

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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COMMENTS ON THE DRAFT ECB SSM FRAMEWORK REGULATION

| Issue | Article | Comment | Concise statement why your comment should be taken on board |
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| Supervisory tasks that have not been conferred on the ECB by the SSM Regulation and that therefore remain within national authorities | 1 | Clarification | The Framework Regulation could provide for the obligation of NCAs to inform the supervised entities regarding the tasks that remain on NCAs e.g. national law requirements. |
| Legal position of the Joint Supervisory | 3 | Clarification | NCA staff when acting as members of the JST are they considered as ECB employees or still NCAs' |

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| Teams' Members | | | staff, since they are acting under ECB coordinators instructios? |
| Modification of NCAs appointments | 4.3 | Clarification | Under what circumstances and conditions may ECB require the modification of the appointments made? |
| Involvement of staff members from other NCAs when it considered "appropriate" in relation to less significant supervised entities | 7 | Clarification | The term "appropriate" should be clarified. Under what circumstances it is determined that a member from another NCA should be involved in the supervisory team of an NCA? For example such "appropriate" condition could constitute: strong cross border activity in other participating member states or interconnectedness with other supervised institutions in other participating member states. |
| Involvement of staff members from other NCAs and their duties. | 7 | Clarification | What will the legal position of other NCAs' staff in the supervisory team of another NCA where they will be involved? Will they have the legal capacity to participate in decision making and issuing of a supervisory decision or initiating supervisory procedures? It is considered doubtful. Will they just be observers contributing with their knowledge the task of supervision? |
| Right of the ECB to instruct NCAs or NDAs to the "extent necessary" to carry out the conferred tasks | 22.1 | Clarification | The term "necessary" should be clarified. What is considered to be "necessary"? Does it mean that for the implementation of this provision the ECB should have no powers similar to these of the relevant NCA or NDA? Should this provision also be activated in the case that the tasks of the ECB can be achieved by the ECB but they can be achieved more effectively with the contribution of the NCA and/or NDA? Does the term "necessary" requires that ECB should first try to carry out the conferred tasks by the use of its powers and only after no result is achieved would ECB be quilified to give instructions to an NCA and/or NDA? |
| Right of the ECB to | 22.1 | Clarification | Does the term "instructions" implies that a supervisory decision would be issued determining the |

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| instruct NCAs or NDAs and the content of the term "instructions" | | | necessity and the content of instructions? Does the term "instructions" refer to the objective or also to the means? Would there be a procedure for the effectiveness of "instructions" to be challenged? |
| Language regime | 24 | Clarification | Article 24 provides for "written communication" and oral hearings. Does it also apply on any other possible case of communication e.g. during the procedure held by the independent investigation unit or during an on-site inspection? |
| Language regime and oral hearings | 24 | Clarification | Why is there no provision for the preparation of minutes of the "oral hearings"? In which language would the minutes be held in case that participants request to be heard not in English? The written minutes could be held in both languages. |
| Time limit for the provision of evidence in ECB supervisory procedures | 29.3 | Amendment | Does the term "may" implies that there is a discretion of the ECB to set, for the parties, a time limit by which evidence could be provided. Considering the importance of the supervisory procedures, a minimum time limit for evidence to be provided should always be set. Furthermore, this time limit should be proportionate to the evidence, the certification of which is needed. The time limit shall be extended upon request, depending on the circumstances of the procedure, upon previous request by the parties. |
| The terms "witnesses" and "experts" in ECB supervisory procedures | 30.1 | Clarification | 1.The terms "witnesses" and "experts" could be given a definition in Article 2 of the SSM Framework Regulation. 2. What are the minimum qualifications required for a person to be considered and allowed to be appointed as an expert? |
| The "witness" in ECB supervisory procedure | 30.4 | Amendment | 1. What are the consequences for not attending a procedure as a witness? Does national law apply? If so, should that be included? 2. Under what circumstances is it possible for a person to be excused for not attending (e.g. sickness). 3. SSM Regulation provides only for the professional secrecy, that it cannot constitute a reason for an exemption? What about other legal reasons for exemption? An |

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| | | | amendment is needed to provide for the aforementioned. |
| The terms "facts" and "objections" | 31.1 | Clarification | 1.The terms "facts" and "objections" could be given a definition in Article 2 of the SSM Framework Regulation. 2. Will parties (26.1) have the right to comment of the legal basis of the decision? |
| The language in which written minutes of a meeting held, in order a party to comment on the facts and objections | 31.2 | Amendment | Specific reference should be made that Article 24 of the SSM Framework Regulation applies accordingly in the case of Article 31.2. The provision should provide that written minutes shall be held both in English and in any other official language of the Union that the party addressed has requested to be heard, in accordance to Article 24.2.d. |
| Supervisory decision addressed without giving the opportunity to the party to comment facts and objections prior to the decision's adoption | 31.4 | Amendment | Article 31.4 should provide when "an urgent decision appears necessary", a spesific reason should given in the decision to omit the party's right to be heard prior to a supervisory decision's adoption. The specific reasons should explain the circumstances due to which it appeared necessary to omit the right to be heard in order to prevent significant damage to the financial system. |
| The parties' access to files in an ECB supervisory procedure | 32.1 | Amendment | Access to files should be limited under conditions. The legal position of the supervised entities in the banking sector its not the same as with that of undertakings under investigation for distortion of competition rules. The supervised entities in the banking sector submit information and reports on an on-going basis and have a kind of day to day communication with the supervision authorities. On the contrary, competition authorities ivestigate other undertakings, only when there are suspicions of competition law infringements. The limited access to the files should be only excused to specific situations (e.g. when the ECB or the independent investigation unit find evidence of facts giving rise to a criminal offence). |

