

Luxembourg, 8 September 2023

Subject: ALFI's response to the ESAs discussion on DORA: public consultation on the first batch of policy products

Introduction

The Association of the Luxembourg Fund Industry (ALFI) represents the face and voice of the Luxembourg asset management and investment fund community. The Association is committed to the development of the Luxembourg fund industry by striving to create new business opportunities, and through the exchange of information and knowledge.

Created in 1988, the Association today represents over 1,500 Luxembourg domiciled investment funds, asset management companies and a wide range of business that serve the sector. These include depositary banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax advisory firms, auditors and accountants, specialised IT and communication companies. Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg domiciled investment funds are distributed in more than 70 countries around the world.

We thank the ESA for the opportunity to participate in this consultation on the first batch of policy products of DORA.

Our members appreciate the opportunity to share the views of the market practitioners in Luxembourg, with regards to the ICT register of information, in the context of DORA.

In order to provide evidence of the industry considerations with regards to those various topics in the context of DORA, answers will be given on a number of selected questions focusing on the high-level assessment and spotted industry-related consideration

Part III: ITS to establish the templates for the register of information

Question 1 *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?*

With regards to this question, ALFI would like to reiterate the point made in the previous consultation on DORA, as not all ICT service providers being legal entities have LEI. LEI are widely used in the financial industry for identifying counterparties among financial market participants (FMP). Nevertheless, FMP may use the services of ICT services providers which, due to their size or structure, do not have LEI. For the latest, alternatives to LEI need to be found for use as unique identifiers.

Question 2 *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?*

From a general standpoint, ALFI agree with the approach of providing information on the material subcontractors supporting the ICT services for critical or important functions of the financial entities. Nevertheless, we are of the view that a clear definition of “materiality” is missing and this lack of preciseness could lead to subjective interpretation.

In addition, we would raise the concern that ICT third party service providers, depending on their size, structure and organization, and their level of formalization in the processes in place, may lack completeness when providing the list of subcontractors, leading to some subcontractors being omitted from the scope.

We appreciate the fact that the regulation would tend to impose to the ICT third party to bring more transparency and completeness in their documentation going forward and consider this is, in the long run, in the best interest of the industry. Meanwhile, in the short term, this could result challenging.

For smaller entities with fewer technology skills, this could be difficult to make decisions on materiality and spot on the missing subcontractors from the ICT service providers. In case there is a significant difference in size between the financial entity and the ICT service provider leading to high power of the supplier vs: low power of the customer in the relationship, the burden put on the financial entity to get the appropriate and complete reporting on the subcontracting parties may be significant, given the low influence on the service provider.

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- Question 3** *When implementing the Register of Information for the first time:*
- *What would be the concrete necessary tasks and processes for the financial entities?*
 - *Are there any significant operational issues to consider?*
- Please elaborate.*

ALFI is of the view that, considering the current regulatory requirements in Luxembourg and in Europe, financial entities already have a framework in place to capture the delegation and supplier relationships in a diligent way. Nevertheless, some elements are striking with regards to the specific requirements derived from the implementation of the templates for the Register of Information:

1. From a contractual standpoint: should the service provider provide a number of services to the financial entity and only a subset of those services is within the scope of DORA, clarification would be needed on whether it would be expected to prepare separate contract for that (those) service(s) within the scope of DORA. If so, this additional contractual exercise would constitute a preliminary task to the implementation of the Register of Information.
2. Data collection: With regards to completing the required information in the Register of Information that are beyond the contractual elements, performing the inventory and gathering of those additional fields required in the Register of Information would trigger significant additional investigation and data collection effort.
3. We have identified particular complexity with regards to assigning the responsibilities (in the template completion exercise) between the group and the entities, including the re-charging of the workload => there is an exacerbated additional cost for non-EU entities or non-EU groups having operations in just one EU country (e.g. Luxembourg)

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- Question 4** *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?*

Provided the assumption that the starting date for the implementation of the Regulation would remain in 2025, ALFI do not see any operational obstacle with keeping information regarding contractual arrangements that have been terminated for five years in the Register of Information. To this respect, ALFI considers that a five years audit trail is a standard practice in the industry.

