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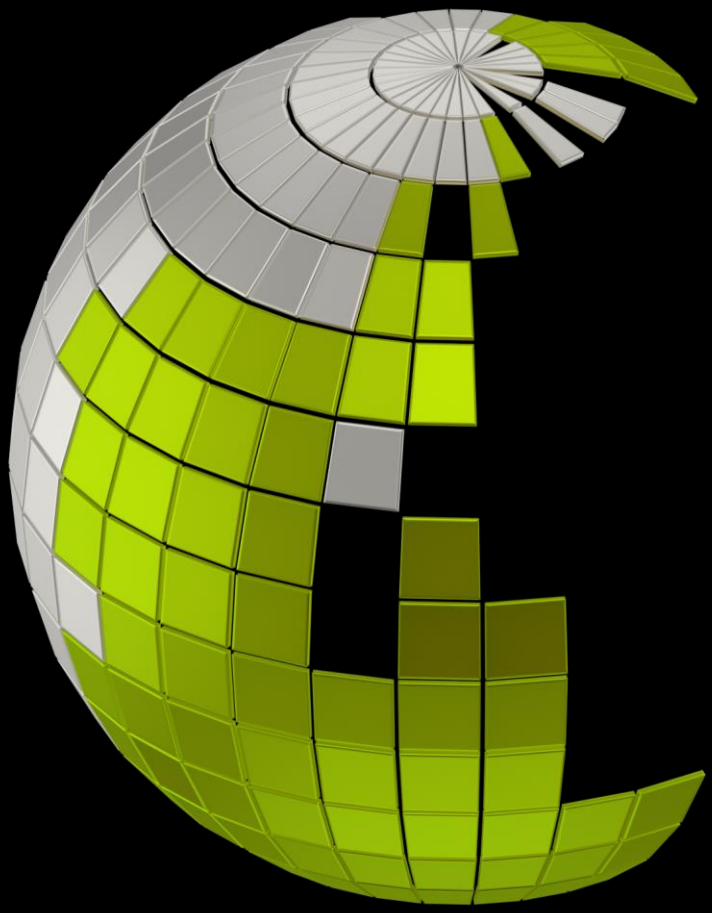
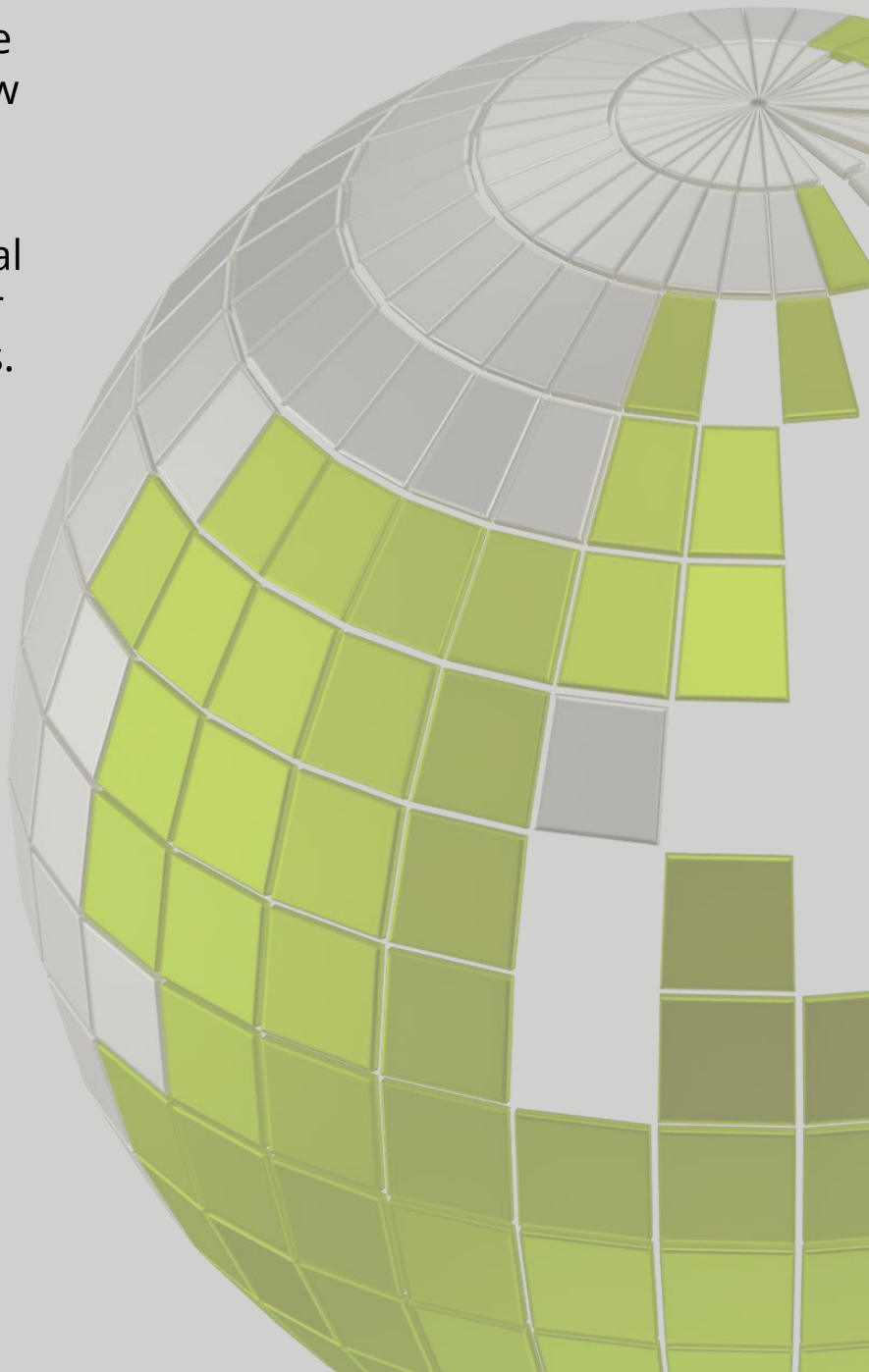


