and do not serve to direct the relevant and essentially simple outcomes here which are to appropriately exclude non-financial companies.

The concepts of TOTV, the Multilateral Venue Perimeter, "Off Book but on Exchange", Arranging verses Execution, contingent trades and packages, aggregation, allocations, EMS, OMS, Matching systems and other unregulated technical tools and pools of trading interests have not proven simple and effective for the FCA to supervise since MiFIR came into force. The advent of smart and self-executing contracts, on-chain execution, DLT, AI and the rise of the role of automated "agents" all together makes any such further reliance, as proposed, rather more complex and problematic.

Including such TV activity would create a stricter and more complex regime which does not align to international standard and business trading models. Well-established and trusted frameworks in both the European Union and the United States explicitly exclude exchange-traded derivatives (ETDs) from de minimis thresholds. Given that all the 13 candidate specified contracts in the UK are listed ETDs, should the FCA mitigate the proposals to align with the US approach, we would query whether and why the residual MTF ad OTF venue trades would be targeted, and why the FCA would also presumably exclude any OMP trades should the UK move to replicate and onshore EU REMIT as seems very plausible.

Beyond assessing the execution chain, sponsored access and other forms of intermediation, matched principal trading or third-country market access. we consider that the proposed inclusion of TOTV derivatives adds unnecessary complexity not only concerning the absent definition of a “derivative” from UK MiFID and MiFIR, but notwithstanding this, market participants, along with others across and tangential to the trade execution chain, would not only need to identify and calculate their trading venue arranged or executed derivatives, but would also need to clarify the trading venue perimeter from EMS and OMS provisions, but classify these transactions into financially-settled vs. physically settled transactions, hedging transactions, exempt transactions such as compression and liquidity provision, and non-privileged transactions - which represents a considerable complexity and compliance burden, for no benefit to any party, at a time when the policy approach purports to be the polar opposite.

Clearly including trading venue activity is inconsistent with the Overseas Person Exclusion, as again we therefore refer to the circularity discussed in answer to question 1. Any self-clearing firm not holding an FCA permissions would rely on the Overseas Persons Exclusion to maintain its exemption from the UK perimeter, whereas it would not be able to rely on the AAE due to the inclusion of TOTV in the scope, further embedding the same circularity.

Overall, we would urge that any suggestion to deviate from the international standard approach come with a compelling case to be so exceptional. Any such use-case fails to be made in the consultation paper as presented. The FCA should exclude all trading activity conducted on UK trading venues from the annual threshold test in order to maintain regulatory alignment with the EU & US; but rather to construe any test, if ever or ultimately required, to be based upon cash-settled commodity derivatives not traded on a trading venue.

Question 3: If the annual threshold test incorporates trading conducted on a trading venue, which option do you prefer from paragraph 3.37 and 3.38, approach 1 or 2?

Option 2 in paragraph 3.38 appears non-sensical. Whilst only narrowly applicable to Regulated Markets rather than to MTFs and OTFs in its phrasing, clearly the counterparty under Regulated Markets rules would always be the vertical CCP; - rendering the paragraph logic purely circular. For wholesale brokers, often operating MTFs and OTFs in a horizontal market structure, they do not act “on behalf of” market participants in an agency capacity, but as arrangers or trading venues, which again renders the paragraph pointless.

It's apparent that for the common corporate entity structure under MiFID I wherein a trading division, or subsidiary within a larger corporate group, attained a limited FCA Part 4A permission; where such an entity trades on own account, the treatment would be different to that where it trades as an agent to the parent group entity. Combined with further cross border exemptions, the outcomes and intent behind this approach appear to be at once both confusing, irrelevant, and holding out none of the principles of good regulation[6].

Furthermore, the second approach appears to seek to reapply the "*With or Through*" provisions in the RAO back inside the FSMA and the FCA Handbook. We cannot recognise why this would be necessary or how it could be seen as a simplification, especially in light of prior comments concerning the need to update these provisions as they stand to accommodate future-proofing, direct market access and equate for third-country access.

This concept therefore seeks to address trading behaviour based on regulatory outcomes (the meaning and locus of 'trade execution') rather than transactional requirements and common business practices; placing third country firms that, especially EU, US or other entities from recognised host or home regimes at a competitive advantage. This would likely exacerbate pressures for firms to relocate trading permissions to other jurisdictions, reducing the UK's diversity and depth as a global financial centre.

Option 1 in paragraph 3.37 appears little better when set against the comments above in answer to questions 1 and 2, since it is performative and the raised threshold[7] simply seeks to effect those same outcomes as a holistic division should do at the threshold to the FSMA in the RAO.

Further, do you agree with the level of the threshold proposed in respect of each option in paragraphs 3.52? If not, please explain why.