Question 5 *Is Article 6 sufficiently clear regarding the assignment of responsibilities for maintaining and updating the register of information at sub-consolidated and consolidated level?*

With regards to Article 6, ALFI would like to highlight the fact that financial market participants, such as management companies, based in Luxembourg or in other European countries, may have their parent company situated in other countries, including in countries which are not within the scope of DORA (e.g. Asia, the Americas, the UK...). This is particularly frequent in Luxembourg, as this country is often the hub for European or global distribution selected by distant management companies.

To this respect, there is concern in case the Group is headquartered outside the EU and only one or few entities are located within the EU. In such case, the responsibility for completing the consolidated template could result unclear, while in practice, the responsibility for contracting with the ICT service provider is centralised within the Group parent company.

The term “entities” should be clearly defined: whether it is all the entities located in the EU and in scope of DORA, or whether it is all the entities of the Group, regardless of their location and jurisdiction “Ultimate parent entity” would need to be clearly defined, considering the scope of DORA which applies to entities based in the EU.

Considering the fact that the definition in Article 48a 1.(1) of Directive 2013/34/EU, defining the term “**Ultimate parent entity**” within the scope of tax reporting as “**ultimate parent undertaking’ means an undertaking which draws up the consolidated financial statements of the largest body of undertakings**”, we consider particular care and additional clarification would be required in Article 6 as applicable in the case of global groups in which only some entities would be EU-based and hence in the scope of DORA.

ALFI would like to stress out the fact that although the Accounting Directive 2013/34/EU definition of the Ultimate parent entity in Article 48a 1.(1) is within the scope of the Country by Country Reporting (CBCR) and therefore corresponds to an OECD requirement, applicable in most jurisdictions where the Financial Market Participants has their parent company located, this is not the case for the DORA Regulation, which is only applicable within the EU. We would emphasize this distinction and would appreciate a clarification specific to the geographical scope of DORA.

Question 6 *Do you see significant operational issues to consider when each financial entity shall maintain and update the registers of information at sub-consolidated and consolidated level in addition to the register of information at entity level?*

Please refer to the concerns presented in our response to question 5.

ALFI’s global members have concerns in case the Group would consist of both EU-based and non-EU-based entities, especially when the parent company would be non-EU-based. In such cases, considering that only the EU-based entities (including the Luxembourg-based entity) would fall into the application of the ESAs regulations, then the Group would maintain the contractual relationship with the ICT service providers on behalf of the Luxembourg entity (respectively EU based entities), and maintain the consolidated register, but only for the ICT service providers used by the Luxembourg entity (respectively EU based entities).

Resultingly, we would welcome **clarification** on the way the ICT service provider info would need to be captured, at group level and entity level, when only one or some entities are within the EU and in scope of the regulation.

Question 7 *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?*

With regards to the presentation of the annual expenses and estimated cost at entity level, ALFI would like to raise concerns as, in the case of entities with parent entity outside of the EU, the recharge costs structure is not currently designed to fit this purpose.

We understand that the ESAs would like to use this actual and estimated cost information to assess the criticality of ICT service providers. Yet, while the costs for the ICT service provider at group level could be substantial, the cost presented at entity level could give only a partial view of the fees level and lead to underestimating the criticality of the ICT service provider.

In addition, from an operational standpoint, the presentation of costs as described in the template would require putting in place additional reporting processes, and therefore represent substantial additional implementation costs for the Financial Market Participants.

Question 8 *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?*

While the structure design may result quite complex, ALFI considers that, in principle, most entities could be already doing this oversight work in the context of their supervision of delegation.

Nevertheless, we would like to emphasize the fact that, in case of a gap in size between the contracting entity and the ICT service provider (e.g. a small local entity vs. a large ICT service provider which segment offers few substitution options to the entity), the effect of the bargaining power of the supplier could make the complete ICT service supply chain data collection exercise challenging. Indeed, for such large-scale suppliers, the supply chain structure could result complex, yet, not all the individual elements may be critical in the context of the services provided to the financial entity.

