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Joint European Supervisory Authority Discussion paper on DORA

Discussion paper on the joint ESAs advice to the European Commission on two delegated acts specifying further criteria for critical ICT third-party service providers (CTPPs) and determining oversight fees levied on such providers, under Articles 31 and 43 of Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operation resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011

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Abbreviations

BCBS	Basel Committee on Banking Supervision
CfA	Call for Advice
(C)TPP	(Critical) Third-Party Provider
DP	Discussion Paper
DORA	Digital Operational Resilience Act
EBA	European Banking Authority
Commission	European Commission
EIOPA	European Insurance and Occupational Pensions Authority
ESAs	European Supervisory Authorities
ESMA	European Securities and Markets Authority
EU	European Union
FSB	Financial Stability Board
G-SII	Globally Systemically Important Institution
IAIS	International Association of Insurance Supervisors
ICT	Information and Communication Technology
ICT TPP	ICT third-party service provider
IOSCO	International Organization of Securities Commissions
JC	Joint Committee of the ESAs
JET	Joint Examination Team
JON	Joint Oversight Network
LFS	Legislative Financial Statement
NCA	National Competent Authority
O-SII	Other Systemically Important Institution
SIFI	Systemically important financial institution

Executive Summary

In light of the two delegated acts envisaged in the Regulation on Digital Operational Resilience for the Financial Sector ("DORA"), the European Commission has requested ('CfA') the ESAs' technical advice to further specify the criteria for critical ICT third-party service providers (CTPPs) and determine the fees levied on such providers¹. The ESAs shall deliver their technical advice by 30 September 2023.

The purpose of this discussion paper is to consult market participants, in an open and transparent manner, on the ESAs' proposals towards the specific issues listed in the CfA. The provided answers during this consultation will be taken into account in the ESAs' advice.

The first part of this discussion paper presents proposals in relation to the elements needed to specify further the criteria referred to in Article 31(2) of the DORA to be considered by the ESAs when assessing the critical nature of ICT third-party service providers. In particular, a number of relevant quantitative and qualitative indicators are proposed for each of the criticality criteria, along with the necessary information to build up and interpret such indicators. Moreover, a number of minimum relevance thresholds are proposed for the quantitative indicators, where possible and applicable. These are thresholds below which the degree to which the factor is in play would not be considered sufficiently relevant to trigger the indicator for inclusion in any criticality assessment methodology. It is important to note that these proposals relate to the identification of indicators relevant to assessing criticality and not to the methodology for that assessment, including the materiality and interaction of the different criteria. The expected type and total number of CTPPs, the details of the designation procedure as well as the related methodology, are explicitly excluded from this discussion paper and shall be defined at a later stage in the context of the implementation of the oversight framework.

The second part of this discussion paper presents proposals in relation to the amount of the fees levied on CTPPs and the way in which they are to be paid. In particular, proposals are made on the necessary types of expenditure that shall be covered by fees, the appropriate method, basis and available information for determining the applicable turnover of the CTPPs (which will form the basis of fee calculation) as well as the method of fee calculation and other practical issues regarding the payment of fees. In addition, a proposed financial contribution for voluntary opt-in requests is included in the paper.

Market participants are invited to provide their feedback on the proposals in this discussion paper, which will be considered by the ESAs in finalising the joint technical advice to the European Commission. Responses should be provided through a form available on the ESAs' websites by 23 June 2023 at the latest.

¹ See Annex II

Responding to this Discussion Paper

The European Supervisory Authorities (EBA, EIOPA, ESMA) invite comments on all proposals put forward in this paper and in particular to the questions presented throughout the paper (and as summarised in Annex I of this paper).

Throughout this paper, specific questions for input are occasionally provided. Where this is the case, the questions appear in a framed text box like this.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence (including relevant data where applicable) to support the views expressed;
- reflect a cross-sectoral (banking, insurance, and investment) approach, to the extent possible; and
- describe any alternatives the ESAs could consider.

Submission of responses

It is important to note that although you may not be able to respond to each and every question, the ESAs would encourage partial responses from stakeholders.

To submit your comments, please refer to <https://ec.europa.eu/eusurvey/runner/DORACriticalityCriteriaAndOversightFees>. Please note that comments submitted after this deadline or submitted via other means may not be processed.

Publication of responses

Please clearly express in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from the ESAs in accordance with the ESAs' rules on public access to documents. We may consult you if we receive such a request.

Any decision we make not to disclose the response is reviewable by the ESAs' Boards of Appeal and the European Ombudsman.



Data protection

The protection of individuals with regard to the processing of personal data by the ESAs is based on Regulation (EU) 1725/2018 of the European Parliament and of the Council of 23 October 2018. Further information on data protection can be found under the Legal notice section of the ESA websites.

Disclaimer

The views expressed in this Discussion Paper are preliminary and will not bind in any way the ESAs in the future development of the draft final response to the European Commission (Commission). They are aimed at eliciting discussion and gathering the stakeholders' opinion at an early stage of the process.

Introduction

Background and rationale

1. On 27 December 2022, Regulation (EU) 2022/2554 of the European Parliament and the Council of 14 December 2022 on the Digital Operational resilience of the Financial Sector (DORA) has been published in the Official Journal of the European Union. It entered into force on 16 January 2023 and will apply from 17 January 2025. The DORA Regulation is accompanied by the Directive (EU) 2022/2556 amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU, 2014/65/EU, (EU) 2015/2366 and (EU) 2016/2341 as regards digital operational resilience for the financial sector.
2. The DORA will create a comprehensive framework addressing various core components of the digital operational resilience of financial entities. It will enhance the overall conduct of ICT risk management, establish testing rules for ICT systems, increase financial supervisors' awareness of cyber risks through an EU harmonized incident reporting scheme and introduce Union oversight to oversee financial entities' dependency on critical ICT third-party service providers (CTPPs). The overall objective is to strengthen and align the digital operational resilience across the different Union financial areas.
3. To address potential systemic and concentration risks posed by the financial sectors' reliance on a small number of ICT TPPs, the DORA introduces a Union oversight framework for providers deemed critical. As Lead Overseers, each of the three European Supervisory Authorities (EBA, EIOPA and ESMA) will have the power to monitor on a pan-European scale the activity of CTPPs in the context of the ICT services they provide to financial entities in the scope of the DORA.
4. In accordance with Article 31(1)(a) of the DORA, an ICT TPP that is considered critical to the stability and integrity of the Union financial system, will be designated by the ESAs (through the Joint Committee) as a CTPP, except where the designation assessment will not apply to those ICT TPPs as per Article 31(8). In assessing criticality, the ESAs, upon recommendation from the Oversight Forum, will take into account the criteria set out in the DORA. These criteria will be further specified by a Commission delegated act.

Article 31(2):

"2. The designation referred to in paragraph 1, point (a), shall be based on all of the following criteria in relation to ICT services provided by the ICT third-party service provider:

(a) the systemic impact on the stability, continuity or quality of the provision of financial services in the event that the relevant ICT third-party service provider would face a large scale operational failure to provide its services, taking into account the number of financial entities and the total value of assets of financial entities to which the relevant ICT third-party service provider provides services;

(b) the systemic character or importance of the financial entities that rely on the relevant ICT third-party service provider, assessed in accordance with the following parameters:

(i) the number of global systemically important institutions (G-SIIs) or other systemically important institutions (O-SIIs) that rely on the respective ICT third-party service provider;

(ii) the interdependence between the G-SIIs or O-SIIs referred to in point (i) and other financial entities, including situations where the G-SIIs or O-SIIs provide financial infrastructure services to other financial entities;

(c) the reliance of financial entities on the services provided by the relevant ICT third-party service provider in relation to critical or important functions of financial entities that ultimately involve the same ICT third-party service provider, irrespective of whether financial entities rely on those services directly or indirectly, through subcontracting arrangements;

(d) the degree of substitutability of the ICT third-party service provider, taking into account the following parameters:

(i) the lack of real alternatives, even partial, due to the limited number of ICT third-party service providers active on a specific market, or the market share of the relevant ICT third-party service provider, or the technical complexity or sophistication involved, including in relation to any proprietary technology, or the specific features of the ICT third-party service provider's organisation or activity;

(ii) difficulties in relation to partially or fully migrating the relevant data and workloads from the relevant ICT thirdparty service provider to another ICT third-party service provider, due either to significant financial costs, time or other resources that the migration process may entail, or to increased ICT risk or other operational risks to which the financial entity may be exposed through such migration."

Article 31(6):

"6. The Commission is empowered to adopt a delegated act in accordance with Article 57 to supplement this Regulation by specifying further the criteria referred to in paragraph 2 of this Article, by 17 July 2024."

Article 31(8):

"8. The designation referred to in paragraph 1, point (a), shall not apply to the following:

(i) financial entities providing ICT services to other financial entities;

(ii) ICT third-party service providers that are subject to oversight frameworks established for the purposes of supporting the tasks referred to in Article 127(2) of the Treaty on the Functioning of the European Union;

(iii) ICT intra-group service providers;

(iv) ICT third-party service providers providing ICT services solely in one Member State to financial entities that are only active in that Member State."

5. In accordance with Art. 43 of the DORA, the Lead Overseers² will charge fees to ICT TPPs designated as critical, and those fees shall cover all the expenditure incurred by the Lead

² Article 33(1) states that the Lead Overseer shall conduct the oversight of the assigned critical ICT third-party service providers and shall be, for the purposes of all matters related to the oversight, the primary point of contact for those critical ICT third-party service providers.

Overseers in relation to the conduct of oversight tasks. The Lead Overseers will charge fees based on the DORA provisions, including the delegated act to be adopted by the Commission. The amount of the fees and the way in which they are to be paid by CTPPs will be further specified in the aforementioned delegated act.

Article 43:

“1. The Lead Overseer shall, in accordance with the delegated act referred to in paragraph 2 of this Article, charge critical ICT third-party service providers fees that fully cover the Lead Overseer’s necessary expenditure in relation to the conduct of oversight tasks pursuant to this Regulation, including the reimbursement of any costs which may be incurred as a result of work carried out by the joint examination team referred to in Article 40, as well as the costs of advice provided by the independent experts as referred to in Article 32(4), second subparagraph, in relation to matters falling under the remit of direct oversight activities.

The amount of a fee charged to a critical ICT third-party service provider shall cover all costs derived from the execution of the duties set out in this Section and shall be proportionate to its turnover.

2. The Commission is empowered to adopt a delegated act in accordance with Article 57 to supplement this Regulation by determining the amount of the fees and the way in which they are to be paid by 17 July 2024.”

6. In light of the above, on **21 December 2022**, the ESAs received a request from the Commission to provide technical advice to assist the latter on the possible content of these delegated acts. This request is enclosed in Annex II of this paper.
7. The call for technical advice addresses the need for further details aimed at shaping-up the designation criteria. The input sought refers to several specific sets of indicators of a qualitative and quantitative nature, for each of the criteria, minimum thresholds triggering such indicators (if applicable in the case of qualitative indicators), and, more extensively, background information deemed relevant by the ESAs to help in the build-up of indicators.
8. It also addresses some of the elements which are needed in the specification of the amount of fees, as well as the way and method(s) in which such fees are to be paid. In providing their advice, the ESAs are invited to draw on relevant experiences from both national supervisors and ESMA (when setting supervisory fees for financial institutions).

Next steps

9. Stakeholders are invited to provide their feedback on the analysis in this Discussion Paper, which will be considered by the ESAs in their response to the Commission. Responses should be provided through a form available on the ESA websites by 23 June 2023 at the latest.

Joint advice on criticality criteria

Introduction

10. Relying on third-party services, including outsourcing, is not a new phenomenon in the financial sector. Financial entities have always cooperated with other financial and non-financial companies.³ This has been subject to EU regulatory requirements and supervision for a long time for most of the entities in scope of the DORA, including through effective governance and risk management requirements and outsourcing provisions.
11. However, technological developments and digitalisation are increasing the extent and ways by which financial entities rely on third parties within the value chain. Indeed, financial entities are increasingly relying on technology and data services provided by third parties for their digital transformation—a trend that has accelerated in response to the COVID-19 pandemic.⁴
12. The ESAs also observe growing interactions between incumbent financial entities and technology firms/ICT providers through a variety of co-operation models, e.g., partnerships, joint ventures, outsourcing and sub-outsourcing, or mergers and acquisitions.
13. These developments are creating new opportunities for consumers and businesses. Outsourcing to technology firms allows financial entities to focus on their core services, which brings flexibility and efficiency gains. Yet, these developments also bring new risks and regulatory / supervisory challenges. The growing reliance of financial entities on tech companies may create risks to financial stability, e.g., if the same small number of companies are being used by many firms across the financial sector and in particular if ICT services provided by these companies support critical or important functions. As already noted, amongst others, in the BCBS Principles of Operational Resilience⁵, until recently, some of the most predominant operational risks resulted from vulnerabilities related to the rapid adoption of and increased dependency on technology infrastructure for the provision of financial services and intermediation, as well as the sector's growing reliance on technology-based services provided by third-parties.
14. The Commission invited the ESAs to specify the designation criteria for CTPPs. In particular, the Commission is requesting sets of indicators of a qualitative and quantitative nature for each of the four criteria set out in Art. 31(2) of the DORA, which should be accompanied by minimum thresholds triggering such indicators (if applicable in the case of qualitative indicators). Moreover, the Commission invited the ESAs to convey any information necessary to build up and (if needed) to correctly read / interpret such indicators as well as to reflect on the frequency of reviewing the respective delegated acts to reflect related developments.