Given the burden and apparently complexities in assessing the conditions implicit with the £3 Bn threshold, we would suppose that the flat approach at a higher level would be simpler. Furthermore, the uncertain perimeter to the definitions of TOTV, to cash settlement and considering the continual currency conversions required again raise questions as to why the FCA seeks to add super-complexity to a garner a simple outcome.

Whether £5 Bn is appropriate remains unclear, presumably this could be subject to review should any NFC corporate groups be inappropriately scoped into MiFID at this level. Again, the underlying logic would therefore appear to make this threshold performative and circular in the ultimate outcomes.

Question 4: Regarding the annual threshold, do you agree with the following proposals:

a. currency of the threshold and,

[6] https://www.fca.org.uk/about/how-we-regulate/handbook/principles-good-regulation; Wholesale Markets Review: Scope, driving principles and consultation objectives; & Principles of good regulation | ICAEW

[7] i.e. a higher threshold of at least GBP 5 Billion and the inclusion of trading venue activity without a distinction by counterparty.

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b. the methodology (outside of trades conducted on a UK trading venue) for calculating a firms net notional exposure?

If not, please explain why.

Since the majority of commodity contracts are traded in USD, it would appear that the most straightforward basis would be to use the USD as the basis to any thresholds.

We have no comments on the FCA's proposed netting approach.

Question 5: Are there circumstances in which the annual threshold might need to be quickly amended, even with the inclusion of a reasonable risk margin (based on internal data analysis)? If yes, please explain.

One may suppose that market adjustments to the price of commodities and to changes in exchange rates or convertibility could create the conditions for the FCA to seek to amend the thresholds. Beyond that, geopolitical issues concerning the supply or the usage of commodities could also infer similar conditions.

In terms of data, any such would have limited applicability for forward looking flexibility beyond the standard VAR and Gaussian based approaches which are unlikely to provide a basis for out-of-model events such as, "*exceptional market developments*". These are reasons why we would not seek to support a thresholds-based criteria approach.

Question 6: Should our rules include a mechanism that adjusts the annual threshold due to certain factors, such as inflation? If so, please suggest on what basis this could be achieved and how frequently reviews and updates might be needed.

Any automatic or periodic mechanism to adjust the annual threshold presents the added complexity and burdens discussed above.

Concerning inflation in isolation, we would suppose that the concept of relevant inflation, whether supply-side driven, demand driven or via terms-of-trade, would be entirely reflected in the fiduciary or nominal prices of commodities themselves. Clearly the concept, benchmarking and mechanical applications for inflation adjustments can be subjective at both a domestic political and cross-border level adding to compliance complexity.

In this manner the thresholds may need to be normalised for the nominal prices of the commodities in question, but once again, this adds each complexity, burdens and circularities to attain an outcome which itself seeks to be constant. We refer again to our comments in question 1 concerning the efficiency of the proposed approach as an unnecessary evolution to MiFID II, rather than a reversion to a simple framework.

Question 7: Do you agree with the proposal to retain the calculation methodology of the trading test and to raise the threshold? If not, please explain why.

Paragraph 3.57 sets out that. "*For the trading venue test, the group's activities will include for UK-based entities their OTC trading activity and trading conducted on UK trading venues and for non-UK based entities their trading conducted on UK trading venues.*"

We note that this excludes all physically settled commodities such as most C6 trading and any activity on trading venues in third countries. Given that UK activity under this specification often represents less than 1% of a group's total trading activity, we doubt that the application confers any meaningful or comparable outcomes. Moreover, it appears to provide for incentives to either trade outside the UK or only on physically settled contracts or C6 "WEPs" which fall under the exclusions.

Again, we note that the meaning of the Trading venue perimeter holds some challenges, not just under the prior set of issues in trying to determine "TOTV" instruments and matters pertaining to EMS and OMS systems as performing outside the definition of a "Multilateral System." We also flag the ongoing debate as to the nature of bilateral systems such as SI operated crossing and 'delta-one' type trade facilitation which essential work around the provision of principal capital, but also the scope of "Off-book, but On-exchange" or "Pre-Negotiated LIS trades" under any framework which expressly turns on the multilateral perimeter when that agreed FCA approach also specifically cite arrangements in addition to trade executions.

Overall, we would consider the proposed approach to diverge from the stated objectives of simplicity and competitiveness.

We make no comment on the setting of the thresholds for the trading tests at 50%, and with maintaining the current calculation methodology as these are purely a matter for market participants.

Question 8: Do you agree with the proposal to retain the calculation methodology for the capital-employed test and to raise the threshold? If not, please explain why.

We make no comment concerning the retention of the calculation methodology for the capital-employed test and related threshold quantification as these are purely a matter for market participants.

Ends.

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