

BVI¹ Position on the Joint European Supervisory Authority discussion paper on DORA

- **Delegated act specifying further criteria for critical ICT third-party service providers (CTPPs)**
- **Delegated act determining oversight fees levied on such providers**

We take the opportunity to present our views on the joint ESA [discussion paper](#) on DORA to provide technical advice to assist the European Commission in adopting delegated acts on specifying further criteria for assessing criticality of ICT third-party service providers and on determining oversight fees levied on such providers. Our members are asset managers and investment firms that are affected by the current consultation only indirectly because they do not offer ICT services. With a share of 28%, Germany represents the largest fund market in the EU. However, our members are all subject to the scope of the DORA Regulation and also interact with ICT third-party service providers that are likely to be classified as critical in the future. We therefore limit our remarks on the criticality criteria (part I of the discussion paper) as follows:

Q 1 Do you have any comments about the related issues listed above?

In general, we support the proposed approach of supplementing quantitative and qualitative indicators for each of the criteria specified in Article 31(2) DORA Regulation according to a two-step approach. In the first step, the critical providers are to be preselected on the basis of minimum relevance thresholds, and in a second step they are to be assessed in more detail on the basis of additional criticality indicators. In this context, we request to clarify that these criteria can only cumulatively lead to an ICT third-party service provider being classified as critical.

The statements listed under the section 'related issues' on the classification of ICT TPP as part of a group are basically in line with the requirements of the DORA regulation. However, we do not fully understand the approach in **paragraph 27 on sub-contractors** which should be appropriately captured to be assessed during the designation exercise. Here it is not clear by whom the subcontractors should be captured. This requirement must not lead to financial entities being obliged to track and document in their registers every subcontractor in the provider chain for all ICT third-party providers used. Rather, we only understand the requirements for identifying the CTPP to mean that they should be designated on the basis of their contractual relationship with the financial companies at the first level only.

Q 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.

We do not see additional issues.

¹ BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 115 members manage assets of some EUR 4 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 28%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.



Q 3 What do you perceive as the key obstacles and practical challenges to implement the proposed set of indicators listed below?

Data base: According to paragraph 18 of the discussion paper, the ESAs propose that the indicators should be largely based on data available via the (new) information registers to be kept by financial entities pursuant to Art. 28(3) DORA Regulation. We reject this approach as long as it leads to additional documentation obligations for financial entities, which are not required to this extent in the DORA Regulation. This is because the identification of critical providers should not lead to a significant additional documentation burden for financial entities, which is not provided for in the DORA Regulation itself. In particular, the proposals for the indicators are still very abstract; we are therefore not yet able to estimate the concrete effort for the establishment and maintenance of the information register with regard to the commissioned ICT service providers. We would expect that in the future there will be a notification/interface defined by the competent authority through which the required data must be provided.

Therefore, it is necessary to re-examine all the proposed indicators for their availability and necessity. This applies in particular to the indicators for the more detailed specification of the substitutability of providers. All indicators should be defined as simply as possible. All data for each indicator should also be publicly available or available through other sources accessible to the competent supervisory authorities. In this context, it is not very helpful that the ESAs, while indicating that they are currently investigating additional data sources besides the information registers, do not present them in the consultation paper.

Timetable: The approach of using only information from the register of financial undertakings to designate CTTs will lead to a significant delay in designation providers as critical. This is because the financial entities are only obliged to list the information in the register from January 2025, which can then be accessed by the competent authorities on a yearly basis (cf. Article 28(3) DORA Regulation). Technical interfaces must also first be created for this. However, the critical providers should already be designated when the DORA Regulation comes into force in January 2025. This is also shown by the timetable for the Delegated Acts in Article 32(6) and Article 43(2) DORA Regulation which are to be adopted much earlier than other Level 2 measures. The ESAs, through the Joint Committee and upon recommendation from the Oversight Forum, will therefore not succeed in designating the critical providers earlier if they first have to rely on the information from the companies' registers here.

Q 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?

Since the relevance thresholds are only intended to be an initial indicator, the approach of no longer classifying these providers as critical for this reason alone should be questioned. The assessment should rather result from all the overall circumstances.



Q 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.

The ICT third-party providers who wish to be voluntarily included on the list should not be bound by the aforementioned indicators. The DORA Regulation does not provide for this either. Here, hurdles should not be set up that are too high.

Q 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.

Yes, we agree with the approach considering the number and the share of financial entities directly using ICT services provided by the same ICT third-party service provider.