³ E.g. insurance undertakings with reinsurance undertakings, investment firms with clearing and settlement services providers, banks with payment service providers and payment card schemes.

⁴ FSB (2020a), [Regulatory and Supervisory Issues Relating to Outsourcing and Third-Party Relationships: Discussion paper](#).

⁵ BCBS Principles of Operational Resilience (2021), <https://www.bis.org/bcbs/publ/d516.pdf>.

15. The proposed indicators based on the criteria set out in Art. 31(2) of the DORA should have the following key characteristics:
- a. Available: usable / underlying data available;
 - b. Measurable: quantifiable / assessment can be summarised in a short paragraph (for qualitative criteria);
 - c. Relevant: directly linked to the topic with immediate applicability;
 - d. Specific: well defined, clear, and unambiguous; and
 - e. Timely: up to date, considering latest technological developments which are likely to have a significant impact on TPPs' criticality.
16. According to Art. 31(3) of the DORA, where an ICT TPP belongs to a group, the criteria must be considered in relation to the ICT services provided by the group as a whole.
17. With regard to the proposed minimum thresholds for certain indicators it is noted that these are described in the CfA as being related to the potential to trigger the relevant indicators. As no criticality determination methodology is being put forward at this stage⁶, such indicators must be considered as related to relevance triggers rather than criticality triggers. Accordingly, it is explicitly highlighted that the thresholds suggested here are minimum relevance thresholds and not minimum criticality thresholds. They are thresholds below which the relevant indicator will not be considered to be called into play for the particular service in question. How the indicator will be assessed within the overall determination methodology will be considered at a later stage. Relevant stakeholders are invited to propose alternatives if they deem it necessary, alongside the relevant rationale or data. It should be noted that the calibration of the related data obtained from the joint ESAs high-level exercise on ICT TPPs (2022 exercise) has been taken into account, to the extent possible, for the proposed minimum relevance thresholds .
18. Moreover, the request of the Commission highlights that the ESAs should not be confined in their reflections to elements that they consider should be addressed by the delegated acts themselves and that their proposal should ensure cross-sectoral consistency. The majority of the proposed indicators are expected to be informed by the data to be provided by financial entities (falling under the scope of the DORA) via their registers of information as per Art. 28(3) of the DORA. At this stage, the discussion paper proposes indicators that are considered appropriate to designate the CTPPs consistently with Article 31(1) of the DORA. Such constructive approach is also applied for the metrics used in the indicators, and the ESAs have tried to define indicators allowing a balanced coverage of all the sub-sectors of the financial

⁶ Such a methodology has to be developed by the ESAs before the completion of the first CTPP designation exercise, i.e. before the the ESAs, through the Joint Committee and upon recommendation from the Oversight Forum established pursuant to Art. 32(1) of the DORA, designate ICT TPPs that are critical for financial entities for the first time. It should be noted that this depends also on the date of adoption of the Delegated Act, which the Commission is empowered to draft in accordance with Art. 31(6) of the DORA. Such a methodology will be approved according to the rules of procedure of the ESAs and the Joint Committee, where applicable.

sector. Additional data sources other than the registers of information are under investigation and may have an impact on the joint-ESAs final response to the Commission.

19. Lastly, the ESAs were also invited to reflect on the frequency of reviewing the respective delegated acts to reflect related developments. In this regard, it is considered appropriate to ensure consistency with the review clause in Article 58 of the DORA and hence to perform a review on the need for potential amendments in the respective delegated acts every 3 years. This could ensure alignment with market developments and experiences gained by the ESAs, which is particularly relevant as this designation exercise is an entirely new task to the ESAs and significant experience is expected to be gained gradually. Moreover, such a review frequency could facilitate an adequate timespan to assess the effectiveness of the criticality indicators as well as the performance of the oversight activities.

Indicative process for criticality assessment

Indicative designation process

20. Taking into account the criteria set out in Article 31(2) of the DORA, and in line with the request that “the advice should [...] consider minimum threshold(s) [...] which would need to be considered for designation subject to a further qualitative assessment [...]”, the following indicator-based criticality assessment is proposed:

Step 1: ‘Assessing ICT TPPs against a set of minimum relevance thresholds (step 1)’

21. Step 1 of the proposed assessment foresees that ICT TPPs, which directly or indirectly provide ICT services to financial entities in scope of the DORA, will be assessed against a set of quantitative criticality indicators, alongside respective minimum relevance thresholds. These step 1 indicators build up on quantitative information about all ICT TPPs and the ICT services they are providing to financial entities in the EU.
22. The outcome of step 1 will indicate those ICT TPPs which could potentially be considered as critical later in the designation process. The ICT TPPs that exceed a certain number of minimum relevance thresholds defined for the step 1 indicators could be subject to a further assessment (step 2). It is important to note that 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. As reported above, the details of the designation procedure as well as the methodology behind are explicitly excluded from this discussion paper and shall be defined at a later stage.

Step 2: ‘Further assessment of ICT TPPs (step 2)’

23. In step 2, the number of ICT TPPs resulting from step 1 will undergo a further assessment based on an additional set of criticality indicators set out in the present document.
24. These step 2 indicators, which are also of qualitative nature and therefore do not come with minimum relevance thresholds, should allow the ESAs to identify the relevant providers to be considered as CTPPs at Union level. The step 2 indicators should be seen as complementary to

the step 1 indicators, allowing for a more granular assessment of the ICT TPPs that could potentially be considered as critical according to step 1.

25. The outcome of the application of the step 1 and step 2 indicators, subject to a further holistic/collective assessment, will be a proposed list of CTPPs to the Oversight Forum, which provides a respective recommendation to the ESAs Joint Committee.

Related issues

26. If an assessed ICT TPP belongs to a group, the criticality criteria shall be considered in relation to the ICT services provided by the group as a whole (consistently with Article 31(3) of the DORA) and the CTPPs, as legal entities, will be designated accordingly.
27. It is important to note that sub-contractors should be appropriately captured to be assessed during the designation exercise.
28. All financial entities, ICT TPPs, including ICT intra-group providers, which meet at least one of the conditions set out by Article 31(8) of the DORA, will be excluded from the designation process, i.e. the step 1 and step 2 indicators set out in this document will not be applied on those TPPs.
29. Furthermore, the list of designated CTPPs should be stable over time in order to manage threshold effects. This implies that, only if a CTPP is continuously below a certain threshold for, e.g., three consecutive years to ensure consistency with the proposed review clause, the respective Lead Overseer, in consultation with the Oversight Forum, could consider proceeding to a roll off phase of the CTPP from the list of CTPPs. An alternative to this approach could be to use the concept of a moving average.
30. It might be considered useful for the designation of CTPPs to take into account the list of essential or important entities under NIS⁷ and CER⁸, despite their horizontal nature, and the wider scope of the DORA when it comes to the financial sector. To the extent the identification of essential or important entities under NIS2 and CER is consistent with the criteria of Article 31(3) and (8) of the DORA, it could inform the designation process of CTPPs under the DORA under step 2.
31. Finally, given the rapid evolution of the topic and short timelines for this exercise, the ESAs will continue the assessment of the results from the joint-ESAs high-level exercise on the ICT TPP landscape and carry out additional simulations in parallel. Thus, relevant adjustments may follow to reflect the ongoing analysis of the results mentioned above.

⁷ Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (Text with EEA relevance): [EUR-Lex - 32022L2555 - EN - EUR-Lex \(europa.eu\)](#).

⁸ Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC (Text with EEA relevance): [EUR-Lex - 32022L2557 - EN - EUR-Lex \(europa.eu\)](#).

Questions for Consultation:

Q1. Do you have any comments about the related issues listed above?

Q2. Do you think there are additional issues that should be included? If yes, please elaborate on which additional issues you see and why you do so.

Q3. What do you perceive as the key obstacles and practical challenges to implement the proposed set of indicators listed below?

Q4. For an already designated CTPP, what could be the minimum turnover time (lifecycle duration) in the CTPP list in case the minimum relevance thresholds specified below are not met for a consecutive number of years?

Q5. Do you consider the indicators identified are relevant and complete in the case of opt-in requests according to Article 31(11) of the DORA? Please explain if you think they are not relevant and complete in such cases.

Criterion 1: impact on provision of financial services

Criterion 1:

“The **systemic impact on the stability, continuity, or quality of the provision of financial services in the event that an ICT TPP would face a large-scale operational failure to provide its services**, taking into account the number of financial entities and the total value of assets of financial entities to which the ICT TPP provides services.”

Introduction

32. If ICT TPPs fail or are no longer able to provide their services, including in the case of severe business disruption caused by external events, this may cause systemic risks to the financial market, which can have a negative impact on the stability, continuity, and quality of the provision of financial services.
33. This is particularly relevant for such market segments, which are dominated by a small number of highly dominant service providers. In particular, if the services provided are highly standardised, allowing the respective ICT TPPs to provide their services to a large number of different clients in an automated manner.
34. For this reason, it is of paramount importance to have a clear view on the extent and nature of impact which a large-scale operational failure of an ICT TPP would have on financial entities, which rely on services provided by an ICT TPP, and on the financial system. This should not only consider the total number of financial entities, which use services provided by an ICT TPP, but also the size of the respective financial entities, their systemic importance and interconnectedness, as well as the importance of the services provided by an ICT TPP on financial entities’ provision of financial services taking into account stability, continuity as well as quality considerations.
35. These aspects are addressed by criterion 1 as set out by Article 31(2)(a) of the DORA and further specified in the below list of indicators.

List of step 1 indicators

Indicator 1.1	Number of financial entities using ICT services provided by the same ICT TPP (per type of financial entity and in percentage terms)
Pan-European	Number of financial entities directly or indirectly using ICT services provided by the same ICT TPP (per type of financial entity and in percentage terms)
Notes:	
<ul style="list-style-type: none"> - The objective of this indicator is to capture ICT TPPs’ pan-European footprint by assessing how many financial entities use ICT services provided by the same ICT TPPs. The idea is that the more financial entities use ICT services provided by the same ICT TPP, the higher the impact on the stability, continuity, or quality of the provision of financial services in the event that the ICT TPP would face a large-scale operational failure to provide its services. 	

	<ul style="list-style-type: none"> - For each ICT TPP, the result of this indicator is calculated by dividing the number of financial entities using ICT services of this ICT TPP by the total number of EU financial entities falling under the scope of the DORA (also per type of financial entity). - 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.
Minimum relevance threshold	- Tentatively: 10% or more of total number of financial entities in the EU (total and / or per type of financial entity) ⁹ .

Indicator 1.2	Share of financial entities using ICT services provided by the same ICT TPP (per type of financial entity and in percentage terms)
Pan-European	Share of financial entities directly or indirectly using ICT services provided by the same ICT TPP, measured by the total value of assets or a total assets-equivalent of financial entities (also per type of financial entity and in percentage terms)

Notes:

- The objective of this indicator is to capture ICT TPPs' pan-European footprint by assessing the share of financial entities using ICT services provided by the same ICT TPP. The idea is that the higher the share of financial entities using ICT services provided by the same ICT TPP (in terms of total value of assets or a total assets-equivalent), the higher the ICT TPP's level of criticality for the EU financial sector.
- For each ICT TPP, the result of this indicator is calculated by dividing the total value of assets/total assets-equivalent of financial entities using ICT services of this ICT TPP by the total value of assets/total assets-equivalent of all EU financial entities falling under the scope of the DORA (per type of financial entity).
- The reference to the 'total value of assets' is referred to in Article 31(2)(a) of the DORA. However, this metric might not be representative for all types of financial entities subject to the DORA to measure their systemic impact on the stability, continuity, or quality of the provision of the financial services they provide. Hence, from that point of view, it is proposed to take into account a 'total assets-equivalent' metric for financial entities for which the 'total value of assets' is not considered representative e.g. 'assets under management' or 'premiums collected'. For this reason, it is considered important to define for each type of financial entity covered by the DORA the most relevant underlying basis, and stakeholders are invited to comment and make proposal on such issue.
- 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.

