

Our position

DORA Level 2

ESAs Joint Advice on the delegated acts

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

In light of the European Supervisory Authorities' Joint Advice, the European Commission should ensure that the scope of the oversight framework will not go beyond what is necessary in order to achieve the objectives laid out in Digital Operational Resilience Act (DORA). To better comply with the new rules, the industry needs more clarity regarding the indicator-based approach and methodology. In addition the inclusion of the level of inherent criticality of ICT services (as per indicator 3.1) is highly concerning as it implies a significant extension, which is not based on the Level 1 legislation. Furthermore, challenges remain around oversight fees. For instance, the Joint Advice upholds a disproportionate fall-back option, which may violate the boundaries set by the DORA.

Introduction

Following the consultation in May 2023, the European Supervisory Authorities (ESAs) published their Joint report on 29 September, and delivered it to the European Commission. The Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) applies the input to drive the delegated acts' text, aiming for adoption under the current Commission mandate before May 2024. DORA established a deadline of 17 July 2024 for the delegated acts. In light of the ESAs' text adjustments by 29 September, we would like to offer the following considerations and open questions.

Criticality designation criteria

The designation criteria of CTPPs must **address the appropriate entity, applying the DORA definitions and inherent logic**. The European Commission should 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. There is 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 'information and communication technology (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 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, as 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.

The ESAs clarified the scope and intention of the designation criteria and range of their advice input to the European Commission. Indicators were adjusted, adding more focus and proposals for information sources to be applied. Indicator 3 was redesigned.

Indicator-based approach

The ESAs propose a two-step indicator-based approach to perform a criticality assessment. Step 1 indicators should be considered holistically as they aim to take into account the dimension and nature of the financial sector's reliance on such ICT TPPs. Six threshold-based indicators determine if a ICT provider would enter step 2, which in turn applies five additional qualitative indicators complementary to step 1 (aiming for more granularity, but no application of minimum thresholds at step 2). Providers confirmed in this second stage will be compiled in a list for consideration and recommendation by the Oversight Forum for designation as critical. The Forum will issue a respective recommendation to the ESAs Joint Committee.

The grouping of indicators into Step 1 and Step 2 is positive. We support a sequencing approach, with the orderly application of each criterion during the assessment process reducing an initial broad list of services considered. However, **more clarity is needed**, particularly regarding what the relationship is amongst the individual indicators in each step.

Methodology

The ESAs state that 'the details on the collective application of steps 1 and 2 are out of scope of this report' (para 26) and we support their conclusion that it is 'appropriate to develop a methodology in this regard'. However, the finalisation of this methodology is announced no later than six months after the adoption of the related delegated act by the Commission. Thus, several things are yet to be defined:

- **How will the ESAs and the Commission secure required industry perspectives not only on the initial indicator approach, but the actual methodology?** Considering the complexities flagged by the ESAs and their commitment to a meaningful industry engagement, a consultation with industry stakeholders before the finalisation of the methodology should take place.
- **How will the process secure sufficient preparatory information and time for the industry (financial entities and ICT service providers) to be ready for the methodology's application under the DORA timeline?** A methodology six months after adoption of the delegated act – with application under DORA mandate: 17 July 2025 - could lead to a publication of the methodology as late as December 2024. Facing the DORA application deadline of 17 January 2025, this would not provide for a sufficient time for ICT providers to prepare for the designation.

Individual indicators

We welcome the positive reference of step 1 indicators to critical or important functions. However, the re-design of indicator 3.1 and inclusion of the 'level of inherent criticality of ICT services' are highly concerning. Several things need to be clarified:

- **Where do the ESAs see the basis for such extension in DORA Level 1?** Art 31(2)(c) DORA refers to 'the reliance of financial entities on the services provided by the relevant ICT third-party service provider in relation to critical or important functions'. This has been appropriately addressed by the ESAs by considering whether the ICT service supports critical or important functions in each Step 1 Indicator. There is, however, no basis in DORA article

31(2)(c) to separately consider the ‘inherent criticality’ of an ICT service detached from the functions of the financial entity that ICT service supports.

- **Why is the central assessment of the ‘inherent criticality’ not planned to be disclosed?** This information appears essential to provide for necessary transparency and the ability to retrace the designation by market participants.

Oversight fees

The ESAs appropriately comment throughout the consultation that it is challenging to determine applicable turnover based on the ICT services as defined in DORA in article 3(21) given that such definition is not complemented by a list of ICT services. Financial entities and ICT providers face the same challenge when trying to determine the boundary of DORA in general. However, procedural difficulty should not lead to a recommendation of an inequitable approach. Art. 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. It is not appropriate 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 ESAs appropriately propose to limit the scope for fees in this regard, applying a reference to the list of ICT services in the ITS on the register of information (Annex IV). Assuming that the list of ICT services in the ITS is aligned with DORA’s focus on the resilience of the financial sector, it would be pertinent to scope turnover to revenue generated by the CTPP in providing services on that list. However, the Joint Report upholds the disproportionate fall-back option to extend to all the services. Thus, several items need to be further explained:

- How will the Commission address this fall-back extension, securing a turnover consideration within the boundaries of DORA?
- How does the Commission plan to secure an alignment of the reference to the Annex IV, considering that the ITS are not finalised? In light of the additional relevance of the Annex IV, will there be an opportunity for the industry to comment on this list?
- How does the Commission plan to address the diverting timelines of delegated act - with a potential reference to a future list - and the finalisation of the ITS with said list only at a later stage?