ECB Public consultation: Draft SSM Framework Regulation – Response by RBS plc

Introduction

The Royal Bank of Scotland (RBS) welcomes the European Central Bank's (ECB) draft Single Supervisory Mechanism (SSM) Framework Regulation (the Regulation). We are grateful for the opportunity to provide our thoughts.

RBS has been engaged with the Association for Financial Markets in Europe (AFME) and the European Banking Federation (EBF) on their respective submissions and we broadly support their contents. We would like to make special reference to the EBF's comments in relation to Joint Supervisory Teams (JSTs). In particular, we endorse their remarks on articles 3 and 4. In this paper we focus on additional issues on which we would appreciate the ECB's response.

Our comments comprise, in the first section, general remarks on issues that are not addressed in the Regulation, but which we believe are essential to the functioning of the SSM, and secondly, remarks on specific articles in the current text.

Broadly, we are concerned that, in a number of the Regulation's provisions, there is insufficient detail about the timelines and the criteria to be applied by the ECB in its supervisory processes. Greater clarity is needed in the Framework Regulation to ensure a single consistent regime, in which banks can openly and constructively engage with both the ECB and national competent authorities (NCAs).

We would be happy to discuss any of the comments made in this response and look forward to engaging with the ECB, as it further develops the SSM. In the first instance, any questions should be addressed to:

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General remarks

The issues below are relevant to the Framework, but are not dealt with in the draft Regulation. Consequently we detail these issues first, before commenting on the text of the Regulation as it currently stands.

1. Regulatory statements

Our current regulatory statements on all literature, advertising, communications and websites set out that an RBS entity is regulated by the relevant NCA.

As our entities designated for ECB supervision will continue to be regulated by their relevant NCA for conduct of business matters, and that we expect the NCAs will continue to act on behalf of the ECB for prudential purposes, we anticipate that this would allow our regulatory statements to remain unchanged.

However, if any change to regulatory statements were to be required, given the systems complexities involved in such a wholesale and wide-ranging operational change, we would require a transitional period of 9 to 12 months for complete implementation.

2. Regulatory liaison and reporting

At present, RBS entities have communication channels and contacts, and encryption protocols, agreed with NCAs for the purposes of regulatory liaison and reporting.

Any amendment to the reporting or communication lines would require sufficient advance notice and agreed encryption protocols. If necessary and applicable, training and bedding down of revised online systems would also be required. Previous experience indicates that a time period of 3 to 6 months would typically be required to address such changes from detailed proposition to final implementation.

We note that decisions on this matter will be linked to the establishment of the Joint Supervisory Teams (JSTs), detailed in Articles 3 to 6 of the Regulation, and related to local circumstances. However, we would also expect the ECB to adopt a somewhat consistent approach to the matter and therefore welcome any guidance.

3. NCA-specific requirements

In our view, existing requirements that were exclusively imposed by NCAs, over and above the Single Rulebook's requirements, should be removed by the ECB to ensure consistent supervision at the outset. These include existing and developing reporting requirements and corporate governance arrangements, as well as requirements imposed under license conditions.

If there are to be additional, collateral or conflicting requirements emanating from the new ECB regime, banks will need to quickly understand the transitional arrangements provided to allow for proper impact assessment and gap analysis of the changes. In addition, we would need to discuss the changes and provide feedback where appropriate, and will need to ensure that systems, policies and process changes are implemented and rolled out in a way that is not disruptive to the business.

4. Regulatory fees and levies associated with the prudential functions of the ECB

The scheme and process for the calculation and payment of relevant fees and levies to the ECB (and any reduction in fees to the NCAs) should be discussed and understood in advance of the November commencement date. This is to allow sufficient budgeting and payment arrangements are put in place and to agree a fair distribution of levies under the new model. Consequently, and noting that the Regulation does not currently set out the terms of fair distribution, we urge the ECB to provide further information as soon as is possible.

5. Further clarity over 'significance' criteria for banks that are winding down

Our comments below on articles 70, 71 and 72 reflect the need for more detailed definition of the 'particular circumstances' in which a bank may be classified as 'less significant'. Such provisions could be set out in Title 9.

These circumstances are particularly important in the case of banks that are in the process of winding down, whereby, for example, the overall size of the balance sheet will transition below the EUR 30 billion quantitative threshold. Clarity is needed over whether such a bank will be classified as significant at the outset and, if so, how it might be re-classified over time given its particular circumstances. We note the derogation to the minimum three-year period of supervision set out in article 52(3). However, we believe more information is needed to show how the derogation will be applied.

