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Consultation response

DORA delegated acts on criticality designation criteria and on oversight fees

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American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 56, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Executive summary

In light of the European Commission's consultation on the delegated acts on criticality designation criteria and on oversight fees under the Digital Operational Resilience Act (DORA), this paper suggests concrete amendments to strengthen the principle of proportionality and legal certainty. In order to ensure robust operational resilience for the European financial sector, the Commission should adopt a clear assessment approach to the criticality designation. Furthermore, a proportionate consideration of the applicable turnover for oversight fee calculation would better secure the funding of the incoming oversight regime.

Introduction

Following the European Supervisory Authorities (ESAs)'s Joint Report delivered to the European Commission on 29 September 2023, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) has applied the input to the delegated acts under the mandate of DORA and opened a call for feedback on the drafts. The Commission's sensible approach advancing the ESAs' guidance outlined in the Joint Report is a positive development. The draft delegated acts show a welcome focus on proportionality in many aspects raised by industry stakeholders under the ESAs consultation in 2023. However, the following suggestions would further strengthen the principle of proportionality and constructively support additional legal clarity and certainty.

Delegated act on criticality designation criteria

Clarification of two-step assessment process

The Commission's approach to a sequenced application of indicators with focus on information and communications technology (ICT) services that support critical or important functions is consistent with DORA Level 1 and will focus designation and resources on ICT services that are relevant to financial stability. However, there is a need to further clarify the description of the two step assessment process to remove any potential for confusion.

Article 1(1) is clear that all step 1 sub-criteria set out in articles 2(1), 3(1) and 5(1) must be fulfilled for those ICT third-parties to be assessed against the step 2 criteria in articles 2(5), 3(4), 4(1) and 5(5). However, language in the subsequent articles appear to suggest that only the sub-criteria for that specific article must be met before proceeding to step 2 for just that article.

We therefore propose the following amendments to preserve the clarity and intention of the proposed framework:

Article 2(5):
'When considering the criterion set out in Article 31(2), point (a), of Regulation (EU) 2022/2554 and where the ICT third-party service provider fufills the 'step 1' sub-criteria referred to in paragraph 1 of this Article, **in addition to the step 1 sub-criteria in Articles 3(1) and 5(1),** the ESAs shall carry out their assessment in the light of the following 'step 2' sub-criteria:'

Article 3(4):
'When considering the criterion set out in Article 31(2), point (b), of Regulation (EU) 2022/2554 and where the ICT third-party service provider fufills the 'step 1' sub-criteria referred to in paragraph 1 of this Article, **in addition to the step 1 sub-criteria in Articles 2(1) and 5(1),** the ESAs shall carry out their assessment in the light of the following 'step 2' sub-criterion:'

Article 5(5):
'When considering the criterion set out in Article 31(2), point (d), of Regulation (EU) 2022/2554 and where the ICT third-party service provider fufills the 'step 1' sub-criteria referred to in paragraph 1 of this Article, **in addition to the step 1 sub-criteria in Articles 2(1) and 3(1),** the ESAs shall carry out their assessment in the light of the step 2 sub-criterion specified in Article 31(2), point (d)(i) of Regulation (EU) 2022/2554.'

Article 1: Assessment approach

We support the understanding that all step 1 indicators are met before an ICT third party provider can be designated critical. However, to increase legal certainty and regulatory transparency, article 1 should include a requirement for the ESAs to provide explanation in reasonable detail to ICT third party service providers how they reached their decision when notifying them of the outcome. This rationale will be crucial to the actual conduct of oversight and in particular the activities contemplated under the second paragraph of article 33(2).

We propose the following amendment to address the issue:

Article 1:

1. 'When considering the criteria set out in Article 31(2) of Regulation (EU) 2022/2554 to designate an ICT third-party service provider that is critical for financial entities, the ESAs shall apply the following approach:

   (a) as a first step, the ESAs shall assess whether the ICT third-party service provider fulfils all of the 'step 1' sub-criteria set out in Articles 2(1), 3(1), and 5(1);

   (b) as a second step, for those ICT third-party service providers that fulfil all of the 'step 1' sub-criteria referred to in point (a), the ESAs shall carry out their assessment in the light of the 'step 2' sub-criteria referred to in Articles 2(5), 3(4), 4(1), and 5(5).

