# EACB position paper
# on ECB draft SSM Framework Regulation

7 March 2014

The EACB would like to provide some general comments in addition to specific proposals for amendment of specific provisions of the draft ECB Framework Regulation (FREG), and for this reason opted not to use the template provided. However, each chapter heading contains a clear indication of provisions of FREG to which the comments refer to.

The EACB is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks" business model. With 4.200 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 160 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.
For further details, please visit http://www.eurocoopbanks.coop/



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The EACB notes that the proposed ECB Framework Regulation (FREG) largely remains in line with the Council Regulation 1024/2013 (SSMR). However, certain elements of the FREG would require precision in order to fulfil its role of providing further clarification of the provisions of SSMR and achieving more legal certainty, cost efficiency and proportionality.

## 1. Scope of FREG (*inter alia* Art 23-24)

Due to the importance of the FREG for the daily supervision, it should be ensured that it cannot be challenged on the grounds of the legal basis. The EACB is however not entirely convinced about the legal basis for some elements of the regulation currently proposed. Art 4.3 of the SSMR mandates the ECB to adopt regulations only to the extent necessary to organise or specify the arrangements of the carrying out of its tasks. We feel, however, that for certain elements included in the proposed FREG the ECB goes beyond its mandate.

This relates for example to the proposed language regime (Art 23-24). The Council Regulation 1/1958 already provides for the language regime applicable to all EU Institutions, including the ECB, stating that the working language is any of the 24 EU official languages. While we understand the need to organise the practicalities of the SSM operation, the FREG must remain in line with the existing EU legal regime.

In addition, although the only exception under the 1958 Regulation to the use of all 24 EU languages can be envisaged in an institution's rules of procedure, nothing can be found on this point in the recently adopted Decision ECB/2014/1.

## 2. FREG objective to clarify SSMR not always achieved (Art 1.a.iii, Art 70, Art 86.2, Art 97.4, Art 98.3.b)

The aim of the FREG is to provide further clarification of the provisions of the SSMR. However, this is not always achieved, as for example demonstrated by the following:

- There is no explanation of what is meant by 'material draft supervisory decisions' referred to in Art 1.a.iii.;
- The definition of 'particular circumstances' in Art 70 of the FREG is *idem per idem*, making reference to 'specific and factual circumstances'. We understand that the intention of the ECB was to maintain this provision open, in order to allow a 'case-by-case' application. However, if no guidance is provided in the legal text at all, the provision will be open to arbitrary and potentially inconsistent interpretation. As a minimum, Par 2 should provide some non-exhaustive list of examples to illustrate the types of situations which might be concerned here;
- There is no definition of a supervisory decision which 'may negatively affect the reputation of the SSM' as referred to in Art 97.4. and 98.3.b, and no further guidance is provided as to how this should be understood. This raises the risk of having no distinct differentiation between the processes of supervision for significant and less significant banks. The underlying rationale of the SSM was to establish central supervision for significant banks which can raise systemic risk, however the provisions of the FREG discussed here seem to run contrary to this objective.

We have also noted some discrepancies between the SSMR, and the FREG. For example, Art 15.2 SSMR refers to a notification of the NCA at least 10 working days before the expiry of the relevant assessment period, while Art 86.2 FREG refers to 15 working days.

## 3. Proportionality (*inter alia* Art 1, Art 70)

According to Recital 17 SSMR, the ECB must have full regard for the diversity of credit institutions, their size and their business models as well as the systemic benefits of diversity in the banking sector of the Union. This principle must be explicitly reflected in Art 1 of the FREG. In addition, proportionality has to be considered with reference to specific aspects, such as the delivery of data, execution of options granted under the CRR (e.g. 24 CRR, 99.6 CRR), or the intensity of the supervision, and should be specifically referenced in the relevant provisions of the FREG.

When carrying out supervision of banking groups classified as significant, the ECB should duly apply proportionality principle and ensure fair involvement of national competent authorities, in line with its responsibilities for solo supervision, supervision on a sub-consolidated basis and on a consolidated basis.

