EFAMA
European Fund and Asset Management Association

CONSULTATION RESPONSE

Brussels, 11 September 2023

EFAMA RESPONSE TO THE CONSULTATION PAPER ON DRAFT IMPLEMENTING TECHNICAL STANDARDS TO ESTABLISH THE TEMPLATES COMPOSING THE REGISTER OF INFORMATION IN RELATION TO ALL CONTRACTUAL ARRANGEMENTS ON THE USE OF ICT SERVICES PROVIDED BY ICT THIRD-PARTY SERVICE PROVIDERS AS MANDATED BY REGULATION (EU) 2022/2554.

General remarks

EFAMA welcomes the launch by the ESAs of the first batch of public consultations on the level 2 legislation under DORA[1]. Due to their number and detailed scope they will be an important element of the new EU framework on digital operational resilience. They would also highly influence the amount of work that each financial entity would have to carry out while implementing new rules ahead of 17 January 2025.

While we also welcome that the authorities have envisaged a period of almost three months for market participants to submit their comments, we believe that the timing of the consultations will not work in favour of their outcome. The period of summer holidays is very challenging when it comes to gathering detailed feedback and analysis, in particular on topics as technical as these. Having four drafts simultaneously under consultation also impedes due consideration being given to all the details, in particular on drafts as elaborate as the ones concerning the risk management framework or the register on contractual arrangements.

We are aware of the tight deadlines established in DORA for the submission of drafts by the ESAs to the European Commission. At the same time, we are of the opinion that it is in the common interest and power of those institutions to secure a timeframe which would favour best outcome of the process, including thought through views provided by all stakeholders. This should be taken more comprehensively into account when drafting provisions of the level 1 acts, as well as when scheduling future public consultations.

In reference to the Draft Implementing Technical Standards to establish the templates composing the register of information in relation to all contractual arrangements on the use of ICT services provided by

[1] Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational 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 (Text with EEA relevance).

Rue Marie-Thérèse 11 | B-1000 Bruxelles | T +32 2 513 39 69 | info@efama.org | www.efama.org | EU transparency register: 3373670692-24

ICT third-party service providers, as mandated by Regulation (EU) 2022/2554[2] (Draft ITS), we would like to draw the ESAs' attention to the following aspects:

- The information that the financial entities are expected to include in the register is excessive and their rationale is doubtful. This is true in particular in the case of the information on the supply-chain, which could be provided more efficiently to the NCAs by the ICT third party service providers (TPPs). Such information should in any case be known to the Lead Overseer in case of critical TPPs. The obligation to keep in the register information on terminated contracts is another example;

- The management of the register would be very burdensome, especially due to the currently foreseen obligation to keep it both at the entity and consolidated/sub-consolidated level. This is an unnecessary duplication, given that the objectives mentioned by the ESAs can be achieved by other means;

- We disagree with the inclusion in the register of sensitive, contractual data. We see this as unnecessary exposure of both the financial entities and the NCAs to cyber-attacks from criminals interested in possessing these data; and

- The Draft ITS creates a new register in content, form and probably technology, that would require an immense amount of work carried out by the financial entities during the implementation and maintenance phases. At the same time, the same goals could be achieved with the use and further development of the register established according to the ESMA Guidelines on outsourcing to cloud service providers, which is simpler in form and known already to the financial entities.

We would also like to highlight that due to the unfortunate timing of the consultation, combined with the consultation of three other drafts, and given the highly complex nature of the Draft ITS, it was not possible to provide the ESAs with a detailed response on the fields proposed in the templates and by means of the Excel spreadsheets provided by the ESAs.

Response to the ESAs' Questionnaire

Q1: Can you identify any significant operational obstacles to providing a Legal Entity Identifier (LEI) for third-party ICT service providers that are legal entities, excluding individuals acting in a business capacity?

The Legal Entity Identifier (LEI) is an identifier nowadays commonly used by the financial entities because of the requirements included in their sectoral legislation. Its use is however not so widespread within the sector of ICT service providers. EFAMA is of the opinion that it should not be the burden of financial entities to ensure that direct ICT third-party service providers (TPP), and even more so their material subcontractors, procure and maintain a valid and active LEI. Therefore, we strongly oppose the obligation included in art. 4(8) of the Draft ITS and ask for it to be deleted. We are also of the opinion that with this provision the ESAs are exceeding their mandate to develop a draft ITS. As art. 28(9) of DORA mentions, its aim is to establish the standard templates, including information that is common to all contractual arrangements, and not to impose on the financial entities obligations of different kind like enforcing on other entities to possess a certain identifier.