⁹ The minimum relevance threshold for this indicator is met if for at least one type of financial entity 10% or more of the total number of financial entities of the same type use ICT services of the same ICT TPP or if 10% or more of the total number of financial entities use ICT services of the same ICT TPP.

Minimum relevance threshold	- Tentatively: 10% or more of total value of assets / total assets-equivalent of financial entities in the EU (per type of financial entity) ¹⁰ .
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List of step 2 indicators

Indicator 1.3	Share of financial entities for which a large-scale operational failure of the same ICT TPP would imply a substantial negative impact on the services, activities and operations of those financial entities (total number of financial entities, per type of financial entity and in percentage terms)
Pan-European	Share of financial entities, for which a large-scale operational failure of the same ICT TPP directly or indirectly providing ICT services to those financial entities, would imply a substantial negative impact on their services, activities and operations, measured by the total number of financial entities (total) and by the total value of assets ¹¹ of financial entities (per type of financial entity and in percentage terms)

Notes:

- The objective of this indicator is to capture the impact of a discontinuation of ICT services provided by an ICT TPP on financial entities. The idea is that the more financial entities are impacted by a discontinuation of ICT services provided by an ICT TPP, the higher the respective ICT TPP's level of criticality for the EU financial sector.
- This indicator is highly dependent on the subjective judgement of the financial entities. In this regard, the activation of the ICT business continuity plans and ICT response and recovery plans of financial entities *in the event of* a large scale operational failure of the ICT TPP may be considered as an input to identify the potential impact on their services, activities and operations.
- 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.

Indicator 1.4	Number of designated CTPPs using the same sub-contractors for providing services to financial entities supporting critical or important functions (in absolute terms)
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¹⁰ The minimum relevance threshold for this indicator is met if for at least one type of financial entity 10% or more of the total value of assets / total assets-equivalent of financial entities of the same type use ICT services of the same ICT TPP or if 10% or more of the total value of assets / total assets-equivalent of financial entities use ICT services of the same ICT TPP.

¹¹ The reference to the 'total value of assets' is referred to in DORA Article 31(2)(a). However, this metric might not be representative for all types of financial entities subject to DORA to measure their systemic impact on the stability, continuity, or quality of the provision of the financial services they provide. Hence, from that point of view, it is proposed to take into account a 'total assets-equivalent' metric to represent all the financial entities e.g. 'assets under management' or 'premiums collected'. For this reason, it is considered important to define for each type of financial entity covered by DORA the most useful underlying basis, and stakeholders are invited to comment and make proposal on such issue.

Pan-European	Number of designated CTPPs using the same sub-contractors to directly or indirectly provide ICT services to financial entities supporting critical or important functions (in absolute terms)
Notes: <ul style="list-style-type: none">- The objective of this indicator is to identify the critical sub-contractors in the EU financial system. The idea is that the more CTPPs use the same sub-contractors to provide ICT services to financial entities supporting critical or important functions, the more important those sub-contractors are for the EU financial sector and might have to be designated as a CTPP themselves. It should be noted that in scope of this indicator are not only rank 1 providers, but all providers in the subcontracting chain. However, the application of this indicator is likely to be challenging during the first years of application due to limited availability of relevant data.- This indicator can only be applied once a first list of CTPPs is available i.e., after the first year of designation.- Indicators listed below for criterion 4 will be used on a complementary basis to inform this indicator.- 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.	

Questions for Consultation:

Q6. Do you agree with the list of step 1 indicators proposed to cover criterion 1 referred to in Article 31(2) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.

Q7. Do you have any comments on the proposed minimum relevance thresholds?

Q8. With regard to indicators 1.2 and 1.3, please provide any equivalent metrics (in relation to the total value of their assets) you may consider appropriate to measure the pan-European footprint of the various financial entities subject to the DORA, that you would deem to be better adapted.

Q9. Do you agree with the list of step 2 indicators proposed to cover criterion 1 referred to in Article 31(2) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.

Q10. Do you have any comments in relation to the information provided in the “Notes” section under each of the indicators?

Q11. Which key data sources would you propose to use for the indicators under criterion 1? Please explain.

Criterion 2: importance of financial entities

Criterion 2:

“The **systemic character or importance of the financial entities that rely on the relevant ICT third-party service provider**, assessed in accordance with the following parameters:

- i. the number of global systemically important institutions (G-SIIs) or other systemically important institutions (O-SIIs) that rely on the respective ICT third-party service provider;
- ii. the interdependence between the G-SIIs or O-SIIs referred to in point (i) and other financial entities, including situations where the G-SIIs or O-SIIs provide financial infrastructure services to other financial entities.”

Introduction

36. As recent financial crises have revealed, financial entities could either be “too big to fail” or “too interconnected to fail”.
37. Various international organisations have developed standards to address this shortcoming, such as the G20, the Basel Committee on Banking Supervision (BCBS), the International Association of Insurance Supervisors (IAIS), the International Organization of Securities Commissions (IOSCO), or the Financial Stability Board (FSB).
38. Financial entities have been characterised as systemically important if their distress or disorderly failure is likely to cause significant disruption to the financial system and economic activity due to their size, complexity and systemic interconnectedness. A failure of such systemically important financial entities could seriously damage the stability of the financial system due to spillover effects to other financial entities and to private and institutional investors. The negative externalities of a failure of a systemically important financial entity would also inflict damage on the real economy through multiple channels.
39. Criterion 2 of Article 31(2)(b) of the DORA takes this consideration into account by referring to the systemic character or importance of the financial entities that rely on ICT services provided by an ICT TPP and by making specific reference to financial entities being designated as G-SIIs and O-SIIs.

List of step 1 indicators

Indicator 2.1	Number of G-SIIs and O-SIIs using ICT services provided by the same ICT TPP (in absolute terms)
Pan-European	Number of G-SIIs and O-SIIs directly or indirectly using ICT services provided by the same ICT TPP (in absolute terms)
Notes:	
- The objective of this indicator is to capture ICT TPPs’ pan-European footprint by assessing the number of G-SIIs and O-SIIs receiving ICT services provided by the same	

<p>ICT TPPs. The idea is that the more financial entities classified as G-SIIs and O-SIIs use ICT services provided by the same ICT TPP, the higher the ICT TPP’s level of criticality for the EU financial sector.</p> <ul style="list-style-type: none"> - It should be noted that the lists of G-SIIs¹²/O-SIIs¹³ refer to credit institutions, thus not covering all the financial entities falling under the scope of the DORA. - 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. 	
Minimum relevance threshold	<p>Tentatively:</p> <ul style="list-style-type: none"> - At least 1 G-SII; OR - at least 3 O-SIIs; OR - at least 1 O-SII with an O-SII score above 3,000¹⁴.

Indicator 2.2	Number of financial entities identified as systemic by competent authorities, other than G-SIBs and O-SIBs, using ICT services provided by the same ICT TPP (in absolute terms)
Pan-European	Number of financial entities, identified as systemic by competent authorities, other than G-SIBs and O-SIBs, using ICT services provided by the same ICT TPP (in absolute terms)

Notes:

- The text in Article 31(2) of the DORA for criterion 2 refers to G-SIIs and O-SIIs for which a respective publicly available list applies only to credit institutions. Therefore, indicator 2.2 aims at capturing the reliance of other types of financial entities, which are ‘systemic’ and not included in a publicly available list of G-SIIs or O-SIIs.
- The objective of indicator 2.2 is to capture ICT TPPs’ pan-European footprint by assessing the number of systemic financial entities using ICT services provided by the same ICT TPP. The idea is that the more financial entities identified as ‘systemic’ use ICT services provided by the same ICT TPP, the higher the ICT TPP’s level of criticality for the EU financial sector.
- Indicator 2.2 refers to ‘financial entities identified as systemic’ based on supervisory expert judgment. This does **not** imply ‘publicly identified’ or proposing the establishment of lists of systemically important financial entities (like e.g., list of G-SIBs) or developing a methodology on how such an assessment should be performed. Relevant competent authorities would be best placed to provide such lists based on expert judgement which would be performed only for the purposes of this process.
- Further consideration may be given to making indicator 2.2 more granular, i.e. splitting it by financial sector.
- 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.

¹² Global Systemically Important Institutions: <https://www.eba.europa.eu/risk-analysis-and-data/global-systemically-important-institutions>.

¹³ Other Systemically Important Institutions: <https://www.eba.europa.eu/risk-analysis-and-data/other-systemically-important-institutions-o-siis->.

¹⁴ Institutions are given a score from 0 to 10000 bps representing their systemic riskiness.

Minimum relevance threshold	- Tentatively: At least 1 financial entity (other than a credit institution) identified as 'systemic' by competent authorities.
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List of step 2 indicators

Indicator 2.3	Interdependence between G-SIIs or O-SIIs and other financial entities using ICT services provided by the same ICT TPP
Pan-European	Level of interdependence between G-SIIs or O-SIIs and other financial entities, including situations where the G-SIIs or O-SIIs provide financial infrastructure services to other financial entities
<p>Notes:</p> <ul style="list-style-type: none"> - The objective of this indicator is to capture financial entities' interconnectedness with other financial entities in the EU financial system, which – all together – receive ICT services from the same ICT TPP. The idea is that the stronger the interdependencies are between systemically important financial entities relying on ICT services provided by the same ICT TPP and other financial entities, the higher the ICT TPP's level of criticality for the EU financial sector. - This indicator covers interdependencies between G-SIIs or O-SIIs providing financial infrastructure or other services to other financial entities. - Article 31(2)(b)(ii) of the DORA specifically refers to the “interdependence between G-SIIs/O-SIIs and other financial entities”. However, measuring this in a quantitative manner to cover the entire EU financial sector is highly challenging due to the lack of concrete and representative data in relation to such interdependencies within the financial sector. - Therefore, additional analysis will be required to further explore the existence and availability of any related accurate, reliable and complete data, which could inform such an indicator. It is an important prerequisite that the ESAs would be able to regularly receive such information. This is to inform a comprehensive assessment of the interlinkages between systemically important financial entities and other financial entities (considering both quantitative and qualitative information). - 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. 	

Questions for Consultation:

Q12. Do you agree with the list of step 1 indicators proposed to cover criterion 2 referred to in Article 31(2)(b) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.

Q13. Do you have any comments on the proposed minimum relevance thresholds?

Q14. Do you agree with the list of step 2 indicators proposed to cover criterion 2 referred to in Article 31(2)(b) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.

Q15. Do you have any comments in relation to information provided in the “Notes” section under each of the indicators?

Q16. Which key data sources would you propose to use for the indicators under criterion 2? Please explain.

Q17. Do you have any views about indicator 2.3 “Interdependence between G-SIIs or O-SIIs and other financial entities using ICT services provided by the same ICT TPP” (including situations where the G-SIIs or O-SIIs provide financial infrastructure services to other financial entities) and in particular about concrete data that could be used to inform this indicator? Please elaborate.

Criterion 3: critical or important functions

Criterion 3:

“The **reliance of financial entities on the services provided by the relevant ICT third-party service provider in relation to critical or important functions of financial entities** that ultimately involve the same ICT third-party service provider, irrespective of whether financial entities rely on those services directly or indirectly, through subcontracting arrangements.”

Introduction

40. Using ICT TPPs to perform critical or important functions creates specific risks for financial entities and should be subject to appropriate oversight. It can have a strong impact on financial entities’ risk profiles.
41. Article 3(22) of the DORA defines a ‘**critical or important function**’ as a function, the disruption of which would materially impair the financial performance of a financial entity, or the soundness or continuity of its services and activities, or the discontinued, defective or failed performance of that function would materially impair the continuing compliance of a financial entity with the conditions and obligations of its authorisation, or with its other obligations under applicable financial services law.
42. As stated in recital 70 of the DORA, the definition of ‘critical or important function’ under DORA encompasses the ‘critical functions’ as defined in Article 2(1), point (35) of the Bank Recovery and Resolution Directive¹⁵.
43. Reference to ‘critical or important functions’ is also made in the criteria for designation of CTPPs. Article 31(2)(c) of the DORA states that a designation shall be based, amongst others, on the level of financial entities’ reliance on services provided by an ICT TPP in relation to critical or important functions of those financial entities that involve the same ICT TPP. In this respect it must not make a difference whether financial entities directly or indirectly (via subcontracting arrangements) rely on these services provided by an ICT TPP.

