



# LEGISLATIVE REFORM OF THE TERMINAL MARKETS ORDER

Issued 12 September 2023

ICAEW welcomes the opportunity to comment on the legislative reform of the Terminal Markets Order consultation published by HM Treasury and HM Revenue & Customs on 18 July 2023, a copy of which is available from this [link](#).

For questions on this response please contact us at [taxfac@icaew.com](mailto:taxfac@icaew.com) quoting REP 91/23.

We note that the consultation period for this consultation was only 8 weeks. We would recommend a consultation period of 12 weeks is used wherever possible. The shorter period allowed for this consultation has somewhat limited how effectively we could respond to the consultation, particularly as the consultation period spanned the summer holiday period. Please could we draw your attention to government guidance regarding consultations:

<https://www.gov.uk/government/publications/consultation-principles-guidance>

This response of 12 September 2023 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

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## ICAEW

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## KEY POINTS

1. We welcome the opportunity to comment on the Government's plans regarding the modernisation of the Terminal Markets Order (TMO) legislation, which we consider is necessary.
2. We note that the Government does not intend to make fundamental changes to the current TMO policy or extend the current scope of the TMO.
3. We would like to take this opportunity to question why the Government has not considered a more radical overhaul of the VAT legislation regarding commodity trading, given the importance to the UK's financial services sector of this activity and the UK's departure from the EU. We have provided some more detailed comments on this in our response to Question 5.
4. However, the rest of our response is written within the constraints of the consultation with a focus on making changes to the TMO to reflect modern market practices and to make it simpler to update it in the future.
5. On this basis, we are broadly supportive of the Government's suggested approach and note that a principle-based approach including definitions in legislation will allow for a more constant and statutory tax system, as defined in Appendix 1.
6. We note however that such an approach could lead to less certainty for taxpayers and ask the Government to consider how this uncertainty could be mitigated.
7. ICAEW remains at the Government's disposal should further input be needed in this area.

## ANSWERS TO SPECIFIC QUESTIONS

### DEFINING A RECOGNISED TMO COMMODITY EXCHANGE OR A RECOGNISED MARKET ASSOCIATION

**1) What are your views on removing the list of named markets which are in the current TMO legislation and replacing it with a definition of a recognised TMO commodity exchange or a recognised market association based on the suggested criteria?**

8. We accept that this change would make the TMO more flexible as potentially all exchanges and market associations would automatically fall within the scope of the TMO where they meet the conditions set out in the principle-based approach.
9. As this would mean the underlying legislation does not have to be regularly changed and updated, if at all, this would lead to a more constant tax system, which is one of the ICAEW Tax Faculty's 'ten tenets for a better tax system' as set out in Appendix 1 to this response.
10. However, removing the list of named markets may lead to uncertainty for taxpayers. If the principle-based approach leaves any room for uncertainty, then this change would not lead to a better tax system.
11. Any principle-based approach should be as simple as possible to avoid any uncertainty. ICAEW would be happy to provide further input on such an approach if this is the route chosen by HMT and HMRC.

**2) Are there any other criteria that could be used to define a recognised commodity exchange or a recognised market association for the purpose of the TMO?**

12. No comment.

**3) What are your views on the alternative approach, where the Government would maintain a list of exchanges/market associations in a VAT Notice?**

13. This alternative approach would provide the taxpayer with certainty, which is clearly a major advantage over a principle-based approach.

14. However, we note that this approach would rely on both the exchanges/market associations and HMRC ensuring that the list is kept up to date in a timely manner. This would place an additional burden on HMRC and introduces the risk that transactions accidentally fall out of the scope of the TMO by 'inadvertence', increasing rather than reducing uncertainty.
15. Any such list should state the date at which it is correct.

#### DEFINING A MEMBER OF THE MARKET

**4) Do you agree that it would be helpful to define 'persons ordinarily engaged with dealings on the market'?**

16. Yes, it is generally beneficial to define key terms in legislation to provide certainty to taxpayers and ensure the tax system remains statutory.

