

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
Reference to Directive 83/349/EEC	2	Clarification	Article 2 (5) of the Framework Regulation (FR) refers to Article 12 (1) of Directive 83/349/EEC. This directive was replaced by Directive 2013/34 Directive. Therefore, it may be better to refer to Article 22 (7) of Directive 2013/34
Missing definition?	2	Amendment	The definition "less significant supervised entity" (Article 2 (7) FR) refers to two cases: a) "less significant supervised entity in a euro area Member State" and b) "less significant supervised entity in a non-euro area Member State that is a participating Member State. While the first case is defined in Article 2 (8) FR, the second is not yet defined.

Definition of working day	2 (28)	Amendment	<p>The Definition of working day in Article 2 (28) FR refers to a published calendar of ECB. For the sake of clarity the public holidays should either be determined here or in a separate legal act to which the FR refers but not in a mere publication.</p> <p>Further, with regard to notifications (Article 35 FR) it should be stipulated that a notification can occur only on a working day and for this purpose the law applicable at the seat of the recipient determines whether a day is a working day. If this is not the case a notification can occur (e.g. by fax) on a day where the office is closed. If a period for a hearing is shortened to three working days in such a situation a recipient may lose a third of the hearing period.</p>
		Choose one option	
Inconsistency between Articles 2 (24) and (26) on the one side and Article 25 (1) FR on the other side	2, 25	Clarification	<p>The definitions of "ECB supervisory procedure" (Article 2 (24) FR) and "ECB supervisory decision" (Article 2 (26) FR) make clear that Part III of the FR applies also to decisions pursuant to Articles 10 to 13 SSM-Regulation (SSMR).</p> <p>Article 25 FR excludes the application of Part III of the FR in these cases.</p> <p>We think that the procedural guarantees of Part III (right to be heard etc.) shall also apply to decisions under Article 10 to 13 SSMR. Article 25 FR should be amended accordingly.</p>
Appointment of members of joint supervisory teams from NCAs	3	Clarification	<p>It should be clarified in Article 3 (2) FR whether NCAs appoint members to joint supervisory teams on the basis of national law (which might need to establish a legal basis for this) or on the basis of EU law. We think that only the first alternative is in line with the SSMR.</p>
Potential contradiction to Article 17 (1) SSMR	11, 12	Amendment	<p>Article 11 (1) FR relates to the case that a significant supervised entity located in a participating Member State (MS) wants to establish a branch in another participating MS. It determines that the significant supervised entity shall notify its home NCA in accordance with Article 35 (2) CRD IV.</p>

			<p>Article 12 (1) FR establishes a parallel provision in respect of the freedom to provide services. The relevant NCA shall inform the ECB.</p> <p>Article 17 (1) SSMR determines that the procedures set out in relevant Union law in connection with establishing branches or providing cross border services shall apply only for tasks not conferred on the ECB. As the prudential supervision of significant credit institutions is conferred to the ECB it could be argued that Article 11 (1) and 12 (1) FR are not in line with Article 17 (1) SSMR.</p> <p>A solution to this issue might be to require significant credit institutions to provide only an informal information (and not all the documentation envisaged by Article 35 (2) CRD IV) to the ECB in case of the opening of a branch in another participating MS or the start of the activities to provide cross border services in another participating MS respectively.</p>
Reference to CRD IV	11, 12	Clarification	<p>In case of a notification for the establishment of a branch the home supervisor has to provide this notification within three months to the host supervisor, Article 35 Directive 2013/36 (CRD IV). The home supervisor may not forward the notification if it has reason to doubt the adequacy of the administrative structure or the financial situation, Article 35 (3) CRD IV. In case of cross border services the home supervisor has to inform the host supervisor of a notification within one month.</p> <p>According to Article 36 (1) of Directive 2013/36 the supervisory authority of the host MS has two months time to prepare the supervision of a branch and to provide information on the conditions for the activity to the credit institution that wants to open a branch.</p> <p>The CRD IV provides that a branch can start its activities if the host MS supervisor either notifies the credit institution on the conditions under which the branch may operate or does nothing. Cross border services may be started 1 month after the notification.</p> <p>Article 11 (3) FR should clarify that ECB may only take a decision to the contrary in line with the national law implementing Article 35 (3) CRD IV i.e. only if it has reason to doubt the the adequacy</p>

