



EUROPEAN CENTRAL BANK

EUROSYSTEM



## FEEDBACK STATEMENT

**Responses to the public consultation  
on the draft Regulation  
of the European Central Bank  
on supervisory fees**

**October 2014**

This document consists of the five sections listed below.

- A. Overview and analysis of responses
- B. Analysis of costs and benefits
- C. General comments
- D. Comments on specific parts of the Regulation on supervisory fees
- E. Amendments made to the draft Regulation on supervisory fees

This document is intended to give an overview of the comments received during the public consultation on the draft ECB Regulation on supervisory fees and to present an assessment of those comments. It explains the amendments made to the ECB Regulation on supervisory fees as a result of the public consultation. As such, this document does not prejudge the future interpretation of the provisions laid down in the ECB Regulation on supervisory fees. Moreover, only the Court of Justice of the European Union can give a legally binding interpretation of provisions of Union law.

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## A OVERVIEW AND ANALYSIS OF RESPONSES

- 1 Article 30 of Council Regulation (EU) No 1024/2013<sup>1</sup> (the ‘SSM Regulation’) provides that ‘the ECB shall levy an annual supervisory fee on credit institutions established in the participating Member States and branches established in a participating Member State by a credit institution established in a non-participating Member State’. The fee levied on a supervised entity will be calculated in accordance with the arrangements established by the European Central Bank (ECB). These arrangements will be published by means of regulations and decisions. It was decided that the arrangements for calculating Single Supervisory Mechanism (SSM) fees should be established in the form of an ECB regulation.
- 2 In this context, on 27 May 2014, the ECB launched a public consultation on a draft Regulation that lays down the rules and procedures for a fair and proportionate SSM-related fee policy (hereinafter the ‘**draft Regulation on supervisory fees**’ or ‘**draft fee regulation**’)<sup>2</sup>. The public consultation ended on 11 July 2014. In addition to the possibility to provide written comments, the ECB gave the general public an opportunity to provide further input at a public hearing held in Frankfurt on 24 June 2014. Building on the feedback received from different sources, the ECB has amended a number of features of its approach.
- 3 In total, 31 responses to the public consultation were received, mostly in English. The comments are available on the ECB’s website. Responses were submitted by central banks and supervisory authorities, public authorities, credit and financial institutions, market and banking associations as well as by individuals, allowing for a broad representation of relevant stakeholders. Replies came from both Member States participating in the SSM and non-participating Member States. Table 1 shows the breakdown of responses by type of respondent.

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<sup>1</sup> Council Regulation (EU) No 1024/2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

<sup>2</sup> The public consultation documents, including the draft Regulation on supervisory fees, are available on the ECB’s website:

**Table 1** Classification of respondents to the public consultation

Type of respondent	Number	Percentage
Market and banking associations	17	55%
Credit and financial institutions	8	26%
Individuals/others	3	10%
Public authorities	2	6%
Non Eurosystem Central banks	1	3%
<b>Total responses</b>	<b>31</b>	<b>100%</b>

- 4 Following the closure of the public consultation, the ECB analysed and gave due consideration to all comments received. This feedback statement presents an overall assessment of these comments by addressing the issues raised in the responses. In the sections below, for each topic, short summaries of the comments received (presented in italics) precede the ECB's assessment. For ease of understanding, references to specific provisions of the draft fee regulation are based on the draft published for public consultation in May 2014. As a result of the responses received, some changes have been made to the draft Regulation on supervisory fees. A table summarising those amendments is included in Section E.
- 5 Following the analysis, the feedback statement and an amended draft Regulation on supervisory fees were forwarded to the Governing Council of the ECB. On 22 October 2014 the Governing Council of the ECB adopted the ECB Regulation on supervisory fees. The Regulation has been released on the ECB's website together with this feedback statement.

