



European Commission
Directorate-General for Financial Stability,
Financial Services and Capital Markets Union
(DG FISMA)
Unit FISMA/B5 Digital Finance
1049 Bruxelles/Brussel
Belgium

18 May 2021

Position Paper of the Association of Foreign Banks in Germany with respect to the proposal for a Regulation on digital operational resilience for the financial sector (DORA)

COM(2020) 595 final | 2020/0266 (COD)

Dear Sir or Madam,

We appreciate that the Commission extended the respective feedback period on the Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014 (*hereafter*: DORA draft) until 18 May 2021 and would like to take the opportunity to address further points in addition to our first submission dated 15 February 2021 ([feedback reference F1838380](#)).

Distinction between financial entities and ICT third-party service providers

Many questions from our member institutions were raised after the first submission deadline are connected to the following question that was part of our first submission: *“When regulated entities acc. to Art 2 (1) a-t DORA draft themselves provide digital and data services to other regulated entities, especially within a group, do they then also qualify as ICT third-party service providers as defined in Art. 3 (15) DORA draft?”*

From our point of view, it must be clarified that regulated entities acc. to Art 2 (1) a-t DORA draft which provide digital and data services to other regulated entities, especially within a group, shall not be additionally regulated as ICT third-party service providers as defined in Art. 3 (15) DORA draft.

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According to the legal definition of ICT third-party service provider in Art. 3 (15) DORA draft, such a provider shall be an undertaking that provides digital and data services, seemingly as the main field of business activity. For purposes of the personal scope of DORA, Art. 2 (2) DORA draft states that all entities as referred to in lit. (a) to (t) shall collectively be referred to as ‘financial entities’, excluding ICT third-party service provider from the financial entity definition. This also gives reason that there should be a distinction between financial entities and ICT third-party service provider. And especially in the case of a group of financial entities in one Member State or of a cross-border group of financial entities in more than one Member State, if one financial entity of this group provides digital and data services to another financial entity of this group, these entities do not treat each other entirely as third parties.

Distinction between financial entities and ICT third-party service providers in third countries

Furthermore, it should be noted that cross-border groups with financial entities domiciled in the EU/EEA which will be subject to DORA provisions can also comprise financial entities in third countries which are not subject to the DORA provisions but to a financial market regulation comparable to the EU financial market regulation acquis; this is specifically the case if the parent undertaking of the financial group is domiciled in a third country und subsidiaries of this parent undertaking are domiciled in EU/EEA and will be regulated as financial entities according to DORA. Such group entities providing digital and data services to a DORA-regulated financial entity of this group should not be seen as ‘ICT third-party service provider established in a third country’ according to Art. 3 (19) DORA draft. This should be because, on the one hand, the provision of digital and data services is mostly not the main field of business activity of such a group entity established in a third-country, and on the other hand, the legal definition of Art. (19) DORA draft contains the precondition that such an ICT third-party service provider established in a third-country has not set up a business/presence in the Union, which is not the case if the third-country entity and the financial entity belong to the same group. **Therefore, it should be clarified that in the case of a cross-border group, in which group entities in third countries provide digital and data services to a DORA-regulated financial entity of this group domiciled in EU/EEA, these group entities cannot be seen as ICT third-party service providers established in a third-country.**

Critical ICT third-party service providers in third countries

Besides this, for the purposes of the obligation in Art. 28 (9) DORA draft stating that financial entities shall not make use of those ICT third-party service provider established in a third country that would be designated as critical pursuant to Art. 28 (1) lit. a and (2) DORA draft under the assumption that they were established in the Union, it should be clarified that in the case of a cross-border group, in which group entities in third countries provide **critical** digital and data services according to Art. 28 (2) DORA draft to a DORA-regulated financial entity of this group domiciled in EU/EEA, these group entities cannot be seen as ICT third-party service providers established in a third-country and are therefore not subject to Art. 28 (9) DORA draft.

And even in the case of a financial entity receiving critical digital and data services according to Art. 28 (2) DORA draft from an ICT third-party service provider established in a third-country, it remains unclear how and in which manner financial entities in EU/EEA shall assess the criticality for the purposes of Art. 28 (9) DORA draft. If all financial entities affected by Art. 28 (9) DORA draft have to carry out an assessment on their own, it is very unlikely that there will be a

consistent approach throughout the Union, in the end leading to a decrease of the level playing field. Therefore, this provision should also be subject to scrutiny by the legislators, ideally in form of an amendment that will lead to more legal certainty and to a harmonised approach for the assessment.

Please do not hesitate to contact us if you have any questions.

Kind regards.

Dr Andreas Prechtel

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