

FESE note on the scope of ICT services under DORA

16th September 2024

The Digital Operational Resilience Act (DORA) aims to strengthen the resilience of financial entities against ICT-related incidents. FESE members are currently intensely implementing the obligations prescribed by DORA and have appreciated the recent rollout of a dry-run exercise organised by the ESAs on the registers for information ([here](#)). In this context, it became apparent both to financial market participants and the European Supervisory Authorities (ESAs) that clarification on key concepts under DORA is needed to ensure effective implementation and a smooth transition towards the application date.

Given the current uncertainty on the definition of ICT services under DORA, financial entities and ICT third-party service providers will need to conclude on a bilateral basis, leading to inefficiency and inconsistency of application. FESE urges the European Commission and the ESAs to provide clear criteria for defining the scope of the ICT services, with the key suggestions outlined below.

Key suggestions:

- FESE urges the ESAs to clarify in a formally adopted Q&A document that regulated financial services are not ICT services under DORA (as previously stated in Q74/75 in the ESAs dry-run exercise FAQs). FESE also suggests excluding from the scope of DORA activities undertaken by financial entities to support the regulated financial services.
- FESE underlines the need for clear criteria to define the scope of ICT services listed in Annex III of the draft ITS on the standard templates for the register of information ([here](#)) to ensure that DORA captures only relevant ICT services.
- Non-regulated services of financial entities should fall under the definition of ICT services only if the ICT component is the main characteristic of the provided services (i.e. limited to the provision of an IT service). For the identification of ICT services, FESE suggests a decision tree approach as outlined in Figure 1.
- It is necessary to provide guidance on how financial entities can assess on a case-by-case basis whether the ICT services they receive support critical or important functions for the purposes of Article 29 of DORA.
- FESE welcomes supervisory guidance regarding the exercise of access, inspection, and audit rights between financial entities as specified in Article 30(3)(e) of DORA.

1. Exclusion of regulated financial services from the scope of the term “ICT services” under DORA

All FESE Members are in the scope of DORA, as they are trading venues and, therefore, financial entities within the meaning of Article 2 of DORA. If trading venues receive ICT services from ICT third-party service providers, the requirements of DORA apply. However, Article 31(8) of DORA provides that financial entities can also provide ICT services to other financial entities. In that case, financial entities which act as ICT third-party service providers (ICT TPPs) are exempt from the Oversight Framework of critical ICT third-party service providers (Chapter V, Section II of DORA).

Trading venues provide several regulated financial services such as trading and investment services, provision of market data and risk management. These services are based on and supported by ICT systems. However, the main characteristic of these services remains under the remit of regulated financial services.

The services mentioned in the DORA Level 1 text (such as Article 3(21), Recitals 63 and 79) and Annex III of the ITS on the register of information are all services in which the ICT component is the main characteristic of the respective service (such as cloud computing services, software, data analytics and data service centres). Therefore, it is our understanding that ICT services within the meaning of Article 3(21) of DORA are generally services in which the main characteristic is the provision of an ICT service. On the other hand, regulated financial services, which primarily aim to achieve financial objectives and are merely provided by means of ICT or include some ICT elements, are not classified as ICT services within the meaning of DORA.

In the FAQ document on the DORA 2024 Dry Run exercise, the ESAs clarified that the definition of “ICT services” in Article 3(21) DORA intentionally has a broad scope to ensure capturing a broad range of “digital and data services provided through ICT systems.”¹ In the initial version of the FAQ document, the ESAs explained that the assessments should be without prejudice to sectoral regulations applicable to regulated financial services and if a financial entity is “*authorised/licenced/registered as a financial entity to deliver a service, such service is, therefore, a regulated financial service and not an ICT service*” under DORA.² The FAQ was then updated on 29th July 2024 stating that the ESAs will provide a clear legal interpretation on this question via a formal Q&A document.³

Considering the existing regulatory mechanisms in sectoral legislation, FESE believes that it is outside of the DORA remit to introduce separate and potentially duplicative regulatory requirements about regulated and ancillary activities that may involve an ICT component, but which are provided by trading venues as services connected to their regulated activities.

In line with the initial ESAs clarifications, trading venues’ services should not be considered ICT services under DORA as they are regulated financial services. **FESE Members urge the ESAs to maintain their stance that regulated financial services are not ICT services and restate this position in a formally adopted Q&A document.**

2. Non-regulated ICT services under DORA

Considering the wide definition of ICT services in Article 3(21) of DORA, it could be challenging to classify services (other than regulated financial services) if these contain at least some ICT component.

The final report on the draft ITS on the register of information introduced uncertainty with the list of ICT services in Annex III. Trading venues provide services that include an ICT element. Following the broad descriptions of the services in Annex III (e.g., 11. Network infrastructure; description: Provision of network infrastructure), certain financial entities are questioning whether some of their services could fall under the description of the ICT services in Annex III. Therefore, it would be necessary **to provide clear criteria for defining the scope of the ICT services to ensure that only relevant ICT services are captured by DORA.**

¹ Q74 & Q75 of the FAQ on the DORA 2024 Dry Run exercise on reporting of registers of information, the initial version [here](#), and the updated version as of 29th July 2024 [here](#).