Comments on the draft Framework Regulation

Issue	Article	Comment	Explanation
Coordination of disputes within JSTs.	4(4)	Amendment	The wording noting that the relevant authorities shall coordinate their participation within the JSTs is general and vague. The question is, how will they coordinate disputes?
Clarify when the ECB is not to be the consolidating supervisor.	8	Amendment	While we do not expect this to be the intention, the current wording of Article 8 implies that the ECB would exercise consolidated supervision where a group was significant on a consolidated basis,

			regardless of whether or not the 'consolidating supervisor' (as determined by Article 111 of Directive 2013/36/EU) was based in a participating member state. Article 8 should be amended to clarify that where a consolidating supervisor is not based in a participating member state, the ECB will not exercise consolidated supervision, but will adopt an approach of sub-consolidation within the SSM area.
Establishment of supervisory colleges.	9(2)	Amendment	The ECB retains the right to establish a college of supervisors with the NCAs of host Member States. This should be revised to include a period of time within which the college will be established.
Grammatical change.	11(1)	Amendment	A comma should be added after the words 'head office' in the first sentence, to avoid misinterpretation.
Notification of exercise of freedom.	12(1)	Amendment	The final sentence in paragraph 1, 'The notification shall be communicated to the NCA', does not make clear who should communicate the notification: the ECB or the supervised entity?
Notification of exercise of freedom.	12(2)	Amendment	The final sentence in paragraph 2, 'The notification shall be communicated to the ECB', does not make clear who should communicate the notification: the NCA or the supervised entity?
Appropriateness test for the right to be heard.	31(1)	Amendment	The wording noting that the ECB may 'if it deems it appropriate' give the parties the opportunity to comment on the facts and objections relevant to the ECB decision in a meeting, is vague and needs to be revised. How will the ECB determine if it is appropriate? The solution to this would be to remove this determination from the ECB's remit.
Power to waive the right to be heard.	31(4)	Amendment	The ECB retains the power to waive the right to be heard "if an urgent decision appears necessary in order to prevent significant damage to the financial system". This wording is very broad and could be seen as a catch-all provision. Further clarification is needed on this point. Our preference would be to narrow the power.
Notification of decisions.	35	Delete	Delete 'orally' as an option. Decisions should always be given formally in writing.
Derogation for the minimum period of being classified as significant.	52(3)	Amendment	More information is required to define the 'exceptional circumstances' referred to in application of the derogation, beyond what is set out in article 52.1.
Criteria for significance.	70, 71, 72	Amendment	Title 9 describes, 'Particular circumstances that may justify the classification of a supervised entity

			as less significant although the criteria for significance are fulfilled'. The criteria for such particular circumstances are set out in the SSM Regulation, article 6(4) paragraphs 2 and 5 ("substantial and non-transitory changes of circumstances"); however these are not defined further but we expect will be strictly interpreted. Further definition of 'particular circumstances' is required along with timelines for assessing and reviewing the existence of particular circumstances. Those circumstances should include at least those set out in article 52(1).
Timing of an authorisation withdrawal decision.	81(1), 83(1)	Amendment	The wording 'without undue delay' should be revised to include a stop date (e.g. 10 days). This will ensure greater certainty as to when a decision will be made – e.g. 'without undue delay and in any event within 10 days of receipt".
Grammatical correction.	85	Deletion	Delete the redundant 'the' in the second line of the article.
Timing of a decision on acquisition.	87	Amendment	As above at articles 81 and 83, a stop date should be given for a decision to be made.
Decision timing.	88(3)	Amendment	Would need to be revised to include the stop-dates as above for articles 81, 83 and 87.
Mechanism for referral for investigation.	124	Amendment	It would be helpful to understand the referral mechanism: who within the ECB or supervisory framework would be responsible for referring to the investigating unit? What will be the trigger for referral? Does the ECB's 'reason to suspect' have a threshold or a specific definition? It is essential that the referral process is consistent and transparent, given it will replace a myriad of existing procedures.
Infringement rulings.	127	Amendment	This suggests that the Supervisory Board can rule that a different infringement has taken place from that which was the subject of the investigating unit's original investigation, or change the factual basis on which the unit reached its conclusion. It is not clear where the boundary is for situations where the Supervision Board can reach a different conclusion without the need for further investigation.
Basis for imposing fines.	128	Amendment	While we acknowledge that there is a provision for imposing fines in the SSM Regulation, basing penalties for legal infringements on the turnover of the parent company could be disproportionate in some circumstances. It implies that two companies

			could be deemed guilty of the same offence, on the same scale, but be differently penalised due to the size of their parent companies. Therefore, we think additional criteria for the use of penalties on a consolidated banking group should be given in the Framework Regulation to ensure that determination of penalties leads to fair, consistent and balanced outcomes.
Publication of decisions about penalties.	132(1)(b)	Amendment	This is potentially open to wide interpretation and should be quantified in some way. Firms should get clearer guidance of the grounds on which the publication of penalties can be prevented, otherwise this potentially opens up the ECB to challenge and gives firms little to base their representations on in the event of concerns arising about genuine financial and reputational damage to the institution.
Reasonableness test for ad hoc requests.	139(1)	Amendment	The wording should be revised to ensure that the request for information and connected time limit (in the last sentence) are subject to a test of reasonableness.
Defining information requests at recurring intervals.	141(1)	Amendment	The final sentence is too broad and there needs to be clarification of the scope of any additional ECB requests.
Right to be heard at on-site investigations.	143	Amendment	This does not include provision for the right to be heard (as under article 143) at an on-site investigation. This should be built into the drafting along with an appropriate time-frame.
Period of notice for an onsite investigation.	145(1)	Amendment	The text provides for a period of 5 days notice for an on-site request. This is inadequate for 'fair notice' and should be extended.
Grounds for waiving the period of notice for an onsite investigation.	145(2)	Amendment	This allows for prior notice to be bypassed 'if the proper conduct and efficiency of the inspection so require'. The wording needs to be clarified as it is too general and would allow 145(1) to be readily disregarded. It also does not take into account the need for preparation and gathering of documents related to the inspection.

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