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From:	Commission
To:	Working Party on Financial Services (Digital Operational Resilience)
Subject:	Interaction between DORA and outsourcing rules in the Union legislation - Commission services non-paper

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## **Regulation on Digital operational resilience for the financial sector (DORA)**

### **Interaction between DORA and outsourcing rules in the Union legislation**

#### **Commission services non-paper**

#### **DISCLAIMER**

This non-paper has not been adopted or endorsed by the Commission. Any views expressed in it may not in any circumstances be regarded as stating an official position of the Commission. The information contained therein is only intended for discussions with the Member State representatives at the Council Working Party on Financial Services.

This non-paper follows up on comments made by delegations in the Council Working Party on Financial Services on the need to bring further clarifications on the envisaged interaction between the rules contained in section 1 of Chapter V of the DORA proposed Regulation related to the management of ICT third-party risk, on the one hand, and the specific rules on outsourcing throughout the Union financial services legislation, on the other hand.

The first clarification relates to the scope of the two sets of rules, which is not identical. The rules in the different pieces of legislation of the Union financial services acquis cover a large range of contracts spanning various outsourcing scenarios. They cover the outsourcing of relevant services/activities/functions of the financial entities and as such are not limited to the procuring/outsourcing of only ICT services.

In addition, and depending on the aim and coverage of each specific rule in the Union acquis, they may be also be differently worded. The acquis covers: outsourcing of ‘activities and services’ and of ‘core services’ (CSDR<sup>1</sup>); outsourcing of ‘functions’ and ‘operational functions or activities’ (EMIR<sup>2</sup>); outsourcing of ‘important operational functions’, ‘essential operating functions’ and ‘critical or important operational functions’ (MiFID<sup>3</sup>); ‘outsourcing of important operational functions’ (PSD 2<sup>4</sup>, CRA<sup>5</sup> and MiFID); outsourcing of ‘critical or important operational functions’ (Solvency II<sup>6</sup>); outsourcing of ‘key functions’ and of ‘tasks and activities’ or of ‘key functions or any other activities’ (IORPs Directive<sup>7</sup>); outsourcing of ‘critical and important functions’ (EBA Guidelines on Outsourcing<sup>8</sup>); ‘delegation’ of ‘functions’ to ‘third parties’ (AIFMD<sup>9</sup>); outsourcing to third parties of the performance of ‘operational functions’ (MICA<sup>10</sup>); outsourcing of ‘operational functions’ (ECSP);

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<sup>1</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (CSDR).

<sup>2</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

<sup>3</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID).

<sup>4</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (PSD 2).

<sup>5</sup> Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (CRA).

<sup>6</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

<sup>7</sup> Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs Directive).

<sup>8</sup> EBA/GL/2019/02 EBA Guidelines on outsourcing arrangements 25 February 2019.

<sup>9</sup> Directive 2011/61/EU on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (AIFMD).

<sup>10</sup> Proposal for a Regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 - COM/2020/593 final (MICA).

outsourcing of ‘important functions’ and of ‘tasks’ (the audit area); outsourcing of ‘functions’ or ‘relevant services and activities’ (Benchmark Regulation<sup>11</sup>).

By comparison, the DORA proposal would only cover one portion of a financial entity’s contracts, namely the ICT-related arrangements, referred to in the DORA proposal as contractual arrangements for the use of ICT services. Moreover, the Commission proposal does not restrict the application of the rules laid down by section 1 of Chapter V to only critical or important ICT functions, but sets out few general principles (Article 25) and key contractual provisions (Article 27) that would apply to all ICT contractual arrangements. In some cases, the DORA proposal requires financial entities indeed to distinguish when it comes to such critical or important functions (for instance when maintaining the Register, when informing supervisors of planned contracts) or it requires a certain rule in the context of a critical or important function (for instance, in Article 27, the obligation of the ICT service provider to notify developments that may have a material impact on such functions).

