Date: March 4th, 2024

EACRA Response to ESAs consultation on DORA RTS on subcontracting ICT services

Dear European Supervisory Authorities,

With reference to your consultation paper JC/2023/67 on Draft Regulatory Technical Standards to specify the elements which a financial entity needs to determine and assess when subcontracting ICT services supporting critical or important functions as mandated by Article 20(5) of Regulation 2022/2554[1], we are pleased to hereby provide the response of our association representing European credit rating agencies registered with ESMA.

Before responding to the questions raised in your consultation paper, we would like to express our great concern with the approach taken in this draft standard regarding subcontracting of ICT services, as it opposes the general principles of subcontracting known in other areas.

For instance, in case of the building industry or in Project finance, the company (or the project owner) contracts with a single general contractor to define the expected service level agreements, the costs and the timing of the construction. Such contracts usually include penalties by the contractor for delayed services or failure to meet other service levels agreed. Such contacts usually allow the contractor to sub-contract elements of the main contract to other entities, the responsibility towards the company remaining with the general contractor (the general contractor usually reflecting the main contract with his sub-contractors on a back-to-back basis in order to ensure that risk and rewards are properly reflected).

In case of this Draft RTS, while sub-contracting by the ICT Third Party Service Provider to ICT sub-contractors is allowed, the financial entity retains the full responsibility[2] and is required to carry out due diligence on all these sub-contracts[3]. This approach therefore results in very

[1] The consultation paper is available as "reference document" on the following page: DORA public consultation on the second batch of policy products - European Union (europa.eu)
[2] See paragraph 8 page 5 of the consultation paper
[3] See paragraph 10 page 5 of the consultation paper

high administrative costs to the financial entity, which may be disproportionate to the risk posed to the financial system as well as to the size and complexity of our Members.

Question 1: Are articles 1 and 2 appropriate and sufficiently clear?

Article 1 on "complexity and risk considerations" provides for a catalogue of criteria to financial entities to assess increased or reduced level of risk steaming from the use of sub-contracted ICT services. While we welcome this catalogue, we would also appreciate if the ESAs define what a "critical or important function" is as this term appears regularly throughout this draft RTS.

Question 2: Is article 3 appropriate and sufficiently clear?

Article 3 on "risk assessment regarding the use of subcontractors" places high due diligence requirements on the financial entity regarding sub-contracting. We doubt that financial entities will be easily able to cope with these expected requirements, especially if the ICT third party service provider is based outside of the European Union. Given that the financial entity has only a contract with the ICT third party service provider and not directly with the sub-contractor, we doubt that smaller financial entities will be able to force these requirements on short notice. Additionally, we are concerned that this RTS is expected to enter into force by January 2025 and that no transition period is foreseen to review the existing contractual relations with current ICT third party service providers.

§ 2 of Article 3 requires financial entities to periodically review their ICT risk assessment. We would welcome a clarification with regard to the expected periodicity. We assume that a yearly review is meant but believe that for smaller financial entities a bi-annual (or event driven[4]) review would be more proportionate.

Question 3: is Article 4 appropriate and sufficiently clear?

Article 4 on "description and conditions under which ICT services supporting a critical or important function may be subcontracted" includes a number of elements which an ICT third party service provider needs to ensure from his sub-contractor before sub-contracting. We consider that this catalogue reflects in essence what a contractor usually does when sub-contacting (expect point I. regarding providing information to relevant competent authorities, but which is meaningful in the context of DORA).

[4] As foreseen for example in Article 7 of this draft RTS.

On the other hand, this article is not really operational in terms of what is eligible for sub-contracting or whether a supervisory authority could oppose the sub-contracting of some functions.

Question 5: Are articles 6 and 7 appropriate and sufficiently clear?

With respect to Article 6 on "material changes to subcontracting arrangements", we note that paragraph 1 includes the notion of a "sufficient advance notice period". We think that this concept provides only for a very vague definition (especially as "what a material change is not defined) and may cause substantial challenges in the implementation and interpretation.

With respect to Article 7 on "termination of contractual arrangements", we find sub-paragraph a as too far reaching at it would result in the termination of the whole contract with an ICT third party service provider while only a sub-contracted element would have posed concerns.

In closing, we have great concerns with this draft RTS as we anticipate numerous problems in enforcing it to Third parties (and the potentially numerous layers of sub-contractors) as the financial entity is not a contracting party of the sub-contractors. Additionally, we assume that US based ICT providers will not necessarily abide to the EU requirements. As a result, we expect that the contracting time (before IT firms uphold to the DORA standards) will increase and that internal processes will become hugely complicated.

We thank you for the opportunity to comment and remain at your full disposal for any clarification or additional information.

About EACRA

The European Association of Credit Rating Agencies (EACRA), set up in November 2009 and registered in Paris, was established to act as a platform for cooperation for EU-based Credit Rating Agencies (CRAs). Our mission is to support and facilitate the compliance of CRAs with regulatory requirements through effective communication, cross-border know how, and the promotion of best practices. In addition, EACRA seeks to promote Credit Ratings and the interests of CRAs across Europe, as well as enhance the financial community and general public's understanding of Credit Ratings.