

PUBLIC CONSULTATION
DRAFT ECB REGULATION ON SUPERVISORY FEES
TEMPLATE FOR COMMENTS

Institution/Company German Banking Industry Committee	
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Please separate your comments per issue, citing the relevant article of the draft Regulation on supervisory fees 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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Name of Institution/Company	German Banking Industry Committee	Country	Germany
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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
Subject matter/ monitoring / control	Art. 1	Clarification	<p>A panel/board in the form of a “supervisory board”, for example, should be set up in the ECB to monitor the efficient and appropriate use of funds at a level in keeping with the legal framework. This panel/board should also include representatives from significant and less significant institutions.</p> <p>The draft contains no provision for industry involvement. It is true that Article 30 para. 4 of the SSM Regulation refers to Article 20 of the SSM Regulation, which governs accountability and reporting. These provisions, however, do not give the institutions that bear the ECB’s banking supervisory expenditure in full any possibility to be involved in a monitoring function. The panel/board could be set up in such a way as to have no influence on the</p>



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			<p>operating activities of the financial supervisor, but instead concern itself primarily with budgetary issues. It should assume the function of a monitoring body focusing on determining what resources are required for effective supervision and ensuring that these funds are used in an orderly manner. Given that the funding will be provided in full by the supervised entities, it is legitimate to involve representatives of these entities – significant and less significant institutions - in an appropriate cost control capacity.</p>
Fee debtors	Art. 1	Amendment	<p>The Regulation on supervisory fees should include an explicit provision, in the form of an addition to Article 1, for example, stating that the overriding principles for the levying of fees are cost-by-cause (doer pays) and proportionality. This means, among other things, that small, less significant and only indirectly supervised institutions should not be unduly burdened when calculating and levying the supervisory fees. It could also be questioned whether, in view of the expenditure generated, in fact all institutions have to participate in the general supervisory fees and generate a high enough expenditure to justify their inclusion in the overall SSM fees. These principles should then be appropriately implemented in Art. 10, too (cf. comments there).</p>
Scope / calculation	Art. 2, para. 2	Clarification	<p>It should be clarified what is meant by the “highest level of consolidation”. We would suggest including this term in the definitions in Article 3.</p> <p>The ECB should, moreover, always assume the fee debtor at the highest consolidation level, as long as there are no objections.</p>
Fee debtor	Art. 5, para. 5	Clarification	<p>We request clarification of what the term “sub-consolidated” means in Art. 5 para.5, as no explicit definition is provided and the explanatory notes on the draft are at times inconsistent. We assume that “sub-consolidated” in this sense means that group subsidiaries established in non-participating Member States may be excluded from the calculation of supervisory fees and that this is thus a non-technical, i.e. non-banking-supervisory interpretation of the term “sub-</p>

			consolidated”. Clarification to this effect should be included in Art. 3 (Definitions). In this context and with regard to para. 35ff. of the introductory explanatory notes on the draft, we would also appreciate explicit clarification of who is to provide/determine the relevant “sub-consolidated” data, i.e.either the fee debtor or supervisory authorities.
Fee debtor	Art. 5, para. 6	Deletion	We propose to delete Art. 5 para. 6. Art. 5 para. 2 states that each group of fee-paying entities will notify the identity of the fee debtor to the ECB and that, in the absence of this notification, the ECB will determine the fee debtor. There is no need to give the ECB an additional right to replace the group’s nomination with a selection of its own. Otherwise, the group’s right of nomination would be worthless.
Annual costs	Art. 6, para. 2 (a)	Amendment /Deletion	Pursuant to Art. 6 para. 2 (a) the supervisory fees would also cover expenses that are indirectly related to the supervisory tasks. It is unclear where the dividing line between expenses indirectly related to supervision and not related to supervision is to be drawn. We therefore think that only expenses directly related to supervision should be part of the annual costs.
Annual costs	Article 6, para. 2 (a)	Clarification	Only the costs of the SSM (new DGs I - IV and costs charged by the shared support units) are to be financed by the SSM supervisory fees. The current draft Regulation allocates also the expendituresof the DG Macro-Prudential Policy and Financial Stability to the supervised institutions (cf. page 5). This DG, however, is part of the “traditional” ECB (monetary policy) and should therefore also be financed by the latter. Were this DG part of the SSM, the separation of functions within the ECB would be violated. We request appropriate clarification in the wording of the Regulation.
Annual costs	Article 6, para. 2	Deletion	Pursuant to Art. 6 para. 2 (b) the annual costs are to include damages to be paid to third parties caused directly or indirectly by the ECB in the performance of its supervisory tasks. We reject the inclusion of such damages in the annual supervision costs. Otherwise, institutions that bring damages claims against the ECB would in effect have to bear a share of the costs of their

