

Provisional request to the European Supervisory Authorities (ESAs) for technical advice on two delegated acts specifying further criteria for critical ICT third-party service providers (CTPPs) and determining fees levied on such providers

With this provisional mandate, the Commission seeks ESAs' technical advice on two delegated acts based on empowerments established in the Regulation on Digital Operational Resilience for the Financial Sector (the "Regulation"). The delegated acts would be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The present mandate is provisional as the Regulation has not yet entered into force. The European Parliament and the Council have adopted the Regulation and accompanying Directive on 10 and 28 November 2022, respectively. The acts are expected to be published in December 2022 and enter into force in January 2023.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The mandate follows the Regulation - Article 31(6) and Article 43(2) - the Communication from the Commission to the European Parliament and the Council - Implementation of Article 290 of the Treaty on the Functioning of the European Union¹ (the "290 Communication"), the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making² and the Framework Agreement on Relations between the European Parliament and the European Commission³ (the "Framework Agreement").

According to Article 31(6) of the Regulation and with regard to the criteria the ESAs must take into account when determining the critical nature of ICT third-party service providers, the Commission shall adopt a delegated act to further specify these criteria. In addition, according to Article 43(2) of the Regulation and with regard to the fees levied on CTPPs, the Commission shall adopt a delegated act to determine the amount of the fees and the way in which they are to be paid.

The European Parliament and the Council shall be duly informed about this mandate.

¹ COM/2022/230 final

² OJ L 123, 12.5.2016, p. 1–14

³ OJ L 304, 20.11.2010, p. 47–62

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice within the European Securities Committee, the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The Commission is empowered to adopt delegated acts pursuant to Article 31 and Article 43 of the DORA Regulation. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

1. Context

1.1. Scope

As part of the 2020 Digital Finance package, the Commission put forward a legislative proposal for a Regulation on the Digital Operational resilience of the Financial Sector (DORA) accompanied by a Directive. The Council and the European Parliament reached on 10 May 2022 a political agreement, later formally endorsed by the two co-legislators on 29 June 2022 and 13 July 2022, respectively. The final adoption took place on 10 November 2022 and on 28 November by the European Parliament and the Council, respectively. Publication in the Official Journal of the EU is expected for December 2022. The texts will enter into force on the twentieth day following their publication.

The Regulation will create a comprehensive framework addressing various, core components of the digital operational resilience of financial entities. It will enhance the overall conduct of ICT risk management, establish testing rules for ICT systems, increase financial supervisors' awareness of cyber risks through an EU harmonized incident reporting scheme and introduce Union oversight to oversee financial entities' dependency on ICT third-party service providers. The overall objective is to strengthen and align the digital operational resilience across the different Union financial areas.

To address potential systemic and concentration risks posed by the financial sectors' reliance on a small number of ICT third-party service providers, the Regulation introduces a Union oversight framework for providers deemed critical. As Lead Overseers, each of the three European Supervisory Authorities (EBA, ESMA and EIOPA) will have the power to monitor on pan-European scale the activity of CTPPs in the context of the ICT services they provide to the financial sector.

In accordance with Article 31 of the Regulation, an ICT third-party service provider that is considered critical to the stability and integrity of the Union financial system, will be designated by the ESAs (through the Joint Committee) as a CTPP. In assessing criticality, the ESAs, upon recommendation from the Oversight Forum, will take into account a set of criteria set out in the Regulation. These criteria need to be further specified by a Commission delegated act.

In accordance with Article 43 of the Regulation, the Lead Overseers will charge fees to ICT third-party service providers designated as critical, and those fees shall cover all the expenditure incurred by the Lead Overseers in relation to the conduct of oversight tasks. The Lead Overseers will charge fees based on a Regulation on fees to be adopted by the Commission through a delegated act.

This provisional mandate addresses certain technical aspects of the upcoming Regulations on fees and the designation criteria.

More specifically, in relation to the delegated act on fees, the current mandate addresses some of the elements which are needed in the specification of the amount itself, as well as the way and method(s) in which such fees are to be paid. In providing their advice, the ESAs could draw on relevant experiences from both national supervisors and ESMA (when setting supervisory fees for financial institutions).

In relation to the delegated act on specifying designation criteria, the current mandate addresses the need for further details aimed at shaping-up the designation criteria. The input sought here refers to several specific sets of indicators of a qualitative and quantitative nature, for each of the criteria, minimum thresholds triggering such indicators (if applicable in the case of qualitative indicators), and, more extensively, background information deemed relevant by the ESAs to help in the build-up of indicators.