   By way of derogation from the first sub paragraph, for the assessment of the criterion (c) of Article 31(2) of Regulation (EU) 2022/2554, the first step shall be covered by the assessment to be carried out for the criteria (a), (b) and (d) of Article 31(2) of Regulation (EU) 2022/2554.

2. **In providing notice of its assessment and any decision to designate an ICT thid-party service provider as critial pursuant to Article 31(5) of Regulation (EU) 2022/2554 and to ensure that any ICT third-party service provider designated as critical may exercise its rights under this same Article, the ESAs shall include in such notice a reasoned explanation of such assessment and designation by each sub-criteria referenced in paragraph 1 of this Article, including the particular ICT services by specific application that will be subject to oversight and reference to specific evidence supporting the designation.**

3. After the end of the time period for the submission of a reasoned statement referred to in Article 31(5), first subparagraph, of Regulation (EU) 2022/2554, the ESAs, through the Joint Committee and upon recommendation from the Oversight Forum, shall designate an ICT third-party service provider as critical for financial entities if it fulfils all the 'step 1' sub-criteria referred to in paragraph 1, point (a), and following a positive outcome of the assessment carried out in relation to the 'step 2' sub-criteria referred to in paragraph 1, point (b).'

Article 2 (5) (a) and article 3 (4): intensity of impact; reliance

Sub-criteria 1.3 and 2.3 should be limited to financial entities identified in step 1 (ie financial entities using the ICT service to support critical or important functions). As currently drafted, the step 2 indicators in sub-criterion 1.3 and sub-criterion 2.3 are broader than their corresponding step 1 indicators. Specifically, neither sub-criterion is limited to financial entities for which the ICT services support critical or important functions and, in the case of sub-criterion 1.3, the 'activities and operations' are not limited to critical or important functions.

We propose the following amendments to address the issue:

Article 2 (5) (a):

'Sub-criterion 1.3: the intensity of the impact of discontinuing the ICT services provided by the ICT third-party service provider on the activities and operations of financial entities **identified in the 'step 1' sub criteria referred to in paragraph 1 of this Article** and the number of **those** financial entities affected;'

Article 3 (4):

'Sub-criterion 2.3: G-SIIs or O-SIIs and other financial entities **identified in the 'step 1' sub criteria referred to in paragraph 1 of this Article**, including where **those** G-SIIs or O-SIIs provide financial infrastructure services to other financial entities, relying on an ICT service provided by the same ICT third-party service provider, are interdependent.'

Article 6: Information sources to enable criticality assessment

The Commission should clarify that the ESAs (i) may only use data from reliable sources to perform their criticality assessment, and (ii) must reference their sources.

As currently drafted, the delegated act allows the ESAs to use any additional available data from any source to perform the criticality assessment regardless of whether the veracity of that data has been proven or if it comes from a reliable source. At the same time, the ESAs are not required to reference or cite their sources when communicating the outcome of the assessment to the ICT third party service provider.

Although we agree that the ESAs should be able to use data they gather in the exercise of their supervisory role, **it is not appropriate for the ESAs to rely on any data they become aware of in any and all arenas** (eg social media, newspapers).

We propose the following amendments to address the issue:

Article 6:

1. 'The ESAs shall use the data provided by the registers of information referred to in Article 28(3) of Regulation (EU) No 2022/2554, for the assessment of the sub criteria listed in Articles 2 to 5. The ESAs may also use additional available data they have at their disposal **from the exercise of their supervisory role** and from all **reliable** sources of information to perform the criticality assessment. **The ESAs shall reference their sources and, to all extent possible, make them available for review when ESAs notify the ICT third-party service provider of the outcome of the assessment.**
2. ESAs shall take into account the most recent data available to them during the assessment year, or where applicable, the data that has been made available to them at the latest by 31 December of the year preceding the criticality assessment.'