Furthermore, if such a TPP would not obtain a LEI, the financial entity would not be able to provide it in the register. The Draft ITS should lay out solutions to this problem by making the LEI field optional for TPPs in all templates or clearly specifying how the financial entity should act in such circumstances. We would also like to highlight that these solutions by all means should not include questioning whether the register is

[2] ESAs, Consultation Paper On Draft Implementing Technical Standards to establish the templates composing the register of information in relation to all contractual arrangements on the use of ICT services provided by ICT third-party service providers as mandated by Regulation (EU) 2022/2554.

maintained and documented correctly, or on terminating the contract. It would be highly disproportionate to prohibit the use of ICT services provided by a well-suited TPP merely on the ground of it lacking a LEI.

Q2: Do you agree with Article 4(1)b that reads 'the Register of Information includes information on all the material subcontractors when an ICT service provided by a direct ICT third-party service provider that is supporting a critical or important function of the financial entities.'? If not, could you please explain why you disagree and possible solutions, if available?

First of all, EFAMA would like to question the need for the financial entities to gather information on the supply-chain of the direct ICT TPPs and include it in the register. Such obligation has not been directly foreseen in the provisions of art. 28 of DORA which mentions only ICT services provided by ICT TPPs, without any notion of subcontractors. We tend to believe that if the aim of the European legislator was to also include the supply-chain, it would be clearly provided for in the provisions of DORA. The responsibility that lays with the financial entity is to choose an ICT TPP able to provide service suitable to its needs and fulfilling all the regulatory requirements. The responsibility for the subcontractors should lie with the direct ICT TPP.

Moreover, in order to include such information, each financial entity would have to obtain them from its provider. In other words, each ICT TPP would have to inform all the financial entities it has contractual arrangements with on its subcontractors, so that it can be further submitted to the NCAs. It seems that it would be much more efficient if the ICT TPP could provide that information directly to the NCAs. As through the register the NCAs would know which ICT TPPs have direct contractual arrangements with financial entities, it should not be too burdensome to create the list of service providers obliged to submit information on their supply-chain.

This obligation imposed on financial entities seems particularly excessive in case of critical TPPs (CTPPs) which will be subject to direct supervision by the Lead Overseer. As according to art. 33(2) of DORA the Lead Overseer shall "*assess whether each critical ICT third-party service provider has in place comprehensive, sound and effective rules, procedures, mechanisms and arrangements to manage ICT risk which it may pose to financial entities*" it is expected that the Lead Overseer will also be aware of the CTPPs' supply-chains.

Therefore, we would strongly support the removal from the register of contractual arrangements elements referring to the ICT TPPs' supply-chains.

Notwithstanding the above, EFAMA would welcome confirmation that, irrespective of whether the subcontractor is material or not, it will not have to be included in the register if the contractual arrangement with the direct ICT TPP does not support critical or important functions. According to art. 28(3) of DORA and art. 4(1)(a) of the Draft ITS, the register shall include information on all contractual arrangements on the use of ICT services provided by the ICT TPPs. However, the information on subcontractors, according to art. 4(1)(b) of the Draft ITS, is to be provided only if those subcontractors are material and the service provided by the direct ICT TPP is supporting a critical or important function. In addition, the Draft ITS do not include a definition of a "material subcontractor", which is only mentioned in the part of the consultation paper presenting the background and rationale for the Draft ITS.

We are also of the opinion that it would be useful for the financial entities if the ESAs could provide examples of situations when reporting should or should not occur.

Moreover, we would like to highlight the excessive content of the template RT.05.02., particularly information on the identifiers and ranks of the subcontracted arrangements. Not only they are not included in art. 30(2)(a-b) of DORA which stipulate the minimum elements of the contractual register, but they also would have to be provided by the direct ICT TPP each time there is a change in the supply-chain. This is

also excessive to what is now included in the ESMA Guidelines on outsourcing to cloud service providers[3] applied to asset managers, and we see no clear rationale for this additional burden.

Q3: Are there any significant operational issues to consider when implementing the Register of Information for the first time? Please elaborate.

What is important is the lack of sufficient time for entities to prepare and maintain the new register. Implementation of the register in its currently proposed form would require substantial effort, time, internal consulting, and the creation of IT solutions. Those works cannot be launched before the final scope and text of the ITS will be available. Therefore, it will be highly difficult for entities to be ready on the application date of the Draft ITS (17 January 2025). Moreover, this date is aligned with the date of the DORA's entry into force and will not allow the ESAs to gather information to select critical TPPs at an earlier stage. This could be problematic for the financial entities which would be interested to know about the selected CTPPs as soon as possible.

Q4: Have you identified any significant operational obstacles for keeping information regarding contractual arrangements that have been terminated for five years in the Register of Information?