² Ibid.

³ Ibid.

From FESE’s perspective, the non-regulated services of financial entities should fall under the definition of ICT services **only if the ICT component is the main characteristic of such services (i.e. limited to the provision of an IT service)**. Where the service is merely carried out employing IT, the service should remain out of scope.

FESE suggests incorporating a **decision tree approach** where a service is firstly assessed on whether it is a regulated service or not. As explained above, regulated services should be excluded from the definition of ICT services. This also includes ancillary services that support the offering of regulated financial services. In case such service is not regulated, as the second step, it should be assessed whether the ICT component of the service is prevailing over its other features.

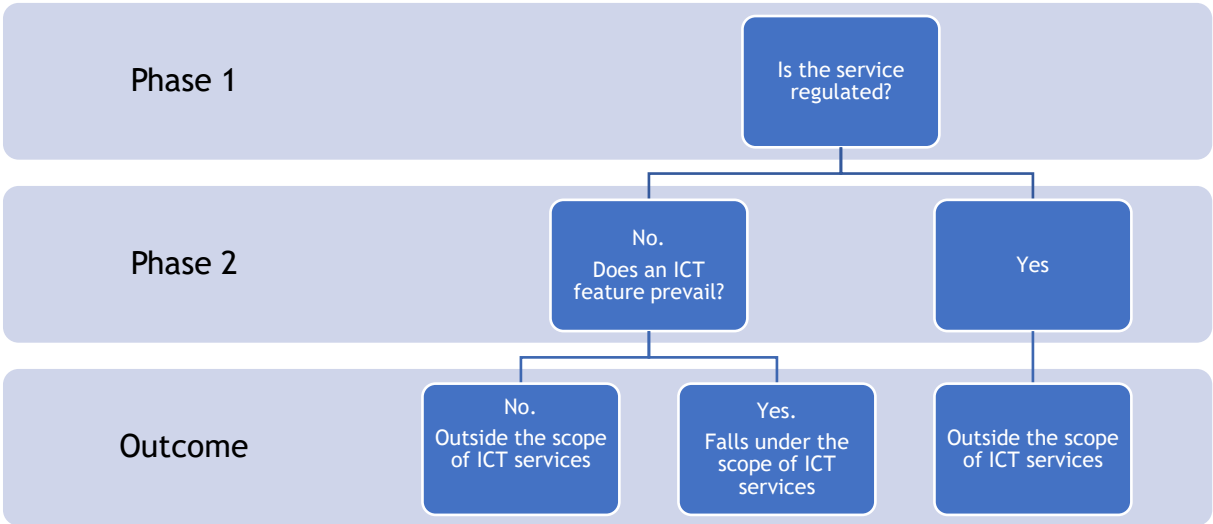


Figure 1: Proposed decision tree approach to define ICT services under DORA

3. Request for safeguards to protect security and confidentiality

If non-regulated services provided by financial entities to other regulated financial entities are classified as an ICT service and such service is instrumental to the provision of regulated services, then the application of risk management requirements should be carefully calibrated considering the “regulated status” of the involved parties.

FESE encourages the ESAs to consider the implications of certain contractual provisions as they relate to entities such as trading venues. If an ICT service is classified as supporting critical or important functions by the financial entity receiving the ICT service, the contractual arrangements of the use of this service would include the right of the financial entity receiving the ICT service to monitor the performance of ICT TPPs that would include “unrestricted rights of access, inspection and audit by the financial entity” (Article 30(3)(e) of DORA). In the specific case that both the ICT third-party service provider and the receiver of the ICT service are financial entities, we believe that the rights of access between the receiver and provider could potentially disrupt the functioning of and the provision of financial services.

Therefore, considering the proportionality principle in Article 4 of DORA (also referenced in Article 28(1)(b) of DORA), there is a need to appropriately safeguard financial entities providing ICT services to other financial entities against unrestricted access rights not to disrupt the functioning of the regulated financial service nor compromise their security and confidentiality. **We would welcome supervisory guidance concerning the exercise of access, inspections, and audit rights between financial entities**, in particular when the ICT provider is a market infrastructure as they play an important role in the financial sector. It is also necessary to provide **guidance on how financial entities assess on a case-by-case**

basis whether the ICT services they receive support critical or important functions for the purposes of Article 29 of DORA in order to avoid arbitrary outcomes.

4. Conclusion

Regulated financial services should not be classified as ICT services under DORA. Activities undertaken by regulated financial entities to support the offering of regulated financial services should also be outside of the DORA remit.

As regards the non-regulated services, we understand that not every service which has an ICT component (automatically) satisfies the definition of “ICT service”. The non-regulated services of financial entities should fall under the definition of ICT services only if the ICT component is the main characteristic of such services. This distinction is crucial to avoid unnecessary regulatory burdens that would be contrary to the proportionality principle. In this regard, it would be necessary to provide further clarifications on the scope of ICT services, in particular in Annex III in the ITS on the register of information.

Lastly, if a non-regulated service provided by a financial entity to another financial entity is classified as an ICT service and such a service is instrumental to the provision of a regulated service then the application of risk management requirements should be carefully calibrated considering the proportionality principle and the regulated status of the involved parties.