However, we do not agree to also use the number and the share of financial entities **indirectly using ICT services** provided by the same ICT third-party service provider as an additional indicator. The criterion in Art. 31(2)(a), for which the indicators are further specified here, has no reference to indirect contractual relations (unlike the criterion mentioned in Art. 31(2)(c) DORA Regulation). This applies all the more as long as this information is to result solely from the register of financial entities because that would lead to the financial entities having to monitor and document for each provider whether additional tasks are sub-contracted to third parties by the provider. This is too broad and burdensome. If at all indirect contractual relationships were also to be covered, this should be limited to the designation of ICT third-party providers whose services support solely for critical and important functions of the financial undertaking.

Q 7 Do you have any comments on the proposed minimum relevance thresholds?

The minimum relevance threshold values should be set in such a way that, as the first indicator, they adequately reflect the critical importance for the concentration risk in the European financial market. It is not important that there is a dominant market position, but rather the effects of a possible failure of the provider on the European financial market.

Q 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.

Basically, we share the assessment that 'the total value of assets' is not the right starting point for asset managers in the meaning of Article 2(1)(k) and (l) of the DORA Regulation in particular to assess the impact of an ICT service provider on their business models. Therefore, we agree in principle that **assets under management** could also be used as an equivalent.

However, this approach should only be used by asset managers with a UCITS or AIF licence. For investment firms that also provide portfolio management services at their own discretion, the total value of assets should be relevant across the board. Otherwise, this could lead to delimitation problems for investment firms that also perform other MiFID activities (such as dealing on own account). In addition, investment firms also manage fund portfolios by way of outsourcing for asset managers, so that double counting can occur.



Moreover, it should be noted that the value of assets under management is not necessarily related to the ICT service provided. For instance, if an asset manager that manages real estate and securities portfolios uses a software provider only to support the portfolio management of the securities, the value of the assets under management in relation to the real estate portfolios would have no influence. Further differentiation (e.g., also by mapping in the information register) should be avoided because this would only lead to more documentation work for the financial entities without any tangible benefits. This applies all the more as an asset manager also uses ICT service providers that can affect him both at the company level and at the portfolio level. Such further differentiation is also not envisaged with regard to the 'total value of the assets' for other financial entities (such as credit institutions) as a whole.

Therefore, the indicators being part of the first step should be kept as simple as possible knowing that these data can only be an approximate reference.

Q 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 applicable, propose alternative indicators that could be considered taking into account the relevant background information about proposed indicators.

Indicator 1.3: We refer to our answer to question 6. Any reference to **indirectly providing** of ICT services should be deleted. There is no corresponding requirement that subcontracting should also be relevant for the criterion specified in Article 31(2)(a) DORA Regulation.

It is also not clear to us how to define a '**large-scale operational failure**'. Does that mean that in the end the financial entities have to classify whether an operational failure is to be considered as 'large', 'middle' or 'low'? This would be too granular and burdensome. If systems fail, reference should only be made to whether this service affects an important and critical function of the financial entity and whether other financial entities in the EU can also be affected and whether these as a whole are important for the European financial market.

Indicator 1.4: To include subcontracting with reference to only critical and important functions follows from the third criterion in Article 31(2)(c) DORA Regulation. The indicator proposed here for the second step to concretise the first criterion in Article 31(2)(a) DORA Regulation should therefore be deleted or used solely as an indicator for the third criterion. Since all criteria are then applied cumulatively, no further concretisation is required at this point.

Q 10 Do you have any comments in relation to the information provided in the 'Notes' section under each of the indicators?

Basically, it is difficult to set an indicator that is based on hypothetical and subjective assumptions. The activation of continuity plans or ICT response and recovery plans can be designed differently in the individual financial entity. In principle, contingency plans can and should be put in place when there are signs of system failures, regardless of their size or impact. The systems in the company should be designed in such a way that failures are avoided. We therefore do not consider the activation of a contingency plan to be an appropriate input to identify the potential impact on their services, activities and operations.

The references to 'indirectly' should be deleted. We refer to our answers to questions 6 and 9.



Q 11 Which key data sources would you propose to use for the indicators under criterion 1? Please explain.

We would prefer to use only the number and the share of the financial entities directly using ICT services provided by the same ICT third-party service provider supplemented by the other criteria, such as whether the service supports critical and important functions at the financial entity (covered by the third criterion).

Q 12 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.

Q 13 Do you have any comments on the proposed minimum relevance thresholds?

Q 14 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.

Q 15 Do you have any comments in relation to information provided in the “Notes” section under each of the indicators?