	(b)		<p>own claim. The term “third party” as beneficiary of a damages claim, moreover, is unclear.</p> <p>If claims for damages result from the ECB exercising its supervisory tasks, these must be borne by the public sector and should not be included in the costs for supervisory activity and allocated to the institutions. Costs that are not necessary for supervision, but due to a breach of duty should not be allocated to the supervised institutions.</p> <p>Banks would face incalculable risks if they had to bear the financial consequences of a violation of duty by the ECB. The institutions subject to supervision cannot influence the ECB’s breach of duty, nor can they be held accountable for it. Ultimately, this would involve an entity which was the victim of a breach of duty by the ECB paying a share of the resulting damages. There should therefore be no separation of official responsibility and official liability, not least to avoid creating undesirable incentives in the exercise of supervisory powers.</p> <p>For constitutional reasons, official responsibility may not be separated from official liability. Any other rule, such as that proposed here, would raise constitutional concerns. This principle is enshrined in Article 34 of Germany’s Basic Law, for example, is reflected in the European Charter of Fundamental Rights and is also expressed in Article 340 of the TFEU.</p>
Annual costs	Art. 6, para. 3 (a)	Amendment/Deletion	<p>The passing on of fees not collected from individual fee debtors to the whole fee-paying community as foreseen in Art. 6 para. 3 (a) should, in our opinion, be avoided. The proposed rule shifts the ECB’s payment and collection risk onto all supervised institutions. The institutions, however, cannot influence the ECB’s actions in enforcing its claims or pursuing them through civil litigation, nor may they be held accountable for them. We therefore call for a deletion of this clause, also to avoid creating undesirable incentives in the exercise of supervisory powers.</p>



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Split of annual costs	Art. 9	Clarification	Pursuant to Article 9 para. 1 of the draft ECB Regulation on supervisory fees, two categories will be established for the calculation pursuant to Article 10: one category for the significant and one for the less significant institutions. In our view, Article 9, para. 2 is too general in specifying how the costs incurred by the newly created directorates-general will be allocated. The costs incurred by DG I and DG II appear to be allocated to the category of significant, while the category of less significant institutions will bear the costs incurred by DG III. It is not clear, however, what will happen to the costs generated by DG IV, which is to perform “horizontal” services and specialist functions (i.e. for both the significant and less significant institutions). Similarly, it is not evident from the draft ECB Regulation on supervisory fees (or the Questions and Answers paper) whether and, if so, how the banking supervision costs from the other DGs (e.g. HR, IT...) will be allocated to the two categories significant and less significant institutions. We propose the inclusion of a provision in this respect in the Regulation (cf. also the remarks on Article 10). In splitting the costs incurred between the significant and less significant entities, it will be essential to use a cost-by-cause method based on the time and effort required for the supervision involved, i.e. there must be no cross-subsidisation of supervision costs between the two groups of supervised entities. In this context we would also appreciate an explanation how the initial split of costs - 85% for the directly supervised institutions and 15% for the indirectly supervised institutions - was arrived at.
Supervisory fee payable	Art. 10, para. 3	Clarification	Pursuant to Art. 10 para. 3 the fee factors will be calculated at “the highest level of consolidation”. Here, too, as in the context of Art. 5 para. 5, it is unclear what is to be understood by consolidation, i.e. whether a technical, banking-supervisory consolidation level is meant or possibly a self-contained “consolidation” within the meaning of the draft regulation, excluding subsidiaries established in non-participating Member States.
Supervisory fee payable	Art.	Clarification	For reasons of legal certainty and clarity, all components and aspects of the procedures and