List of step 1 indicators

Indicator 3.1	Share of financial entities using ICT services provided by the same ICT TPP where these ICT services support critical or important functions (total number of financial entities, per type of financial entity and in percentage terms)
Pan-European	Share of financial entities directly or indirectly using ICT services provided by the same ICT TPP which support critical or important functions, measured by

¹⁵ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0059>.

	the total number of financial entities (total) and by the total value of assets ¹⁶ of financial entities (per type of financial entity and in percentage terms)
Notes:	<ul style="list-style-type: none"> - The objective of this indicator is to capture ICT TPPs’ pan-European footprint by assessing the share of financial entities using ICT services provided by the same ICT TPP supporting critical or important functions. The idea is that the higher the share of financial entities using ICT services provided by the same ICT TPP to perform critical or important functions, the higher the ICT TPP’s level of criticality for the EU financial sector. - 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. - See Article 3(22) of the DORA for the definition of a ‘critical or important function’.
Minimum relevance threshold	Tentatively: <ul style="list-style-type: none"> - 10% or more of total value of assets / total assets-equivalent per type of financial entity in the EU; OR - 10% or more of total number of financial entities in the EU.

List of step 2 indicators

Indicator 3.2	Level of criticality of ICT services provided to financial entities by the same ICT TPP
Pan-European	Level of criticality of ICT services directly or indirectly provided to financial entities by the same ICT TPP
Notes:	<ul style="list-style-type: none"> - The objective of this indicator is to capture the different levels of criticality of ICT services provided to financial entities by the same ICT TPP. This is considered an important piece of information to further assess the ICT TPPs’ level of criticality for the EU financial sector. - This indicator could benefit from an indicative ‘ICT services’ taxonomy to allow the identification of the different types of ICT services provided to EU financial entities and assess the different level of criticality these ICT services may entail, in particular when supporting critical or important functions. Such a taxonomy could be developed at a later stage. - 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.

¹⁶ The reference to the ‘total value of assets’ is referred to in DORA Article 31(2)(a). However, this metric might not be representative for all types of financial entities subject to DORA to measure their systemic impact on the stability, continuity, or quality of the provision of the financial services they provide. Hence, from that point of view, it is proposed to take into account a ‘total assets-equivalent’ metric to represent all the financial entities e.g. ‘assets under management’ or ‘premiums collected’. For this reason, it is considered important to define for each type of financial entity covered by DORA the most useful underlying basis, and stakeholders are invited to comment and make proposal on such issue.

Questions for Consultation:

Q18. Do you agree with the list of step 1 indicators proposed to cover criterion 3 referred to in Article 31(2)(c) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.

Q19. Do you have any comments on the proposed minimum relevance thresholds?

Q20. Do you agree with the list of step 2 indicators proposed to cover criterion 3 referred to in Article 31(2)(c) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.

Q21. Do you have any comments in relation to information provided in the “Notes” section under each of the indicators?

Q22. Which key data sources would you propose to use for the indicators under criterion 3? Please explain.

Criterion 4: degree of substitutability

Criterion 4:

“The **degree of substitutability of the ICT third-party service provider**, taking into account the following parameters:

- i. the lack of real alternatives, even partial, due to the limited number of ICT third-party service providers active on a specific market, or the market share of the relevant ICT third-party service provider, or the technical complexity or sophistication involved, including in relation to any proprietary technology, or the specific features of the ICT third-party service provider’s organisation or activity;
- ii. difficulties in relation to partially or fully migrating the relevant data and workloads from the relevant ICT third- party service provider to another ICT third-party service provider, due either to significant financial costs, time or other resources that the migration process may entail, or to increased ICT risk or other operational risks to which the financial entity may be exposed through such migration.”

Introduction

44. Systemic risk can materialise if a sufficiently large number of financial entities (or a single systemically important financial entity) is dependent on one or a small number of ICT TPPs for the provision of critical ICT services that are impossible or very difficult to substitute in a cost-efficient and quality manner and in an appropriate timeframe, for instance due to limitations in the capacity or ability of alternative ICT TPPs or other solutions.
45. A major disruption, outage, or failure at one of these ICT TPPs could create a single point of failure with potential adverse consequences for financial stability and/or the safety and soundness of multiple financial entities.
46. The ultimate impact would depend on the specific ICT services being provided, the criticality and substitutability of those services, and the mitigation plans in place by financial entities and the ICT TPPs in question.
47. Criterion 4 of Article 31(2)(d) of the DORA takes account of this reasoning as it refers to the “degree of substitutability of the ICT third-party service provider”, the “lack of real alternatives” as well as the “difficulties in relation to [...] migrating the relevant data and workloads from the relevant ICT third- party service provider to another ICT third-party service provider”.

List of step 1 indicators

Indicator 4.1	Share of financial entities reporting that no alternative ICT TPPs are available or have the required ability and / or capacity to provide the same ICT services as the existing ICT TPP (total number of financial entities, per type of financial entity and in percentage terms)
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Pan-European	Share of financial entities reporting that no alternative ICT TPPs are available or have the required ability and / or capacity to (fully or partially) provide the same ICT services as directly or indirectly provided by the existing ICT TPP, measured by the total number of financial entities (total) and by the total value of assets ¹⁷ of financial entities (per type of financial entity and in percentage terms)
Notes:	<ul style="list-style-type: none"> - The objective of this indicator is to capture the level of substitutability of an ICT TPP. The idea is that the more difficult it is to substitute an ICT TPP, the higher the ICT TPP's level of criticality for the EU financial sector. - 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.
Minimum relevance threshold	Tentatively: <ul style="list-style-type: none"> - 10% or more of total value of assets / total assets-equivalent per type of financial entity in the EU; OR - 10% or more of total number of financial entities in the EU.

Indicator 4.2	Share of financial entities reporting that it is highly complex / difficult to migrate or reintegrate ICT services provided by an ICT TPP to support critical or important functions (total number of financial entities, per type of financial entity and in percentage terms)
Pan-European	Share of financial entities reporting that it is highly complex / difficult to migrate or reintegrate ICT services directly or indirectly provided by an ICT TPP to support critical or important functions, measured by the total number of financial entities (total) and by the total value of assets ¹⁸ of financial entities (per type of financial entity and in percentage terms)
Notes:	<ul style="list-style-type: none"> - The objective of this indicator is to capture the level of difficulty of migrating or reintegrating ICT services provided by an ICT TPP. The idea is that the more difficult it is to migrate or reintegrate ICT services, the higher the ICT TPP's level of criticality for the EU financial sector. - 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.

¹⁷ The reference to the 'total value of assets' is referred to in DORA Article 31(2)(a). However, this metric might not be representative for all types of financial entities subject to DORA to measure their systemic impact on the stability, continuity, or quality of the provision of the financial services they provide. Hence, from that point of view, it is proposed to take into account a 'total assets-equivalent' metric to represent all the financial entities e.g. 'assets under management' or 'premiums collected'. For this reason, it is considered important to define for each type of financial entity covered by DORA the most useful underlying basis, and stakeholders are invited to comment and make proposal on such issue.

¹⁸ The reference to the 'total value of assets' is referred to in DORA Article 31(2)(a). However, this metric might not be representative for all types of financial entities subject to DORA to measure their systemic impact on the stability, continuity, or quality of the provision of the financial services they provide. Hence, from that point of view, it is proposed to take into account a 'total assets-equivalent' metric to represent all the financial entities e.g. 'assets under management' or 'premiums collected'. For this reason, it is considered important to define for each type of financial entity covered by DORA the most useful underlying basis, and stakeholders are invited to comment and make proposal on such issue.

Minimum relevance threshold	<p>Tentatively:</p> <ul style="list-style-type: none"> - 10% or more of total value of assets / total assets-equivalent of financial entities in the EU; OR - 10% or more of total number of financial entities in the EU.
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List of step 2 indicators

Indicator 4.3	Market share of ICT TPPs (total number of financial entities, per type of ICT service and in percentage terms)
Pan-European	Market share of ICT TPPs directly or indirectly providing ICT services to financial entities, measured by the total number of financial entities (total) and by the annual expenses or estimated costs of the contractual arrangements (per type of ICT service and in percentage terms) ¹⁹
<p>Notes:</p> <ul style="list-style-type: none"> - The objective of this indicator is to capture ICT TPPs’ pan-European footprint per type of ICT service by assessing the market shares of ICT TPPs. The idea is that the higher the market share of an ICT TPP (per type of ICT service), the higher the potential dependency to the respective ICT TPP. - For each ICT TPP, the result of this indicator is calculated by dividing – per type of ICT service - the total annual expenses or estimated costs of all contractual arrangements, which an ICT TPP has in place with EU financial entities falling under the scope of the DORA, by the total annual expenses or estimated costs of all contractual arrangements, which all ICT TPPs have in place for the same type of ICT service and by dividing the total number of financial entities using ICT services provided by the same ICT TPP by the total number of EU financial entities using ICT services of ICT TPPs (per type of ICT service). - 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. 	

¹⁹ The ESAs are aware of the technical complexity of such an indicator. Relevant stakeholders are invited to propose relevant alternatives if they deem appropriate.

Questions for Consultation:

Q23. Do you agree with the list of step 1 indicators proposed to cover criterion 4 referred to in Article 31(2)(d) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.

Q24. Do you have any comments on the proposed minimum relevance thresholds?

Q25. Do you agree with the list of step 2 indicators proposed to cover criterion 4 referred to in Article 31(2)(d) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.

Q26. Do you have any comments in relation to information provided in the “Notes” section under each of the indicators?

Q27. Which key data sources would you propose to use for the indicators under criterion 4? Please explain.

Joint advice on oversight fees

Introduction

48. Once designated as critical, TPPs will have to pay oversight fees to their Lead Overseer to fund the oversight tasks. Neither the amount of these fees nor the way the CTPPs will have to pay them are defined at Level 1. However the aim of such fees is specified in Article 43 of the DORA.
49. Indeed, such fees will be the single way to fund the oversight activities of the ESAs, given that pursuant to Article 43(1) of the DORA the fees charged to designated CTPPs shall *“fully cover the Lead Overseer’s necessary expenditure in relation to the conduct of oversight tasks pursuant to this Regulation including the reimbursement of any costs which may be incurred as a result of work carried out by the JET”*. Article 43(1) second subparagraph of the DORA further requires that the amount of fees charged to CTPPs *“shall cover all costs derived from the execution of the duties”* under the DORA.
50. Recital (96) of the DORA also explains that fees will be charged to fully fund oversight activities, but not to cover *“costs for the implementation of dedicated ICT systems supporting the upcoming oversight, since dedicated ICT systems would need to be developed and deployed beforehand”* (funded from Union and national competent authorities’ contributions) consistently with the LFS on the DORA. The ESAs discussion paper is thus consistent with this clear delimitation of fees to be levied upon CTPPs. However, it is also important to highlight that the identified overall amount of incurred expenditure in the LFS cannot be considered as comprehensive, given the number of elements that cannot be anticipated in the short term and which may impact the expenditure of the Lead Overseers (the number of designated CTPPs, the intensity, frequency and nature of oversight activities, the involvement of competent authorities, the use of independent experts, etc.). Hence, it is of the highest importance for the ESAs and involved competent authorities in the JETs to have the necessary flexibility to estimate their incurred expenditure, including the possibility to reassess the fees which need to be levied upon CTPPs to cover the oversight tasks under the DORA from one year to another. The functioning of the future Oversight framework will particularly rely on the means the involved authorities will have to perform the different oversight activities foreseen by the DORA.

51. In line with the applicable financial rules, the total overall aggregated amount of the yearly oversight fees charged from CTPPs will be published in the EU Official Journal and on the websites of the ESAs.
52. While preparing this advice, the ESAs faced several challenges. The main one is the lack of actual information on the future CTPPs (number, size, group structure, etc), given that their designation will take place after the publication of the related delegated act. The ability of the ESAs to anticipate which TPPs will be designated as critical is limited as the criticality criteria are yet to be determined. Therefore, the ESAs are of the opinion that the method of calculation of the oversight fees should be adaptable to the annual designation process of CTPPs, while being proportionate to the turnover of the future CTPPs, in line with Article 43(1) of the DORA. Consistently with the specification of the request of the Commission, the method proposed by the ESAs is inspired by the experience of national supervisors and ESMA when setting supervisory fees for financial institutions.
53. In the same vein, the ESAs have a limited understanding of the type of ICT services provided by TPPs, based on the definition of Article 3(21) of the DORA (contrary to financial services defined or presented in the relevant financial legislation). Therefore, through this discussion paper, the ESAs take the opportunity to seek feedback from relevant stakeholders on such services, in particular on the relevant information that should be taken into account to define the scope of the applicable turnover that will be used to calculate the oversight fees.
54. Moreover, the ESAs also consider the fact that some CTPPs might be designated on the basis of opt-in voluntary requests based on Article 31(11) of the DORA. The tasks related to the assessment of such applications cannot be funded by the oversight fees paid by other designated CTPPs. Hence, the ESAs take the opportunity of this discussion paper to seek feedback from relevant stakeholders on the best way to fund such tasks.
55. Lastly, the ESAs were also invited to reflect on the frequency of reviewing the respective delegated acts to reflect related developments. In this regard, it is considered appropriate to ensure consistency with the review clause in the DORA Article 58 and hence to perform a review on the need for potential amendments in the respective delegated acts every 3 years. This could facilitate adequate planning and stability in the calculation, charge and collection of oversight fees.