As a second point of clarification, while the sector specific rules cover more contracts than ICT-related arrangements (hence broader from this angle), the DORA proposal in turn aims at laying down general principles encompassing all ICT third-party dependencies. The main reason behind the broad coverage and wording is the need to strengthen the digital resilience of the financial entities and, in doing so, also enhancing the resilience of the financial ecosystem as such. This can be achieved based on a clear overview of all ICT-related dependencies and certain minimum requirements set out for the contractual arrangements reflecting these dependencies. In addition, the variety of technological solutions used (or to be used in future) by financial entities in their activities may raise complex assessments as to when a particular situation would be qualified as outsourcing which is hence left to the sector specific rules.

The DORA proposal and the sector specific rules on outsourcing are therefore complementary, and the amendments suggested by DORA and DORA Directive fully ensure this complementarity. The accompanying mapping allows an overview of such sectoral rules, pointing towards their complementarity and alignment with the approach endorsed by the DORA proposal.

The approach of the sectoral rules spells out, for instance, that outsourcing should not result in the delegation of a financial entity’s responsibility, should not alter the relationship or the obligations of the financial entity towards its participants/issuers, or the authorisation conditions, or prevent the exercise of supervisory functions, that the financial entity should retain the expertise and resources to evaluate the quality of the delivered services by the third-party providers and for managing risks associated with the outsourcing. This is the case for instance for CSDR, EMIR, MiFID (and more extensively the MiFID delegated act), PSD 2, Solvency II (and more extensively the Solvency II delegated act), the IORP Directive, the AIFMD (and more extensively the AIFMD delegated act rules on delegation), the Benchmark Regulation, MICA, Crowdfunding Regulation, CRA). All such rules would thus fully apply to an outsourcing of ICT services.

Apart such main elements framing the outsourcing, sector specific rules concerning supervisory powers would also fully apply. For instance, the *acquis* lays down important rules on supervisory powers extending to the third-party providers. The respective delegated acts of Solvency II and MiFID II as well as the PSD 2 are more explicit in stating that not only the financial entity and its external auditor, but also its supervisory authority should have effective access to all information relating to the outsourced functions and activities, including the carrying out of on-site inspections of the business premises of the service providers (Solvency II). Similar approaches exist in other acts reflecting the need of supervisory access to outsourced activities, of cooperation of the third party provider with the supervisory authority and information to be obtained by the financial supervisor directly from the service providers (for instance CSDR, with some variances also EMIR). The sector specific rules would apply in the way they are enshrined in the respective acts when the matter concerns outsourcing of ICT services. DORA contains in Article 27 (2) (i) a requirement for all financial entities to have contractual clauses on the cooperation of the ICT third-party provider with the (financial) competent authorities, while with regard to critical ICT third-party providers it requires competent authorities to coordinate any supervisory actions with the Lead Overseer.

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<sup>11</sup> Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (Benchmark Regulation).

The sector specific rules also may contain various derogations. The DORA proposal has no impact on them. These remain fully applicable too, for instance the CSDR-based derogation for the outsourcing (of services/activities) to a public entity in the case of outsourcing governed by a legal, regulatory and operational framework, jointly agreed and formalised by the public entity and the relevant central security depository and agreed by the competent authorities. In many cases, the DORA proposal would not aim to regulate a certain matter, and hence there should be no interference, for instance, a rule that outsourcing or a core outsourcing shall be subject to authorisation, and the specification of procedures or conditions in that context, are spelled out in the sector rules.

As far as regards the interplay with the EBA guidelines on outsourcing, these guidelines would need to be reviewed (EBA to perform a screening based on the final DORA text) since several elements contained therein have been carried over into the DORA proposal, for instance in the context of the Register of Information (with further specifications to be contained in the delegated and implementing acts), termination rights, elements to be assessed in the context of sub-outsourcing. A similar screening exercise could take place for the EIOPA guidelines<sup>12</sup> (ESMA guidelines on outsourcing not yet finalised).

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<sup>12</sup> Guidelines on outsourcing to cloud service providers EIOPA-BoS-20-002.