

PUBLIC CONSULTATION  
DRAFT ECB SSM FRAMEWORK REGULATION  
**TEMPLATE FOR COMMENTS**

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Please separate your comments per issue, citing the relevant article of the draft Framework Regulation where appropriate and indicating whether you are proposing an amendment, clarification or a deletion. If you require more space for your comments, please copy page 2.



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**TEMPLATE FOR COMMENTS**

Name	Dutch Banking Association (comments part 1)	Country	Netherlands
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**COMMENTS ON THE DRAFT ECB SSM FRAMEWORK REGULATION**

Issue	Article	Comment	Concise statement why your comment should be taken on board
In general, the FR can only be understood in correlation with the CRD, CRR and BRRD, as well as other regulations. It should be a stand-alone text.		Clarification	The FR would be most effective and practical if it could be ‘used’ as a standalone text. Having to consult a number of legal frameworks before being able to assess which authority is competent in a specific case and which authority should be addressed for a specific request complicates daily supervision for the authorities and entities involved whereas overlap and questions on competence should be avoided as much as possible.

<p>The FR is ambiguous on which authority (ECB or NCA) is the point of entry for requests of significant supervised entities</p>		<p>Clarification</p>	<p>We note that the introduction of the FR states that ‘the single point of entry for all requests coming from significant supervised entities is, as a rule, the ECB, except as otherwise provided for in the SSM Regulation or in the draft FR’. This rule is repeated in par. 95 (1). The FR only give specifics on how to apply for a license or to notify an intention to acquire a qualifying holding and states that the NCAs are the point of entry for requests in this regard.</p> <ul style="list-style-type: none"> <li>• Can we conclude that – for significant entities - the ECB is the single point of entry for all other requests with respect to the tasks conferred on the ECB in par. 4(1) of the SSM Regulation e.g. requests for vetting of board members or a request to grant a waiver with regard to the remuneration rules?</li> <li>• Would the ECB also be the single point of entry with regard to requests made on the basis of national legislation exercising options provided for in EU Directives or Regulations?</li> <li>• Who has the ultimate say if both ECB and NCA consider themselves the competent authority?</li> </ul> <p>What guarantees do supervised entities have that statutory time limits are adhered to and that they are not caught in between conflicts on competence between ECB and NCAs? Again, there should be no discussion about which supervisory authority – the ECB or the NCA – has the sole responsibility for each of the supervisory tasks as laid down in the SSM Regulation or in national legislation</p>
<p>No legal protection / right of appeal rules</p>		<p>Amendment</p>	<p>The FR does not contain rules on legal protection and rights of appeal. The legal rights and processes on legal protection should be clear and available.</p> <p>It is unclear whether the procedure contained in article 35 of the Statute of the ECB (see below) is also drafted for the supervision of the ECB in accordance with the SSM Regulation and FR. The provisions for due process and the Administrative Board of Review as described in the SSM</p>

			<p>Regulation are not sufficient.</p> <p>An internal procedure with respect to complaints and appeal, as laid down in the Dutch administrative law should be available.</p> <p>Article 35 of the Statute of the ECB states that acts or omissions of the ECB shall be open to review or interpretation by the Court of Justice of the European Union in the cases and under the conditions laid down in the Treaty on the Functioning of the European Union. The ECB may institute proceedings in the cases and under the conditions laid down in the Treaties. Disputes between the ECB, on the one hand, and its creditors, debtors or any other person, on the other, shall be decided upon by the competent national courts, save where jurisdiction has been conferred upon the Court of Justice of the European Union.</p>
No confidentiality rules		Amendment	<p>The FR does not contain rules on confidentiality obligations for both supervisory authorities (including ECB) between themselves as in relation to third parties.</p> <p>Article 27 of the SSM Regulation and article 37 of the Statute of the ECB contain confidentiality obligations. It can be questioned whether these articles will change the current closed-circuit system, which gives the opportunity to have an open communication line between the bank and the supervisory authority, and it is a concern that the absolute guarantee of confidentiality will disappear. The current protection, that the information shared between the bank and the supervisory authorities cannot be made public on request of a third party, has to be preserved.</p> <p>The ECB shall be authorized to exchange information with national or Union authorities and bodies within the limits and conditions set out in the relevant Union Law. It is not clear whether the confidentiality will be protected without restrictions.</p>
Addressee chart /		Clarification	<p>Some rules of the FR are only addressed to the supervisory authorities, others are addressed to the institutions and some are addressed to all parties involved or combinations. It would be helpful to</p>

