

Discussion note: Proportionality

1. Sectorial Proportionality

1 – Sectorial approach (Article 14a)

In its fourth partial compromise proposal (PCP4), the Presidency proposed as a compromise, to introduce more proportionality criteria throughout the proposal and increase where appropriate the exemptions for microenterprises. This horizontal approach, which was generally well received by a majority of Member-States (MS) was to be combined with a sectorial approach, under which some financial entities would benefit from a lighter application of DORA, on the grounds that their own sectorial prudential regulation does not fully apply to them. The financial entities which should benefit from this sectorial approach were discussed at the 12 of May CWP and implemented by the Presidency following MS' written comments.

However, some MS considered that a sectorial approach to the principle of proportionality was not necessary, that a horizontal approach should be sufficient, and that the establishment of a specific regime would be a source of legal uncertainty.

The Presidency notes that the establishment of different levels of application is not uncommon in EU financial legislation, and that the sectorial approach tries to mirror that approach. However, the different layers of application of a given legislation can render its interpretation and application less straightforward.

It should also be noted that in the absence of Article 14a the exclusions foreseen in Article 2(3) of the PCP4, the exemptions for microenterprises, as well as the general proportionality criteria along the proposal would still apply.

Q.1 – Could MS accept as a compromise the new Article 14a proposed by the Presidency in relation to small and non-interconnected investment firms, payment institutions exempted by Directive (EU) 2015/2366, credit institution exempted by Directive 2013/36/EU, electronic money institutions exempted by Directive 2009/110/EC and small institutions for occupational retirement provision?

2 – Submitting crowdfunding service providers and crypto-asset providers to Article 14a

As per Article 14a of PCP4, and following the discussion held on the CWP of 12 April, the Presidency proposed to the MS submitting small and non-interconnected investment firms, payment institutions exempted by Directive (EU) 2015/2366, credit institution exempted by Directive 2013/36/EU, electronic money institutions exempted by Directive 2009/110/EC and small institutions for occupational retirement provision to a specific, proportionate ICT risk management framework.

Some MS have pointed out that other entities could also benefit from such sectorial approach on proportionality, such as small crowdfunding services providers or crypto-asset services providers which do not hold clients' money/funds.

Regarding crowdfunding services providers, the Presidency acknowledges that the prudential framework foreseen in the Crowdfunding Regulation for these financial entities is relatively simple and less burdensome than most of the sectorial financial legislation, notably regarding capital requirements.

However, the Presidency also notes that the crowdfunding regulation provides for a unified prudential framework as there is not a derogation depending on the activity or the size of the crowdfunding service provider. Furthermore, the provision of crowdfunding services takes place mostly in a digital environment, as crowdfunding service providers rely on the use of internet-based information systems such as crowdfunding platforms for the provision of their services. ICT risks may, therefore, reveal to be particularly intense, namely for consumers in case of a security breach, requiring them to be properly addressed and potentially justifying a full application of DORA to crowdfunding service providers.

Regarding crypto-asset service providers, it should be noted that the MiCA negotiation is still ongoing. Nevertheless, the Commission's original proposal divides crypto-asset service providers into 3 classes, with different capital requirements depending on the services provided or whether the crypto-asset service provider holds client's funds. Since crypto-asset services share similarities with investment services it could be argued that a similar approach to the one taken for investment firms, could also be followed for crypto-asset service providers, submitting class 1 crypto-asset service providers to Article 14a of DORA.

Nonetheless, as in with crowdfunding services, crypto-asset services are also almost exclusively provided online, which means that they could be seen as suitable targets for cyberattacks. It could also be argued that for this market to develop in the European Union, operational resilience would be of the most importance in order to establish consumer confidence in those services and products.

Q.2.1 – Do MS consider that small¹ crowdfunding service providers should be subject to the new Article 14a?

Q.2.2 –Do MS consider that class 1² crypto-asset service providers which do not hold client funds should be subject to the new Article 14a?

¹ As defined in Article 3(50.4) of DORA.

² Currently defined in Annex IV of MiCA as those with minimum capital requirements of EUR 50,000.