In specific cases, there should be a possibility to exempt smaller credit institutions within the group from direct supervision of the ECB under Art 70, subject to further precision of this article as mentioned above.

Moreover, the ECB should ensure that when exercising its direct supervisory powers vis-à-vis the significant and less-significant credit institutions, the procedures are appropriately calibrated. The EACB recommends that the details of how this can be achieved are reflected in the ECB Manual.

## 4. Joint Supervisory Teams (Art 4, Art 6, Art 18)

Further details on the criteria for determining the size and composition of the JST would be welcome in Art 4 FREG.

Moreover, although the JST coordinator can give instructions to the team members, Art 6 FREG provides no solution for resolving potential disputes within the JSTs. Appropriate conciliation procedures should be established ensuring that the ECB maintains the final say.

Concerning the ECB role as coordinator of the financial conglomerate (Art 18 FREG), it must be ensured that the supplementary character of the supervision of the conglomerate, based on a separate supervision of the banking sector and of the insurance sector, as confirmed in the EBA Regulatory Technical Standard 139 of 21 January 2014, is maintained. Consultation with EIOPA on this point could be considered (e.g. involvement of supervisors of the insurance sector with consulting function within the JST). In addition, appropriate involvement of the NCAs experienced with the supervision of bank driven conglomerates is highly recommended.

## 5. Language regime (Art 23-24)

We appreciate that there is a simple mechanism for opting for communication with the ECB exclusively in the English language. This is highly valuable for banks operating internationally. However, the use of the English language cannot be expected to be the rule. Divesting of the local language would exceed the capacities of the majority of banks or entities inside their groups

The principle safeguarding the possibility for every NCA or bank domiciled in a Member State to communicate with the ECB in its national language envisaged in the SSMR and in the Council Regulation No 1/1958 must be appropriately reflected in the FREG. **Any possibility of using the English language should be totally optional.** However, as it currently stands in the ECB proposal, the NCAs are forced to communicated with the ECB in English, and there is also an indirect pressure put on banks themselves to use the English language by default, which is demonstrated by the following:

- the ECB will seek an explicit agreement on the use of the English language with the significant supervised entities; it must be made clear in the Regulation that the use of the English language is absolutely optional, and that decisions of the supervised entities to use exclusively English language could be made only at group level. For this reason we would propose to amend Par 2 Art 24 as follows:

  *"The ECB, supervised entities and any other legal or natural person individually subject to ECB supervisory procedures may **opt for using** exclusively ~~**use**~~ the English language in their written communication, including with regard to legal acts, if they expressly agree to do so.*
  *If supervised entities decide to **use** ~~**on the use of**~~ exclusively the English language in their communication w the ECB, they shall negotiate an explicit – and revocable at any time – agreement with the competent authority (ECB NCA)".*
- the communication and the legal acts addressed by the ECB to the NCAs in the English language may have a spill over effect on the communication between the NCAs and supervised entities. For example, the obligation to provide a summary in English of any non-NCA document as envisaged in Art 23.5 FREG would mean that any supervised entity may have to provide such a summary to the NCA; the ECB Regulation should make a clear reference to the Council Reg. 1/1958 to regulate the language regime, and Par 5 of Art 23 should be deleted;
- It must be ensured that opting for using the national language only by the supervised entity does not lead to any disadvantage;
- According to Art 24 only decisions of the ECB, but not requests for information, are to be addressed to the supervised entity in any of the EU languages. This is too restrictive, and all communication with the supervised entity should be in any of the EU languages;
- Hearing in own language in oral communication as envisaged in Art 24.2 is limited to the cases where the entity made an appropriate request. This is also too restrictive.

There are also some questions which require clarification, for example, when an agreement to use the English language from the significant credit institution would be expected before it is used. It is important for banks to prepare in time for the applicable language regime. A decision to have contacts primarily in English will require that certain

documents, decisions, minutes, etc. are available in English, and thus the request should be made well in advance.