Scope of the oversight fees: estimated expenditure and applicable turnover

Scope of the estimated oversight expenditure

56. The specific rules on fees which are set out in sectoral (L1) legislation, as well as in relevant delegated (Level 2) acts²⁰ rely on the principle of full-cost recovery, put in place by an activity-based management methodology, which establishes that the fees should cover:
- the total estimate of all direct and indirect expenditure necessary for the targeted/defined tasks performed by ESAs (so staff resources directly involved in the defined tasks, but also the costs of the horizontal services i.e., operational and administrative support necessary for fulfilling defined tasks);
 - the total estimate of direct and indirect expenditure for the reimbursement of competent authorities involving staff to provide assistance to ESAs.
57. For instance, for financial entities under its direct supervision, ESMA uses the Activity Based Management (ABM) model based on an activity breakdown allowing to identify the main expenditures categories: i.e. (i) direct activities (ii) horizontal services supporting the execution of the direct activities.
58. Based on the LFS of the DORA, oversight expenditure will cover staff expenditure, infrastructure and operating expenditure. Based on the assumption of an equal sharing of the overall expenditures among the three ESAs, each of the ESAs is estimated to incur at least €693,000 for the first year (i.e., 2025), €2,553,000 for 2026 and €2,683,000 in 2027.
59. The ESAs are of the view that such estimated costs in the LFS are underestimated given that they do not cover all identified oversight tasks. There is for instance no reference to additional costs generated by the use of independent experts, or by the involvement of the competent authorities.

Hence, the ESAs propose to clarify that the related expenditure of at least the following oversight activities identified in the DORA Level 1 will be funded by the oversight fees. For each category,

²⁰ Delegated Regulation (EU) 2022/805 specifying fees applicable to the supervision by ESMA of certain benchmark administrators; Delegated regulation (EU) 2020/1302 with regard to fees charged by ESMA to central counterparties established in third countries; Delegated regulation (EU) 272/2012 with regard to fees charged by ESMA to credit rating agencies; Delegated regulation (EU) 2022/930 specifying fees relating to the supervision by ESMA of data reporting service providers; Delegated regulation (EU) 2019/360 with regard to fees charged by ESMA to trade repositories; Delegated regulation (EU) 1003/2013 supplementing Regulation (EU) No 648/2012 with regard to fees charged by the ESMA to trade repositories; Delegated regulation (EU) 2020/1732 with regard to fees charged by ESMA to securitisation repositories.

illustrative examples are provided based on what ESAs can identify at this early stage of the process. This list is not exhaustive, and does not prevent the inclusion of any other expenditure to the extent it falls under the remit of oversight activities.

- (i) Designation of CTPPs, such as the expenditure related to the assessment and designation (through the JC upon Oversight Forum (OF)²¹ recommendation) of the CTPPs²², or to the appointment of the respective Lead Overseer (LO), based on Article 31(1) of the DORA.

While performed by the ESAs and not by the Lead Overseers *stricto sensu*, these assessments are the starting points for the oversight mechanism to apply. Furthermore, the principle of full cost recovery implies that the related costs should be covered in full by a fee levied upon on the designated CTPPs. Therefore, the ESAs are of the opinion that this assessment should be covered by the oversight fees paid by CTPPs. There would be one exception: the first assessment (first time CTPPs are designated) which the ESAs will have to perform on their own budget will not be covered by such fees given that there will be no designated CTPPs at that time.

- (ii) Conduct of the oversight, such as the expenditure related to the organization, coordination and performance of on-site inspections, general investigations and other off-site activities (e.g. preparation of related decisions and exchanges with CTPPs), or the advice provided by the independent experts in relation to matters falling under the remit of direct oversight activities.

Such expenditures are expected to represent the biggest share of the overall oversight expenditures.

- (iii) Follow-up of the recommendations issued by the LO, such as expenditure related to the treatment of the notifications of the CTPPs of their intention to follow the recommendations, and the communication with the relevant competent authorities.
- (iv) Governance of the Oversight, such as the expenditure related to the functioning of the JON for coordination among Lead Overseers in the preparatory stages and the conduct of oversight.

For each category, expenditure related to the activities performed by the CAs to participate to the oversight of CTPPs (such as, for instance, the resources provided in the JET) are also identified by the ESAs as being part of the oversight expenditures.

In addition, such expenditures will cover both direct and indirect (such as support functions) costs related to oversight activities.

²¹ The Oversight Forum will be in charge of promoting a consistent approach for the monitoring of ICT third party risk and assessing the results of oversight activities. It will be composed by the ESAs, NCAs, relevant additional authorities, NIS authorities, ECB, ESRB, ENISA and COM.

²² The list of CTPPs shall be yearly updated by the ESAs through the Joint Committee

Question for Consultation:

Q28. Do you have any comments on the scope of oversight expenditure?

Definition of the applicable turnover of the CTPPs

60. To determine the appropriate method, basis and available information for considering the “applicable turnover” of the CTPP in fee calculations, the ESAs have identified five issues to solve: (i) the data available, and the timeliness of its availability, (ii) the ability to have accounting information only for ICT services in the scope of the DORA, (iii) the ability to identify the geographical distribution of the turnover, (iv) the profile of the customers of the CTPPs, and (v) the criticality of the functions supported by ICT services. Most of these issues are highly dependent on the first one (data availability). In any case, the defined scope of the applicable turnover should be consistent with the criticality criteria and with the CTPPs designation process.
61. In addition, the methodology to determine the applicable turnover proposed in this discussion paper aims at ensuring an equal treatment of all potential CTPPs. Hence, the ESAs joint advice will depend strongly on the capabilities of all potential CTPPs to provide the identified information in the same way to the ESAs.
62. With regard to the data available to determine the applicable turnover, the existing delegated acts on fees²³ are using as a basis the revenues generated as they appear in the audited accounts of the supervised or overseen entity.
63. In addition, audited accounts are generally not made available immediately at the end of the calendar year. However, it is essential for the ESAs to be able to calculate the applicable fees for overseen entities and to send the related invoice as soon as possible every year.

Therefore, to ensure the availability of relevant information for all CTPPs and allow ESAs to calculate applicable fees within appropriate deadlines, it is proposed to refer, in the Delegated Act, to the certified revenues in the audited accounts of the CTPPs of the year (n-2) as being the information used to calculate the oversight fee for a given year (n). CTPPs are assumed to be well established

²³ Please see previous footnote with the list

companies at the time they will be designated as such and it is expected that they will always be able to provide audited accounts for the year (n-2). In addition, in order to ensure an equal treatment of all CTPPs, the certified audited financial statement will be audited according to IFRS.

64. With regard to the scope of revenues of the CTPPs to be taken into account, it is challenging to determine the applicable turnover based on the ICT services as defined in DORA in Article 3(21)²⁴ given that such definition is not complemented by a list of ICT services from which it would be possible to identify the generated revenues. Without additional specification (on such list of ICT services), there is no guarantee of an harmonised approach by all CTPPs to define their revenues generated by such ICT services. Therefore, it is proposed that the applicable turnover should be determined on the basis on the revenues generated by all provided services of the CTPPs.

65. Furthermore, on the basis of the above, the ESAs also consider that there is no need to make a distinction between core and ancillary ICT services given such distinction does not exist in the DORA.

On this basis, the ESAs are proposing the Delegated Act to establish that the revenues generated by all the services provided by the CTPPs are considered in the determination of the applicable turnover.

66. With regard to the issue of geographical distribution of the revenues of the CTPPs, some CTPPs may be companies with only European-based activities, but others may receive revenues generated from activities in non-EU countries. The determined applicable turnover should at least take into account all revenues generated from the provision of services by CTPPs to entities subject to DORA, including when such services are provided to European clients by entities established outside the EU. Therefore, before advising on possibly taking into account the geographical distribution of revenues into the applicable turnover, the ESAs need to better understand (i) to what extent it is possible in the revenues of the CTPPs to differentiate for CTPPs established in a third country revenues arising from services to European clients from revenues coming from non-EU clients and (ii) whether this information can be certified by

²⁴ Article 3(21) reads “‘ICT services’ means digital and data services provided through ICT systems to one or more internal or external users on an ongoing basis, including hardware as a service and hardware services which includes the provision of technical support via software or firmware updates by the hardware provider, excluding traditional analogue telephone services”

auditors before being submitted to the ESAs. The ESAs would like to ascertain that all potential CTPPs would indeed be capable of systematically providing a certified dedicated financial statement with the geographical distribution of their revenues so as to discount non-EU revenues from the applicable turnover.

67. In parallel, in order to ensure consistency with Article 31(3) of the DORA, within a group, the applicable turnover of the entities designated as CTPPs would be considered.

On this basis, in case it is possible for all CTPPs to provide audited revenues covering all European-based activities (including if the services are provided from outside the EU), the ESAs may advise that such revenues should be considered to determine the applicable turnover. That means CTPPs should be able to produce a dedicated audited document certifying the European origin of their revenues. If this not possible, the ESAs would propose as a default solution and in order to ensure an equal treatment of all CTPPs, to consider the worldwide revenues as the applicable turnover²⁵. In addition, for practical reasons, it should be clarified in the Delegated Act that if the revenues are reported in a currency other than the euro, the Lead Overseer would have to convert them into euro using the average euro foreign exchange rate applicable to the period during which the revenues were recorded. For that purpose, the euro foreign exchange reference rate published by the European Central Bank would be used.

68. With regard to the issue of the profile of the clients of the CTPPs, it should be noted that such providers have, in principle, many kinds of clients, which are not only limited to financial entities as referred to in Article 2(2) of the DORA. Based on the reading of Article 33(2)²⁶ of the DORA, it appears that the Oversight Framework is established to monitor the activities of the CTPPs provided to “financial entities” as referred to in Article 2(2) of the DORA and thus subject to the DORA. It could therefore be argued that only revenues streaming from services provided to financial entities referred to in Article 2(2) of the DORA and thus subject to the DORA should be taken into account for the determination of the applicable turnover. It is likely that CTPPs can identify the revenues generated by the services they provide to the financial sector. However, ESAs need to know if all CTPPs can separate, on a harmonised, consistent and

²⁵ Which is also consistent with the approach for the potential periodic penalties as defined in article 35(8).

²⁶ Article 33(2) of the DORA reads “[...]The assessment shall focus mainly on ICT services provided by the critical ICT third-party service provider supporting the critical or important functions of financial entities. Where necessary to address all relevant risks, that assessment shall extend to ICT services supporting functions other than those that are critical or important.”

certified manner, revenues generated by services provided to financial entities subject to the DORA²⁷.

On this basis, in case it would be possible for all CTPPs to provide audited revenues covering their clients of the financial sector subject to the DORA, the ESAs may advise that such revenues should be considered to determine the applicable turnover. Alternatively, if this would not be the case, the ESAs would recommend not taking the type of entity to which ICT services are provided into account for the determination of the applicable turnover nor limiting it to ICT services provided to financial entities.

69. With regard to the criticality of the functions supported by ICT services included in the applicable turnover, based on the reading of Article 33(2) second subparagraph of the DORA, it appears that the Oversight Framework “shall focus mainly” on ICT services supporting the critical or important functions of financial entities. However, it is further clarified that “where necessary” the oversight “shall extend to ICT services supporting functions other than those that are critical or important”. In addition, it appears very challenging to distinguish in audited accounts between revenues generated by ICT services supporting critical and non-critical functions, as the criticality is not inherent to the provided ICT services themselves but to the functions they support within the concerned financial entities. Hence, it is ESAs’ view that the level of criticality of the functions supported by ICT services should not be used as a criterion to determine the applicable turnover of the CTPPs.

Therefore, the ESAs are proposing not to use, in the Delegated Act, the criticality of the functions supported by the provided ICT services as a criterion to determine the applicable turnover of the CTPPs.

70. To conclude, account taken of all of the above considerations, the ESAs are proposing that the applicable turnover of the designated CTPPs would be calculated on the basis of the revenues of services provided to EU-based clients of the financial sector subject to the DORA, in case it is possible that the ESAs receive certified audited account on this specific scope. If this would

²⁷ As there are some financial entities not subject to the DORA, such as the ones mentioned in article 2(3) of the DORA or the ones mentioned in article 58(2) of the DORA.

not be possible, the ESAs are proposing that the applicable turnover would be calculated on the basis of the audited worldwide revenues, for all provided services to all their clients.

Questions for Consultation:

Q29. Do you have any comments/relevant input to the proposal determining the applicable turnover of the CTPPs based on their certified audited accounts of the year (n-2)? If you disagree, please provide a reasoning and propose an alternative solution, if available.

