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EFAMA'S VIEWS ON FURTHER CRITERIA FOR CRITICAL ICT THIRD PARTY SERVICE PROVIDERS (CTPPs) AND OVERSIGHT FEES LEVIED ON SUCH PROVIDERS.

EFAMA welcomes publication by the ESAs of the Discussion paper¹, which commences consultations on the level 2 legislation under DORA². Due to a very short timeframe given by the ESAs (less than a month) and complexity of the issue, detailed answer to the questions included in the Discussion paper has proven to be impractical and very challenging. Therefore, EFAMA presents below key messages which would address the main areas of concern of the European asset management industry. We nevertheless welcome the fact that the European Supervisors have envisaged a longer period of time for reply to consultations published on 19 June. This would allow respondents to provide more detailed analysis, which will be beneficial to the outcome of the debate.

I. Scope of the indicators and the designation process

EFAMA is of the view that the process of designating CTPPs should be as simple as possible. Therefore, we welcome the fact that the proposed indicators (with one exception – see point IV. c. below) correspond to the characteristics of the CTPPs directly stipulated by Art. 31(2) of the DORA.

It is also crucial that all indicators are taken into account cumulatively, as otherwise TPPs other than critical ones, or those who request it, would fall under the supervision of the Lead Overseers. This would be contrary to the rationale of the appointment of the Lead Overseers, as stipulated in the recital 67 of the DORA, and would be contrary to what was explicitly foreseen in the introductory part of Art. 31(2) of the DORA: “*The designation (...) shall be based on all of the following criteria (...)*”. We understand that this is the purpose of the indicative designation process (as explained in points 20-25 of the Discussion paper). However, we would support stating it explicitly to avoid any misunderstandings in the future, as for instance, wrongly capturing a TPP as a CTPP with considerable assets under management, but not providing any critical ICT services.

¹ 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 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.

² 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).

II. Thresholds

Initially, it is worth mentioning that without access to the current analysis of the data on the proposed indicators, it is impossible to recommend the right level of thresholds. Therefore, EFAMA would like to underline the foreseen effects of the introduction of the CTPP category and their supervision on the market of ICT services. On the one hand, we believe that this would bring better supervision to this area of delegated services, and therefore, a higher level of security and certainty for the financial entities having contractual arrangements with such providers. From the CTPP's point of view, they could benefit when marketing their services, as this would in fact create a system of "quasi certification". On the other hand, this could also have the unintended consequence of increasing concentration risk across the EU market; as a greater proportion of financial entities may choose CTPPs due to their oversight at an EU level. It would also have an impact on the costs borne by financial entities, as favoured CTPPs would finance their oversight fees through higher fees paid by their clients. This might also be more challenging for smaller TPPs, which might limit scope of their business in order to avoid being treated as CTPP with likely knock-on effects on the level of competition on the market of ICT services.

Bearing all the above in mind, EFAMA would suggest that the thresholds should be treated with an gradual approach. At the initial phase they should be placed at a higher level that would allow the ESAs to supervise the largest TPPs. Lower thresholds could be considered at a later stage and upon careful observation of the impact that this "quasi certification" would have on the ICT services' market.

III. Data source

Another crucial issue for the accurate calculation of the indicators and proper selection of the CTPPs are the data required and the source thereof. As stipulated in Art. 31(10) of the DORA, the designation of the CTPPs will be carried out based on the information received by the Oversight Forum from the competent authorities. For this purpose, they shall transmit the reports referred to in Art. 28(3), i.e. regarding the register of contractual agreements. EFAMA is of the opinion that this exercise should not impose additional burden on the financial entities, in particular that it should not require any supplementary or ad hoc reporting. The data mandatory to calculate the indicators and the scope of the register of contractual agreements should be interoperable in such a manner that the ESAs or competent authorities would not require additional and excessive reporting from the financial entities. Moreover, in case of insufficient information included in the register of contractual arrangements, the competent authorities should also rely on their own expertise and information gathered via other means.

Assets under management (AUM), which are proposed as an underlying basis for the indicator 1.2 for the asset management industry, present a good example of such data. After the initial analysis, AUM seems to be the most relevant data to capture the ICT TPP footprint for asset management entities (however only if considered cumulatively with other factors, as discussed above). This data should be, to the extent possible, provided by the competent authorities. Otherwise, if to be calculated by the financial entities themselves, it should be clear how these should evaluate it. It is important to bear in mind that an EU asset manager could also manage assets in other non-EU jurisdictions or that services of an ICT TPP could cover only part of the asset manager's AUM. In such cases, the calculation of an indicator based on a total AUM figure would not be accurate.