Q 16 Which key data sources would you propose to use for the indicators under criterion 2? Please explain.

Q 17 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.

It should be clarified that criterion 2 mentioned in Article 31(2)(b) DORA Regulation and the additional indicators are not relevant for investment firms regulated under the IFD/IFR, nor for asset managers licensed under the UCITS or AIFM Directives either, that rely on ICT third-party service providers. The prudential and legal requirements for these financial entities require no systemic classification comparable to that of credit institutions or insurance companies. Rather, the IFD/IFR makes it clear that the investment firms regulated there are not systemic or important. This also applies to an asset manager as a single financial entity that only manage third-party funds as trustees.

Q 18 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.

We agree with the indicator 3.1 to use the share of financial entities using ICT services provided by the same ICT third-party service provider where these ICT services support critical or important functions. As described in our answer to question 9, that indicator could be combined with the proposed indicator 1.4 (to include subcontracting with reference to only critical and important functions).

However, before subcontracting is also included, it should first be carefully evaluated to what extent the financial entities can or must keep data on the subcontracting of ICT services in the supply chain. The



corresponding proposals for Level 2 measures will only be announced in autumn 2023 by the ESAs. We therefore ask that such indicators be used more downstream.

Q 19 Do you have any comments on the proposed minimum relevance thresholds?

We refer to our answer to question 4.

Q 20 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.

We refer to our answer to question 18.

Q 21 Do you have any comments in relation to information provided in the “Notes” section under each of the indicators?

It is currently not clear to us what is meant by an '**ICT services taxonomy**' and to what extent it should be designed. A description of all functions and ICT services to be provided by the ICT third-party service provider will be part of the contractual agreements. Moreover, the type of contractual arrangements and the ICT services and functions which are being provided will be reported on a yearly basis to the competent authorities (cf. Article 28(3) DORA Regulation). Whether a taxonomy can be derived from this in the future should only be assessed later. In particular, the ICT services can also differ in terms of their nature and are regularly tailor-made product solutions for the respective business models of the financial companies. We therefore expressly request to refrain from further classification schemes and taxonomies. Rather, we see the danger here that this will lead to considerable effort for the financial entities in the documentation of their information registers.

Q 22 Which key data sources would you propose to use for the indicators under criterion 3? Please explain.

N/A.

Q 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.

An obligation to classify the degree of substitutability of the service provider does not arise from the AIFMD and UCITS Directive or from the DORA Regulation. They should therefore be deleted. It should therefore be based solely on whether the company is substitutable or not, without further gradations of substitutability. In particular, the objective of this categorisation is not clear to us. In the case of capital management companies, certain services are not arbitrarily interchangeable and cannot be provided by a third party without further ado. Rather, they are customised products and business models that also take into account group structures. What they all have in common is that a termination of the contracts in accordance with the legal requirements is possible in principle, but even in a favourable case would lead to a considerable cost expenditure and often even more or less completely counteract the underlying business model. A survey by the ESAs is therefore not suitable in many cases to gain meaningful insights.



Q 24 Do you have any comments on the proposed minimum relevance thresholds?

We refer to our answer to question 4.

Q 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.

We request deletion of indicator 4.3 or to replace it by a simpler approach. If the CTPP is difficult to replace anyway, its failure will lead to high costs in any case. Therefore, it does not make sense to list or report the contract costs separately. This is because they only cover the value of the service, but not the costs of a possible failure of the service provider. It would also be far too time-consuming and inefficient to estimate the amount of costs that could be incurred to cover the shortfall. In principle, the financial entities assume – also due to the high standards – that the service can be provided by the ICT provider.

With regard to **indicator 4.3**, there would be difficulties in assigning the costs of service providers to the financial entity in groups that do not only consist of financial entities but in which the ICT services are bundled. If a group entity connects the ICT service provider and passes on the services to the group as necessary, the breakdown of the individual service provider costs in the respective financial company is not possible or at least not without considerable conversion effort – especially if the service is still available in the group is ‘refined’ before the financial entity acquires it. It would be preferable for the indicator to only capture the number of financial companies in which the service is used.

Q 26 Do you have any comments in relation to information provided in the “Notes” section under each of the indicators?

We strongly disagree with the approach of using the total annual expenses or estimated costs of all contractual arrangements and refer to our answer to question 25.

Q 27 Which key data sources would you propose to use for the indicators under criterion 4? Please explain.

If necessary, information from the register of the financial entity should be used as to whether the ICT service can be replaced or not (without any further differentiation) and only if this service supports critical and important functions.