Firstly, EFAMA would like to highlight the need for the clarification of the scope of this obligation. According to art. 4(5) of the Draft ITS, financial entities shall maintain in the register information on terminated contractual arrangements for at least 5 years after the termination. The Draft ITS shall apply from 17 January 2025 (art. 10 (2)) and, as the ESAs explained during the public hearing on 13 July, financial entities are expected by that time to have filled-in the register with pre-existing arrangements. This, however, does not mean that arrangements that have expired before that date should also be included and as such, they should not be maintained in the register for further 5 years. In EFAMA's opinion, an opposite interpretation would be contradictory both to the provisions of DORA (in particular art. 64 on its entry into force) and of the Draft ITS as mentioned above. Financial entities would however appreciate a confirmation from the ESAs, having also in mind that they might not be in possession of all the information required by the Draft ITS on contractual arrangements terminated before 17 January 2025.

Moreover, in EFAMA's opinion, keeping historical data in the register for 5 years lacks a clear rationale in view of the 3 objectives of the register and therefore art. 4(5) of the Draft ITS should be removed. As mentioned by the ESAs, they are: selection of critical TPPs, financial entity's ICT risk management, and support of the supervision by NCAs. This requirement would result in a huge multiplication of the data kept in the register, as each financial entity would have many contracts that would change in time. It should also be noted that such obligation was not included in the provisions of DORA and the ESAs' mandate to draft the ITS, established in art. 28(9) of DORA, includes only "*templates for the purpose of the register of information referred to in paragraph 3, including information that is common to all contractual arrangements on the use of ICT services*."

Given the above, we also believe that the obligation included in art. 4(5) of the Draft ITS to ensure that the register of information would have an audit trail functionality that allows to retrieve changes that significantly affect, or are likely to significantly affect, the information contained in the register of information for at least the previous 5 years, is excessive and contradictory to the principle of proportionality.

[3] ESMA, Guidelines On outsourcing to cloud service providers, 10 May 2021.

Q5: Is Article 6 sufficiently clear regarding the assignment of responsibilities for maintaining and updating the register of information at sub-consolidated and consolidated level?

Please see our response to Question no. 6.

Q6: Do you see significant operational issues to consider when each financial entity shall maintain and update the register of information at sub-consolidated and consolidated level in addition to the register of information at entity level?

In EFAMA's opinion, the obligation, included in art. 6(1) of the Draft ITS, that each entity apart from its own register would also maintain and update the register on sub-consolidated and consolidated level is highly excessive. The same is true for art. 6(3) of the Draft ITS which requires financial entities to ensure that the register encompasses all entities that are financial entities and ICT intra-group service providers in scope of consolidation and sub-consolidation. This would result in the duplication of work done by each entity, which would be particularly problematic for smaller entities.

The rationale for such a solution is also not clear. In the Consultation Paper, the ESAs explain that this will be used to "*link the registers of information of the various entities in scope of the group and to ensure there is no double counting*". This approach is however contradictory to basic standards of accountability for group consolidation in which financial entities, being subsidiaries of a group, are not responsible for consolidation. In fact, they will not be able to fill in all those forms as they might not be in possession of all necessary information on the group level.

In EFAMA's opinion, such an effect could be achieved by simpler means, most likely with the help of the parent undertaking. Therefore, the approach of art. 6(1) and 6(3) of the Draft ITS should be fundamentally changed including above mentioned standards for group accountability.

Q7: Do you agree with the inclusion of columns RT.02.01.0041 (Annual expense or estimated cost of the contractual arrangement for the past year) and RT.02.01.0042 (Budget of the contractual arrangement for the upcoming year) in the template RT.02.01 on general information on the contractual arrangements? If not, could you please provide a clear rationale and suggest any alternatives if available?

EFAMA strongly disagrees with the inclusion of figures such as "Annual expense or estimated cost of the contractual arrangement for the past year" and "Budget of the contractual arrangement for the upcoming year" in the register. In this regard, we maintain our position, included in our response to the Discussion paper on the joint ESAs advice to the European Commission on specifying further criteria for CTPPs and determining oversight fees levied on such providers[4]. As mentioned therein, we consider such data as commercially sensitive and unnecessary for the selection of CTPPs. Such data would be particularly valuable to cyber-criminals, which would be interested in selling them. As they would be further submitted by the entities to the NCAs, which would then aggregate and analyse them, the authorities themselves would become an appealing target for a cyber-attack. Such unnecessary risk should be avoided by all means.

We also do not agree with the ESAs' statement that the purpose of internal risk management of the financial entity requires these data to be included in the register and then further submitted to the NCAs. Such

[4] 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.

information could be valuable if the default of an ICT TPP could have a significant impact on the business model of the company or its solvency. However, especially in case of asset managers and investment firms providing portfolio management, which as trustees have an obligation to segregate assets of the managed portfolios, the insolvency risk based on such circumstances is much lover and covered by the operational risk and minimum capital requirements.