It is also of critical importance that both the register of contractual agreements and the indicators would not include data of a sensitive nature. As such, we understand that information e.g. on "annual expenses or estimated costs of the contractual agreements" is commercially sensitive and can prove difficult to calculate (especially if the ICT services are shared within a group, and even more so, if the group has subsidiaries in third countries). Including such information in the calculation of the indicators would not bring added value to the designation of the CTPPs based on the criteria provided in Art. 31(2) of the DORA (see also point IV. c. below).

IV. Specific comments to some of the indicators

Apart from the abovementioned and more generic messages, EFAMA presents below a few specific comments regarding three of the indicators proposed by the ESAs:

a. Indicator 2.2 - Number of financial entities identified as systemic by competent authorities

According to the Notes for this indicator included in the Discussion paper, systemic financial entities will be identified by the competent authorities based on “supervisory expert judgement”. EFAMA is of the opinion that such approach leaves too much discretion in the hands of the competent authorities and may in fact create an uneven playing field within the EU market, i.e. what may prove “systemic” at a national level, may not necessarily be at an EU one. As a result, such approach would not allow for the capture of a pan-European dimension.

Talking specifically about financial entities such as management companies of alternative investment funds (AIF) and UCITS funds, as well as investment firms falling under the scope of the IFD/IFR, a conclusion to be drawn is that such companies, as single financial entities, are not “systemic”. As part of the post-Global Financial Crisis reforms spanning over the course of the last decade, international standard setters (i.e. IOSCO and FSB) have in fact resisted a systemic designation for asset management companies and/or their funds. Legal and prudential provisions of AIFMD and UCITSD, as well as IFD/IFR, do not require such systemic classification for such entities, given their fundamentally different business models compared to those of credit institutions or insurance companies. As an example, we read from the recital 6 of the IFD that the rationale for this directive was to create a specific regime for “*investment firms which are not systemic by virtue of their size and their interconnectedness with other financial and economic actors.*” Therefore, it should be clarified that management companies licensed under the AIFMD and UCITSD, as well as investment firms regulated under IFD/IFR, have no systemic character, nor importance, and should not be considered in view of the criterion 2, as per Art. 31(2)(b) of the DORA.

b. Indicator 4.2 - Highly complex/difficult migration or reintegration of ICT services

According to the description of the Indicator 4.2., it will be based on the share of financial entities’ reporting in instances where it is highly complex / difficult to migrate or reintegrate ICT services. As such, reporting will depend on an entirely subjective assessment by the financial entities. Lack of any guidelines in this regard would make such evaluation challenging and could result in overreporting. EFAMA is of the opinion that this would be counterproductive for the task at hand. Therefore, we would suggest that firms consider the duration of migration / reintegration as a factor which would be more objective and clearer to assess.

c. Indicator 4.3 – Market share of ICT TPPs

EFAMA strongly recommends for indicator 4.3 to be removed from the list of indicators. As described above in point III, indicators should not rely on data that are sensitive, as we understand “annual expenses or estimated costs of the contractual arrangements” to be. Moreover, unlike other proposed indicators, this one is not mentioned directly by the criteria enumerated by Art. 31(2) of the DORA. As previously mentioned in point I, the designation of the CTPPs should be as simple as possible and, even more so, should not exceed what was explicitly prescribed in the provisions. Therefore, this indicator is seen as superfluous and too burdensome.

V. Oversight fees

In the area of oversight fees, EFAMA would like to bring these to the ESAs’ attention by stressing that additional costs levied on the CTPPs would most probably have impact on the increase of fees paid by financial entities to their service providers, and as such, likely to be passed further onto their end-investors. Given that this will apply to critical TPPs, i.e. such that are difficult to substitute according to indicator 4.1., financial entities would have no room for negotiations and would be compelled to agree to higher fees. It is therefore of the highest importance for the financial entities that the oversight expenditure and fees are transparent, and their related information is made available to market participants.



ABOUT EFAMA

EFAMA is the voice of the European investment management industry, which manages over EUR 30 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 authoritative EFAMA [Fact Book](#).

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Contact:

Zuzanna Bogusz

Regulatory Policy Advisor

zuzanna.bogusz@efama.org | +32 2 548 26 69