schedule			institutions when the FR will contain an addendum chart containing an outline which rules are addressed to whom and especially which articles are addressed to institutions (as well)
Distinction between EU and national law		Clarification	<p>In general the FR should provide more clarity on the distinction between EU law, national law based on EU law and ‘pure national law’. Which authority is competent to deal with what segment of the law, which procedural legislation (EU or national) is applicable and who decides in case of overlap or disagreement between the relevant authorities? There should be an explicit paragraph that deals with this topic in order to really achieve the goal of one European supervisory mechanism.</p> <p>Furthermore, the ECB has to respect the national (public and civil) law; this can be clarified in the preamble of the FR.</p>
Reporting formats/filing formats		Clarification	We note it would enhance the consistent application and cost efficient execution of the SSM framework if the ECB would publish forms so that supervised entities are aware of the information to be provided when they file a formal request. Will the ECB publish such forms?
Relation with CRD - Procedure regarding member states in close cooperation		Clarification	<p>It is advisable to clearly address which provision (and the relevant conditions) from an exemption to the CRD.</p> <p>For example, on page 13 it is mentioned that the principle, that the procedural rules governing the right to establishment (of branches) and the exercise of the freedom to provide services specified in the CRD would not be amended, has some exemptions. The exemptions mentioned are (i) pursuant article 17(1) of the SSM the procedures of CRD do not apply in case of an internal passport and (ii) the home/host distinction of the CRD is not applicable in case of a significant supervised group with all entities belonging to the group established in member states. A complete overview of the exceptions are advisable.</p> <p>The distinction between an internal passport and an outbound passport, as detailed on page 13,</p>

			<p>seems not to be identical with the procedures as detailed in Part IX in case of establishing a close cooperation. Do the relevant non-euro Member States in close cooperation not qualify as ‘participating Member States’?</p> <p>For illustration:</p> <p>In case of an internal passport the relevant NCA remains the addressee of the notification subject to an obligation to immediately inform the ECB. The ECB has two months to take a decision. Please be referred to page 13 and article 11 FR. In case of an outbound passport the procedures of the relevant Union law apply and the ECB will be de home authority for significant supervised entities.</p> <p>In article 107 is mentioned that the EBC does not have direct applicable powers over significant supervised entities and groups established in the participating Member State in close cooperation. Does a supervised entity established in a member state in close cooperation not qualify as a participating Member State and therefore the above mentioned procedural rules with regard to internal passport’ and outbound passport’ are not applicable?</p>
Definitions	1	Amendment	<p>A definition of participating member states and SSM would be advisable. A clear definition will create certainty with regard to the status and relevant procedures to be taken into account for the non-Euro area member states in close cooperation.</p> <p>As a result of the decision of the ECB of 31 January 2014 (EBC/2014/5), a decision of the ECB establishing a close cooperation shall be published in the Official Journal and shall apply 14 days after its publication. Do transitional provisions apply in order to prevent last-minute surprises with respect to the relevant procedures re notifications? We propose to include a clause that gives more legal certainty to interested parties that formal requests will always be sent on to the competent authority.</p>

Define all tasks of the ECB in the FR	1	Amendment	Not all tasks of the ECB stemming from the SSM Regulation (par. 4(1)) are dealt with in the FR e.g. requirements to have in place robust governance arrangements and remuneration policies and practices. This leads to confusion about on the division of responsibilities between the NCA's and the ECB on tasks not mentioned in the FR. We propose to clarify how the different tasks of the ECB as mentioned in part. 4(1) of the SSM Regulation are dealt with by the ECB per task. As a result of this, there should be a crystal clear distinction between the supervisory powers of the ECB on the one hand and the relevant NCA on the other hand. This is the only way to prevent for duplication of supervision.
Definition 'relevant Union Law'	2 and throughout the FR	Amendment	The terms 'relevant Union Law' and 'Union law' are used frequently throughout the FR. 'Relevant Union Law' is defined in footnote 23 as 'directly applicable EU Regulations'. The term 'Union Law' is not defined. Making use of container terms such as (relevant) Union Law raises questions of legality and enforcement. We therefore propose to specify which specific paragraph of which EU Regulation is meant or even, preferably, copy the relevant paragraph in the FR. We also propose to clarify what the difference is between 'relevant Union Law' and 'Union Law'. E.g. does implementation of EU directives constitute Union Law?
Joint Supervisory Teams	3	Clarification	It should be clarified how the Joint Supervisory Teams operate and it should be clarified that the Joint Supervisory Teams act in name of and under the responsibility of the ECB exclusively. We assume at least that the staff members from the NCAs will only be able to act on behalf of the ECB and not the NCA.
Branch establishment outside EU	11	Clarification	The Regulation doesn't clarify which authority should be approached and is responsible for the application of the establishment of a branch outside the EU. Since the ECB acts as the home authority for significant supervised entities and the NCA for less significant entities in respect of outbound passports to non-participating Member States, we consider it logical that entities should file requests for passports outside of the EU also with either the ECB (significant entities) or the

