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From:	Presidency
To:	Working Party on Financial Services (Digital Operational Resilience)
Subject:	PRESIDENCY DISCUSSION NOTE - Scope

Working Party on Financial Services
Digital Operational Resilience
(DORA)

Meeting 11 February 2021

Scope

Statutory auditors and audit firms

In accordance with the Commission's proposal, statutory auditors and audit firms are included in the personal scope of DORA and considered "financial entities" for the purpose of the Regulation.

The personal scope was discussed in previous working party (WP) meetings, were Member States (MS) expressed different positions regarding the inclusion of statutory auditors and audit firms. Indeed, some MS expressed their support to the Commission's proposal, while others specifically asked for their exclusion. Some MS also suggested a mid-ground approach, by limiting DORA's scope to certain statutory auditors and audit firms.

MS supporting the maintenance of statutory auditors and audit firms in the scope of DORA pointed out the importance of auditors' functions within the financial sector and the sensitiveness of the information that they often handle.

MS in favour of the exclusion of (all or part of) statutory auditors and audit firms from the scope of DORA, argued that: (i) they are not financial entities; (ii) there is a potential proportionality issue concerning the application of DORA to auditors which are SMEs and (iii) there is also a potential supervision issue, considering the specific framework regarding auditors' supervision and the fact that the authority responsible for supervising auditors is not always the competent authority responsible for financial supervision.

Considering the views expressed by MS, the Presidency sees the following possible ways forward:

Option 1 – Including statutory auditors and audit firms in the personal scope of DORA, as proposed by the Commission.

According to this option, statutory auditors and audit firms would remain in DORA's personal scope and no changes to the proposal would be made in this regard. Statutory auditors and audit firms that are microenterprises would benefit from the exemptions already foreseen in the Commission's proposal for those companies – or of any other that may be introduced– and from the general proportionality criteria introduced throughout DORA.

Option 2 – Excluding statutory auditors and audit firms from the personal scope of DORA.

Should this option be chosen, statutory auditors and audit firms would not be subject to the Regulation and would not have to comply with the requirements established therein.

Option 3 – Limiting the personal scope of DORA to audit firms providing audit services to financial entities falling under the personal scope of DORA.

Should this option be chosen, statutory auditors would be fully excluded from the scope of DORA, and only audit firms that provide services to the financial sector would be captured by DORA's personal scope. This option takes into account their activities (concerning financial and non-financial entities), while enabling a broad scope for DORA that captures all players interconnected with the financial system.

Option 4 – Limiting the personal scope of DORA to audit firms providing audit services to financial entities falling under the personal scope of DORA and that are considered public-interest entities (in accordance with the national transposition rules of Directive 2006/43/EC).

This option would further narrow the personal scope of DORA since statutory auditors would be fully excluded while only audit firms providing audit services to financial entities included in DORA's personal scope and which are deemed public-interest entities under Article 2(13) of Directive 2006/43/CE[1] and the respective national transposition rules – core financial services providers, such as credit institutions and insurance undertakings – would be covered.

It should be taken into account that MS may designate entities other than those explicitly mentioned in Article 2(13) of Directive 2006/43/CE as public-interest entities, for instance entities that are of significant public relevance because of the nature of their business, their size or the number of their employees, in accordance with the same provision. Therefore, more audit firms than those mentioned in the above-mentioned Article 2(13) of Directive 2006/43/CE may fall under DORA's personal scope depending on whether – and to what extent – MS designate other financial entities as public-interest entities.

It should also be noted that such solution may hinder consistency and harmonisation in the application of DORA throughout different MS, as some audit firms may be deemed financial entities for the purposes of DORA in certain MS, while in other MS they would not be subject to the Regulation.

Q.1 Which of the 4 options presented about the inclusion of statutory auditors and audit firms in the personal scope of DORA is MS preferred option?

[1] 'Public-interest entities' means entities governed by the law of a Member State whose transferable securities are admitted to trading on a regulated market of any Member State within the meaning of point 14 of Article 4(1) of Directive 2004/39/EC, credit institutions as defined in point 1 of Article 1of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and insurance undertakings within the meaning of Article 2(1) of Directive 91/674/EEC. Member States may also designate other entities as public interest entities, for instance entities that are of significant public relevance because of the nature of their business, their size or the number of their employees.

Insurance intermediaries, reinsurance intermediaries and ancillary insurance intermediaries

According to Article 2(1)(n) of DORA, insurance intermediaries, reinsurance intermediaries and ancillary insurance intermediaries ("intermediaries"), as defined in Article 2(3) to(5) of Directive (EU) 2016/97 – the Insurance Distribution Directive (IDD) –, are covered by the requirements of DORA.

In previous discussions at WP meetings, some MS questioned whether intermediaries should be excluded from the scope of DORA, while others proposed to restrict the intermediaries to be covered based on proportionality considerations.

In this regard, some MS pointed out that intermediaries have low operational capabilities and are, in many cases, supported both in administrative and technical terms by other financial entities (for example, insurance undertakings or banks). Additionally, it was alleged that the risks to financial stability posed by this type of financial entities are relatively low, as the consequences of an intermediary not being operational for a day or a week are of low risk for insurance contracts' and business' continuity.

MS also recalled that intermediaries are not required to set a system of governance nor bounded by digital resilience obligations under the IDD, unlike other financial entities under their respective sectorial rules.

Q.3 Member States are invited to indicate their preferences among the following options.

Option 1 – Including intermediaries in the personal scope of DORA, as proposed by the Commission.

Option 2 – Invoking the principle of proportionality in the personal scope:

Option 2.1 – by restricting the application of DORA to intermediaries which are not microenterprises, in accordance with Commission recommendation 2003/361/EC[2].

Option 2.2 – by restricting the application of DORA to intermediaries which are not small enterprises, in accordance with Commission recommendation 2003/361/EC[3].

Option 2.3 - Other proportionality criteria deem appropriate by MS.

Option 3 – Removing intermediaries from the personal scope of DORA.

[2] Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

[3] Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.