Delegated act on oversight fees

The Commission's proposal to limit the scope for fees, applying a reference to the list of ICT services in the Implementing Technical Standards (ITS) on the register of information (article 1 [1]), is a positive development. Assuming the list of ICT services in the ITS is aligned with DORA's focus on the resilience of the financial sector, it would be appropriate to scope turnover to revenue generated by the critical ICT third-party service provider (CTPP) in providing services on that list.

The ESAs flagged procedural difficulty in the determination of the applicable turnover in their advice. However, this should not lead to a recommendation of an inequitable approach by overly extending a fall-back option, as we see it under article 2 (3) of the draft delegated act. Article 43(1) DORA foresees that fees shall cover the Lead Overseer's necessary expenditure in relation to the conduct of the oversight and in relation to matters falling under the remit of direct oversight activities. In this sense, **it would be disproportionate to determine applicable turnover based on the revenue generated by all the services provided by a CTPP regardless of their relevance to DORA or financial entities.**

The Commission's intention to avoid basing the calculation of the fees on the global turnover of the CTPP as per article 2 (1) is a positive development. The draft delegated act proposes the application of only a phased broadening of the in-scope turnover as a fall-back under article 2 (3). However, **there should be more flexibility in the fallback options where the figures the CTPP can provide entirely include the in-scope turnover in the earlier option.**

Under current article 2 (3), if the CTPP does not have audited figures that align exactly with the scope of paragraph 1 or the first option in paragraph 3, then their only option is to provide worldwide revenue. **This is disproportionate where the CTPP is able to provide audited figures that entirely include the in-scope revenue for the previous, more narrow option even if the figures are not limited to that narrower scope.**

Since DORA will designate the EU subsidiary of the CTPP as the legal entity subject to direct oversight, we propose that the basis for the calculation is the audited annual figures of this legal entity. In order to ensure further proportionality, considering the revenue of the EU legal entity will include the revenue related to customers of the CTPP that are out of the scope of DORA, we suggest the oversight fees paid by a CTPP should not exceed 5% of the total oversight fees collected by the Overseers.

We propose the following amendments to address this:

Article 2 (3):

'Where the critical ICT third-party service provider does not provide the Lead Overseer with audited figures by the date referred to in paragraph 2 that are limited to **or entirely include** revenues generated from the provision of services to financial institutions listed in Article 2(1) of Regulation (EU) 2022/2554, the Lead Overseer shall consider the turnover generated in the Union from the provision of the ICT services listed in the implementing technical standards adopted pursuant to Article 28(9) of Regulation (EU) 2022/2554 irrespective of the type of clients of the critical ICT third-party service provider.

Where the critical ICT third-party service provider does not provide the Lead Overseer with audited figures by the date referred to in paragraph 2 that are limited to **or entirely include** revenues generated in the Union from the provision of ICT services referred to in the implementing technical standards adopted pursuant to Article 28(9) of Regulation (EU) 2022/2554, the Lead Overseer shall consider the worldwide turnover generated from the provision of those ICT services.

A designated critical ICT third-party service provider shall pay as an annual oversight fee a part of the relevant amount which corresponds to the ratio of the critical ICT third-party provider applicable turnover to the total applicable turnover of all designated critical ICT third-party provider required to pay an annual oversight fees which should not exceed 5% of the total oversight fees collected by the Overseers.'

Non-disclosure of data

Due to its business sensitive nature, audited financial data provided by the CTPP to the Lead Overseer must be treated as confidential data and for this reason it should not to be disclosed to any third parties.

We propose the following amendment to address this:

Article 6:

'For the purposes of this Regulation, all communication between the European Supervisory Authorities and critical ICT third-party service providers shall take place by electronic means.

All communication, including audited financial data, provided by the critical ICT third-party service providers to the European Supervisory Authorities shall be treated as confidential and not to be disclosed to any third parties. Such confidential data shall be used for the sole purpose of calculating oversight fees applied to CTPPs.'

Conclusion

The amendments in this paper would help to drive transparency and legal certainty for the criticality designation. A clear assessment approach supports a proportionate framework for providers and financial services customers alike, ultimately contributing to a robust operational resilience for the European financial sector. A proportionate consideration of the applicable turnover for oversight fee calculation – avoiding an overly broad consideration and met by a fee cap – will secure the necessary funding of the incoming oversight regime.