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| ECB's decision to take over a pending supervisory procedure | 48.4 | Clarification | When by derogation to Article 48.3 ECB takes over a pending supervisory procedure, which will be the applicable legal framework? The one provided by SSM Framework Regulation or national law? This is important in terms of the applicant's or addressee's procedural rights. What happens to the actions exercised according to national procedural rights? What happens if the national legal framework was more favorable for the applicant or addressee ? |
| Basis for determining the status of a supervised entity on the basis of size | 51.2 and 51.4 | Clarification | Diffence between 51.2 and 51.4. The reference to Regulation 1606/2002 is omitted in 51.2. |
| The terms "instructions", "requests" and "guidelines" as legal instruments related to supervision in connection with close cooperation | 108.1 | Clarification | The terms should be given a definition in Article 2 of the SSM Framework Regulation. What is a "general" and what is a "specific" instruction? |
| The NCA's liability for any damage resulted from a failure to comply | 108.6 | Clarification | Article 108.6 refers to damage but it not specified to whom the damage is occured? To market participants? To investors? In accordance to what criteria will the damage be estimated? Which law will be applicable? In which jurisdiction? What procedure? Will there be a procedure for review? Is Article 108.6 providing for the damage done to ECB? |
| Administrative penalties under the regime of close | 113.3 | Clarification | 1. Does the NCA in close cooperation have to establish an independent investigation unit in accordance with part X of the SSM Framework Regulation or is the member state in close cooperation obliged to provide for the necessary legal framework in order for the independenet |

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| cooperation | | | <p>investigation unit of the ECB to be able to act in accordance with part X in participating member in close cooperation?</p> <p>2. What procedures apply to the penalties imposed on the ECB's instructions? Since NCAs impose them, then they could be challenged before national Courts, whereas in the case of eurozone participating member states, the procedure to review the decision imposing the penalties is different. Is this creating an unlevel playing field?</p> <p>3. Does Article 137 apply accordingly? Who is collecting the administrative pecuniary penalties?</p> |
| Disagreement with the Supervisory Board's decision and participating member's request to terminate close cooperation | 118.4 | Amendment | <p>There is no road map for the termination of close cooperation. The article should be amended to include a step by step procedure. A simple declaration of request to terminate the close cooperation agreement, with immediate effect, could cause significant and disproportionate damage to the financial system of other participating members. Following the rationale of "publication postponement" of Article 132, such a provision could be also included in this case.</p> |
| Disagreement with an objection of the Governing Council to a Supervisory Boards draft decision. | 119.4 | Amendment | <p>There is no road map for the termination of close cooperation. The article should be amended to include a step by step procedure. A simple declaration of request to terminate the close cooperation agreement, with immediate effect, or temporary suspension, could cause significant and disproportionate damage to the financial system of other participating members. Following the rationale of "publication postponement" of Article 132, such a provision could be also included in this case.</p> |
| Procedural rights upon completion of an investigation and the terms "facts" and | 126.2 | Clarification | <p>The terms should be given a definition in Article 2 of the SSM Framework Regulation in accordance with Article 31.</p> |

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| "objections" | | | |
| Written submissions on the factual results and objections and the term "reasonable time limit" | 126.2 | Amendment | The term "reasonable time limit" may create legal uncertainty. Considering the importance of the procedure for a supervised entity, a specific minimum time limit should be defined along with the right to be extended upon request of the party concerned. The extension should be proportionate to factual results and their complexity. |
| Oral hearing before the the independent investigation unit | 126.3 | Amendment | <p>1. Article 126.3 could refer directly to the provision of Article 24 regarding the language regime of oral hearings before the independent investigation unit.</p> <p>2. Article 126.3 could refer directly to the provision of Article 27 to be applied regarding the representation in the oral hearings before the independent investigation unit. Article 27 provides in a thorough way for the representation of a party during oral hearings.</p> <p>3. Does Article 29 apply accordingly in the procedure before the independent investigation unit?</p> |
| Publication of decisions regarding administrative pecuniary penalties | 132.1 | Amendment | Following the "postponement" rationale of this Article and considering that even in the case of publication on anonymised basis, speculation as to the identity of the supervised entity could create uncertainty and damage to the supervised entity and the financial system, the article could provide for a postponement of publication but without the precondition of estimating the period of time that the adverse circumstances will last and especially estimating that this time period would be "reasonable". The term could create uncertainty. The postponement of publication, during adverse circumstances, may be required to have a longer duration than initially estimated and ECB should have the discretion to decide on the time suitable for the publication. |
| Proceeds from penalties | 137 | Amendment | Since the supervised entities will cover, in accordance with a regulation to be published, the expenses for the supervision, the proceeds from administrative pecuniary penalties imposed could be a contribution to the ESM, in order to ease European tax payers, or the relevant Deposit Guarantee Fund |



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| | | | of the participating member state where the supervised entity is domiciled. |
| Ad-hoc requests for information under Article 10 SSM Regulation | 139.2 | Clarification | Does the obligation to take first into account the information available to NCAs constitute a procedural prerequisite? Would ECB be able to implement Article 139, without first referring to the information available to NCAs? Would ECB have the obligation to specify that the information available to NCAs is not adequate to exercise the tasks conferred? |
| On-site notification without prior notification | 145 | Clarification | Under which circumstances on-site inspection without prior notification could be justified? |
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