

Our position

Response to the consultation on the Digital Operational Resilience Act Discussion Paper



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

AmCham EU welcomes the opportunity to comment on the public consultation on Advice by the three European Supervisory Authorities on the indicators for determine criticality of third-party ICT providers to trigger financial services industry under DORA, as well as on the possible level of oversight fees.

AmCham EU commends the ESAs on their constructive dialogue with the industry on this new oversight framework but remains concerned about in particular three aspects of the proposed framework.

These concerns relate to:

- **Some confusion and overlap between the proposed indicators for criticality.** The text also remains silent on whether these criteria should be read as stand-alone indicators or are cumulative. As currently drafted, AmCham EU believes the indicators could potentially cover all or most of today's ICT providers and therefore do not in themselves serve as effective filters for prioritization.
- Based on the consultation document **the criticality assessment will cover the group level of an ICT provider.** This is much broader than what we believe has been set out in the DORA Regulation. We agree that the overseer should fully understand the business model and governance arrangements of the ICT provider but unless carefully framed in the text this could have significant additional extraterritorial implications.
- Finally and related to the previous point, we believe **that oversight fees by the ESAs can only relate to the services actually covered by DORA.** The calculation of oversight fees should be based on the size of these services and not the business activities of an ICT group as a whole. We would also again draw attention to the potential extraterritorial implications of such a broad application of the fee arrangements.

AmCham EU looks forward to the continued dialogue with the ESAs on this important legislation and would welcome the opportunity to discuss our comments with you in greater detail.

Introduction

We welcome the European Supervisory Authorities' (ESAs) ambition to provide for proportionate advice to the European Commission on the criteria for the designation of critical third party provided (CTPPs) under the DORA Delegated Act. We appreciate the authorities' dedication to the engagement with the industry - to drive towards a balanced rule consistency, supervisory efficiency, required clarity and legal certainty.

Under DORA timelines, the ESAs committed themselves to a pragmatic approach, which nevertheless shall provide a proportionate outcome. To achieve the latter, we welcome the opportunity to share our perspective, looking at the necessary legal clarity, certainty and balance of proposals in the ESA Discussion Paper.

The criticality designation of providers establishes the central aspect of the upcoming new oversight regime, a novel framework that will require a common learning experience by industry, overseer and public authorities contributing under the procedural rules. We offer a number of constructive comments and amendments to the Discussion Paper, aiming to support more clarity and proportionality.

From the perspective of AmCham we believe our recommendations on the methodology, criticality indicators, as well as on the relevant data is particularly important to make the new oversight framework under DORA a success. We welcome in particular the comments by the ESAs that the criticality indicators should not be understood as triggers of criticality but a minimum requirement above which the criticality assessment is to be carried out.

Group level assessment and supervisory fees

We remain very concerned that the assessment will cover the group level of an ICT provider. This is much broader than what has been set out in the DORA Regulation, and it could have significant extraterritorial implications.

The designation criteria of CTPPs must address the appropriate entity, applying the DORA definitions and inherent logic. We call on the ESAs to ensure that the scope of the Oversight Framework will not go beyond what is necessary in order to achieve their underlying objectives.

The reference to a group as a whole under Art. 31(3) must be considered in the context of DORA's definitions as the legal foundation. We observe significant confusion with the DORA Level 1 definitions in the context of cross-border subcontracting, including intra-group subcontracting. Criteria considering the "group as a whole" need to align with the definition of "ICT subcontractor established in a third country" and "ICT third-party service provider established in a third country". Both definitions require a contractual arrangement as a condition of their application. Consequently, where contracts are established with EU financial entities with an entity of an ICT TPP, the designation process should focus on this entity rather than group elements (without contract), which are more appropriately considered under the subcontracting provisions.

In many cases, ICT providers use EU entities to contract with EU financial entities. Therefore, there are well-established compliance processes and anchorage of these entities in Europe, the Lead Overseer will be able to execute oversight tasks in full competence. Information and relevant understanding of service provision by the CTPP will be secured for the authority.

In addition, the oversight fees are to be calculated for the EU revenue as a whole. Considerations on Oversight Fees in the ESAs' Discussion Paper highlight the need for flexibility in estimating expenditure incurred and the possibility to reassess fees from one year to another. While flexibility is necessary, it may also introduce uncertainty and unpredictability for the parties involved. And while the challenge of distinguishing between revenues generated by ICT services supporting critical and non-critical functions is highlighted, the Discussion Paper does not propose an alternative criterion or method for determining the applicable turnover based on the criticality of functions supported by ICT services.

Importantly, the proposal to consider revenues generated by all services provided by CTPPs appears to be in contradiction with the provisions of article 43 of DORA, which foresee that the fees shall cover the Lead Overseer's necessary expenditure in relation to the conduct of oversight tasks pursuant to DORA. In practice, the oversight activities will not have relevance to all the services of CTPPs. Hence, the proposal of the ESA's to take into account all services will lead to a revenue base that is higher than the true oversight costs, thus deviating from article 43 of DORA.

