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HM Treasury and FCA propose new ancillary activities test

HM Treasury has published draft legislation on the ancillary activities exemption which exempts firms from authorisation as an investment firm when their trading in commodity derivatives, emission allowances or derivatives of emission allowances provided that this activity is ancillary to the main activity of its group. The legislation will give relevant rulemaking powers to the FCA, with the FCA also launching a consultation proposing changes to the ancillary activities test firms need to meet to benefit from the exemption. In addition, the FCA will have power to specify an annual trading threshold below which a firm can also benefit from the exemption (without needing to complete the ancillary activities test), with the FCA CP suggesting how this new threshold could be set. The FCA consultation closes on 28 August 2025, with the FCA aiming to publish a policy statement in Q4 2025-Q1 2026. The revised rules will apply from 1 January 2027.

Background

The ancillary activities test (AAT), which was introduced by MiFID II, is complex and relies on calculations that require market data to be sourced every year at a cost. Following the Wholesale Markets Review, the current quantitative test was initially going to be change to a qualitative test. However, in response to feedback, the AAT will now remain a quantitative test, with the consultation aiming to simplify it while maintaining legal certainty.

HMT legislation on the AAE

HM Treasury's draft legislation will amend the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) to specify that the ancillary activities exemption (AAE) is either met:

1. when a firm's trading in commodity derivatives, emission allowances or derivatives of emission allowances is ancillary to the main activity of its group (i.e. the AAT); or

2. alternatively, the firm's relevant trading activity is below an annual threshold.

The legislation will empower the FCA to write rules:

1. setting the criteria for the AAT; and

2. setting the new annual threshold for trading activity in commodity derivatives, emissions allowances, and derivatives thereof, and criteria for when activity is considered to be below that threshold.

These powers reflect the fact that the FCA is better able to specify the relevant criteria, as well as being more nimble in amending relevant thresholds when necessary.

In line with FSMA 2023 (which allows for these powers to be transferred to the FCA and provides for certain legislation to be revoked), existing UK RTS 20 and Article 7[illegible] RAO (which removed the need for firms to perform the market share test of the [illegible] where there is a lack of publicly available data on the overall size of the market)

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will be revoked separately. HM Treasury has indicated that Article 72J will remain in place for 12 months after the commencement of the new AAE/AAT, i.e. until 1 January 2028, in order to assists firms transitioning to the new regime.

FCA proposals for the AAE and AAT

The FCA is proposing to establish three separate and independent tests to assess whether a firm can use the AAE:

- A **new annual threshold test** ("de minimis" test) which will exempt firms that undertake trading in commodity derivatives on a relatively small scale. This will replace the current market share test which is based on yearly averages of overall market activity in relevant commodity derivatives and instead be based on a specific monetary threshold. The FCA seeks views on whether a **GBP 3bn** or **GBP 5bn** threshold would be appropriate, depending on whether the FCA decides to include or exclude cash-settled positions in derivatives traded on UK trading venues (with the FCA inviting firms responding to the CP to provide data to support the setting of the annual threshold). The FCA otherwise proposes that the calculation against the annual threshold is not done for each different type of commodity, but across all cash-settled commodity derivatives on a net basis and excluding contracts traded on non-UK trading venues. Under the proposed rules firms' average outstanding notional exposures across the previous three years would need to be below the annual threshold to benefit. The FCA is interested in views as to whether the rules should build in an automatic way for the annual threshold to be adjusted, such as in line with inflation, or whether amendments to the threshold should always be subject to consultation.

- The existing **trading test** and **capital employed test** (currently part of the main business test) with some modifications, principally to change the applicable thresholds to 50% (i.e. the size of the trading activities account for 50% or less of the other trading activities of the group, or the estimated capital employed for carrying out those trading activities accounts for not more than 50% of the capital employed at group level for carrying out the main business). The trading test and capital employed test would assessed against the simple average of trading activities and estimated capital employed, respectively, across the preceding three years.

For all the above tests, intra-group transactions, hedging transactions and transactions entered into as part of an agreement to provide liquidity on a trading venue, and transactions entered into by FCA-authorised members of the group are excluded from the calculations (although, with respect to the trading test, these exclusions apply only to transactions entered into by the firm itself and not to transactions entered into by members of its group). The definition of hedging transactions will remain consistent with that set out in current UK RTS 20 and the new commodity derivatives regulatory framework outlined in FCA PS25/1.

The FCA does clarify that these changes go to whether a firm qualifies as an investment firm and that firms trading in commodity derivatives will still need to assess their UK licensing position under the RAO (where different exclusions may apply), even if they are able to rely on the AAE for MiFID purposes. Firms benefitting from the AAE will, therefore, still need to carefully consider their UK licensing position – a complication caused by the complex way in which the UK's implementation of MiFID interacts with the RAO.

Timing and next steps

The FCA consultation closes on **28 August 2025**, with the FCA aiming to publish a policy statement in Q4 2025-Q1 2026.

Technical comments on HM Treasury's draft legislation can be made by the same date. HM Treasury intends to lay the legislation in the Autumn before the final FCA rules are published.

The revised AAE and AAT will apply from **1 January 2027** and the changes to the RAO and new FCA rules will apply from then.

Existing UK RTS 20 and Article 72J RAO (which removed the need for firms to perform the market share test of the AAT, where there is a lack of publicly available

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data on the overall size of the market) will be revoked separately. HM Treasury has indicated that Article 72J will remain in place for 12 months after the commencement of the new FCA regime, i.e. until **1 January 2028** in order to assist firms transitioning to the new regime.

Documents

FCA consultation paper (CP25/19) Ancillary Activities Test was published on 3 July 2025 and is available here. The FCA webpage is here. HM Treasury's policy note and draft legislation on the AAE is available here.

Our client note on the new UK commodity derivatives regime, which will apply from July 2026, is here: UK MiFID: FCA finalises reforms to UK commodity derivatives regime to improve resilience of markets.

Materials from our joint webinar with the FCA on the new regime can be accessed here: In discussion with the FCA: The new UK commodity derivatives regime.

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