



PUBLIC CONSULTATION

DRAFT ECB REGULATION ON SUPERVISORY FEES

TEMPLATE FOR COMMENTS

Name of Institution/Company	European Banking Federation	Country	---
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COMMENTS ON THE DRAFT ECB REGULATION ON SUPERVISORY FEES

Issue	Article	Comment	Concise statement why your comment should be taken on board
Transparency of the supervisor and obligation to inform and to be audited	new	Addition	There should be an advisory panel to discuss and oversee the annual budget of the SSM. Banks should have a seat in that panel in order to ensure that payers have at least information and the capacity to communicate formal opinions on the use of the amounts paid. It should be made clear how the expenses of the supervisor will be audited by an independent organ such as a court of auditors.
Subject matter	1(a)	Amendment	For the sake of precision, it should be clarified that it is “the total amount of the annual supervisory fees to be levied by the ECB on supervised entities”.



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	Article 2(2)	Clarification	The precise meaning of the term “highest level of consolidation” should be clarified. We would suggest including this term in the list of definitions in Article 3.
Definitions	Article 3(13)	Clarification	Banking networks subject to article 10 of regulation (EU) No 575/2013 (CRR) and article 21 of directive 2013/36/EU (CRD IV) should be treated as a group.
Fee debtor	Article 5(2)(a)	Clarification	Where it says “Each group of fee-paying entities shall nominate the fee debtor for the whole group”, more clarity in the role of the fee debtor would be welcome.
	Article 5(5)	Clarification	The term “sub-consolidated data” should be defined in Article 3. It was said in the public hearing that “sub-consolidation” means consolidation within the perimeter of the participating member states. This point should be clarified in the definitions of Article 3.
	Article 5(6)	Deletion	In conjunction with paragraph 2, which states that the identity of the fee debtor will be notified to the ECB, the provision in paragraph 6, under which the ECB may itself determine the fee debtor, is counterproductive and contradictory. Paragraph 6 should therefore be deleted.
	Article 6(2)(a)	Clarification	The provision under which the annual costs would also cover ECB expenditure indirectly related to its supervisory tasks goes too far. The wording is too broad and imprecise to justify requiring the banks to bear such costs.
	Article 6(2)(b)	Deletion	Article 340 of the Treaty on the functioning of the EU states: “ <i>The contractual liability of the Community shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. The preceding paragraph shall apply under the same conditions to damage caused by the ECB or by its servants in the performance of their duties. The personal liability of its servants towards the Community shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of employment applicable to them.</i> ” In view



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			<p>of the EU Treaty, damages caused by the ECB in the performance of its duties, are to be paid for by the ECB.</p> <p>Therefore, the provision under which damages would be included in the costs shared among banks should be deleted.</p> <p>Banks would face incalculable risks if they had to bear the financial consequences of a violation of duty by the ECB. The supervised banks will have no influence on the breach of duty committed by the ECB and cannot be expected to bear the associated costs. Ultimately, this would involve the company which was the victim of a violation paying a share of the resulting damages. There should be no separation of official responsibility and official liability, not least to avoid creating undesirable incentives in connection with the exercise of the ECB's supervisory powers.</p>
	Article 6(3)(a)	Deletion	<p>The proposed inclusion of fees from previous periods that were not collectible should be deleted.</p> <p>The insolvency and operating risk that should be borne by the ECB as the recipient of the fees would otherwise be shifted on to all supervised banks. The supervised banks will have no influence on action taken by the ECB to enforce its claims or pursue them in court and cannot be expected to bear any associated losses. This provision should also be deleted to avoid creating undesirable incentives in connection with the exercise of the ECB's supervisory powers.</p>
Estimating and determining the annual costs	Article 7	Clarification	<p>ECB should be more transparent and give more information related to the breakdown of costs covering the SSM activities on an annual basis.</p> <p>We would appreciate information of the ECB regarding the analysis of "potential costs and benefits" as required in Article 30(2) of the SSM regulation (Council regulation No 1024/2013).</p>