Moreover, we see a high burden that the calculation of these data would pose for financial entities. The use of ICT services is often a part of a global IT budget and produce a running cost, which does not make it practical to state a cost for individual ICT arrangements in a particular period of time. This is even more problematic for entities being part of a capital group where ICT services are often acquired for the whole group or part thereof. To provide a breakdown of costs between entities will be very problematic, if not impossible.

It is also worth mentioning that in art. 11(1) of DORA financial entities are required to provide their competent authorities with estimates rather than actual amounts of aggregated annual cost and losses caused by major ICT-related incidents. They are to be provided only upon request. In such a case it seems even more disproportionate to expect actual amounts for all contractual arrangements to be included in the register.

In order to provide the ESAs with an alternative, we would suggest that instead of those exact figures, the register could include a question asking whether the annual expense / estimated cost of the contractual arrangement for the past year / budget of the contractual arrangement for the upcoming year exceed 1 M EUR. Financial entities would provide a simple answer of "yes/no" in the register. This would allow both the entities and the NCAs to evaluate the significance of each contractual arrangement in relation to the affairs of said entity and to the financial system in general, without posing at the same time unnecessary threats as discussed above.

Q8: Do you agree that template RT.05.02 on ICT service supply chain enables financial entities and supervisors to properly capture the full (material) ICT value chain? If not, which aspects are missing?

Please see the answer to Question no. 2 above.

As for the template itself, we would like to stress that the market participants deem it as convoluted as it would require including each subcontractor multiple times, separately for each direct ICT TPP using it.

Q11: Is the structure of the Register of Information clear? If not, please explain what aspects are unclear and suggest any alternatives, if available?

EFAMA would like to highlight the very broad scope and high complexity of the register, with its final outcome hard to foresee. In our opinion, the register should follow the example of the outsourcing register created according to the ESMA Guidelines on outsourcing to cloud service providers mentioned above. Even if the data included therein are in the ESA's opinion insufficient for the purposes of ICT TPP management, we believe that the register on contractual arrangements which is now under discussion could simply expand what was already included in the register on outsourcing to cloud service providers, rather than create an entirely new methodology. The register created according to the ESMA guidelines is much simpler in form, with a format already known to the market, established by the majority of companies and in fact overlapping on many elements with the discussed one. On the other hand, the register created under the Draft ITS is very complicated, with a huge number of templates which will only intensify the risk of mistakes.

We would like to highlight that also in case of the Chapter V of DORA ("Managing of ICT third-party risk") art. 4(2) of DORA requires that application of those provisions by financial entities "*shall be proportionate*

to their size and overall risk profile, and to the nature, scale and complexity of their services, activities and operations". We do not see any way in which this principle was applied to the Draft ITS. Due to its wide scope, complicated structure and highly burdensome maintenance, companies without a significant ICT structure such as some asset managers and investment firms will not be able to create, maintain and update this register. We also believe that such highly burdensome and bureaucratic solutions will have significant impact on the resources of the financial entities. It will be contrary to the objective of strengthening the operational resilience if they would be buried with fulfilling those requirements rather than concentrating on preventing cyber-attacks.

We would also like to highlight the problem of the means by which the competent authorities will be provided with the information on the register. According to art. 9(2) of the Draft ITS "*competent authorities shall set out appropriate uniform formats and secure electronic channels*" which to our understanding means that each authority will prepare these on its own account. This will lead to a lack of harmonisation across Member States and enormous implementation effort for entities with presence in different countries. It would therefore be desirable for such forms and interfaces to be standardised across the EU with a wide acknowledgment of the wide range of entities that will be subject to those provisions and their IT capabilities.

Q12: Do you agree with the level of information requested in the Register of Information templates? Do you think that the minimum level of information requested is sufficient to fulfill the three purposes of the Register of Information, while also considering the varying levels of granularity and maturity among different financial entities?

Please see the response to Question no. 11.

Q13: Do you agree with the principle of used to draft the ITS? If not, please explain why you disagree and which alternative approach you would suggest.

As this question is unclear to what principle it refers, we are unable to provide a response.

Q14: Do you agree with the impact assessment and the main conclusions stemming from it?

We would like to refer to our answer to the Question no. 11. The impact on the asset managers and investment firms seems not to be appropriately considered.

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ABOUT EFAMA

EFAMA is the voice of the European investment management industry, which manages EUR 28.5 trillion of assets on behalf of its clients in Europe and around the world. We advocate for a regulatory environment that supports our industry's crucial role in steering capital towards investments for a sustainable future and providing long-term value for investors.

Besides fostering a Capital Markets Union, consumer empowerment and sustainable finance in Europe, we also support open and well-functioning global capital markets and engage with international standard setters and relevant third-country authorities. EFAMA is a primary source of industry statistical data and issues regular publications, including Market Insights and the EFAMA Fact Book. More information is available at www.efama.org

Contact:

Zuzanna Bogusz
Regulatory Policy Advisor
zuzanna.bogusz@efama.org | +32 2 548 26 69