## **B ANALYSIS OF COSTS AND BENEFITS**

### **B.1 CRITERIA SUPPORTING THE ANALYSIS OF COSTS AND BENEFITS**

- 6 Under the SSM Regulation, the ECB is required to levy fees. Since it has no discretion in this regard, there is no need for a cost-benefit analysis on the question of fees itself.
- 7 Nonetheless, the ECB has conducted an analysis of the costs and benefits involved in its specific fee arrangements, as required by Article 30(2) of the SSM Regulation, taking account of the following factors.
- (a) **Impact of the fee allocation:** In assessing the potential measures, two particular points have been considered: (i) the number of supervised entities directly

impacted by the provision analysed, and (ii) the impact on the distribution of costs across other entities within the same category.

- (b) **Administrative impact on supervised entities:** Costs arising from a potential additional administrative burden and the avoidance of unnecessary duplications in data reporting have been taken into account.
- (c) **Limiting the volatility of the annual fee:** The extent to which stability for the supervised entities is ensured has been assessed, in order to minimise unexpected variations in the annual supervisory fee.
- (d) **Financial cost to the ECB:** The additional effort required by the ECB to implement and maintain the annual supervisory fee mechanism has been considered.
- (e) **Adoption of best practices:** In 2013 the ECB examined different fee systems and approaches used in Europe and internationally, particularly in the United States, with a view to identifying best practices.

## B.2 SUMMARY OF THE ANALYSIS

- 8 **Meeting legal requirements:** In establishing the fee arrangements, the ECB has implemented the provisions of the SSM Regulation that set out the main parameters of the annual supervisory fee. In this respect, compliance with Regulation ECB/2014/17<sup>3</sup> (the ‘SSM Framework Regulation’) and other relevant provisions of Union law has been ensured.
- 9 **Providing legal certainty:** An ECB regulation has general application. It is binding in its entirety and directly applicable in all euro area Member States. It is thus the appropriate legal instrument to organise the practical arrangements for the implementation of Article 30 of the SSM Regulation.
- 10 **A simple, straightforward and cost-efficient solution:** The simplicity, straightforwardness and cost efficiency of the mechanism for determining the annual supervisory fee aims at minimising the operational burden and providing consistency and transparency for the fee-paying entities and the general public.

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<sup>3</sup> Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.05.2014, p. 51).

- 11 **Proportionality and fairness for all supervised entities:** The methodology for the calculation of the individual supervisory fee decided by the ECB has taken account of (i) the number of supervised entities directly impacted by the provision analysed, and (ii) the impact on the distribution of costs across other entities within the same category. The ECB methodology specifies that the annual amount to be recovered will be related to the status of the supervised entity, i.e. whether it is deemed significant or less significant for the purposes of the SSM Regulation, thus reflecting the different degree of supervisory scrutiny required from the ECB for each of these two categories of credit institution<sup>4</sup>. This has been an important factor in ensuring proportionality and fairness for the supervised entities.
- 12 **Reasonableness for all supervised entities:** Given that the three largest credit institutions in each participating Member State are considered significant, even if they are very small, the ECB has also inserted a special provision for very small significant institutions (i.e. entities with total assets not exceeding EUR 10 billion). They will benefit from a halving of the minimum fee component. This measure has had only a marginal impact on the distribution of costs across the other entities in the category of significant institutions, while ensuring the reasonableness of the annual supervisory fee to be levied on all banks or banking groups concerned.
- 13 **Catering for changes in status of supervised entities:** Similarly, the ECB has inserted provisions in Article 8 of the Regulation to ensure that each supervised entity is only obliged to pay a levy (i) for the part of the year in respect of which it is covered by the SSM and (ii) that reflects its supervisory status, i.e. whether it is considered significant or less significant. These provisions aid in maintaining the reasonableness and proportionality of the measures applicable to the supervised entities and facilitate the distribution of costs across entities within the same category. Note that this increases the ECB's operational implementation costs only marginally.
- 14 **Administrative impact on supervised entities:** The SSM Regulation specifies that supervisory fees must be based on objective criteria relating to a supervised entity's importance and risk profile, including its risk-weighted assets. When selecting the best variable to measure these criteria, the ECB has sought to minimise administrative and operational burdens on all supervised entities. The measures chosen are already part of the supervisory reporting framework and are well-defined and audited. Conversely, a complex model of multiple variables would have decreased the transparency of the fee