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			<p>In view of the transfer of significant supervisory tasks from NCAs to the ECB, it should be expected that supervisory fees due at national level be reduced as envisaged in article 30(5) of the abovementioned SSM regulation. It would be appropriate to set a term (e.g. 3 years) at which the total expenditure is to be evaluated also in relation to that of the NCAs in order to have some control over the size of the total budget.</p>
	Article 9(2)	Clarification	<p>Under Article 9(1) of the draft ECB Regulation on supervisory fees, two categories will be created for the calculation specified in accordance with Article 10: one category for significant entities and one for less significant entities. In our view, Article 9(2) is too general in specifying how the costs incurred by newly created directorates-general will be allocated. We assume the costs incurred by DG I and DG II will be allocated to the category of significant entities, while the costs incurred by DG III will be allocated to the category of less significant entities. The ECB should clarify in the final regulation how exactly the costs incurred by DG IV as well as costs incurred by other units (e.g. human resources and IT) will be allocated, given that this DG will perform “horizontal” services (i.e. for both significant and less significant banks).</p>
Fee factors	Article 10(3)(a)(i)	Clarification	<p>Total asset amounts are dependent on the implementation of IFRS or on the national GAAPS. The treatment of certain accounts such as derivatives may imply big changes in those factors. The methodology should ensure consistency and comparability.</p>
Fee factors	Article 10(3)	Clarification / amendment	<p>According to the proposal, the fee factors are calculated at the highest level of consolidation within participating Member States. The part II.1 item (17) of the proposal states that <i>All subsidiaries of this supervised entity are considered as belonging to the same supervised group.</i></p> <p>It should be clarified that the group perimeter must be the prudential perimeter of banks, i.e. excluding insurance companies for financial conglomerates. Since the ECB has no supervisory powers in relation to insurance companies as part of the conglomerate (as stated in Council regulation 1024/2013 and Article 127 (6) of the Treaty on the Functioning of the European</p>



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			<p>Union), insurance part should not be used as fee calculation basis for fee calculation. This would also ensure same treatment between insurance-led and a bank-led conglomerates.</p>
	Article 10(4)	Clarification	<p>A provision should be included specifying the legal consequences and procedure to be followed if one or more banks fail to provide the fee factors. Strictly speaking, it would then be impossible to calculate the amount of the supervisory fee payable by such bank(s).</p>
Minimum fee percentage for significant entities	Article 10(5)(a)	Clarification	<p>It is said in recital 43 that “The minimum fee percentage for significant entities will be 10%. In each participating country, at least the three most significant credit institutions will be subject to direct supervision by the ECB, irrespective of their total asset size. These credit institutions may be small relative to the other supervised entities in this category. For this reason, the ECB will halve the minimum fee component for the smaller significant institutions with total assets of €10 billion or less”.</p> <p>Questions:</p> <p>How will this waiver be offset?</p> <p>This amount will not be covered or it will be transferred to other institutions. If the latter is the case, how will the allocation of the extra cost be done?</p>
	Article 12(1)	Clarification	<p>We basically welcome this provision, which is designed to ensure that fee levels are proportionate. We nevertheless see a need to clarify the legal consequences if it is determined that the fees set for some banks and branches are not reasonable and appropriate.</p> <p>It should be specified who exactly (the rest of banks in the category?) will bear the amounts not charged and the methodology thereby used to allocate potential costs not charged to any individual financial institution.</p> <p>If it is concluded that some individual fees should be reduced, there is no procedure at present for</p>



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			dividing the associated costs among other fee-paying banks. It also needs to be clarified that the procedure for the retrospective modification of a fee (which should be determined on the basis of defined, objective criteria) should not result in costs being divided among other banks at the ECB's discretion.
	Article 14(3)	Clarification	The period allowed for payment should begin – as is usual under administrative law – on the date on which the fee notice is received, not on the date of issuance. This is the only way to ensure that the debtor will have a full 30 days to effect payment and that the payment period will not be inadmissibly curtailed by the transmission time. The principle should apply that full use may be made of the payment period. Nor would it be acceptable to make supervised banks bear risks associated with the transmission of the fee notice. This would run counter to administrative and civil law rules governing the risk of loss.
	Article 15(1)	Deletion	This requirement is impracticable and should be deleted. Every single year, banks would have to name the person to whom the fee notice should be sent. This is unnecessary bureaucracy. It also begs the question as to how to proceed if the person named changes after the 1 March deadline. It would be more practicable to send the fee notice to the body authorised to act on behalf of the bank (e.g. the management board) and substitute annual communication with a requirement to notify the ECB of any changes as and when they occur.
	Article 15(2), second option under (a)	Deletion	The option “or by other comparable means of communication” should be deleted. This is too unspecific a term to include in a legal provision designed to ensure receipt of the fee notice. Given the other notification methods listed, moreover, one wonders what further means might conceivably be left.
Sanctions	Article 16	Amendment	Article 3 (11) of EC Regulation 2532/98 concerning the powers of the ECB to impose sanctions states that <i>‘An undertaking shall bear the costs of the infringement procedure if it has been</i>



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			<p><i>decided that it has committed an infringement</i>'. This draft Regulation nor the SSM Regulation or SSM Framework Regulation take into account that costs related to enforcement should be paid for by the offender and that these costs can therefore not be paid out of the ECB budget. This Regulation should include the principle of art. 3 (11) of EC Regulation 2532/98.</p>
Sanctions	Article 16	Amendment	<p>The SSM Framework Regulation (article 137) states that <i>'proceeds from penalties shall be the ECB's property'</i>. It should be made clear in this Regulation that proceeds from penalties will be part of the ECB/supervisory budget and not of the ECB/Central Bank budget.</p>