CTPP designation

We need a clear set of CTPP designation criteria under article 31. The criticality assessment should leave no room for uncertainty due to unclear requirements, or elementary specifications at the time of DORA's application. The goal is to avoid an overly broad oversight, protecting both authorities executing (or contributing to) the new oversight and industries from an overburdening investment of resources and workload.

It is currently unclear if and how transparency and traceability will exist to make clear to all parties which specific ICT service(s) provided by the ICT TPP or ICT TPP group met what criteria and what indicators so as to result in designation. Providing a clear understanding of DORA's applicable oversight for individual ICT providers will help the uptake of digital transformation by financial service institutions, adding certainty in the context of compliance with the financial supervisory regime as well as new business uptake with ICT providers.

Industry engagement: sharing perspectives on the methodology

The proposed indicative designation process requires additional clarity. All material criteria for the designation of CTPPs should appear in the text of the forthcoming Delegated Act to create clarity for both financial entities and potential CTPPs.

When the CTPP designation criteria are applied in practice, they should clearly establish the CTPP's ICT services that the Lead Overseer will focus on. This clarity is challenged where the details of the designation procedure and the methodology behind are explicitly excluded from the ESA discussion paper. Where central guidance is postponed to a later stage, the application of rules will prove additionally difficult for the industry to implement under the DORA timeline. A methodology by the ESAs only before the completion of the first CTPP designation exercise (see DP page 10, footnote 6), will miss the opportunity to benefit from a sound industry engagement and relevant insights regarding designs and impact.

Criticality indicators

The ESA proposes to approach the criticality criteria holistically. However, a number of further clarifications can secure a proportionate designation of critical ICT providers.

ICT TPP groups and sub-contracting

Recommendation: reconsider or clarify both (1) the references to 'indirectly' providing services, and (2) this Note 'Directly or indirectly: important to cover critical sub-contractors. In particular, if sub contractors belong to a group, the group will be assessed as a whole'.

It is currently not clear how the criticality criteria and designation will apply to ICT TPP groups that provide different ICT services. The financial sector leverages innovation services provided by ICT TPP groups. A single group may provide multiple different ICT services to financial institutions. Under the two-step approach proposed by the ESAs, each of these services could meet indicators at step 1 and 2, meet only step 1 indicators but not step 2 (or vice versa), or meet neither steps' indicators for a criteria. In turn, transparency and traceability are crucial, so it is clear to all parties which specific ICT service(s) provided by the ICT TPP or ICT TPP group met what criteria and what indicators so as to result in designation. This clarity will enable the subsequent conduct of oversight activities targeted in a proportionate and efficient manner.

It is also not clear if there is basis to directly designate subcontractors as critical and what impact this would have on other elements of DORA. Para. 27 outlines how to capture sub-contractors. However, it does not address the potential absence of a contractual arrangement of this sub-contractor with a financial entity. According to art. 3 DORA, an 'ICT subcontractor established in a third country' means an ICT subcontractor that is a legal person established in a third-country and that **has entered into a contractual arrangement either with an ICT third-party service provider**, or with an ICT third-party service provider established in a third country. An 'ICT third-party service provider established in a third country' in turn means an ICT third-party service provider that is a legal person established in a third-country and **that has entered into a contractual arrangement with a financial entity for the provision of ICT services**. If a subcontracted provider (without contractual arrangements with the financial entity, yet subcontractor to an EU based provider which has contracts with EU financial entities) is designated critical because financial entities are 'indirectly' using its services, it's unclear how article 31(12) would be triggered as technically the subcontracted provider is not an 'ICT third-party service provider established in a third country'.

Without further clarification, the broad approach to sub-contracting risks double counting in constellations of intra-group sub-contracting (affiliated providers). Under article 31(3) DORA, where the ICT third-party service provider belongs to a group, the criteria [...] shall be considered in relation to the ICT services provided by the group as a whole. Yet different providers under a group structure could provide the same service to a financial institution: one directly, based in the EU and contracting with the EU financial entity. The second provider can provide the service indirectly, without a contractual arrangement with the financial entity yet acting as an 'ICT subcontractor established in a third country'.

Assessment of criticality criteria in relation to each other

Recommendation: provide clarity on how each criterion is weight to each other and the relationship between them

We recognise the ESA approach to develop a two-step procedure, based on indicators for each criterion. The quantitative approach at step 1 (thresholds) is complemented with qualitative indicators at step to provide a more granular view. However, to allow for an assessment of appropriate criteria, they should also be considered in relation to each other. Without clarity on the weight given to each criterion and the relationship between them, it is impossible to properly assess if the criteria are appropriate. For example: Criteria 2 (importance of financial entities) focuses purely on the character/importance of the financial entity using the ICT service and Criteria 4 (degree of substitutability) focuses purely on substitutability, in each case without any reference to the criticality

or importance of the service to the financial entity. If these criteria are given equal weight as the other criteria, then it could skew designation and resources away from ICT services that are actually relevant to financial stability.