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<sup>4</sup> See Article 9 of the draft fee regulation.

approach and increased the administrative burden, particularly for supervised groups with subsidiaries outside of the euro area, which would have needed to provide multiple sets of new data. Such an administrative burden and complexity would be unjustified in comparison with the annual supervisory fee for the institutions concerned. A simplified approach also assists in creating more predictability for the fee-paying entities by limiting the potential for volatility in the annual supervisory fee.

## C GENERAL COMMENTS

- 15 **The SSM and relevant Union law:** As pointed out in the explanatory report for the public consultation, the Regulation on supervisory fees, which implements the provisions of the SSM Regulation, has to be read and applied together with the Treaty on the Functioning of the European Union (TFEU) (including the Statute of the European System of Central Banks and the European Central Bank (the ‘Statute of the ESCB’)) and relevant secondary Union legislation. The ECB is subject to those provisions and will act in accordance with them. Where the relevant rules are laid down in directives, the ECB should apply the national legislation transposing those directives. The definitions and other rules provided for in relevant Union law also apply to the Regulation on supervisory fees. Against this background, there is no need to repeat in the Regulation on supervisory fees the principles, rules, rights and obligations established in relevant Union law. General principles of Union law, such as the principle of proportionality, also apply.

## D COMMENTS ON SPECIFIC PARTS OF THE DRAFT REGULATION ON SUPERVISORY FEES

### D.1 SCOPE

- 16 **Clarification on the scope of the Regulation on supervisory fees:** *A number of respondents requested clarification on the scope of the Regulation on supervisory fees, for example, on whether it covers all supervisory activities pursued by the ECB. In accordance with Article 30 of the SSM Regulation, the Regulation on supervisory fees comprehensively covers the tasks conferred on the ECB pursuant to the SSM Regulation.*

## D.2 DEFINITIONS

- 17 **Clarification of definitions:** *Some respondents to the public consultation requested changes and clarification in respect of the definitions contained in the draft Regulation on supervisory fees.*
- 18 **Definitions amended for the sake of completeness and clarity:** In order to eliminate any possible inconsistencies between the definitions provided in the Regulation on supervisory fees and the SSM Framework Regulation, the definitions article of the draft fee regulation now clearly states that the definitions provided in the SSM Framework Regulation shall also apply. In addition, the definition of ‘total assets’ has been clarified to make clear that this term includes only the assets taken into account for the purposes of consolidated prudential reporting. Thus assets of those units of a supervised group that are not credit institutions (such as investment firms or insurance companies) are excluded.
- 19 **Specific clarifications regarding the definition of the credit institutions covered:** Article 30(1) of the SSM Regulation provides that the fees will cover the expenditure incurred by the ECB in relation to the tasks conferred on it under Articles 4 to 6 of the SSM Regulation. Furthermore, recital 77 of the SSM Regulation states that the costs of supervision should be borne by the entities to which it applies<sup>5</sup>. According to Article 4(1)(g) of the SSM Regulation, the ECB is required to carry out supervision on a consolidated basis, including over financial holding companies and mixed financial holding companies. Article 30(1) of the SSM Regulation establishes that the ECB will levy an annual supervisory fee on credit institutions established in participating Member States and branches established within the participating Member States by credit institutions established in a non-participating Member State. Where credit institutions or branches are part of a supervised group, as defined in Article 2 of the SSM Framework Regulation, the ECB is required to calculate the fee at the highest level of consolidation within participating Member States. In accordance with this framework, the supervisory fees levied on credit institutions and branches will also include the fees to be paid in respect of mixed financial holding companies and financial holding companies.

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<sup>5</sup> Hence, entities that are not under the supervision of the SSM are not subject to the obligation to pay fees. To address a specific comment in this regard, the recitals now state that institutions referred to in Article 2(5) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.06.2013, p. 338) (Capital Requirements Directive IV) are excluded from the supervisory tasks conferred on the ECB in accordance with Article 1(1) of the SSM Regulation and, therefore, are also excluded from the obligation to pay supervisory fees to the ECB.