DORA
Getting your contracts ready

July 2023

Now that the European Union's Digital Operational Resilience Act ("DORA") has been adopted by the Council of the European Union and the European Supervisory Authorities have begun the process of developing the relevant underlying technical standards, UK companies who provide financial services into the EU will be looking to understand how DORA could impact them.

This article provides an overview of the contractual implications DORA has for UK financial services firms.



Background

DORA is a wide ranging piece of legislation, aimed at increasing the resilience of the EU's financial services sector by ensuring firms are able to withstand, respond to, and recover from, all types of information and communications technology ("ICT") related disruptions and threats.

It was initially proposed in September 2020, as part of a broader package of measures which also address digital finance, markets in crypto-assets and proposals regarding uses of distributed ledger technology.

A key part of DORA is the requirement for specific contractual terms to be included in each agreement with an ICT supplier. The requirements will be familiar to those working within the financial services sector, as similar requirements exist in relation to outsourcings by UK regulated firms, as set out in various guidance and regulation including:

- the European Banking Authority 'Guidelines on outsourcing arrangements' ("EBA Outsourcing Guidelines"), which the FCA requires banks, building societies, IFPRU investment firms, payment institutions and e-money institutions to comply with; and
- the PRA's Supervisory Statement SS2/21 on 'Outsourcing and third party risk management', ("PRA Requirements") which applies to the firms the PRA regulates.

Following the adoption of DORA in November 2022, UK firms that are also subject to EU regulation, because they provide regulated services within the EU, now have until 16 January 2025 to ensure they meet the latest contractual requirements.

Outside outsourcing

A key difference between the requirements DORA imposes on contracts and the position set out in the EBA Outsourcing Guidelines and the PRA Requirements is that DORA applies to contracts for all "ICT services", not only to outsourcings. ICT services is defined very broadly in DORA, as:

> *"digital and data services provided through ICT systems to one or more internal or external users on an ongoing basis, including hardware as a service and hardware services which includes the provision of technical support via software or firmware updates by the hardware provider, excluding traditional analogue telephone services."*

Whereas outsourcings are defined in the EBA Outsourcing Guidelines and PRA Requirements as activities that would be undertaken by the relevant financial institution if it was not procuring the service from a supplier, ICT services under DORA has no such limitation.