## 6. Supervisory procedures

At the time when the ECB takes over the direct supervision of the relevant credit institution, the procedures developed in the past by the NCAs should be duly taken into account. In particular, there must be room for a degree of discretional judgment at national level. For example, in case of a merger of two local member banks within the same group, the NCAs developed simplified processes for obtaining the license for the new bank. Those processes and other experience build up over the years should be maintained under the SSM.

## 7. Assessing significance of credit institutions (Title 3)

Size
Since there is no EU legislation on prudential definition of balance sheets, a reference to COREP would be useful in the context of Art 55.

Significance for the economy
The criteria provided in Article 57 would require further precision. Especially, the significance of the supervised entity for specific economic sectors could be problematic for many co-operative banks, traditionally interconnected with agricultural sector. The sectors should be therefore appropriately ranked. In addition, the remaining criteria would benefit from being backed by thresholds and/or figures to ensure more transparency.

Significance of cross border activities
The SSMR provides clearly that for the credit institution to be considered as significant on the basis of significance of its cross border activities, it needs to establish subsidiaries in more than one Member State and its cross border assets or liabilities must represent a significant part of its total assets or liabilities. However, the cumulative effect of those two conditions is not translated into Art 59.1 of the FREG. In addition, the ratio of 10% envisaged in Art 59.2 is far too low. Credit institutions which are located in the border area may be particularly effected. A threshold of 25% would be more appropriate.

## 8. ECB direct supervision of less significant entities

The ECB will be able to assume direct supervision over any institution (Article 6(5)(b)) when it deems it necessary to ensure consistent application of high supervisory standard. Art 67-69 of the FREG provide certain clarification on the factors that need to be taken into account before such a decision is made, as well as on the procedures preparing such decisions. However, as those decisions may have serious practical consequences for the bank concerned, the criteria as currently proposed in the FREG are far too vague. For example, it is not clear what is meant by the fact that the bank is 'close' to meeting one of the criteria.
Please also refer to points 2 and 3 of this paper with reference to Art 70 FREG.

Moreover, the respective bank should be notified already when the procedure for preparing a decision to exercise direct supervision has been launched, and the bank concerned should be given the opportunity of being heard before any such decision is taken.

## 9. Confidentiality (Art 7, Art 32)

Clear references to the confidentiality obligations with regards to the information provided by supervised entities would be suitable, in particular in the context of the involvement of the NCAs and ECBs staff in the JST, the involvement of staff from one NCA in another, as well as the exchange of information between the ECB, NCAs and other parties, and access to files in the ECB procedures. For example, staff from one NCA delegated to another NCA under Art 7 must be subject to at least the same non-disclosure and confidentiality requirements as the staff of the 'host' NCA.

On the other hand, the correspondence between the ECB and the NCA, or between the NCAs, as well as all the internal documentation of the ECB should not be *per se* classified as 'confidential' as is currently envisaged in Art 32. If this is maintained, the right to access files in an ECB supervisory procedure will be undermined as the supervised entity would only be able to see its own documents.

## 10. Stakeholder involvement

We strongly believe that, while ensuring a high degree of confidentiality, the ECB should ensure an "open culture", based on a systematic dialogue with the public, with the banks it supervises and with the banking community as a whole. Such "open culture" should be properly reflected in the FREG.

Article 4.3 of the SSMR confers on the ECB powers to *"adopt guidelines and recommendations, and take decisions subject to and in compliance with the relevant Union law and in particular any legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU."* Moreover, this article states that *"Before adopting a regulation, the ECB shall conduct open public consultations and analyze the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify that urgency."*

We would encourage the ECB to further elaborate on the consultation process in the FREG. Since also guidelines and recommendations can cause important cost, we would urge the ECB to extend those consultation principles also to those acts.

