

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 Policy on ICT services, 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 IV: Policy on ICT services

Question 1 *Question 1: Are the articles 1 and 2 regarding the application of proportionality and the level of application appropriate and sufficiently clear?*

ALFI welcomes these Regulatory Technical Standards as they provide a detailed approach on the governance to implement when delegating critical and important function to ICT Service Providers.

This European Regulation applies to European entities, and “the parent undertaking (...) shall ensure that the policy (...) is implemented consistently in their subsidiaries (...)”

- ALFI would appreciate clarification if the policy applies also to groups with a Non-EU based parent company when the subsidiaries are based in the European Union, or if only European entities (i.e. subsidiaries) should be the ones to define and apply these policies
- A similar question is raised for entities owned by several companies (incl. Non-EU owners). Does each of the owner have to define and apply the policy or does it only apply to the EU-based entities?

Question 2 *Question 2: Is article 3 regarding the governance arrangements appropriate and sufficiently clear?*

The majority of the points raised in article 3 are already applicable in Luxembourg, via the Circular CSSF 22/806 on outsourcing arrangements, which applies the EBA guidelines (EBA/GL/2019/02). The article 3 extends the applicability of these guidelines to a wider range of entities.

One point of attention raised by ALFI members is the duplication of the governance structure and supervision tasks, in the subsidiaries and in the parent entities. ALFI would recommend that the IT risks monitoring should remain local, while the monitoring of the Policy may be managed by the parent company.

On a contractual perspective, due to the significant number of points to review and to renegotiate (even if some of them are already well known and applied in Luxembourg), a point of attention is raised on the delay needed to renegotiate existing contracts with ICT Service Providers. Achieving these renegotiations by Jan 2025 seems quite ambitious and some flexibility with regards to the duration of the transition period would be welcome.

In addition, ICT Service Provider which are registered in Europe should be incentivised to follow and apply the same formalism in the description of the policy and contractual arrangements that are requested to entities.

- ICT Service Provider should have the obligation to provide the information requested in the Regulation (resources for example) even to small entities appointing them (including details on resources mutualised among client entities). By experience, such info is hard to retrieve for small entities. So, requesting also to ICT Service Providers to disclose to their clients, whatever the size of the client, a standard set of information in order to allow to the Entities to comply with their duty of completing their registry, would ensure a level playing field for several entities using the same ICT Service provider.

Question 3 *Question 3: Is article 4 appropriate and sufficiently clear?*

Article 4 is clear and distinguish the various categories of ICT service providers, being registered or not, in Europe or not, intragroup or not

Yet, ALFI would welcome a precision on the control framework to deploy in case of use of subcontractors by ICT service providers (partially covered in article 7.1.b), and article 4 could be more explicit in detailing the applicability of the following principles :

- An Entity using an ICT Service Provider should have an overview of the total value chain of the services it receives, including a view of the services rendered by subcontractors, in order to have a comprehensive view and be in a capacity to perform a full Risk Assessment.
- When an Entity delegates an activity to an ICT Service Provider which is using subcontractors, the due diligence process of the entity over the ICT Service Provider have to include a review of the contracts and policies the ICT Service provider has with its subcontractors. The expectations of the control framework to deploy for such arrangement should be explicit in the RTS
 - When the subcontractor is in Europe
 - When the subcontractor is not in Europe

Question 4 *Question 4: Is article 5 appropriate and sufficiently clear?*

Article 5 is clear in listing the main phases of the lifecycle of an arrangement with an ICT Service provider.

This being said, ALFI would recommend, when the entity is part of a Group, to provide additional precision on the organisation at the entity level :

- The local entity should remain in charge of the details of the implementation of the policy, under a supervision by the parent company for a consistent approach within the Group in terms of policy content
- The policy of a group should be applied by all entities of the group. The local specificities would have to be raised to the parent company of the Group.

Question 5 *Question 5: Are articles 6 and 7 appropriate and sufficiently clear?*

ALFI does not have any comment on Article 6.

Article 7 brings a point of attention on the formalisation of the assessment of the ICT Service Provider over Article 7.e : «ethical and socially responsible».

This matter is already described under the CSR Directive, and for ICT Service Providers already subject to CSDR, the assessment by the Entity is straight forward.

Yet, ALFI raises concerns should such assessment be performed on ICT Service Providers that would not be subject to CSRD, and would welcome additional details on the controls to be performed, considering the potential data issue.

Question 6 Question 6: Is article 8 appropriate and sufficiently clear?

- ALFI considers that article 8 on Conflict of Interest is clear.

Question 7 Question 7: Is article 9 appropriate and sufficiently clear?

ALFI welcomes the Risk Based Approach that an Entity should apply upon the answers from the ICT Service Provider (existing certifications and audit reports), while letting room for additional controls and testing.

However, ALFI raises a concern as the process of data chasing and gathering by the entity requires a significant amount of time and effort, while such information could be pushed, or made available by the ICT Service provider. ALFI would welcome the emergence of a new business opportunity to support the availability of such documentations and certifications in the context of DORA.

Question 8 Question 8: Is article 10 appropriate and sufficiently clear?

The prescription of article 10 are in line with the standards practice of processes for oversight in the industry.

Question 9 Question 9: Is article 11 appropriate and sufficiently clear?

The prescription on Exit and Termination of article 11 are in line with the EBA guidelines of 2019 EBA/GL/2019/04.

ALFI would like to draw the attention to the specificity of the use of cloud infrastructures, as the major platforms available on the market are provided by non-EU ICT Service providers, and as such, are not subject to EU regulation and the related provisions with regards to governance and oversight.