			<p>of the administrative structure or financial situation. ECB should be able to determine both aspects without further information.</p> <p>On a general note, the FR should not refer to provisions of the CRD IV to determine obligations but rather to the relevant national law implementing the relevant provisions of the CRD IV. Only these national provisions are applicable vis-à-vis the credit institutions.</p>
Merely descriptive provisions	11, 12	Clarification	With respect to less significant supervised entities NCA are competent for forwarding the notifications for the opening of a branch or cross border services to the host supervisor. This results from the fact that the SSMR does not transfer these competences to the ECB. Articles 11 (2) and (4) and Article 12 (2)FR are merely descriptive. We suggest to delete them.
Reference to CRD IV	13 to 16	Clarification	It should be clarified that references to the CRD IV means reference to the relevant national law implementing these provisions.
Determining the competent authority	13 (2)	Amendment	It should be stipulated how and in which time frame the relevant NCA and the ECB determine whether the upcoming branch is significant.
Competent authority for supervision of service providers	16	Amendment	<p>As can be derived from the explanatory document to the FR (page 15, II. D. 2.) the ECB shall be the host authority for all credit institutions from non-participating MS providing cross border services.</p> <p>While acknowledging that the wording of Article 4 (2) SSMR could lead to this view, we suggest that the NCAs remain the competent authorities for the supervision of cross border services from non-participating MS.</p> <p>This can be based on Article 4 (2) SSMR as the task are conferred to the ECB only "within the scope of [Article 4] paragraph 1 [SSMR]". As the framework to which Article 4 SSMR refers only relates to credit institutions in participating MS, Article 4 (2) SSMR does contradict the underlying concept of the SSM. The FR should solve this contradiction by determining that the NCAs remain competent</p>

			for the supervision of cross border services from non-participating MS.
Clarification of scope of application	17	Clarification	In Article 17 (1) and (2) FR the words "established in a participating Member State" should be inserted in the first line after the word "entity"
Language Regime	23 (3)	Clarification	It should be clarified in Article 23 (3) (a) to (c) FR that the preparation of a draft decision by an NCA in an official language of the MS of the NCA as provided for in Article 23 (3) (a) to (c) FR, does only apply if the decision has to be addressed in this language to the supervised entity. It should not apply in case the decision to the supervised entity has to be in the English language pursuant to Article 24 (2) FR.
Other language in oral hearings	24 (2)	Clarification	The concept of sufficient advance notice should be clarified. We suggest that a sufficient advance notice is given, if the concerned person has informed the ECB without undue delay after receipt of the invitation to the oral hearing that a language other than the language of the ECB supervisory procedure shall be used.
Language Regime	24 (3)	Clarification	Article 24 (3) FR assumes that in each MS one official language applies: "the official language of the Member State in which each addressee has its head office or domicile". In case of more than one official language it shall be adopted in one of these languages. It should be clarified to which language this refers. The language meant can in our view only be the official language of the relevant MS "used in the relevant proceeding" (eg. the hearing).
Scope of procedural provisions	25 (1)	Amendment	<p>Before commenting the procedural provisions, it has to be acknowledged that ECB established detailed provisions on procedural aspects.</p> <p>It should be made clear that the reference to Article 4 in Article 25 (1) FR is to Article 4 SSMR.</p> <p>The procedural rules should also apply to decisions of ECB relating to the exercise of investigatory</p>