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	10, para. 3		methods for calculating the fees should be definitively laid down in the Regulation on supervisory fees. If it is the intention of Art. 10 para. 3 in conjunction with para. (69) of the Rationale that details of the methodology and procedures will only be published on the ECB website, this would not be compatible with the aforementioned principles.
Supervisory fee payable	Art. 10, para. 4	Amendment	Pursuant to Art. 10 para. 4 the supervised entities should by 1 March each year submit to the competent NCAs, among other things, the required data for the calculation of the annual supervisory fees. We consider this deadline too tight since audited annual financial statements are not normally available until 31 May. With this in mind, it should be sufficient to submit the data on 15 June. This would still allow enough time to issue fee notices, which pursuant to Art. 14 para. 1 may be done up to 31 August.
Supervisory fee payable	Art. 10, para. 4	Amendment	It should be ensured that, if at all possible, supervisory fees are calculated without imposing a reporting burden on the institutions. Instead, data should be collected primarily from the national competent authorities. This principle should, moreover, be explicitly incorporated in Art. 10, para. 4.
Supervisory fee payable	Art. 10, para. 4	Clarification	In our view, the legal consequences in the event that fee debtors do not comply with the obligation to submit data pursuant to Art. 10 para. 4 are unclear, as in this case the fee volume attributable to the fee debtors cannot be calculated exactly. A provision should therefore be included that specifies the legal consequences and/or procedure if one or more institutions do not comply with the notification of the fee factors.
Supervisory fee payable	Art. 10, para. 5	Amendment	Art. 10 para. 5 (b) sentence 4 provides for the possibility of halving the minimum fee component. The intention is to ease the burden on small significant institutions in particular (page 9 of the Rationale). To maintain proportionality, such a provision must at the same time apply also to less significant institutions (e.g. a halving for institutions with total assets of less than € 500 million), without a counteraction to this relief by means of an increase in the

			variable component of the fee. The reduction should rather be spread across the relevant category of less significant institutions. Appropriate clarification should be added to Art. 10, para. 5 (c).
Supervisory fee payable	Art. 10	Amendment	In our view, the splitting of the minimum fee component equally among all less significant institutions is not justified. An institution with total assets of € 13 million would thus pay an equally large minimum fee as an institution with total assets of € 29 billion. On grounds of proportionality the minimum fee component too should include a corrective factor (e.g. a halving for institutions with total assets of less than € 500 million, cf. above), without a counteraction to this relief by means of an increase in the variable fee component. The reduction should be spread across the relevant category of less significant institutions. Appropriate clarification should be added to Art. 10, para. 5 (c).
Cooperation with NCAs	Art. 12, para. 1	Clarification and amendment	<p>First, it is unclear whether for the communication between the ECB and NCAs regarding cost-effectiveness and reasonableness of the calculated fees Art. 12 para. 1 provides for an overall or individual-institution approach. We consider the individual-institution or at least a more customized approach advisable. This would facilitate corrections to the fee levels with regard to proportionality considerations and the cost-by-cause principle can be made. In this context the question of legal consequences of implemented adjustments arises. If it is found that some individual fees should be reduced, there is no procedure at present for dividing the associated costs among the other fee debtors in a manner compatible with the principle of proportionality. Moreover, it has to be made clear that the procedure for retrospectively modifying an individual fee will not lead to costs being divided among other banks at the ECB's discretion.</p> <p>To ensure the cost-effectiveness and adequacy of the supervisory fees, the ECB and NCAs should investigate whether ECB supervision will entail a reduction of tasks and responsibilities that would result in lower fees for the NCAs. The objectives of budgetary control set out in part II.2 (24) should be explicitly included in the Regulation to prevent a</p>



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			steep rise in annual costs in the medium term.
Fee notice	Art. 14, para. 3	Amendment	Pursuant to Art. 14 para. 3 the fee debtor should pay the amount within 30 days of the date of issue of the fee notice. Given the various means of notifying the fee notice listed in Art. 15 para. 2, even the simultaneous dispatch of the fee notices could mean payment periods of differing lengths for the fee debtors. In the interests of fairness, all fee debtors should have the same amount of time. This can be achieved by replacing the term “issuance” with “delivery”. In addition, the principle should apply that full use may be made of payment periods. Finally, the imposition on supervised institutions of the delivery risk relating to the fee notice is to be rejected. This would run counter to administrative and civil law rules governing the risk of loss.
Notification of the fee notice	Art. 15	Amendment	There is no compelling reason why the ECB has to be advised annually of a person in the institution to whom the fee notice has to be sent. This notice represents an administrative action and should instead be addressed to executive management as the official body and representative of the institution, which can then simply pass this on for further action within the institution. Otherwise, every time there was a departure or internal reorganisation the ECB would have to be informed before the notification of each fee notice, which would significantly increase the potential for error in the procedure. Another reason for sending the fee notice to the executive body of the institution is that legal consequences, such as deadlines for legal remedy and similar, may ensue.
Notification of the fee notice	Art. 15	Deletion	The expression in Article 15 para. 2 (a) 2nd alternative “or other comparable means of communication” should be deleted. This term is too vague to include in a legal provision designed to ensure receipt of the fee notice. Given the other notification methods listed, moreover, the question arises as to what further means of communication remain.