3 - Medium-sized (re)insurance intermediaries (Article 14a)

The inclusion of insurance intermediaries, reinsurance intermediaries and ancillary insurance intermediaries (“intermediaries”) in the scope of the DORA Regulation is a topic on which views of MS have been fairly divided since the beginning of the discussions. On the one hand, some MS would prefer to keep the original proposal of the European Commission to include all intermediaries in the scope of DORA, in some cases without any exemptions, while on the other hand several MS would prefer to totally exclude them from the scope of DORA.

For these reasons, and in order to try to reach a compromise, the Portuguese Presidency has already addressed this issue on two CWP (11/02 and 28/04), in its first partial compromise proposal (where ancillary insurance intermediaries and insurance and reinsurance intermediaries, which are microenterprises are excluded from scope) and in its first global compromise proposal (which extends the exclusion from scope to small insurance and reinsurance intermediaries).

Additionally, in the 12/04 CWP, the application of the principle of proportionality under DORA was also discussed, including both a horizontal approach, that would cover all financial entities under DORA, and a sectorial approach.

Based on comments received by MS on the proposal for horizontal proportionality, the Presidency considers it adequate to ask MS whether an additional layer of proportionality could be introduced regarding medium-sized (re)insurance intermediaries, notably by applying to these entities the regime described under Article 14a of DORA.

For this purpose, enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million would be deemed as medium-sized.

The following table summarises the proposed application of the principle of proportionality to intermediaries.

Criteria	Treatment under DORA
Ancillary insurance intermediaries	Excluded from scope, as per Compromise Proposal I
(Re)insurance intermediaries, which are microenterprises	Excluded from scope, as per Compromise Proposal I
(Re)insurance intermediaries, which are small enterprises	Excluded from scope, as proposed in Global Compromise Proposal I
(Re)insurance intermediaries, which are medium-sized enterprises	Application of the regime foreseen in Article 14a, as proposed in this CWP

The Portuguese Presidency would like to ask MS’ views on the following:

Q.3 - Do MS agree with the proposal to apply the regime foreseen in Article 14a to (re)insurance intermediaries that are medium-sized enterprise³³?

³³ DORA would define a ‘medium-sized enterprise’ as a financial entity which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

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2. Horizontal Proportionality

1 – Exemption for microenterprises and market infrastructures (Article 3(50))

Under the Commission proposal and the PCP4, any financial entity which is a microenterprise can benefit from the exemptions foreseen in DORA.

However, some MS consider that because of their potential systemic relevance to the financial system, their interconnectedness, the cross-border profile of their operations, and the sensitivity of the data that they store, DORA should fully apply to market infrastructures (trading venues, CCPs and CSDs) regardless of their size.

The Presidency recognizes that market infrastructures play a vital role in the financial ecosystem, and therefore, there could be merits in fully applying DORA to those financial entities.

Q.1 – Do MS agree that market infrastructures should not benefit from the exemptions for microenterprises?

2 – Exemption for microenterprises and for financial entities referred to in Article 14a from threat led penetration testing (Article 23(1))

In PCP4, the Presidency proposed to expressly exempt microenterprises and the financial entities referred to in Article 14a from the threat led penetration testing (TLPT) foreseen in Article 23 of DORA.

Some MS expressed concerns regarding this exemption, in particular as to the financial entities referred in Article 14a, which they considered should benefit from such an exemption. Other MS argued that, since national competent authorities must consider the principle of proportionality when selecting the financial entities which should be subject to TLPT, combined with the criteria in which national competent authorities must base their decision, which will be further developed in a RTS that will also consider the principle of proportionality, microenterprises and the financial entities referred in Article 14a would most probably not be selected for TLPT.

The Presidency acknowledges that in light of the criteria foreseen in Article 23(3) of DORA, it does not seem likely that a smaller financial entity, in particular a microenterprise, could be selected by the national competent authority for a TLPT. However, without a clear exemption, that possibility would theoretically exist, and smaller financial entities could be selected to be part of TLPT.

Finally, the Presidency would like to highlight that the approach adopted in this regard will influence the wording of Article 24 coherently.

Q.2 – Regarding Article 23(1) of DORA can MS accept to maintain the exemption for microenterprises and financial entities referred in Article 14a?



Council of the European Union
General Secretariat

**Interinstitutional files:
2020/0266(COD)**

Brussels, 19 May 2021

WK 6704/2021 INIT

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From:	Presidency
To:	Working Party on Financial Services (Digital Operational Resilience)
Subject:	DORA: Presidency discussion note - Proportionality