### D.3 DETERMINATION OF THE ANNUAL SUPERVISORY FEE

20 **Determination of the annual supervisory fee:** *The ECB received a number of comments concerning the determination of the annual supervisory fee, i.e. the amount to be recovered via the annual fee, and on how the underlying budget will be set.*

#### D.3.1 GOVERNANCE OF THE PROCEDURE BY WHICH THE ECB DETERMINES ITS BUDGET AND THE ANNUAL SUPERVISORY FEE

21 **Details of the governance procedures:** *A number of respondents focused on issues of governance relating to the ECB's supervisory budget and requested further information on related procedures and controls, with a few proposing the involvement of an independent body such as the European Court of Auditors.*

22 **Budget authority:** In accordance with the ECB's Rules of Procedure<sup>6</sup>, the budgetary authority of the ECB is vested in its Governing Council. This body adopts the ECB's annual budget, which encompasses the budgetary needs of the supervisory directorates, following a proposal put forward by the Executive Board of the ECB after consultation with the Chair and the Vice-Chair of the Supervisory Board.

23 **Budget Committee:** For assistance in matters related to the budget of the ECB, the Governing Council has established a Budget Committee (BUCOM) consisting of members from all national central banks of the Eurosystem. BUCOM evaluates the ECB's budget planning and monitoring reports and reports on them directly to the Governing Council.

24 **External governance instruments:** The Statute of the ESCB provides for the audit of the ECB by two bodies: appointed external auditors and the European Court of Auditors. External auditors audit the annual accounts of the ECB in accordance with Article 27.1 of the Statute of the ESCB. The audit reports of the external auditors are published as part of the ECB's Annual Report. The European Court of Auditors examines the operational efficiency of the management of the ECB in accordance with Article 27.2 of the Statute of the ESCB.

25 **Possible forum to govern the setting of the annual supervisory fee:** *Certain respondents proposed that the ECB establishes a forum or committee to verify that the fee level is reasonable and that the fees are spent in a proper and cost-effective manner. Given that the funds required for the conduct of the ECB's supervisory tasks will be*

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<sup>6</sup> Article 15 of Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.03.2004, p. 33).

*provided by supervised entities, it was suggested that the group should consist of representatives from the supervised entities or, alternatively, representatives from European banking associations.*

- 26 **Level of influence of supervised entities:** Recital 75 of the SSM Regulation states: ‘In order to carry out its supervisory tasks effectively, the ECB should exercise the supervisory tasks conferred on it in full independence, in particular free from undue political influence and from industry interference which would affect its operational independence’. Therefore, the establishment of a formal committee including banking representatives and vested with powers related to the setting of the budget would not only duplicate the current role played by the Budget Committee, but could also be perceived as being in conflict with the SSM Regulation.
- 27 **Accountability obligations are in place:** In relation to the ECB’s exercise of its supervisory tasks, the EU’s legislative bodies have established accountability obligations towards EU institutions and national parliaments. In this process, the interests of the supervised entities and the general public will be taken into account in a balanced way.
- 28 **Supervised entities will be consulted on changes to the Regulation:** Although there is no provision for regular involvement of supervised institutions in the budget process, the ECB is committed to public consultation of interested parties on any substantial update of the Regulation on supervisory fees.