			NCA (less significant entities) but clarification on this topic is needed.
Editorial suggestion	11	Amendment	Subsection 1 and 3 relate to significant entities and subsection 2 and 4 to less significant entities. It would be helpful when the order can be changed in the following order: subsection 1, 3, 2, 4, 5.
Notification towards institution	11(4)/12(2)	Clarification	Should the institution itself not also be notified?
Duty of transfer of requests	21	Amendment	<p>Since the division of tasks and competences between the ECB as supervisor and the NCAs is not always clear, we propose to include a clause that gives more legal certainty to interested parties that formal requests will always be sent on to the competent authority. The clause is standard practice in Dutch administrative law and is effective if the law is not unequivocal. Authorities that receive a request that should have been sent to another administrative body are obliged by law to send on the request to the competent administrative body and inform the applicant that the request was forwarded and to whom. We propose that forwarding the request and simultaneously informing the applicant of the forwarding is to be done within 2 working days. Forwarding within 2 working days could be considered an acceptable delay, if forwarding would take longer, this would be to the detriment of the applicant.</p> <p>Suggestion for amendment article 21a new:</p> <ol style="list-style-type: none"> <li>1. An administrative authority (NDA/NCA/ECB/FSA) shall send documents which manifestly come within the competence of another administrative authority to such authority without delay, while simultaneously informing the sender.</li> <li>2. An administrative authority shall return to the sender as soon as possible documents which are not intended for it and are also not passed on to another administrative authority.</li> </ol>



Language regime	23-24	Amendment	<p>For practical and general communications English can very well be the general language. However, institutions should always have the right to communicate in their own language.</p> <p>There should not be any responsibility or pressure on institutions to be obliged to communicate in English or any other language, nor to translate and/or transform existing and elder internal documents and internal procedures into English or any other language. Any communications between the ECB and the NCAs with respect to a certain institution should, as a rule, also be in the official language of the MS in which the institution has its head.</p>
Administrative Board of Review	25	Amendment	We suggest to include a definition of Administrative Board of Review in the FR.
Lack of legal certainty	29(3)	Amendment	It is stated in paragraph 3 that the ECB may set the time limits. This will create legal uncertainty. The ECB should not have discretionaire powers to set the time limits. This paragraph should be adjusted to provide clear time limits.
Right to be heard	31	Amendment	A timeframe of two weeks (or three days in case the ECB deems necessary) is much too short to for entities to respond and seems to be practical impossible taking into consideration the CRD timeframes.
Technical means	32(5) (a)	Amendment	Current wording can be outdated in near future. Suggestion to rephrase: “by means of any generally acceptable electronic date storage device.”
Information sharing with representative	35(2)	Amendment	This article is too restrictive. the ECB should send its supervisory decision to the representative ánd the institution itself.
Reporting of breaches	36-38	Amendment	We welcome rules on the reporting of breaches. The rules should however be complemented with safeguards against improper use and exploitation of these rules.

Adjustment of criteria for size	52(1)	Amendment	<p>legal separation is not mentioned in this article as one of the options as a change in circumstances. this option should be inserted into the paragraph</p>
Right of appeal	75	Clarification	<p>The FR should clearly state how an entity can appeal against a decision of the supervisor. Is the assumption correct that decisions based on the CRD can be challenged before national courts and that the CRR can be challenged before European Court? This should be clarified in the FR.</p> <p>The notification of an application for an authorization to take up the business of a credit institution shall be assessed by the NCA considering the conditions laid down in the relevant national law. A rejection of the application seems to qualify as a decision of a NCA, taking account of Article 88 (3)(b) which refers to 'an NCA decision'. Consequently, do the procedural rules laid down in national law apply to this decision?</p> <p>Can a NCA still make a supervisory decision or is each decision of a NCA per definition a decision of the ECB? Can a decision of the NCA be challenged before national courts or does it qualify as a decision under the responsibility of the ECB and subject to the European procedures?</p>
ECB's assessment of applications and hearing of applicants	77	Clarification	<p>The ECB shall assess the application on the basis of the conditions for authorization laid down in the relevant Union law. This assessment will be made after the drafting of the authorisation decision by the NCA. Would it not be advisable to make an assessment of the conditions of Union law by the NCA as well before the NCA will draft an authorisation decision?</p> <p>Is it possible to address the specific conditions in accordance with relevant Union law which are relevant in addition to national law?</p> <p>With respect to the right to be heard: See comments on article 31.</p> <p>The maximum period for deciding on an application may be extended by the ECB in 'duly justified cases' in accordance with Article 14(3) of the SSM Regulation. What are 'duly justified</p>

