

Joint Statement on DORA & definition of ICT Services

The Digital Operational Resilience Act (DORA) represents an important milestone in EU financial regulation. In preparation for its application, we welcome the decision of the European Supervisory Authorities (ESAs) to host the Dry-Run exercise on the Register of Information. This *de facto* pilot helped financial entities to test and develop their understanding of the incoming obligations. In part, it further reinforced the concern that there is ongoing divergence among industry stakeholders regarding the interpretation of the definition of ‘ICT Services’ as specified in Article 3(21) of DORA and, in particular, when financial entities, including financial market infrastructures (FMIs), may be seen as ICT service providers.

In light of this persistent challenge, and the proximity to DORA’s implementation timeline on the 17th January 2025, the industry welcomes the intention of the ESAs to provide Q&A clarifications on the definition of ICT services. This should reinforce the widely held understanding that *regulated* financial services, such as those provided by FMIs, credit institutions and investment firms in their capacity as such, should *not* be deemed ICT services in the scope of DORA, consistent with a proportionate and risk-based approach. These financial institutions are subject to separate financial services legislation and regulation, as well as supervision by financial services regulators so that many of their services are not ICT services in accordance with DORA but rather regulated financial services. Hence, this approach would align with the rationale of the ESAs original responses to questions 74ⁱ and 75ⁱⁱ within the Dry-Run FAQ, which noted that a regulated financial service is not an ‘ICT service’ for the purposes of DORA.

Whilst we appreciate that the ESAs and the European Commission are in the process of reviewing these FAQ responses, we strongly urge the ESAs to **reinstate the guidance confirming that regulated financial services should not be treated as ICT services for the purpose of DORA** and **clarify that regulated financial services include any services and activities subject to the supervision of a financial services regulator including any ancillary or delegated services** (as opposed to stand-alone ICT services). Such clarification would ensure that financial entities need to treat services provided by other financial entities as ICT services under DORA only if such services are primarily ICT-focused in their nature and purpose, such as cloud computing services, software, and data service centres as specified in Article 3(21) and Recital 79 DORA.

We call on the ESAs and the European Commission to issue the clarification to this effect within the Q&A portal for DORA as soon as possible. This would provide much needed reassurance to industry as we approach the 17th January 2025 application deadline. Financial entities are already under significant pressure to ensure that broader third-party arrangements, which are of a material number, and typically bundled within global framework agreements, are remediated in time, inserted in the Register and subjected to due diligence. To capture regulated financial

activities as ICT services, and subject them to further regulatory uplift, could have a detrimental impact on the smooth provision of financial services in the EU and would impose a significant operational challenge on industry with no value-add in terms of risk management. For example, clearing services could be impacted due to the level of access, inspection and audit rights under DORA Article 30, whereas the European Market Infrastructure Regulation (EMIR) has tailored requirements to the specific activities being regulated.

This would also be at odds with the Financial Stability Board which stated in its 2023 *Enhancing Third-Party Risk Management and Oversight: a toolkit for financial institutions and financial authorities* that:¹

“...regulated financial institutions, [applies to services provided by FMIs within the scope of the CPMI-IOSCO Principles for Financial Market Infrastructures and to financial messaging infrastructure and market data or information services subject to oversight by financial authorities] to the extent they are engaging in financial services transactions, such as correspondent banking, lending, deposit-taking, provision of insurance, clearing and settlement, and custody services, are generally not considered third-party service providers, and the financial services they provide are not in the scope of third-party service relationships. While these financial services might be objectively critical for any financial institutions that rely on them, the risks they raise are addressed through other, often more specific financial regulatory and supervisory frameworks.”

We are additionally conscious that for a significant number of arrangements with financial entities, in particular with FMIs, it may be more suitable at a future date to consider an entity-level class exemption (e.g., for services provided by entities acting as trading venue operators, central securities depositories, central counterparties, credit institutions and investment firms) given the generalised definition of ICT services in DORA and the oversight financial services regulators already exercise over the contractual arrangements of these entities. Considering that it is at the discretion of financial entities to classify the ICT services they receive and establish that these services support critical or important functions pursuant to Article 29 DORA, the exemption would ensure that regulated financial entities are not at risk of being unintentionally captured by the DORA regime for their already regulated activities.

