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Governance of the Oversight Framework

Non-paper for DORA trilogues

DISCLAIMER

This non-paper has not been adopted or endorsed by the Commission. Any views expressed therein shall not be regarded in any way as stating an official position of the Commission. The information contained within is exclusively intended for discussions with the Union co-legislators in the context of the inter-institutional trilogues on DORA.

Background

On the 25th of January 2022, the Union co-legislators held a first political trilogue on the Digital operational resilience Act for the financial sector (DORA). The present non-paper follows-up on the mandate received by the Commission to assess the EP amendments tabled to the Oversight governance seeking, inter alia, to address concerns expressed by the three ESAs¹. The underlying objective seems to be three-fold: avoid a “silo mentality” in the oversight of ICT third-party risk, ensure a balanced participation of the three ESAs and render effective its day-to-day functioning.

Relevant amendments and Commission assessment

While the Commission services fully endorse these objectives, accomplishment thereof has to be based on solutions thoroughly anchored in the existing institutional scheme of the European Supervisory Authorities.

¹ Joint ESAs letter (ESAs 2021 07) from 9 February 2021 regarding the legislative proposal for a regulation on digital operational resilience for the financial sector.

1. Existing institutional scheme of the European Supervisory Authorities

We recall that Regulations No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010, respectively (herein referred to as 'ESAs regulations') comprise a section, in their respective chapter IV, which specifically deals with the issue of 'Joint Bodies of the European Supervisory Authorities'.

The respective chapter IV of each of the ESAs Regulations lays down, in an identical manner, the legal framework in which joint bodies (and sub-structures) shall be established and shall operate. According to Article 54 of the ESAs Regulations, a Joint Committee of the European Supervisory Authorities is established as a forum in which the three Authorities 'cooperate regularly and closely to ensure cross-sectoral consistency, while considering sectoral specificities, in particular regarding....[cybersecurity]'.

According to the same article, the Joint Committee has dedicated staff provided by the ESAs and acting as a permanent secretariat, while each ESA contribute to that effect "adequate resources to administrative, infrastructure and operational expenses.' Further, Article 57 of the ESAs Regulations foresees the possibility for the Joint Committee to 'establish sub-committees for the purpose of preparing draft joint positions and common acts for the Joint Committee'.

The Commission proposal consequently built on the legal basis foreseen by Article 57 of the ESAs Regulations when establishing, through Article 29 DORA, an *Oversight Forum* as a dedicated sub-committee of the Joint Committee, to support the Lead Overseer's work and mandate for the area of ICT third-party risk across the financial sectors. Moreover, the Commission proposal explicitly allocates to the Oversight Forum a *supportive* role to the workings of the Lead Overseer, in accordance with the preparatory functions of a sub-committee, as laid out by Article 57 of the ESAs regulation.

The work of the Lead Overseer would consist of a continuous monitoring to avoid that CTPPs pose undue risk to their financial service customers. This would be implemented through different types and formats of checks to assess that CTPPs have comprehensive, sound and effective rules and mechanisms to manage the ICT risks that they may pose to financial entities. Such checks may, for instance, come through a combination of regularly planned and ad-hoc meetings (agreed as per Oversight plans), on-site and off-site inspections to be conducted at the premises and infrastructures of the CTPPs, through discussions on ICT risk identification and ICT risk management, requiring CTPPs to produce reports, notably specific incident reports, discussing any problem faced by CTPPs in the supply of ICT services, aspects raised in the Financial Services Addenda concluded with financial entities. etc. The outcome would be reflected in a set of conclusions and the adoption of possible recommendations by Lead Overseer including on any suitable remedies or practices.

2. Commission assessment of the amendments proposed by the EP

The EP proposal replaces the *Oversight Forum* proposed by the Commission by a new body (the Joint Oversight Body) - a structure seemingly outside existing arrangements and, as such, with no clear anchorage in the ESAs Regulation - as it deletes the reference to its status as a sub-committee. Through its amendments, the EP therefore would set up an entirely new type of structure common to the three ESAs, which, in the wording of the amendments, would be “*established for the purposes of overseeing ICT third-party risk across financial sectors and conducting direct oversight of ICT third-party service providers designated as critical pursuant to Article 28*”.

Lack of legal basis in the ESAs founding regulations

The ESAs founding regulations do not appear to provide for any legal basis for this type of new [legal] body. Whatever the intention of the amendments (legal body or a mere joint ESAs structure with no legal status) we take the view that in the absence of amendments to the ESAs regulations, establishment of joint bodies and structures of the three ESAs should only be done in accordance with existing rules, and any decision-making powers can only be conferred on the ESAs.

We understand that the establishment of a CCP Supervisory Committee in Article 24a (8), (9) and (10) of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR Regulation) pursuant to Article 41 of Regulation (EU) No 1095/2010 Article 41 of Regulation (EU) No 1095/2011 (ESMA Regulation) has to some extent inspired the EP proposal on the establishment of the Joint Oversight Body.

