

Our position

Digital Operational Resilience Act

Regulatory Technical Standards on Subcontracting

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Executive summary

The final report on the Regulatory Technical Standard (RTS) on Subcontracting introduces helpful guidance and addresses several key points raised by industry during the consultation period. However, certain provisions remain concerning. The scope of application continues to be overly broad, imposing all the requirements in the RTS on all information and communication technology (ICT) subcontractors that provide ICT services supporting critical or important functions, which risks unnecessary complexity. A more focused application of the requirements to subcontractors that effectively underpin the primary ICT service would allow for a more proportionate and risk-based approach to third-party risk management. Furthermore, the timeline for implementation is insufficient given the scale of changes required. The RTS introduces substantial new obligations that will necessitate updates to existing contractual and operational frameworks. To ensure smooth and effective compliance, a minimum implementation period of two years from the finalisation of the RTS is essential.

Introduction

In line with the Digital Operational Resilience Act (DORA), the European Supervisory Authorities (ESAs) are mandated to develop jointly draft RTSs to further specify the elements that a financial entity needs to determine and assess when subcontracting ICT services that are supporting critical or important functions. Members of the American Chamber of Commerce to the EU (AmCham EU) fully appreciate the work of the ESAs, which addresses several key points raised by industry during the consultation period, and their continuous focus on a balanced and risk-based approach. However, certain requirements in the final report on the RTS on Subcontracting remain challenging for financial entities and third-party ICT providers, as they overlook the current realities of ICT outsourcing.

The expansive scope of the proposed requirements in the RTS on Subcontracting adds significant complexity to risk management practices and deviates from a risk-based approach by failing to appropriately focus on material supply chain risks. To resolve these concerns, the European Commission should consider the following recommendations:

1. The scope of application for *all* the requirements in the RTS on Subcontracting should be limited to ICT subcontractors that effectively underpin the primary ICT service (rather than establishing certain risk management requirements alongside a broader scope of requirements applying to *all* ICT subcontractors that provide ICT services supporting critical or important functions).
2. Alongside the scoping challenges, both financial entities and third-party ICT providers will require a reasonable amount of time to implement the RTS requirements once they are finalised.

Limitation of requirements to ICT subcontractors that effectively underpin the primary ICT service

Recital 6 of the RTS on Subcontracting states that financial entities should put ‘a particular and continuous focus on subcontractors that effectively underpin the ICT service supporting critical or important functions’. Accordingly, the RTS applies a materiality threshold to some of the risk

management requirements, limiting their application to subcontractors ‘effectively underpinning’ the ICT service supporting critical or important functions, and reflecting a risk-based approach to third-party oversight. This demonstrates the appropriate application of a risk-based approach to third-party risk management, which enables financial entities and third-party ICT service providers to focus on material supply chain risks.

However, there is also an expectation for financial entities and third-party ICT providers to identify, more broadly, the overall chain of ICT subcontractors ‘providing’ ICT services supporting critical or important functions. This parallel expectation has led to inconsistency in how the RTS applies proportionate and risk-based principles to the requirements. It also substantially expands the scope of certain requirements beyond what is reasonably practicable.

Only Article 5(2) explicitly references subcontracted services that effectively underpin primary services. Given the extremely broad definition of ‘ICT service’, the requirement to identify and map the overall ICT supply chain and the technological reality of ICT services, this approach could result in hundreds of third parties being in scope of the RTS requirements per ICT service. Multiplied by the number of ICT services each financial entity uses, this could bring thousands or even tens of thousands of subcontractors into scope for each financial entity.

This places a tremendous and disproportionate burden on financial entities, third-party ICT providers and all ICT subcontractors in the chain. It also does not align with the approach the ESAs have adopted for their own supervisory activities, which via ‘template RT.05.02 — ICT service supply chains’ of the [Register of Information](#) is limited to ICT subcontractors that effectively underpin the ICT service.

Recommendation

The following two options would resolve this challenge:

Option 1 (preferred): Explicitly focus all the requirements in the RTS on Subcontracting on ICT subcontractors that effectively underpin the primary ICT service.

Option 2: Alternatively, and at the very least, explicitly focus all the subcontracting chain requirements in Article 3(1)(b) and (c) and all of Article 5 to ICT subcontractors that effectively underpin the primary ICT service.