ⁱ FAQ 74: The definition of ‘ICT services’ in Article 3(21) of Regulation (EU) 2022/2554 intentionally maintains a broad scope. Recital (35) of Regulation (EU) 2022/2554 indeed clarifies that, with the aim of maintaining a high level of digital operational resilience, the definition of ICT services should be understood in a broad manner to the extent such services encompass digital and data services provided through ICT systems on an ongoing basis. Therefore, financial entities are responsible for undertaking such assessment for the services they rely on. Such assessment should be performed taking into account the clarification from DORA Recital (63), and without prejudice to sectoral regulations applicable on financial regulated services: in case a financial entity must be authorised/licenced/registered as financial entity to deliver a service, such service is therefore a regulated financial service and not an ICT service in the meaning of DORA Article 3(21)

ⁱⁱ FAQ 75: Consistently with DORA article 3(19), all third-party service provider providing ICT services to a financial entity are considered as ICT third-party service provider. In case a financial entity is the service provider, the single exception to recital 7 is about services for which the financial entity must be authorised/licenced/registered as financial entity to deliver it: in that case such services are therefore regulated financial services and not an ICT service in the meaning of DORA Article 3(21). Financial entities would need to make their own assessment.

¹ Financial Stability Board (FSB) *Enhancing Third Party Risk Management: A toolkit for financial institutions and financial authorities* (2023), pg 12-13

About AFME

The Association for Financial Markets in Europe (AFME) is the voice of all Europe's wholesale financial markets, providing expertise across a broad range of regulatory and capital markets issues. We represent the leading global and European banks and other significant capital market players. We advocate for deep and integrated European capital markets which serve the needs of companies and investors, supporting economic growth and benefiting society. We aim to act as a bridge between market participants and policy makers across Europe, drawing on our strong and long-standing relationships, our technical knowledge and fact-based work. Focus on a wide range of market, business and prudential issues Expertise deep policy and technical skills Strong relationships with European and global policymakers Breadth broad global and European membership Pan-European organisation and perspective Global reach via the Global Financial Markets Association (GFMA).

About EACH

The European Association of CCP Clearing Houses (EACH) represents the interests of Central Counterparties (CCPs) in Europe since 1992. CCPs are financial market infrastructures that significantly contribute to safer, more efficient and transparent global financial markets. EACH currently has 18 members from 14 different European countries. EACH is registered in the European Union Transparency Register with number 36897011311-96.

About ECSDA

The European CSD Association represents 40 Central Securities Depositories (CSDs) headquartered in 36 countries across geographical Europe. In pursuit of an efficient and risk-averse infrastructure for European financial markets, the Association has as its ethos to provide a forum that aims to increase dialogue and intellectual exchange on common topics of interest among CSDs and relevant external stakeholders. For more information regarding the role and activities of ECSDA, we invite you to consult the following [link](#).

About FESE

The Federation of European Securities Exchanges (FESE) represents 36 exchanges in equities, bonds, derivatives and commodities through 17 Full Members and 1 Affiliate Member from 31 countries.

At the end of April 2024, FESE members had 5,832 companies listed on their markets, of which 9% are foreign companies contributing towards European integration and providing broad and liquid access to Europe's capital markets. Many of our members also organise specialised markets that allow small and medium-sized companies across Europe to access capital markets; 1,503 companies were listed in these specialised markets/segments in equity, increasing choice for investors and issuers. Through their RM and MTF operations, FESE members are keen to support the European Commission's objective of creating a competitive and efficient European Savings and Investments Union. For more information, visit www.fese.eu.

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers. FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

As the principal members of derivatives clearinghouses worldwide, FIA's clearing firm members play a critical role in the reduction of systemic risk in global financial markets.