Q30. Do you have any comments/relevant input to the proposal determining the applicable turnover of the CTPPs based on the overall revenues generated by all the services provided by the CTPPs? If you disagree, please explain and describe which alternative basis you would suggest.

Q31. Do you consider designated CTPPs would be able to provide the ESAs with audited revenues generated by the provision of services to European clients only? If you do, please explain how such revenues would be isolated from other revenues, and if these revenues could be presented separately and certified by independent auditors.

Q32. Do you consider designated CTPPs would be able to provide the ESAs with audited revenues generated by the provision of services to clients of the financial sector subject to DORA? If you do, please explain how such revenues would be isolated from other revenues, and if these revenues could be presented separately and certified by independent auditors.

Q33. Do you have any comments/relevant input to the proposal determining the applicable turnover of the CTPPs without taking into account the criticality of functions of their clients supported by the provided ICT services? If you disagree, please explain and describe which alternative basis you would suggest.

Q34. Do you have any other related proposals/input on the applicable turnover to be used as a basis for the oversight fees?

Methods of calculation of the Oversight fees

71. In respect of the methods of calculations of the oversight fees, the first issue is to determine if the collected fees should be adapted yearly or fixed to be specified by the Delegated Act. To date, both approaches are used by the ESAs, but for different kinds of fees. Registration, recognition and certification fees to be paid by financial entities are generally envisaged as “fixed” fees for efficiency purposes. In some cases, their amount can however be adjusted based on (i) the complexity of the application, (ii) the size of the concerned entity (for instance, entities with a smaller number of employees are subject to a smaller amount of registration fees), or (iii) the expected turnover. This assumes an advanced determination of every possible situation with different fee buckets (e.g. depending on the number of employees, the diversity of activities, the expected turnover, etc) to make it adaptable to the potential changes of the entities subject to such fees. Given the CTPPs will be designated only after the application of the DORA, it is not possible to determine fixed fees in the Delegated Act since neither the exact amount of oversight expenditure nor the exact number of CTPPs will be known before the oversight framework is fully established.
72. With regard to annual supervisory fees, on the basis of the principle of annuality and the principle of full cost recovery, they are calculated based on the estimated (direct and indirect) costs to be incurred by the ESAs to perform their tasks²⁸. While these estimated costs are generally consistent from one year to the next, there is still a need to adjust them every year. The total annual fees are therefore adjusted every year to match the estimated costs. At entity level, the annual fee is calculated based on a “fully proportionate approach”, i.e. the fee charged is determined as a prorated amount that corresponds to the percentage represented by the applicable turnover of the charged entity compared to the sum of applicable turnovers of all supervised entities.
73. Therefore, based on their experience, the ESAs are of the view that yearly adaptable fees calculated through a fully proportionate approach should be used to calculate the annual oversight fees for CTPPs. The ESAs recognize that such approach contains some challenges, in particular in terms of predictability for both the CTPPs and the ESAs. The annual fees being proportionate to the applicable turnovers of CTPPs, this might result in a small number of

²⁸ The assessment relies on the estimation of the expenditure calculated by ESAs’ Activity Based Budgeting model and is part of the overall planning and budgeting process of all activities of the authorities (i.e., not only the one related to oversight or supervisory tasks).

CTPPs supporting a large part of the funding of the framework in case of significant disparity among overseen entities.

74. To ensure all entities contribute to the funding of the framework on a minimum basis, some existing delegated acts (e.g. for trade repositories, securitisation repositories, benchmark and data reporting service providers) include a requirement for a minimum annual supervisory fixed fee. This gives a bit more predictability to the concerned entities. In addition, it ensures coverage of the ESAs’ minimum cost estimated for the oversight of one entity regardless the size.

Therefore, the ESAs are proposing the Delegated Act to determine a method of calculation fully proportionate to the applicable turnover of the CTPPs concerned, on the following basis:

$$\% \text{ of oversight fees paid by the CTPP} = \frac{\text{applicable turnover of this CTPP}}{\text{applicable turnover of all CTPPs}}$$

To ensure that all CTPPs pay a relevant annual fee, including the “smallest” ones, such calculation should be complemented by a minimum fixed oversight fee, which would be paid if the fee resulting from the calculation above is smaller than such threshold. The ESAs are proposing such minimum fee to be fixed at EUR 50 000²⁹.

75. Another important aspect is to determine at what level the annual fees should be calculated, i.e. if the applicable turnover of the CTPPs is compared with the applicable turnover of the other CTPPs overseen by the same Lead Overseer or with the applicable turnover of all the CTPPs overseen by the three ESAs considered together. To recall, based on Article 31(1)(b) of the DORA, the appointment of the Lead Overseers will only rely on *“the financial entities having together the largest share of total assets out of the value of total assets of all financial entities using the ICT services of the CTPPs, as evidenced by the sum of the individual balance sheets of those financial entities”*. This could lead to differences regarding the number and the size of CTPPs being overseen by the three ESAs.

76. If there is an expected relation between the estimated oversight costs and the number and the size of the CTPPs each Lead Overseer will have in its remit, this relation is not expected to be fully linear. The oversight expenditure will indeed integrate some fixed costs (i.e. costs that are related to the number and size of overseen CTPPs) and will also depend on the intensity of the oversight conduct that may be deemed necessary by each Lead Overseer (on the basis of

²⁹ Such minimum fees to be indexed each year

the identified risks for each CTPP). In addition, some expenditure will be commonly “shared” (for instance, when ESA staff work in a JET led by another ESA). For these reasons, calculating the annual fees applying the “fully proportionate approach” at the level of each Lead Overseer might lead to inconsistent fees being charged to CTPPs considered all together.

77. The ESAs therefore recommend adopting an approach which ensures that (i) each Lead Overseer will be able to cover 100% of its estimated oversight expenditure and (ii) there is no bias in the invoiced oversight fees due to the appointed ESA (proportionality applied at cross-ESAs level and considered all CTPPs together).

To ensure appropriate proportionality and comparability amongst all the CTPPs, the ESAs are proposing the Delegated Act to determine the calculation of the annual oversight fees at cross-ESAs level.

In practice, each ESA – and each involved competent authority - will calculate its estimated costs to cover its direct and indirect oversight tasks for the following year. The sum of these estimated costs will be used as a basis to apply the fully proportionate calculation method and considering all CTPPs together.

The fees will be collected by the ESAs in the Lead Overseer role which will then reallocate the collected fees among the other ESAs based on their estimated total oversight expenditure³⁰.

78. With regard to the potential deficits or surpluses, the total amount of the ESAs budget (including the total amount of annual fees, EU subsidy and contribution from the National Competent Authorities) is determined on the basis of their Activity-Based Management methodology. At the end of the financial year, any surplus from the ESAs total budget is recovered by the Commission in line with the principle of universality³¹.

79. Finally, it is important to stress that, through the existing mechanisms in place (EU budgetary procedure, annual reporting, single programming document), any decision concerning the level of the ESAs total budget as well as the level of income per fund sources is adopted by the ESAs Board of Supervisors, of which the EC is a permanent Member. Furthermore, on a yearly basis, the European Court of Auditors assesses the regularity and accuracy in the implementation of ESAs’ budget, including the fee-funded budget, in line with the EU Financial

³⁰ And with the involved competent authorities to reimburse their expenditures, see below.

³¹ At the end of each year, the Commission recovers the total surplus generated by all sources of income (including fee revenues).

Regulation³². The final audit report is communicated to the European Parliament and Council in the context of the ESAs budgetary discharge.

On this basis, the ESAs are proposing, in the Delegated Act, to establish the following approach for the management of the potential deficits or surpluses for the oversight fees collected from CTPPs:

- In case of deficits (the ESAs collects less than incurred), the ESAs do not recover the deficit from CTPPs;
- In case of surpluses (the ESAs collects more fees than incurred), the ESAs do not pay back the surplus to CTPPs, and such surpluses would be fully given to the Commission in the year Y+1 following the annual financial accounts, like for other types of surpluses (coming from EU subsidy or NCAs contributions) in line with the principles of annuality and universality.

Questions for Consultation:

Q35. Do you have any comments/relevant input to the proposal regarding the methods of calculation of the oversight fees (i.e. percentage based on fully proportionate approach, calculated as “applicable turnover of one CTPP/applicable turnovers of all CTPPs”)? If you disagree, please propose an alternative approach, if available.

Q36. Do you have comments on the level of the minimum annual fees?

³² Framework Financial Regulation for TFEU bodies, i.e. Commission Delegated Regulation (EU) 2019/715 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (OJ L 122, 10.5.2019, p. 1).

Practical issues related to the payment of the fees

80. With regard to the modalities and the schedule of payment of the fees, in some existing ESAs practices, fees are collected once a year (one-instalment system). In other cases, they are collected twice per year (two-instalment system), with the first instalment being based on the estimated annual fees before the financial accounts of the entity are available and the second instalment on the actual annual fees calculated based on the financial accounts and reduced by the amount of the first instalment. This second system is particularly relevant with respect to fees that are calculated based on (n-1) audited accounts (which are generally not available when the first instalment is paid). However, experience shows that this differentiated treatment (two-instalment system) complicates the collection of the fees and budgetary management of both the ESAs and the supervised entities. More specifically, the two-instalment approach is more burdensome (more calculation and invoicing) and has only limited benefits for entities (in practice calculating fees based on (n-2) audited account leads to similar fees being collected over time). In addition, the one-instalment system is considered more appropriate and more in line with the overall ambition to harmonise the different fee regimes within the ESAs.

Therefore, the ESAs are proposing, in the Delegated Act, to establish a one-instalment payment for the collection of the annual oversight fees from all CTPPs. It is also proposed to require fees to be cashed by the end of April each year.

As some CTPPs may be third country entities, it is also proposed to specify in the Delegated Act that all the fees will be invoiced and paid in Euros.

81. Based on the previous proposals, for the oversight conducted during year “n”, annual oversight fees paid by the CTPPs would be based on their (n-2) applicable turnover with a one-instalment system at the end of April of year n. To reduce the probability of partial oversight during the first year, the ESAs assume they will as far as possible update the list of CTPPs (and notify the designated companies³³) shortly before the end of the last quarter each year, so that the oversight activities could begin on 1 January of the following year. Such practice would give sufficient time to the ESAs to organize the oversight of the new CTPPs and to facilitate the

³³ Given that Article 31(5) second subparagraph of the DORA reads the “starting date [of the oversight] shall be no later than one month after the notification [of the designation as CTPP]”.

management of the fees (each time a full year). The response to the potential voluntary opt-in requests could be finalised to the same timeline when it is consistent with Article 31(11) of the DORA, to align all the processes. This would also allow the potential third country CTPPs to establish their subsidiary in the Union in accordance with Article 31(12) of the DORA enabling initiation of the oversight activities from on January n+2.

82. However, it is possible that an entity is effectively designated as a CTPP during a given year, with the voluntary opt-in request process for instance³⁴, so such case has to be anticipated. It would not be possible to recalculate the annual fees for all CTPPs including the new one, based on the fully proportionate approach at cross-ESAs level, given the other CTPPs would have already been invoiced/would have already paid their fees. Hence, the ESAs are of the view such new designation has to be managed in a simple way, and for this first (partial) year, such new CTPP should pay a standard fee taking into account the number of days it is effectively overseen. Such fee should be calculated on the basis of the estimated annual cost of 1 FTE (a Temporary Agent).

Therefore, in the case of a partial year of oversight due to a designation (or positive notification to an opt-in request) during the year, the ESAs are proposing to determine the fee for the partial year of oversight as a standard fee. It should be calculated on the basis of the annual costs of 1 FTE (around EUR 200 000, including overheads), taking into account the number of effective oversight days during the year³⁵:

Annual costs of 1 FTE*(number of days when overseen/365 days).

Such fee would be paid within 30 days from the issuance of LO's debit note at the start of the oversight.

83. The ESAs deem also useful to specify in the Delegated Act how the competent authorities involved in the oversight tasks will be reimbursed. In some existing delegated regulations³⁶, the reimbursement of the actual costs of CAs incurred as a result of carrying out delegated tasks is explicitly foreseen. This includes all fixed and variable costs related to the performance of the tasks or to the assistance provided to the ESAs. For CTPPs oversight, it appears to be

³⁴ Article 31(11) third subparagraph of the DORA reads that “the decision referred [...] shall be adopted and notified to the ICT third-party service provider within 6 months of receipt of the application”, so it will depend when it is received by the ESAs during the year.