1.2. Principles that the ESAs should take into account

On the working approach, the ESAs are invited to take into account the following principles:

- The principle of proportionality; the technical advice should avoid excessive financial, administrative or procedural burdens for CTPPs.
- The rule-of-law principle, which requires the respect of appropriate rights of defence for entities subject to ESAs' oversight.

- In accordance with the ESAs Regulation⁴, the ESAs should not be confined in their reflections to elements that they consider should be addressed by the delegated acts itself but, if appropriate, may also indicate the need for any further guidelines and recommendations that accompany the delegated acts to ensure effectiveness or clarity.
- The ESAs shall determine their own working methods depending on the content of the provisions being dealt with. Nevertheless, across the board questions should be dealt consistently with standards of work being carried out by expert groups.

The ESAs should ensure cross-sectoral consistency, and, where relevant, cooperate with the European Systemic Risk Board on issues related to systemic cyber risk.

- In accordance with the ESAs Regulation, the ESAs are invited to widely consult market participants, in an open and transparent manner, and take into account the resulting opinions in their advice. The ESAs should design this open consultation in a manner and approach they consider proportionate, appropriate and effective given the timeline of this advice. The ESAs should provide a detailed feedback statement on the consultation, specifying when consultations took place, as well as the main arguments for and against the issues raised. This feedback statement should be annexed to the technical advice. The technical advice should justify ESAs' choices vis-à-vis the main arguments raised during the consultation process.
- The ESAs are invited to justify their advice by providing a quantitative and qualitative cost-benefit analysis of all the options which they have considered and those which they have finally proposed in the advice. The ESAs should provide the Commission with a description of the problem, the objectives of the technical advice, options for consideration and a comparison of the main arguments for and against considered options. The cost-benefit analysis, that should be proportionate to the timeline of this advice, should justify ESAs' choices vis-à-vis the main considered options.
- The ESAs' technical advice should not take the form of a legal text. However, they should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice should be presented in an easily understandable language respecting current terminology in the Union.

⁴ The European Banking Authority ('EBA') established by Regulation (EU) No 1093/2010, the European Securities and Markets Authority ('ESMA') established by Regulation (EU) No 1095/2010, and the European Investment and Occupational Pensions Authority ('EIOPA') established by Regulation (EU) No 1094/2010.

- The ESAs should provide a comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:
 - the relevant provisions of the Regulation;
 - the corresponding recitals, or;
 - the relevant Commission's request included in this mandate.
- The ESAs should address to the Commission any question to clarify the text of the Regulation that the ESAs consider of relevance to the preparation of its technical advice.

2. Procedure

The Commission is requesting ESAs' technical advice in view of the preparation of two delegated acts to be adopted pursuant to the Regulation and in particular regarding the questions referred to in section 3 of this mandate. The mandate considers the Regulation (Article 31 and Article 43), the ESAs Regulation, the 290 Communication, the Framework Agreement and the ESAs' Financial Regulation.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received based on this mandate will not prejudice the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of delegated acts relating to the Regulation.

The Commission shall duly inform the European Parliament and the Council about this mandate. As soon as the Commission adopts the delegated acts, it will notify it simultaneously to the European Parliament and the Council.

3. The ESAs are invited to provide technical advice on the following issues

Article 43(2) of the Regulation requires the Commission to adopt one delegated act to further specify the amount of the fees levied on CTPPs and the way in which they are to be paid by the latter, and a delegated act to further specify the criteria to be considered by the ESAs when assessing the critical nature of ICT third-party service providers.

3.1. Specifying the amount of fees

Article 43(1) of the Regulation specifies that the fees collected from CTPPs shall cover the necessary expenditure in relation to the conduct of oversight tasks, including the costs which may be incurred because of the work carried out by the joint examination teams, and the cost of advice provided by independent experts in relation to matters falling under the remit of direct oversight activities. The fees charged to CTPPs shall be proportionate to the turnover of the CTPPs concerned.