Suggested amendments

Article 3 - Due diligence and risk assessment regarding the use of subcontractors supporting critical or important functions

1) A financial entity shall decide before entering into an arrangement with an ICT third party service provider whether an ICT service supporting critical or important functions or material parts thereof may be subcontracted by an ICT third-party service provider only after having assessed at least:

(b) that the ICT third-party service provider is able to identify, notify and inform the financial entity of any subcontractors in the chain of subcontracting providing ICT services **that effectively underpin ICT services** supporting critical or important functions or material parts thereof, and to provide all relevant information that may be necessary for the assessment;

(c) that the ICT third-party service provider ensures that the contractual arrangements with the subcontractors providing ICT services **that effectively underpin ICT services** supporting critical or important functions or material parts thereof allow the financial entity to comply with its own obligations stemming from Regulation (EU) 2022/2554 and all other applicable legal and regulatory requirements, and grant the financial entity and competent and resolution authorities the same contractual rights of access, inspection and audit along the chain of subcontractors providing ICT services **that effectively underpin ICT services** supporting critical or important functions as those granted by the ICT third-party service provider ;

Article 5 - Conditions for subcontracting relating to the chain of ICT subcontractors providing a service supporting a critical or important function by the financial entity

1) When permitting sub-contracting ICT services supporting a critical or important functions, the written contractual agreement between the financial entity and the third party service provider shall provide all the following elements:

a. that the chain of ICT subcontractors providing ICT services **that effectively underpin ICT services** supporting critical or important functions shall be identified in accordance with Article 3(1)(b);

b. that the identification of the chain remains up-to-date over time in order to allow for the financial entity to discharge its obligation to maintain and update the register of information in accordance with Article 28(3) and (9) of Regulation (EU) 2022/2554.

2) To maintain the financial entity's overall responsibility for the ICT services supporting critical or important functions provided by ICT third-party service providers, including ensuring effective monitoring, the written contractual agreement between the financial entity and the ICT third-party service provider shall enable the financial entity's effective monitoring of the contracted ICT services in accordance with Article 30(3) point (a) of Regulation (EU) 2022/2554.

The contractual arrangements shall in particular include elements enabling the financial entity to fulfil its obligation to monitor the ICT risk that may arise in relation to its use of ICT services provided by subcontractors ~~providing ICT services supporting critical or important functions, in particular those~~ that effectively underpin the provision of ICT services supporting critical or important functions or material parts thereof.

The monitoring referred to in the second subparagraph may, where appropriate, rely on information provided by the ICT third-party service provider.

3) The contractual arrangements shall, in compliance with Article 4 of this Regulation, include elements enabling the financial entity to assess whether and how the potentially long or complex chain of subcontractors that provide ICT services **that effectively underpin ICT services** supporting critical or important functions or material parts thereof may impact their ability to fully monitor the contracted functions and the ability of the competent authority to effectively supervise the financial entity in that respect.

4) The contractual arrangements shall include elements allowing the financial entity to obtain information from the ICT third-party service provider on contractual documentation between the ICT third-party service providers and its subcontractors providing ICT services **that effectively underpin ICT services** supporting critical or important functions, and on relevant performance indicators,

considering the provisions of Article 30 paragraphs 3 letter (e) of Regulation (EU) 2022/2554, and of Article 8 paragraph 2 of 2 of the Commission Delegated Regulation (EU) 2024/1773.

Implementation time

The RTS contains requirements that represent a major step-change in the management of ICT supply chain risk in the financial sector. These include detailed requirements for the contracts between (a) financial entities and providers, and (b) providers and subcontractors (and by extension every other provider in the chain), which will necessarily require amendments to existing agreements.

While the RTS appears to acknowledge the practical difficulties of implementing changes made to written agreements, the time granted to industry to implement all the new requirements in the RTS is insufficient. DORA takes effect in four months, on 17 January 2025, and the Commission has not yet adopted the final RTS. This timeframe is significantly shorter than the implementation deadlines for more than two years that were provided for all the current ESA guidelines via transitional provisions.

Recommendation

The Commission should extend the implementation deadline for existing arrangements to at least two years after the final RTS is available. Additionally, the regulators should clarify their day-one supervisory priorities regarding contract remediation.

Conclusion

As the 17 January 2025 implementation deadline for DORA nears, financial entities and third-party service providers are fully focused on addressing the requirements in the first-level text, as well as the several RTSs and ITSs. Although the ESAs' final report on the RTS on Subcontracting includes helpful clarifications, certain challenges remain, in particular with regard to the requirements relating to the subcontracting chain. Focusing all requirements in this RTS on ICT subcontractors that effectively underpin the primary ICT service would ensure a proportionate and effective approach to risk management. AmCham EU members remain committed to working constructively with the European Commission and the ESAs on the implementation of DORA and the remaining pieces of secondary legislation.