As such, impacted UK institutions are likely to need to revise contracts which have previously been considered to fall outside the regulatory requirements applicable in the UK, because they are not "outsourcings".

Critical and important functions

As with the EBA Outsourcing Guidelines and PRA Requirements, there are two levels of contractual requirements under DORA. One applies to all contracts for ICT services, and the other to contracts for ICT services which are also "critical or important functions". This is defined in DORA as:

> *a function, the disruption of which would materially impair the financial performance of a financial entity, or the soundness or continuity of its services and activities, or the discontinued, defective or failed performance of that function would materially impair the continuing compliance of a financial entity with the conditions and obligations of its authorisation, or with its other obligations under applicable financial services law.*

Whilst very similar to the definition of "material outsourcing" used in the PRA Requirements and the definition of "critical or important functions" in the EBA Outsourcing Guidelines, the terms are not identical. Firms will need to verify whether their existing categorisations capture all of the ICT contracts which are for critical or important functions under DORA, to ensure that the correct contractual terms are included.

Mandatory contractual terms

As with the EBA Outsourcing Guidelines and the PRA Requirements, DORA does not set out full form clauses to be copied into all contracts, but instead sets out elements the contract must address.

Whilst some of these are terms which would typically be included in any properly drafted ICT contract, such as requiring a full description of the services, or identifying whether sub-contracting is permitted, others may not be in supplier's standard terms or in regulated firm's templates. These include:

- requirements that the ICT service provider deliver assistance at no cost, or a cost which is determined or estimated in advance (DORA uses the Latin phrase "ex ante", leaving the exact requirement open to interpretation), when an ICT incident related to the ICT service occurs;
- conditions for the supplier to participate in the relevant firm's ICT security awareness programmes and digital operational resilience training; and
- for critical and important functions, requirements that the service provider participate and fully cooperate in the financial entity's threat-led penetration testing, which is a mandatory DORA requirement.

Whilst many of the topics covered by DORA's requirements will be familiar to organisations which have been through the exercise of updating their contracts in relation to the EBA Outsourcing Guidelines and/or the PRA Requirements in the past few years, DORA's requirements are sufficiently different that all ICT contracts will need to be reviewed to ensure compliance with DORA.

Other terms necessary for compliance

Whilst the mandatory contractual terms imposed in the EBA Outsourcing Guidelines, PRA Requirements and now DORA are the primary focus of most contractual remediation exercises, a point some organisations miss is that other requirements of DORA may be best addressed contractually.

One example is exit. Separately from requiring mandatory clauses relating to exit strategies in contracts for critical and important functions, DORA requires that firms must be able to exit all contracts without:

- disruption to their business activities;
- limiting compliance with regulatory requirements; and
- detriment to the continuity and quality of services provided to clients,

and exit plans must be comprehensive, documented and sufficiently tested and reviewed periodically. Many firms may need the support of their suppliers to meet this requirement and would be well served by including an additional contractual obligation to this effect.

Firms should ensure they understand the full implications of DORA for their ICT contracts before starting the amendment and negotiation process.

Stepping towards DORA compliance

There are clear steps a UK firm impacted by the DORA contractual requirements should now take:

1. Identify all contracts for ICT services.

2. Analyse those contracts and separate into two categories: (1) ICT contracts for critical or important functions; and (2) all other contracts for ICT services.

3. Identify amendments required to align each contract with the applicable mandatory DORA requirements and any additional changes needed to enable the firm's compliance with other aspects of DORA.

4. Engage with suppliers to seek to agree necessary variations.

5. Where suppliers are not willing or able to agree to mandatory provisions, arrange for alternative services.

6. Update templates and playbooks to ensure all future contracts entered into comply with the relevant DORA requirements.

Contacts

Deloitte Legal's expertise in advising on the contractual implications of regulatory changes, combined with our legal managed services capabilities, enables us to provide unique solutions to contractual re-papering exercises, which take advantage of the latest technologies to drive speed, efficiency and accuracy of outcome. If you would like to discuss, please get in touch with us.

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