Indicator 1.3

Recommendation: limit Indicator 1.3 to the impact of failure of the ICT on the provision of financial services by financial entities, and not services, activities and operations generally.

Proposed amendment:

'Indicator 1.3: Share of financial entities for which a large-scale operational failure of the same ICT TPP **to provide its services** would ~~imply cause~~ a substantial negative impact on the continuity of the **provision of financial services by** ~~services, activities and operations of~~ those financial entities (total number of financial entities, per type of financial entity and in percentage terms).'

As currently drafted, Indicator 1.3 does not align with DORA art 31(2)(a). art 31(2)(a) is limited to the impact on the stability, continuity or quality of the provision of financial services. It does not extend to the impact on the services, activities and operation of financial entities generally (ie beyond their provision of financial services). Given that Indicators 1.1 and 1.2 are very broad (any financial entities using the services), it is crucial that the Step 2 indicator is properly scoped and consistent with the focus of art 31(2)(a). The proposed amendment makes Indicator 1.3 more specific (well defined, clear, and unambiguous) and relevant (directly linked to the topic with immediate applicability).

Indicators 2.1 and 2.2

Recommendation: address **reliance** on ICT services provided (as opposed to mere 'use').

Proposed amendments:

'Indicator 2.1: Number of G-SIIs and O-SIIs **that rely on** ~~using~~ ICT services provided by the same ICT TPP (in absolute terms).

Indicator 2.2: Number of financial entities identified as systemic by competent authorities, other than G-SIBs and O-SIBs, **that rely on** ~~using~~ ICT services provided by the same ICT TPP (in absolute terms).'

As currently drafted, Indicators 2.1 and 2.2 do not align with DORA art 31(2)(b). Art 31(2)(b) refers to financial entities that 'rely' on the ICT TPP. Merely using an ICT service should not be automatically equated with reliance, which necessarily entails some level of impact on systemic or important activities if the ICT services were unavailable. Given the Step 2 indicator only addresses interdependence between financial entities and not the reliance each financial entity places on the ICT services, it is crucial to address reliance in Indicators 2.1 and 2.2. We suggest the adjustments above to make Indicators 2.1 and 2.2 more Specific (well defined, clear, and unambiguous) and Relevant (directly linked to the topic with immediate applicability).

Indicators 3.2

Recommendation: The ESAs should draw on registers that financial entities maintain under the existing ESA outsourcing guidelines. Based on the included determination of which ICT services support critical or important functions it could then further consider these ICT services.

We consider indicator 3.2 as a crucial indicator. However, this is also the only Step 2 indicator under Criterion 3, and falls short of a minimum threshold, which makes accurate assessment a challenge. It will be essential to have a more extensive triage process, in particular if there will be a lengthy list of potential CTPPs.

Indicators 4.1 and 4.2

Recommendation: provide clear definitions of / thresholds for ‘alternative’ or ‘complex / difficult’ in the context of substitutability.

Indicators 4.1 and 4.2: without a common understanding of what terms such as ‘alternative’ or ‘complex / difficult’, different financial entities using the same ICT services may report substitutability differently. This compromises the reliability of these indicators. To make the indicators more specific (well defined, clear, and unambiguous), there need to be clear definitions of / thresholds for ‘alternative’ or ‘complex / difficult’ in the context of substitutability.

In addition, to make it more relevant (directly linked to the topic with immediate applicability), we suggest that, like Indicator 4.2, Indicator 4.1 should focus on the substitutability of ICT services that support critical or important functions. Assessment should be made on the number and concentration of providers that provide such services within the marketplace.

Relevant data

The ESA’s concept to use registers of information as per art. 28(3) DORA allow for a data driven model considering the types of workloads that the financial entities are deploying. The focus on registers by financial institutions built under the ESA outsourcing guidelines would help to avoid the application of different information registers, possibly diverging definitions and different data collection methods for the financial institutions.

Where the ESAs expect additional information to be provided outside of the information register, clear intent and expectations of data source(s) should be expressed, and entity should be provided. Where indicators - and possible additional expectations by the supervisors - are unclear, information might not be readily available later on. This acts as a barrier (eg ‘Indicator 4.3 - information of total annual expenses or estimated costs of all contractual arrangements [...]’). It is unclear if the ESAs are proposing that ICT TPPs or financial entities provide information about the total annual expenses or estimated costs of all contractual arrangements which the ICT TPP has in place with EU financial entities. The need for self-identification by financial entities under the DORA scope and confidentiality for

information disclosure would need to be addressed should the ESAs aim for information provision by the ICT TPPs).

Conclusion

As drafted, DORA’s indicators could be confusing and include a number of overlaps. As a result, the indicators do not provide sufficient clarity to the industry. Rather, they should be sufficiently clear and give guidance to the industry on the possibility and likelihood of a possible designation. Given the nature of our members, we also remain concerned that some of the proposals would have a disproportionate extraterritorial effect.

In order to create a successful DORA, it is crucial and the ESA takes into consideration the aforementioned recommendations and suggestions.