			<p>powers (Article 10 to 13 SSMR = Chapter III Section 1 SSMR).</p> <p>While it can be tried to argue that limiting the procedural rights to procedures under Chapter 3 Section 2 SSMR based on Article 22 (1) SSMR, such argument is not convincing. Also decisions making use of investigatory powers are decisions that may negatively affect the supervised entities, so that the procedural rights should apply.</p>
Scope of procedural provisions	25	Amendment	Article 25 to 35 FR (= Part III Title 2 FR) are limited to supervisory proceedings and thereby to the preparation of decisions (Art. 288 TFEU). ECB may, however, issue also other legal acts vis-à-vis the supervised entities. Also for these cases procedural rules should be established.
Duty to examine facts	28 (1)	Clarification	It should be clarified that ECB shall determine "all facts relevant for adopting a final decision". The current wording could - not intentionally - be misunderstood that the ECB has only to determine the fact supporting its decision.
Obligation to participate	28(3) and 29(2)	Clarification	Article 28(3) and 29 (2) FR contain provisions on the obligation of parties to support ECB in ascertaining the facts of a case. The provisions should be consolidated in one provision.
Scope of the right to be heard	31 (1)	Deletion	The last sentence of Article 31 (1) FR should be deleted. Also in respect of the exercise of investigatory powers a right to be heard has to exist in our view in accordance with the general principle of EU law.
Access to files	32	Amendment	With regard to the access to files two situations should be differentiated: the situation prior to the taking of a supervisory decision and the situation after a supervisory decision was taken. In the first case the exclusion of confidential information from the access is acceptable. After the decision is adopted we do not see a need to keep internal documents of and correspondence between ECB and NCAs confidential.



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			<p>As the access to the file by the concerned party is a fundamental right to protect a party's right, the legitimate interests of third parties should be defined in a narrow manner.</p>
Notification	35	Amendment	<p>According to the recent wording, the hour at which a notification occurs is not of relevance. It should be stipulated that a decision delivered e.g. by fax or courier after 17:00 is only deemed to be received/notified on the following working day.</p> <p>See also comment to Article 2 (28) "working day".</p>
Withdrawal of unlawful decisions and revocation of lawful decisions		Amendment	<p>In order to complete procedural provisions, ECB should add a clause on the withdrawal of unlawful decisions and the revocation of lawful decisions. A wording could be:</p> <p>Article X</p> <p>Withdrawal of an unlawful legal act</p> <p>1. ECB may in accordance with the provisions of this Title 3 decide to withdraw an unlawful legal act which is addressed to one or more supervised entities or other persons which adversely affects the rights of such addressee even after it is no longer appealable in front of the Court of Justice of the European Union.</p> <p>The legal act shall be withdrawn with effect for the future only unless particular circumstances justify a withdrawal with retroactive effect.</p> <p>2. ECB may in accordance with the provisions of this Title 3 decide to withdraw an unlawful legal act which is addressed to one or more supervised entities, national competent authorities or other persons and which is in favour of such addressee even after it is no longer appealable in front of the Court of Justice of the European, if</p> <p>(i) the addressee or addressees obtained the legal act by giving incorrect or incomplete</p>