We recall that the CCP Supervisory Committee is an *internal committee* established by one single ESA (ESMA) pursuant to Article 41 of ESMA Regulation for the purposes of preparing draft decisions for adoption by the Board of Supervisors and carrying out the tasks set out in paragraphs 7, 9 and 10 of this Article ('CCP Supervisory Committee').

However any cross-sectoral structures encompassing the three ESAs are foreseen in section I of Chapter IV of the ESAs Regulations mentioned above (Articles 54 - 57) with the Joint Committee acting as a common forum and the possibility of setting-up sub-committees (as well as further *joint work streams* which may be set-up according to the Joint Committee's Rules of Procedure). Thus, preparatory work in the context of the DORA Oversight should build on, and use, existing structures laid out in the ESAs Regulation framework. In addition, if the new body were to be considered as a new EU agency, it would require the adoption of a full legislative act with provisions similar to the ESAs founding regulations. In any event, the creation of a whole new agency or of a sub-body with substantial new power delegations as proposed by the EP would also require consequent human, administrative and technological resources that have not been considered, nor impact assessed in the initial Commission's proposal.

Disruption of the repartition of powers granted to the three ESAs: Moreover, the Joint Oversight Body's status seems to go beyond supportive functions conferred on cross-sectoral structures encompassing the three ESAs since the EP assigns it a mission of '*conducting direct oversight over ICT third-party service providers designated as critical pursuant to Article 28*'. In granting these functions to the new body, the EP proposal would, in the Commission's view, disrupt the existing balance of powers conferred on the ESAs. It is only the Lead Overseer - as ESA, legal body and Union agency - that can assume direct supervisory functions or, respectively, in the context of DORA Regulation, direct oversight of CTPPs. This is justified by the fact that the Lead Overseer is the best placed EU Agency to exercise its powers in its respective sector, building on the expertise and relations it has developed when implementing other EU legislative acts.

This change encroaching upon the Lead Overseer's role is apparent throughout several amendments where the EP replaces the *Lead Overseer* with the *new Joint Oversight Body*:

- as author of the recommendations addressed to CTPPs²: in the Commission services' view, directly addressing specific recommendations to the CTPPs should remain the Lead Overseer's prerogative. In addition, the Joint Oversight Body neither possess the same level of technical expertise of the Lead Overseer nor directly engages with CTPPs;
- as body which competent authorities, when taking measures concerning CTPPs, have to agree with³: a change which, in the Commission services' view is inconsistent with the role of the Joint Oversight Body, and can only work in relation to the Lead Overseer;

² Article 31(1) (d) DORA, also cross-referred to in Article 29(5).

³ Article 30(4). We do not mention in this context the changes in Article 30 (3) - as the replacement operated by the EP therein (for which we still have concerns) seems partial and not fully altering the substance the Lead Overseer's powers. The EP asks the *Joint Oversight Body* (under the coordination and direction of the Lead Overseer) - rather than the Lead Overseer - to draft and propose a clear, detailed and reasoned individual Oversight plan for each CTPP. Although the EP acknowledges that adoption of the plan ultimately rests with the ESA, this may still be unfeasible from a practical point of view as the technical expertise to draft plans belongs to the Lead Overseer and its joint examination team' staff having monitored in concrete the CTPP.

- when informing CTPPs of the intention of issuing recommendations /giving them the opportunity to provide information / bring challenges⁴; and as CTPP's counterpart with whom the latter should cooperate in good faith and provide assistance⁵: in our views, it is the Lead Overseer which CTPPs need to assist (CTPPs need to assist the body that inspects them, not the Joint Oversight Body which lacks inspection rights);
- as body which adopts the recommendations addressed to CTPPs⁶: in the Commission services' view, the adoption of recommendations can only be a prerogative of the Lead Overseer (adopted by the Board of Supervisors of the respective ESA);
- as vector channelling information to competent authorities on whether CTPPs intend to follow the recommendations⁷ and in as the counterpart which competent authorities inform on measures taken on financial entities⁸.

In the event where the co-legislators would want to grant this new body powers that were originally conferred on the three existing ESAs, DORA would also need to amend existing ESAs regulations. This may disrupt the balance achieved by the ESAs founding regulations and further complicate the delineation between the roles of the ESAs and this new body. Ultimately, we fear that instead of simplifying the coordination between ESAs, the adjunction of such new body would raise questions of power delegation and attribution, and may end up further complicating the work of both ESAs and the new body.

⁴ Article 31(2).

⁵ Article 31(3).

⁶ Article 35 (4) reflected further in Articles 36(1) (d) and 37 (2) respectively.

⁷ Article 37(1).

⁸ Article 37(5).

Only EU Agencies are accountable before the European Institutions: The EP also proposes that the yearly report referred to in Article 29 (7) to be presented to the European Parliament, the Council and the Commission (on the application of the Oversight) would not be presented by the ESAs but by the Joint Oversight Body. In the case where the new body would still be considered as a sub-body of the three ESAs, such substitution appears to be inaccurate. The subject of the obligation should be an ESA since the ultimate legal and political accountability [towards the Union institutions] belongs to the ESAs, in their quality of Union Agencies, not to their internal structures, however shaped. This reflects well-established principles of responsibility and accountability of public authorities and as such explicitly featured in Article 3 of the respective ESAs regulations. The latter state that the Authorities referred to in points (a) to (d) of Article 2(2) of the respective [ESAs] regulations - the European Systemic Risk Board for the purposes of those Regulations and EBA, ESMA and EIOPA respectively - shall be accountable to the European Parliament and to the Council.