			<p>cases’?</p> <p>The extension is possible for the same period of 10 working days, in which timeframe the applicant has to comment in writing. This timeframe for comments in writing is too short for applicants.</p> <p>For clarification reasons we suggest that the extension of the timeframe has to be informed by the ECB as soon as possible, but within the period of ten working days as mentioned in Article 14(3).</p>
Right to be heard	82/83	Clarification	The exception to the right to be heard seems more a rule than an exception when reading article 83(1) where the ECB has the obligation to take a decision without undue delay. An exception to the right to be heard as mentioned in clause 31(4) is unacceptable in the situation of a (draft) decision on the withdrawal of an authorization. The institution should have the unconditional right to be heard.
The term resolution authority is not defined	84	Clarification	What is meant by the national resolution authority? Is this the resolution authority to be appointed on the basis of par. 3 of the BRRD? Please note that the BRRD has not been implemented in national law yet and no national resolution authority therefore exists in several MS.
Notification to NCAs of the acquisition of a qualifying holding	85	Clarification	The NCA will notify the ECB after a ‘complete notification’ of an intention to acquire a qualifying holding instead of ‘notification’ as mentioned in Article 22(1) CRD. Consistency with the clauses in CRD is necessary
Editorial suggestion	85(1)	Amendment	2nd line: “the-that” should be “that“
Time limits	73-85	Clarification	The FR states that the NCA that receives an application for a license or a notification to acquire a qualifying holding shall notify the ECB of the receipt within 15 working days or not later than 5 working days after receipt respectively. Since the procedures with regard to license applications and qualifying holdings are implemented in national law we assume that national procedural time

			limits for handling of these requests are applicable regardless of how much times lapses because of communication between ECB and NCAs. We propose to clarify that the time limits mentioned are not in any way deducted from the normal time limits set by national procedural law.
Assessment of potential acquisitions	86	Clarification	Can you inform us about the ‘relevant assessment period as defined by relevant Union law’? What is the difference with the assessment period pursuant the relevant national law as mentioned in Article 85(2)? The submission of the draft decision by the NCA to the EBC at least 15 working days before the expiry of the relevant assessment period seems to conflict with the timelines as provided in article 31 related to the right to be heard
Exchange of information	92	Amendment	A permanent exchange of information between the ECB and NCA should be institutionally arranged, not only under the circumstances as mentioned in this clause. The ECB has to take into account the information available to NCAs.
We note that par. 93(2) states that to assess the suitability of managers of significant supervised entities, the ECB shall have the supervisory powers that competent authorities have under the relevant Union and national law. This clause is confusing	93(2)/94	Amendment	<p>93(2) states that the ECB shall (also) have the supervisory powers that NCA’s have under national law, in addition to Union law. This suggests an extension of the authority to ‘pure’ national law that isn’t based on EU law.</p> <p>Is this the intended effect of this wording? Is the ECB not only competent with regard to national law that is based on EU law?</p> <p>Art. 93-94 deals with the suitability of management bodies, but no clarification is given on to whom requests for vetting are to be directed.</p> <p>Does this mean that national administrative law will apply? How will ECB ensure a level playing field between countries? Will ECB (or maybe EBA) develop common standards? Will ECB aim for mutual recognition of approvals?</p>

Requests, notifications or applications by significant supervised entities	95	Clarification	It is unclear what is meant by the reference to ‘its ordinary interaction with its NCA’. The significant supervised entity shall address to the ECB all its requests, notifications of applications relating to the exercise of the tasks conferred on the EBC without changing its ordinary interaction with the NCA. How does this relate to the Joint Supervisory Teams?
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