³⁵ Such fees to be indexed each year

³⁶ See for instance article 9(2) of Regulation (EU) No 272/2012 of 7 February 2012 or article 12(2) of Delegated Regulation (EU) 2019/360 of 13 December 2018.

useful for both the ESAs and the competent authorities to clarify on which basis the competent authorities will be reimbursed by the ESAs. For the CTPPs, this would also clarify that all costs will be covered by the ESA's invoices. In order to facilitate oversight budget management of the competent authorities, it appears more efficient for the ESAs to reimburse the competent authorities in due time after they have collected the oversight fees from the CTPPs, so on the basis of the estimated expenditure of the competent authorities. Hence, both the ESAs and the competent authorities can fund their oversight activities with the collected oversight fees during the year.

The ESAs are, thus, proposing to specify in the Delegated Act that only the ESAs through the Lead Overseer will charge fees to CTPPs (taking into account the estimated expenditure of the involved competent authorities, as proposed above). It should also be indicated that the competent authorities will be reimbursed for their estimated (fixed and variable) costs.

84. The first time that ESAs will designate CTPPs (first year of designation of CTPPs), an ad hoc approach may be considered to fully fund the first oversight tasks, depending on the timing of the first designation. In that case, the overall oversight expenditure would be estimated in the annual budget of the ESAs at the end of the previous year, before the ESAs know the actual number and the profile of the CTPPs. The estimation of such expenditure would rely on the scope of oversight expenditure as presented above. However, the allocation of the oversight fees would, exceptionally, not depend on the applicable turnover of the CTPPs because it is assumed that during the first year of the concerned CTPPs would not have sufficient time to prepare and to send their certified audited financial accounts to the ESAs. Instead, it would depend on the number of designated CTPPs: indeed, the overall estimated oversight fees of the ESAs would be equally allocated among the designated CTPPs (each CTPP would pay the same amount exceptionally). The payment would rely on one-installment approach, and the payment date would depend on the designation date.
85. For this very first (partial) year of the oversight framework implementation, exceptionally it is not suggested to rely on fixed fees (differently to what is proposed above in case of partial year of oversight). Indeed, such approach is not based on overall estimated expenditure of a particular year, while the expenditure incurred by the oversight activities related to the oversight of these first designated CTPPs would be as far as possible anticipated in the annual budget of the ESAs.

Hence, the ESAs are proposing to specify in the Delegated Act that, exceptionally during the first year of CTPPs designation, the related oversight fees would be equally charged to the designated CTPPs, the amount for each CTPP depending on the overall estimated expenditure of the ESAs and the number of designated CTPPs. Such fees would be paid based on the one-instalment system, within 30 days from the issuance of Lead Overseer's debit note at the start of the oversight.

86. The ESAs understand that the call for technical advice of the Commission does not invite them to propose approaches on how to manage the late payment of the oversight fees. However, as it is a fundamental requirement in the existing fee regulations, the ESAs consider it appropriate to also cover this aspect in the Delegated Act on oversight fees.
87. Here again, different approaches exist. In some cases (e.g. for the supervision of CRAs, TRs, SRs, benchmark administrators³⁷), a daily penalty equal to a fixed percentage of the amount due is applied. In other cases (e.g. for the supervision of DRSPs and TC CCPs³⁸), the default interest laid down in Article 99 of Regulation 2018/1046³⁹ applies. As already flagged in previous pieces of advice⁴⁰, the ESAs would suggest referring to the default interest laid down

³⁷ CDR (EU) No 272/2012 of 7 February 2012, CDR (EU) No 1003/2013 of 12 July 2013, CDR (EU) No 2020/1732 of 18 September 2020, CDR (EU) No 2022/805 of 16 February 2022 and CDR (EU) No 2019/360 of 13 December 2018.

³⁸ CDR (EU) No 2022/930 of 10 March 2022 and CDR (EU) No 2020/1302 of 14 July 2020.

³⁹ Article 99 of the "Financial Regulation" relates to the rate applied by the European Central Bank to its principal refinancing operations, [Regulation \(EU, Euratom\) 2018/ of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations \(EU\) No 1296/2013, \(EU\) No 1301/2013, \(EU\) No 1303/2013, \(EU\) No 1304/2013, \(EU\) No 1309/2013, \(EU\) No 1316/2013, \(EU\) No 223/2014, \(EU\) No 283/2014, and Decision No 541/2014/EU and repealing Regulation \(EU, Euratom\) No 966/2012 \(europa.eu\)](#)

⁴⁰ For instance the technical Advice on Fees Charged to CRAs by ESMA dated 21 June 2021 (ESMA80-196-5170) and Technical advice to EC on simplification and harmonisation of fees to TRs under EMIR and SFTR dated 8 July 2021 ([ESMA74-362-1978](#)).

in Article 99 of Regulation (EU, Euratom) 2018/1046 for all categories of supervised entities in view of ensuring consistency of approaches.

On this basis, to manage potential late payments of the annual oversight fees, the ESAs are proposing to rely, in the Delegated Act, on Regulation 2018/1046 and to apply the default interest laid down in Article 99 of this Regulation.

Questions for Consultation:

Q37. Do you agree with the one-instalment payment approach for the collection of the oversight fees from all CTPPs, to be cashed by the end of April each year? If you disagree, please explain and propose an alternative payment approach, if available.

Q38. Do you have comments on the method of calculation of the fees that will be paid by CTPPs designated during a given year?

Q39. Do you have comments on the reimbursement process of the CAs's oversight expenditures?

Q40. Do you have comments on the proposal to fund the oversight activities related to the first designated CTPPs?

Treatment of the opt-in application

88. There is no explicit provision in the DORA related to the cost to be paid by TPPs, for their application to opt in to the Oversight Framework on a voluntary basis in accordance with Article 31(11) of the DORA. However, the assessment of such opt-in requests will oblige the ESAs to dedicate specific resources to analyse and assess the applications; and such resources should be compensated for. Therefore, consistent with existing requirements for the registration or certification fees for entities in the direct supervision remit of ESMA, which are deemed to be relatively comparable activities, it is proposed to establish a financial contribution for opt-in requests.

Hence, the ESAs are proposing to define, in the Delegated Act, a fixed fee that ICT service providers would have to pay when they submit opt-in application to the ESAs. Account taken of and in comparison with the variety of the fixed fees charged by ESMA for its certification and registration activities, the ESAs are of the view that opt-in TPPs pay a fee of EUR 50 000⁴¹.

Such fixed fees will not be refundable both to incentivise solid and complete applications, and because a significant amount of work goes into assessing a request from the initial stage. Therefore, if the applicant withdraws its application before the end of the assessment, or if the notified decision is negative, the paid fees will not be reimbursed.

Question for Consultation:

Q41. Do you agree with this amount of a fixed fee applicant providers will pay for their opt-in requests to be assessed by ESAs? If you disagree, please explain and elaborate on why a different amount should apply.

⁴¹ Such fees to be indexed each year

Annex I: Overview of questions for consultation

1. The purpose of the Discussion Paper is to present preliminary analysis and options considered so far. The discussion paper aims to gather additional evidence and opinions on the topics presented and to serve as a basis for future discussions with various stakeholders.
2. The ESAs are looking to receive feedback from ICT TPPs, financial entities under the scope of DORA and other stakeholders that consider they might be impacted by any topic or option outlined in this discussion paper or that might have relevant information that would help to form a complete picture on them.

Part I: Criticality criteria

Question 1	Do you have any comments about the related issues listed above?
Question 2	Do you think there are additional issues that should be included? If yes, please elaborate on which additional issues you see and why you do so.
Question 3	What do you perceive as the key obstacles and practical challenges to implement the proposed set of indicators listed below?
Question 4	For an already designated CTPP, what could be the minimum turnover time (lifecycle duration) in the CTPP list in case the minimum relevance thresholds specified below are not met for a consecutive number of years?
Question 5	Do you consider the indicators identified are relevant and complete in the case of opt-in requests according to Art. 31(11) of the DORA? Please explain if you think they are not relevant and complete in such cases.
Question 6	Do you agree with the list of step 1 indicators proposed to cover criterion 1 referred to in Article 31(2) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.
Question 7	Do you have any comments on the proposed minimum relevance thresholds?
Question 8	With regard to indicators 1.2 and 1.3, please provide any equivalent metrics (in relation to the total value of their assets) you may consider appropriate to measure the pan-European footprint of the various financial entities subject to the DORA, that you would deem to be better adapted.
Question 9	Do you agree with the list of step 2 indicators proposed to cover criterion 1 referred to in Article 31(2) of the DORA? If not, please elaborate and, if

	<p>applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.</p>
Question 10	<p>Do you have any comments in relation to the information provided in the “Notes” section under each of the indicators?</p>
Question 11	<p>Which key data sources would you propose to use for the indicators under criterion 1? Please explain.</p>
Question 12	<p>Do you agree with the list of step 1 indicators proposed to cover criterion 2 referred to in Article 31(2)(b) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.</p>
Question 13	<p>Do you have any comments on the proposed minimum relevance thresholds?</p>
Question 14	<p>Do you agree with the list of step 2 indicators proposed to cover criterion 2 referred to in Article 31(2)(b) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.</p>
Question 15	<p>Do you have any comments in relation to information provided in the “Notes” section under each of the indicators?</p>
Question 16	<p>Which key data sources would you propose to use for the indicators under criterion 2? Please explain.</p>
Question 17	<p>Do you have any views about indicator 2.3 “Interdependence between G-SIIs or O-SIIs and other financial entities using ICT services provided by the same ICT TPP” (including situations where the G-SIIs or O-SIIs provide financial infrastructure services to other financial entities) and in particular about concrete data that could be used to inform this indicator? Please elaborate.</p>
Question 18	<p>Do you agree with the list of step 1 indicators proposed to cover criterion 3 referred to in Article 31(2)(c) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.</p>
Question 19	<p>Do you have any comments on the proposed minimum relevance thresholds?</p>
Question 20	<p>Do you agree with the list of step 2 indicators proposed to cover criterion 3 referred to in Article 31(2)(c) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.</p>
Question 21	<p>Do you have any comments in relation to information provided in the “Notes” section under each of the indicators?</p>
Question 22	<p>Which key data sources would you propose to use for the indicators under criterion 3? Please explain.</p>

Question 23	Do you agree with the list of step 1 indicators proposed to cover criterion 4 referred to in Article 31(2)(d) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.
Question 24	Do you have any comments on the proposed minimum relevance thresholds?
Question 25	Do you agree with the list of step 2 indicators proposed to cover criterion 4 referred to in Article 31(2)(d) of the DORA? If not, please elaborate and, if applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.
Question 26	Do you have any comments in relation to information provided in the “Notes” section under each of the indicators?
Question 27	Which key data sources would you propose to use for the indicators under criterion 4? Please explain.

Part II: Oversight fees

Question 28	Do you have any comments on the scope of oversight expenditure?
Question 29	Do you have any comments/relevant input to the proposal determining the applicable turnover of the CTPPs based on their certified audited accounts of the year (n-2)? If you disagree, please provide a reasoning and propose an alternative solution, if available.
Question 30	Do you have any comments/relevant input to the proposal determining the applicable turnover of the CTPPs based on the overall revenues generated by all the services provided by the CTPPs? If you disagree, please explain and describe which alternative basis you would suggest.
Question 31	Do you consider designated CTPPs would be able to provide the ESAs with audited revenues generated by the provision of services to European clients only? If you do, please explain how such revenues would be isolated from other revenues, and if these revenues could be presented separately and certified by independent auditors.
Question 32	Do you consider designated CTPPs would be able to provide the ESAs with audited revenues generated by the provision of services to clients of the financial sector subject to DORA? If you do, please explain how such revenues would be isolated from other revenues, and if these revenues could be presented separately and certified by independent auditors.
Question 33	Do you have any comments/relevant input to the proposal determining the applicable turnover of the CTPPs without taking into account the criticality of functions of their clients supported by the provided ICT services? If you

	<p>disagree, please explain and describe which alternative basis you would suggest.</p>
Question 34	<p>Do you have any other related proposals/input on the applicable turnover to be used as a basis for the oversight fees?</p>
Question 35	<p>Do you have any comments/relevant input to the proposal regarding the methods of calculation of the oversight fees (i.e. percentage based on fully proportionate approach, calculated as “applicable turnover of one CTPP/applicable turnovers of all CTPPs”)? If you disagree, please propose an alternative approach, if available.</p>
Question 36	<p>Do you have comments on the level of the minimum annual fees?</p>
Question 37	<p>Do you agree with the one-instalment payment approach for the collection of the oversight fees from all CTPPs, to be cashed by the end of April each year? If you disagree, please explain and propose an alternative payment approach, if available.</p>
Question 38	<p>Do you have comments on the method of calculation of the fees that will be paid by CTPPs designated during a given year?</p>
Question 39	<p>Do you have comments on the reimbursement process of the CAs’s oversight expenditures?</p>
Question 40	<p>Do you have comments on the proposal to fund the oversight activities related to the first designated CTPPs?</p>
Question 41	<p>Do you agree with this amount of fixed fees applicant providers will pay for their opt-in requests to be assessed by ESAs? If you disagree, please explain and elaborate on why a different amount should apply.</p>

Annex II: EC request to ESAs to provide technical advice on DORA

Request to the European Supervisory Authorities (ESAs) for technical advice on two delegated acts specifying further criteria for critical ICT third-party service providers (CTPPs) and determining fees levied on such providers

With this provisional mandate, the Commission seeks ESAs' technical advice on two delegated acts based on empowerments established in the Regulation on Digital Operational Resilience for the Financial Sector (the "Regulation"). The delegated acts would be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The present mandate is provisional as the Regulation has not yet entered into force. The European Parliament and the Council have adopted the Regulation and accompanying Directive on 10 and 28 November 2022, respectively. The acts are expected to be published in December 2022 and enter into force in January 2023.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The mandate follows the Regulation - Article 31(6) and Article 43(2) - the Communication from the Commission to the European Parliament and the Council - Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "290 Communication"), the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making and the Framework Agreement on Relations between the European Parliament and the European Commission (the "Framework Agreement").