Amendment proposals to increase coordination between ESAs: Against this background, and looking at some of the amendments of the Council and the EP in relation to the participation of the ESAs we believe that the following elements could be used to address the EP concerns. There could be a reinforced role of the ESAs in the Oversight not only through the participation of ESAs in the Oversight Forum (foreseen in the Commission proposal) but also through participation of ESA's staff in the joint examination teams (as per amendments tabled). In this regard the amendments explain that the members of the joint examination team (hence also ESA's staff) shall join the preparation and execution of the Oversight activities. Also, if the Lead Overseer, assisted by the joint examination team (hence also ESA's staff) is tasked to assess compliance with the recommendations and inform the competent authorities of the financial entities using that critical ICT third party service provider of the result of such assessment, this amendment equally contributes to increasing the hands-on and primary involvement of the two remaining ESAs in the day-to-day Oversight and post-inspections work.

The Council also mandates Level 2 acts in Article 36 (1) (ca) DORA for specifying further the criteria for determining the composition of the joint examination team established for each critical ICT third-party service provider pursuant to Article 35(2) DORA with a view to ensure a balanced participation of “staff members from the Lead Overseer and from relevant competent authorities, appointed on the basis of their knowledge, skills and experience in ICT and operational risk”. This could be further amended by enlarging the aim of ensuring balanced participation also to the (other) ESAs staff (not only the Lead Overseer’s staff).

The representation of ESAs’ staff in the Oversight Forum (Commission proposal) and in the joint examination team (Council and EP amendment’s) would, in our views, enable effective cross-sectoral convergence and allow the Lead Overseer to take into account any sector perspectives and expertise from the remaining two ESAs.

Annex

ESAs’ involvement in the Oversight framework⁹

Areas of participation or involvement of the other two ESAs (when not designated as Lead Overseer)	COM proposal	EP Amendments	COUNCIL Amendments

⁹ Elements in the Commission proposal highlighted in orange, co-legislators’ amendments highlighted in blue.

Areas of participation or involvement of the other two ESAs (when not designated as Lead Overseer)	COM proposal	EP Amendments	COUNCIL Amendments
<p>Participation in the Oversight Forum</p> <p>Article 29(4)</p> <p>Line 520</p>	<p>Chairpersons of the ESAs</p> <p>+</p> <p>Executive Directors of each ESA as observers</p>	<p>Executive Directors of the ESAs</p> <p>+</p> <p>One high-level representative from the current staff of the ESAs</p>	<p>Chairpersons of the ESAs who shall be voting members</p> <p>+</p> <p>Executive Directors of each ESA as non-voting observers</p>
<p>Guidelines on Cooperation ESAs - NCAs on Oversight</p> <p>Article 29(5)</p> <p>Line 521</p>	<p>ESAs guidelines for cooperation ESAs - NCAs</p>	<p>-</p> <p>ESAs guidelines for cooperation between the <i>Joint Overseer Body, /Lead Overseer</i> and NCAs</p>	<p>Keeps COM approach</p>
<p>Accountability of the ESAs on the Oversight</p> <p>Article 29 (7)</p> <p>Line 523</p>	<p>ESAs to present yearly to the European Parliament, the Council and the Commission a report on the application of the Oversight</p>	<p>The Joint Oversight Body to present yearly to the European Parliament, the Council and the Commission a report on the application of the Oversight</p>	<p>Keeps COM approach</p>

Areas of participation or involvement of the other two ESAs (when not designated as Lead Overseer)	COM proposal	EP Amendments	COUNCIL Amendments
<p>Participation of the ESAs in the Joint examination team (JET)</p> <p>Article 35 (2)</p> <p>Line 598</p>	<p>Lead Overseer</p> <p>+</p> <p>JET to work under the coordination of a designated ESA staff member ('Lead Overseer coordinator').</p>	<p>Lead Overseer</p> <p>+</p> <p>other ESAs</p>	<p>ESAs</p> <p>+</p> <p>Designated Lead Overseer coordinator</p>
<p>ESAs involvement in the assessment of compliance with recommendations</p> <p>Article 35(5a)</p> <p>Line 603a</p>	-	-	<p>Lead Overseer assisted by the joint examination team (= also the ESAs) to assess compliance with the recommendations</p>
<p>RTS to specify the composition of the JET to ensure a</p>	-	-	<p>Criteria for the composition</p>

Areas of participation or involvement of the other two ESAs (when not designated as Lead Overseer)	COM proposal	EP Amendments	COUNCIL Amendments
<p>balanced participation</p> <p>Article 36(1),point (ca) Line 608</p>	<p>RTS not specifically covering this angle</p>		<p>of JET meant to ensure a balanced participation of staff members from the Lead Overseer and competent authorities</p> <p><i>+ could be further improved to also add</i></p> <p><i>"from the other ESAs"</i></p>