To this respect, ALFI is of the view that the ESAs should consider this challenge when defining the concept of “material” in the ICT value chain.

We would welcome initiatives from the ESAs aiming at incentivising the ICT service providers of financial entities to provide the complete set of information and value chain details in a standard and efficient way. Such initiatives could include factsheets / white-papers / inventories standard formats or templates.

Question 9 *Do you support the proposed taxonomy for ICT services in Annex IV? If not, please explain and provide alternative suggestions, if available?*

The proposed taxonomy seems not to specify whether the ICT supplier – ICT services relationship considered is a 1-1 or 1-many. To this respect, clarification would be needed on whether one ICT service provider could be assigned multiple services categories within this ICT services taxonomy (e.g.: ICT risk management, provided in the form of SaaS and also ensuring the maintenance services and version upgrades would result in ticking various boxes in the proposed taxonomy).

In addition, ALFI has noticed a potential discrepancy between the definition of ‘ICT services’ in DORA (Article 3 – Definitions item (16)) and the taxonomy, especially with regards to ICT Risk Management and audit. We would suggest seeking further alignment between the definition and the items’ individual descriptions in the taxonomy.

Question 10 *Do you agree with the instructions provided in Annex V on how to report the total value of assets and the value of other financial indicator for each type of financial entity? If not, please explain and provide alternative suggestions?*

Clarification would be appreciated in case an entity would cumulate multiple licences.

Question 11 *Is the structure of the Register of Information clear? If not, please explain what aspects are unclear and suggest any alternatives, if available?*

ALFI considers the structure of the template is complex. For examples of the highlighted complexity, please refer to the responses expressing requirements for clarification (i.e. Q5, Q6, Q8 and Q10). In all instances, we would welcome an example of a completed template to facilitate the implementation of this template reporting by our members.

Question 12 *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 fulfil the three purposes of the Register of Information, while also considering the varying levels of granularity and maturity among different financial entities?*

NA

Question 13 *Do you support the proposed taxonomy for ICT services in Annex IV? If not, please explain and provide alternative suggestions, if available?*

NA

Question 14 *Do you agree with the impact assessment and the main conclusions stemming from it?*

The impact is difficult to assess in advance of actual implementation. In addition, the impact would need to be reassessed for global entities with HQ outside the EU.

In line with our response to Q11, one concern is whether the official template to be filled in would be received from the ESAs in the review process, or would the different entities have to build up their own design of the template based on the RTS themselves. Indeed, the impact could differ depending if the ESAs would make available a standard template or would only provide fill in instructions in the RTS. To the respect, ALFI is of the view that should the ESAs already have a ready-to-use template including all corresponding drop down lists ready and link structures, not only would it be easier to implement for the financial market participant, but additionally, it would result easier for the Regulator to eventually consolidate the data collected from the Registers of Information.

In all instances, ALFI would welcome a communication on the preferred option retained by the ESAs at an early stage, so that our members could assess the associated level of effort for the development and implementation of the Register of Information

General Question	<i>In addition to the consultation questions above, for each column of each template of the register of information, the following is asked: a) Do you think the column should be kept? Y/N b) Do you see a need to amend the column? Y/N c) Comments in case the answer to question (a) and/or question (b) "No".</i>
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ALFI's comments are limited to the template RT.02.02 — Contractual Arrangements:

In the field RT.02.02.0140 related to the storage of "customer data" we understand there is an assumption that each entity could have its own interpretation of what is the definition of customer. In this context we would appreciate clarification, or confirmation that the interpretation of the definition of "customer" is at the discretion of the FMP.

In the field RT.02.02.0150, in the drop-down menu, the "low reliance" is "no interruption" and the next item is "material reliance": "lasts more than few minutes/few hours". Our view is that there is a large gap between these two subsequent items and we would appreciate some additional granularity (i.e. intermediary options between "low" and "material").