According to Article 31(6) of the Regulation and with regard to the criteria the ESAs must take into account when determining the critical nature of ICT third-party service providers, the Commission shall adopt a delegated act to further specify these criteria. In addition, according to Article 43(2) of the Regulation and with regard to the fees levied on CTPPs, the Commission shall adopt a delegated act to determine the amount of the fees and the way in which they are to be paid.

The European Parliament and the Council shall be duly informed about this mandate.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice within the European Securities Committee, the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within

the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The Commission is empowered to adopt delegated acts pursuant to Article 31 and Article 43 of the DORA Regulation. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

1. Context

1.1. Scope

As part of the 2020 Digital Finance package, the Commission put forward a legislative proposal for a Regulation on the Digital Operational resilience of the Financial Sector (DORA) accompanied by a Directive. The Council and the European Parliament reached on 10 May 2022 a political agreement, later formally endorsed by the two co-legislators on 29 June 2022 and 13 July 2022, respectively. The final adoption took place on 10 November 2022 and on 28 November by the European Parliament and the Council, respectively. Publication in the Official Journal of the EU is expected for December 2022. The texts will enter into force on the twentieth day following their publication.

The Regulation will create a comprehensive framework addressing various, core components of the digital operational resilience of financial entities. It will enhance the overall conduct of ICT risk management, establish testing rules for ICT systems, increase financial supervisors' awareness of cyber risks through an EU harmonized incident reporting scheme and introduce Union oversight to oversee financial entities' dependency on ICT third-party service providers. The overall objective is to strengthen and align the digital operational resilience across the different Union financial areas.

To address potential systemic and concentration risks posed by the financial sectors' reliance on a small number of ICT third-party service providers, the Regulation introduces a Union oversight framework for providers deemed critical. As Lead Overseers, each of the three European Supervisory Authorities (EBA, ESMA and EIOPA) will have the power to monitor on pan-European scale the activity of CTPPs in the context of the ICT services they provide to the financial sector.

In accordance with Article 31 of the Regulation, an ICT third-party service provider that is considered critical to the stability and integrity of the Union financial system, will be designated by the ESAs (through the Joint Committee) as a CTPP. In assessing criticality, the ESAs, upon recommendation from the Oversight Forum, will take into account a set of criteria set out in the Regulation. These criteria need to be further specified by a Commission delegated act.

In accordance with Article 43 of the Regulation, the Lead Overseers will charge fees to ICT third-party service providers designated as critical, and those fees shall cover all the expenditure incurred by the Lead Overseers in relation to the conduct of oversight tasks. The Lead Overseers will charge fees based on a Regulation on fees to be adopted by the Commission through a delegated act.

This provisional mandate addresses certain technical aspects of the upcoming Regulations on fees and the designation criteria.

More specifically, in relation to the delegated act on fees, the current mandate addresses some of the elements which are needed in the specification of the amount itself, as well as the way and method(s)

in which such fees are to be paid. In providing their advice, the ESAs could draw on relevant experiences from both national supervisors and ESMA (when setting supervisory fees for financial institutions).

In relation to the delegated act on specifying designation criteria, the current mandate addresses the need for further details aimed at shaping-up the designation criteria. The input sought here refers to several specific sets of indicators of a qualitative and quantitative nature, for each of the criteria, minimum thresholds triggering such indicators (if applicable in the case of qualitative indicators), and, more extensively, background information deemed relevant by the ESAs to help in the build-up of indicators.

1.2. Principles that the ESAs should take into account

On the working approach, the ESAs are invited to take into account the following principles:

- The principle of proportionality; the technical advice should avoid excessive financial, administrative or procedural burdens for CTPPs.
- The rule-of-law principle, which requires the respect of appropriate rights of defence for entities subject to ESAs' oversight.
- In accordance with the ESAs Regulation, the ESAs should not be confined in their reflections to elements that they consider should be addressed by the delegated acts itself but, if appropriate, may also indicate the need for any further guidelines and recommendations that accompany the delegated acts to ensure effectiveness or clarity.
- The ESAs shall determine their own working methods depending on the content of the provisions being dealt with. Nevertheless, across the board questions should be dealt consistently with standards of work being carried out by expert groups.

The ESAs should ensure cross-sectoral consistency, and, where relevant, cooperate with the European Systemic Risk Board on issues related to systemic cyber risk.

- In accordance with the ESAs Regulation, the ESAs are invited to widely consult market participants, in an open and transparent manner, and take into account the resulting opinions in their advice. The ESAs should design this open consultation in a manner and approach they consider proportionate, appropriate and effective given the timeline of this advice. The ESAs should provide a detailed feedback statement on the consultation, specifying when consultations took place, as well as the main arguments for and against the issues raised. This feedback statement should be annexed to the technical advice. The technical advice should justify ESAs' choices vis-à-vis the main arguments raised during the consultation process.
- The ESAs are invited to justify their advice by providing a quantitative and qualitative cost-benefit analysis of all the options which they have considered and those which they have finally proposed in the advice. The ESAs should provide the Commission with a description of the problem, the objectives of the technical advice, options for consideration and a comparison of the main arguments for and against considered options. The cost-benefit analysis, that should be proportionate to the timeline of this advice, should justify ESAs' choices vis-à-vis the main considered options.

- The ESAs' technical advice should not take the form of a legal text. However, they should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice should be presented in an easily understandable language respecting current terminology in the Union.
- The ESAs should provide a comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:
 - the relevant provisions of the Regulation;
 - the corresponding recitals, or;
 - the relevant Commission's request included in this mandate.
- The ESAs should address to the Commission any question to clarify the text of the Regulation that the ESAs consider of relevance to the preparation of its technical advice.

2. Procedure

The Commission is requesting ESAs' technical advice in view of the preparation of two delegated acts to be adopted pursuant to the Regulation and in particular regarding the questions referred to in section 3 of this mandate. The mandate considers the Regulation (Article 31 and Article 43), the ESAs Regulation, the 290 Communication, the Framework Agreement and the ESAs' Financial Regulation.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received based on this mandate will not prejudice the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of delegated acts relating to the Regulation. The Commission shall duly inform the European Parliament and the Council about this mandate. As soon as the Commission adopts the delegated acts, it will notify it simultaneously to the European Parliament and the Council.

3. The ESAs are invited to provide technical advice on the following issues

Article 43(2) of the Regulation requires the Commission to adopt one delegated act to further specify the amount of the fees levied on CTPPs and the way in which they are to be paid by the latter, and a delegated act to further specify the criteria to be considered by the ESAs when assessing the critical nature of ICT third-party service providers.

3.1. Specifying the amount of fees

Article 43(1) of the Regulation specifies that the fees collected from CTPPs shall cover the necessary expenditure in relation to the conduct of oversight tasks, including the costs which may be incurred because of the work carried out by the joint examination teams, and the cost of advice provided by independent experts in relation to matters falling under the remit of direct oversight activities. The fees charged to CTPPs shall be proportionate to the turnover of the CTPPs concerned.

The ESAs are invited to provide technical advice to assist the Commission in formulating elements needed for the Commission to enact a delegated act on fees for CTPPs, and more specifically on the following aspects:

- The ESAs are invited to **detail their assessment of the estimated costs** they will incur as Lead Overseers for the oversight tasks and the work of the joint examination teams, as well as the estimated cost of advice provided by the independent experts in relation to matters falling under the remit of direct oversight activities. The ESAs should provide information on their estimates and on methods of calculation, including how the expenditure necessary for the performance of their tasks in relation to CTPPs should be distributed to the individual overseen CTPP. The ESAs should advise on how the surpluses/deficits in the overall oversight budget should be managed, and whether fees should be yearly adjustable or fixed.
- The ESAs are invited to detail their assessment of the estimated costs they will incur for the assessment of the opt-in requests sent by ICT third party service providers to be designated as CTPPs based on article 31(11). The ESAs should provide information on their estimates and on methods of calculation, and if such fees should be yearly updated or fixed.
- The ESAs should suggest the **timing and appropriate modalities of the payment** of the fees by the CTPPs or opt-in applicants. The ESAs are invited to advise on appropriate schedules for collection of fees.
- According to Article 43(1) of the Regulation, the amount of a fee charged to a CTPP shall be **proportionate to the turnover** of the CTPP concerned. The ESAs are invited to provide technical advice on the appropriate method, basis and available information for considering the turnover of the CTPP in fee calculation.

3.2. Specifying the criteria for assessing criticality

The ESAs are also invited to provide technical advice to assist the Commission in formulating elements needed for the Commission to enact a delegated act specifying further the criteria to be considered by the ESAs, upon recommendation of the Oversight Forum, when assessing the critical nature of ICT third-party service providers, including in case of voluntary opt-in request from an ICT third-party service provider based on Article 31 (11). These criteria set out in Article 31(2) of the Regulation are the following:

- The **systemic impact** on the stability, continuity or quality of the provision of financial services in the event that a CTPP would face a large-scale operational failure to provide its services, taking into account the number of financial entities and the total value of assets of financial entities to which the CTPP provides services.
- The **systemic character or importance** of the financial entities that rely on a CTPP, by taking into account (i) the number of global systemically important institutions (G-SIIs) or other systemically important institutions (O-SIIs) that rely on the CTPP, and (ii) the interdependence between the G-SIIs or O-SIIs and other financial entities, including situations where the G-SIIs or O-SIIs provide financial infrastructure services to other financial entities.
- The **reliance of financial entities** on the services provided by a CTPP, in relation to critical or important functions of financial entities that ultimately involve the same ICT third-party

service provider, irrespective of whether financial entities rely on those services directly or indirectly, through subcontracting arrangements.

- The **degree of substitutability** of a CTPP, by taking into account (i) the lack of real alternatives, even partial, and (ii) difficulties in relation to partially or fully migrating the relevant data and workloads from the CTPP to another ICT third-party service provider.

The ESAs are invited to specify the relevant indicators of a qualitative and quantitative nature for each of the criteria of the Regulation mentioned above. This exercise would allow the criteria themselves to be applied, in concrete, to facilitate the designation. The ESAs are also invited to convey to the Commission any information necessary to build up and (if needed) to correctly read / interpret such indicators.

The Commission services thus seek technical input on precise, detailed and complete sets of indicators of a qualitative and quantitative nature, for each of the relevant DORA criteria. The advice should also consider minimum threshold(s) (if applicable in the case of qualitative indicators) which would need to be considered for designation subject to a further qualitative assessment and, more extensively, background information deemed relevant by the ESAs to help in the actual build-up and interpretation of such indicators.

The Commission services recall the importance of both the accuracy and completeness of these elements. To be able to carry out the assessment leading to the concrete designation process, the ESAs need to have at their disposal all relevant information and clarity of the parameters themselves.

The ESAs are invited to reflect on the frequency of reviewing the respective delegated acts to reflect related developments.

4. Indicative timeline

This mandate takes into consideration the time that the ESAs need in preparing their technical advice and the timeline for the Commission to adopt delegated acts according to Article 290 of the TFEU.

The power of the Commission to adopt these two delegated acts is granted by Articles 31 and Article 43 of the Regulation. The European Parliament and the Council may object to a delegated act within a period of three months, extendible by three further months. The delegated act will only enter into force if neither the European Parliament nor the Council has objected (on expiry of that period) or if both institutions have informed the Commission of their intention not to raise objections.

The Regulation requires the Commission to adopt these two delegated acts within twelve months from its entry into force.

For the Regulation to be fully operational and the ESAs to initiate their oversight activities, it is of the utmost importance to start working on the matter as soon as possible. The deadline set to the ESAs to deliver the technical advice is 30 September 2023.

The request is also available online: [Draft ESAs technical advice commented by ESAs \(europa.eu\)](#)