Moreover, we suggest that the FREG also refers to other forms of stakeholder involvement. The members of the EACB are concerned that the supervision of co-operative banks is done in a way that, while ensuring convergence and equal competition, at the same time appropriately reflects the particularities of co-operative banks (e.g. regarding group structures, capital definition, etc.) and their business models. We would recommend that the ECB establishes internal structures as to allow

discussion and an exchange of views to establish best practices in this respect. When doing so, the ECB should give stakeholders the opportunity to get involved in the discussion, be it through a regular dialogue or other forms of exchange.

## 11. Administrative penalties (Art 122.b, Art 132, Art 135)

Full transparency and coordination must be ensured between the ECB and NCAs with reference to their capacities to impose penalties on the less significant credit institutions (Art 122.b and 135 FREG), in order to prevent double penalization for the same breach by both the ECB and NCA.

The publication by the ECB on its website of any decision imposing an administrative pecuniary penalty, as envisaged in Art 132 FREG, should be kept in line with the provisions of Art 68 Directive 2013/36/EU (CRDIV), in particular with regards to the publication of the information on the appeals status, proportionality of publication of certain type of information, etc. Such publication should be limited to maximum 5 years.

## 12. No introduction of additional reporting requirements (Art 100, Art 141)

It is not clear what the annual report envisaged in Art 100 FREG should contain. In any case, it should be clarified that the report should be based on the data already available and should not lead to additional reporting requirements for the supervised entity. Likewise, Art 141 FREG is not specific on what the requests from the ECB could concern. In addition, both those provisions should not indirectly result in an obligation to use IFRS formats. This report shall be exclusively addressed to supervisory authorities. Nevertheless, we are afraid of certain spill-over-effects. This has to be avoided.

## 13. Review of managers' suitability (Art 94)

The provisions of Art 94 FREG seem to be excessively burdensome and disproportionate. While it is understandable that the relevant conduct of persons acting as managers of supervised entities should be reported to the supervisor when it has a *material* impact on their suitability, it cannot mean that any smallest incident, whether in a private or public sphere, would have to be immediately reported ('without delay once these facts or issues are known to the supervised entity'). Certain incidents will become material only when considered on aggregate with other such facts, and the supervised entity should be allowed a degree of flexibility. The EACB would propose to amend this article to ensure that *material* information is reported to the supervisors when relevant:

*"A significant supervised entity shall inform the relevant NCA of any* ***material*** *new facts that may affect an initial assessment of suitability* ~~***or any other issue which could impact on the suitability***~~ *of a manager* ~~***without undue delay once these facts or issues are known to the supervised entity or the relevant manager***~~ ***as soon as their effect on the suitability assessment is suspected****. The relevant NCA shall notify the ECB of such new facts or issues without undue delay".*

## 14. Additional comments

The EACB would also like to offer some brief comments on a couple of issues which are not regulated under the FREG but which however are closely related:

Costs to the banks

Under Art 30 of the SSMR, the ECB shall establish supervisory fees for the banks established in the participating Member States. In this context, we would encourage the ECB to consider the burden of all the other new costs and levies imposed on the banking sector (levies under the national legislation, contributions to the national/EU resolution funds, contributions to the deposit guarantee schemes). When coupled with other prudential requirements, the ability of banks to finance the real economy is already strained by the aggregate costs of these reforms.

Furthermore, the level of supervisory fees must be proportional to the supervisory tasks performed, and therefore be differentiated according to whether it falls under direct or indirect supervision of the ECB, as well as the bank's size. Banks which are not directly supervised by the ECB should be exempted from additional fees paid towards the ECB given that they will continue contributing to the NCAs. Banks under direct ECB supervision should not end up with doubled supervisory costs. Since certain tasks which were in the past carried out by NCAs will now be taken over by the ECB, rather than duplicated, clear rules on how the level of fees should be split between the ECB and the NCA will be necessary.

ECB Manual

As the organizational aspects and procedures which are to be laid out in the ECB guide to the SSM supervisory practices (the so called 'ECB Manual') will have an immediate impact on the supervised banks, the EACB welcomes the decision to make the Manual public, as stipulated on page 6 of the Explanatory Statement. The EACB would recommend that the publication applies to the entire document, and not only parts of it, as it was suggested in the past.

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