The ESAs are invited to provide technical advice to assist the Commission in formulating elements needed for the Commission to enact a delegated act on fees for CTPPs, and more specifically on the following aspects:

- The ESAs are invited to **detail their assessment of the estimated costs** they will incur as Lead Overseers for the oversight tasks and the work of the joint examination teams, as well as the estimated cost of advice provided by the independent experts in relation to matters falling under the remit of direct oversight activities. The ESAs should provide information on their estimates and on methods of calculation, including how the expenditure necessary for the performance of their tasks in relation to CTPPs should be distributed to the individual overseen CTPP. The ESAs should advise on how the surpluses/deficits in the overall oversight budget should be managed, and whether fees should be yearly adjustable or fixed.
- The ESAs are invited to detail their assessment of the estimated costs they will incur for the assessment of the opt-in requests sent by ICT third party service providers to be designated as CTPPs based on article 31(11). The ESAs should provide information on their estimates and on methods of calculation, and if such fees should be yearly updated or fixed.
- The ESAs should suggest the **timing and appropriate modalities of the payment** of the fees by the CTPPs or opt-in applicants. The ESAs are invited to advise on appropriate schedules for collection of fees.
- According to Article 43(1) of the Regulation, the amount of a fee charged to a CTPP shall be **proportionate to the turnover** of the CTPP concerned. The ESAs are invited to provide technical advice on the appropriate method, basis and available information for considering the turnover of the CTPP in fee calculation.

3.2. Specifying the criteria for assessing criticality

The ESAs are also invited to provide technical advice to assist the Commission in formulating elements needed for the Commission to enact a delegated act specifying further the criteria to be considered by the ESAs, upon recommendation of the Oversight Forum, when assessing the critical nature of ICT third-party service providers, including in case of voluntary opt-in request from an ICT third-party service provider based on Article 31 (11). These criteria set out in Article 31(2) of the Regulation are the following:

- The **systemic impact** on the stability, continuity or quality of the provision of financial services in the event that a CTPP would face a large-scale operational failure to provide its services, taking into account the number of financial entities and the total value of assets of financial entities to which the CTPP provides services.
- The **systemic character or importance** of the financial entities that rely on a CTPP, by taking into account (i) the number of global systemically important institutions (G-SIIs)

or other systemically important institutions (O-SIIs) that rely on the CTPP, and (ii) the interdependence between the G-SIIs or O-SIIs and other financial entities, including situations where the G-SIIs or O-SIIs provide financial infrastructure services to other financial entities.

- The **reliance of financial entities** on the services provided by a CTPP, in relation to critical or important functions of financial entities that ultimately involve the same ICT third-party service provider, irrespective of whether financial entities rely on those services directly or indirectly, through subcontracting arrangements.
- The **degree of substitutability** of a CTPP, by taking into account (i) the lack of real alternatives, even partial, and (ii) difficulties in relation to partially or fully migrating the relevant data and workloads from the CTPP to another ICT third-party service provider.

The ESAs are invited to specify the relevant indicators of a qualitative and quantitative nature for each of the criteria of the Regulation mentioned above. This exercise would allow the criteria themselves to be applied, in concrete, to facilitate the designation. The ESAs are also invited to convey to the Commission any information necessary to build up and (if needed) to correctly read / interpret such indicators.

The Commission services thus seek technical input on precise, detailed and complete sets of indicators of a qualitative and quantitative nature, for each of the relevant DORA criteria. The advice should also consider minimum threshold(s) (if applicable in the case of qualitative indicators) which would need to be considered for designation subject to a further qualitative assessment and, more extensively, background information deemed relevant by the ESAs to help in the actual build-up and interpretation of such indicators.

The Commission services recall the importance of both the accuracy and completeness of these elements. To be able to carry out the assessment leading to the concrete designation process, the ESAs need to have at their disposal all relevant information and clarity of the parameters themselves.

The ESAs are invited to reflect on the frequency of reviewing the respective delegated acts to reflect related developments.

4. Indicative timeline

This mandate takes into consideration the time that the ESAs need in preparing their technical advice and the timeline for the Commission to adopt delegated acts according to Article 290 of the TFEU.

The power of the Commission to adopt these two delegated acts is granted by Articles 31 and Article 43 of the Regulation. The European Parliament and the Council may object to a delegated act within a period of three months, extendible by three further months. The delegated

act will only enter into force if neither the European Parliament nor the Council has objected (on expiry of that period) or if both institutions have informed the Commission of their intention not to raise objections.

The Regulation requires the Commission to adopt these two delegated acts within twelve months from its entry into force.

For the Regulation to be fully operational and the ESAs to initiate their oversight activities, it is of the utmost importance to start working on the matter as soon as possible. The deadline set to the ESAs to deliver the technical advice is 30 September 2023.