**5) Do you agree with the principles set out at paragraphs 2.15 and 2.16? If not, are there any additional or different principles which the Government should consider?**

17. We do not necessarily agree with the principles set out at paragraphs 2.15 and 2.16.
18. Given the UK has left the EU, we recommend it is considered whether now is an opportune time to radically simplify the whole commodity trading regime from a VAT perspective.
19. As an example, the zero-rating of commodity trading could be extended to commodity trading in all cases not leading to physical delivery.
20. Where commodity trading does lead to physical delivery, this could be subject to the standard rate but using the domestic reverse charge to counter the risk of fraud.
21. Clearly this would be a major change and would need to be considered more thoroughly, but this would be a chance to introduce real tax simplification whilst potentially making the UK financial sector more competitive on a global basis.

**6) What are your views on the alternative approach, where the Government would maintain a list of member classes entitled to trade under the TMO in a VAT Notice that would have the force of law?**

22. Maintaining a list of member classes entitled to trade under the TMO in a VAT Notice that would have the force of law would provide taxpayers with certainty.
23. However, as with exchanges and market associations, this would require HMRC to ensure the list is kept up to date – though we note that member classes entitled to trade under the TMO are likely to change much less frequently.
24. We would also reiterate that the tax system should be statutory wherever possible with legislation subject to proper democratic scrutiny.

#### DEFINING QUALIFYING TRANSACTIONS THAT FALL UNDER THE SCOPE OF THE TMO

**7) What are your views on the proposal to define the qualifying transactions that would fall under the scope of the TMO?**

25. We support the proposal to define the qualifying transactions that would fall under the scope of the TMO as this would ensure the tax system in this area is both certain and statutory.

**8) What are your thoughts on the proposed criteria that could be used as a basis for the definition of qualifying transactions that would fall under the scope of the TMO?**

26. Notwithstanding the comments we made in our response to Question 5, the proposed criteria for the definition of qualifying transactions appears sensible.

**9) Do you think any other criteria should be included in such a definition?**

27. Though we note that goods and services are defined elsewhere in VAT legislation, should a definition or a reference to the relevant definition of a supply of goods vs a supply of services be included within the TMO?
28. Furthermore, it may be sensible to define the meaning of 'delivery of the goods'.

**SPECIFYING THE COMMODITIES TRADED ON TERMINAL MARKETS**

**10) Do you foresee any issues with the intention to specify commodities within the legislative framework of the TMO?**

29. The only problem we foresee is that it could be difficult to keep such a list up to date, but we note that new commodities for trade emerge relatively infrequently.
30. We also note that the intention is to include the principles for the inclusion of commodities within the legal framework to form the basis by which the Government could decide to include other commodity trades within the scope of the TMO, which might mitigate this risk.

**11) Do you agree with the principles that commodities should meet for the purposes of the TMO and that they are sufficient to prevent VAT fraud?**

31. Yes, we agree with the principles that commodities should meet for the purposes of the TMO and trades with final consumers are specifically excluded.
32. It is difficult to say whether the principles by themselves are sufficient to prevent VAT fraud. The government could consider other options to support this aim, such as increased monitoring of transactions.

**TMO AND INVESTMENT GOLD (ARTICLES 4 – 7 SI 1973/173)**

**12) Do you agree that Articles 4 to 7 of the TMO do not need to be revised? If you do not agree, please explain what changes may be required and why?**

33. We consider that Article 6 needs to be amended as it currently refers to Schedule 3 of VATA 1994, which was omitted by the Taxation (Cross-border Trade) Act 2018.
34. As per our response to Question 9, the only other changes that may be required to Articles 4 to 7 of the TMO would be the possible introduction or tightening of relevant definitions to increase legal certainty.

**FUTURE CHANGES TO THE TMO**

**13) Do you think the proposed principle-based approach meets the objective of flexible legislation to incorporate future changes?**

35. Notwithstanding our concerns about a lack of certainty a principle-based approach may provide, we agree that such an approach does meet the objective of flexible legislation to allow for future changes.

**14) Do you think there is an alternative method to make these changes?**

36. Notwithstanding our suggestion for a more radical overhaul of the VAT legislation concerning commodity trading, which we understand is not being considered by Government, the principle-based approach, on balance, seems most appropriate.
37. However, we would note that HMRC should expect such an approach to lead to more queries from taxpayers seeking certainty on their tax position. Options for mitigating this uncertainty such as maintaining up to date lists of qualifying exchanges, commodities and transactions should be considered.

**15) Does your business have any plans to change or consult on the operation of your commodity exchange or market association in the future? If so, can you provide the outline of these changes?**

38. As we are responding to this consultation as a professional body, this question does not apply.

## APPENDIX 1

### ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see <https://goo.gl/x6UjJ5>).