			<p>information;</p> <p>(ii) the addressee or addressees obtained the legal act by misrepresentation, threat or bribery.</p> <p>The legal act shall be withdrawn with effect for the future only unless particular circumstances justify a withdrawal with retroactive effect.</p> <p>3. This Article does not limit the ability of ECB to adopt legal acts with regard to new factual circumstances deviating from former legal acts.</p> <p>Article X</p> <p>Revocation of a lawful legal act</p> <p>1. ECB may in accordance with the provisions of this Title 3 decide to revoke a lawful legal act which is addressed to one or more supervised entities or other persons and which adversely affects the rights of such addressee even after it is no longer appealable in front of the Court of Justice of the European Union unless a legal act of the like content has to be adopted.</p> <p>ECB may in particular revoke a decision adopted in accordance with [Article 31 (4) of this Regulation] without giving the opportunity to be heard after the opportunity to be heard has been given in accordance with [Article 31 (5) of this Regulation].</p> <p>The legal act shall be withdrawn with effect for the future only, unless particular circumstances justify a withdrawal with retroactive effect.</p> <p>2. ECB may in accordance with the provisions of this Title 3 decide to revoke a lawful legal act which is addressed to one or more supervised entities, national competent authorities or other persons</p>
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Protection for reports of breaches	37(2)	Clarification	The word "personal" should be deleted in order to avoid the misleading impression that only data relating to natural persons are protected. Also data related to involved undertakings must be protected.
Reports in bad faith	37(1)	Amendment	If a report is made in bad faith, and therefore no protected report does exist, ECB should be obliged to inform the affected supervised entity, so that it can protect itself against such bad faith reports (see also Article 23 SSMR at the end).
Treatment of branches	41(3)	Clarification	Taking into account Article 41 (1) FR, Article 41 (3) FR should be clarified by deleting the words: "individually as separate supervised entities". The purpose of Article 41 (3) FR is merely to determine that branch(es) and subsidiaries in one country are not viewed in a combined way (i.e. they are viewed separately) to determine whether significance is given.
Review of status	43 (3)	Amendment	In Article 43 (3) FR it should be added that the ECB is obliged to review the status upon request of a supervised entity.
Notification of status as a significant supervised entity	44(2)	Deletion	The decision whether a supervised entity is significant is of substantial importance for the entity in question. It seems to us that it is not appropriate to deem the notification of this decision to be given by publication in the list of significant supervised entities.

Pending procedures	48	Amendment	<p>The concept of the current clause on pending procedure is to perpetuate the competence of the authority whose competence ends.</p> <p>We are afraid that one may have to switch to a concept in which the authority assuming supervision becomes also competent for pending procedures, but has to continue the proceeding in the status as they are.</p> <p>While we acknowledge that the concept chosen by the ECB has practical advantages (the persons involved in the procedure remain involved) we are afraid, that it can be argued that the current concept of Article 48 FR restricts the transfer of competences provided for in the SSMR and is therefore not in the scope of organising or specifying the arrangements for the carrying out of the conferred upon the ECB by the SSMR (see Article 4 (3) second sub-paragraph SSMR).</p>
Pending procedures in respect of common procedures	48(6), 149	Deletion	<p>Article 48 FR stipulates the rules applying to pending procedures in an operating SSM.</p> <p>For the start of the SSM Article 149 FR provides a corresponding provision. It states that Article 48 shall apply unless ECB decides otherwise.</p> <ol style="list-style-type: none"> 1. In Article 149 FR the words "Unless the ECB decides otherwise" should be deleted as Article 48 FR provides for the ability of ECB to take over the procedure. 2. Article 48 (6) and Article 149 (2) FR which exclude common procedures (authorisation, withdrawal, qualifying holdings) should be deleted. Also for such procedures the pending procedure provisions should apply. (However, a pending procedure clause structured in accordance with the preceding comment may be more appropriate in these cases.)
Publication	49(1)	Amendment	<p>The "or" in the first line of Article 49 (1) FR should be replaced by "and". It should be clear that in case of a significant supervised group also all supervised entities which are part of the group are</p>

			published in the list (and not only the name of the group).
Determining size	51(1), (3)	Clarification	Refers "year end prudential consolidated reporting for the supervised group" refer to the end of the calender year or the business year?
Reference to IFRS	51 (2)	Clarification	In Article 51 (2) FR the reference to IFRS should be specified in the same manner as in Article 51 (4) FR.
Relation of Articles 63 and 64 FR to Part IV Title 1 and 2	63, 64	Deletion	<p>The content of Article 63 (1) and (2) FR as well as Article 64 FR should be integrated in Part IV Title 1 or 2 or be deleted:</p> <ol style="list-style-type: none"> 1. Article 63 (1) FR should be integrated in Article 44FR as it requires a decision on the classification as significant as of a specific date. An alternative is to clarify in Article 63 (1) that this rule deviates from the general riule on classification. 2. Article 63 82) does not seem to be necessary as this follows also from Article 45 FR; it could therefore be deleted. 3. Article 64 FR repeats Article 40 (2) (b) FR. It could therefore be deleted.