### **D.3.2 SUPERVISORY BUDGET**

- 29 **Size of the supervisory budget:** *A number of responses referred to the development of the ECB’s supervisory budget and proposed various measures aimed at providing a forecast of any future increases, such as long-term budget planning, a proactive approach to increase the transparency of the ECB’s budget and a commitment to cost efficiency.*
- 30 **Long-term budget planning is premature:** While supporting the goal of limiting longer-term increases in the ECB’s supervisory budget, the ECB considers that the provision of a multi-annual budget is currently premature, also given the possibility that additional countries may join the SSM, with concomitant effects on the ECB’s resource requirements.
- 31 **The ECB is committed to transparency in relation to its supervisory budget:** Having regard to the requirements set out in the SSM Regulation, in particular in

Articles 20, 21 and 29 and Article 30(4), the ECB is obliged and committed to transparency with regard to its budget and expenditure on supervisory activities. Initial addressees of such reporting will be the European Parliament, the Council of the European Union, the European Commission and the Eurogroup. When submitting the annual report required by Article 20 of the SSM Regulation, the ECB must simultaneously forward it to the national parliaments of the participating Member States. Finally, the ECB also intends to publish that report, and thus make it available to all interested parties.

- 32 **Greater breakdown of supervisory costs:** *Some respondents requested a further breakdown of the costs determining the annual supervisory fee as a mechanism to monitor the accuracy of the costs incurred by the ECB for its SSM-related tasks.*
- 33 **A sound governance framework ensures a close monitoring of the ECB's supervisory costs:** As outlined above, a sound governance framework regarding the ECB's budget and the costs to be allocated to supervisory tasks is already in place. This framework also entails detailed reporting and publication requirements that ensure a high level of transparency in respect of the ECB's budget and cost allocation.
- 34 **Costs of external staff are included in annual costs:** The supervisory fee will include the full costs of the ECB's supervisory tasks. In the event that the ECB needs to make use of external resources to carry out its tasks, these costs will be recovered via the annual supervisory fee.

### **D.3.3 METHODOLOGY FOR DETERMINING THE ANNUAL SUPERVISORY FEE**

- 35 **Details on the methodology for calculating the annual supervisory fee:** *A number of respondents requested further details regarding the methodology by which the ECB intends to ensure cost segregation between monetary policy-related costs and SSM-related costs (in particular as regards the macro-prudential function) and on the term 'indirect costs'. Some also called for the ECB (i) to present such methodology as part of the Regulation on supervisory fees, and (ii) to exclude expenditure indirectly related to supervisory tasks, i.e. the expenditure incurred by support services.*
- 36 **Macro-prudential tasks to be included in costs:** The ECB is obliged to recover by way of fees the expenditure incurred in relation to the tasks conferred under Articles 4 to 6 of the SSM Regulation. Therefore, expenditure for the macro-prudential tasks provided for in Article 5 of the SSM Regulation must also be recovered via fees.

However, this does not include expenditure for financial stability tasks related to the ECB's monetary policy responsibilities.

**37 Details on the ECB's cost accounting framework:**

- (a) The general principles by which SSM services will be charged to credit institutions result from the ECB's cost accounting framework (established using methodology approved by the Governing Council) and are described below.
- (b) The calculation of the SSM cost is based on the full cost principle. This means that all relevant costs incurred by the ECB when performing supervisory tasks are allocated to the SSM function directly or indirectly (via overheads). The allocation of indirect costs such as building or IT costs is achieved primarily through a set of cost allocation keys. In this way, all costs are allocated either to the tasks conferred upon the ECB by the TFEU ('monetary policy-related tasks') or to the tasks conferred by the SSM Regulation.
- (c) When determining allocation keys, the ECB takes account of the following general principles:
  - (i) a preference for direct cost allocation;
  - (ii) the causal relationship<sup>7</sup> principle;
  - (iii) a preference for quantitative data, based on measurable variables such as headcount, occupied space, number of personal computers, etc.;
  - (iv) simplicity and efficiency;
  - (v) process or customer orientation i.e. the choice of the best allocation key must be based on the question: 'For what or whom is the cost incurred?'

**38 Recovery of full costs:** *One response called for further information to explain why the ECB intends to recover full costs, although the SSM Regulation states that fees shall not exceed expenditure.*

**39 Full cost recovery required by the SSM Regulation:** Having regard to Article 30(1) of the SSM Regulation, it is a legal requirement that the costs incurred by the ECB in relation to its supervisory tasks are recovered via fees. The term full costs is used in this context to clarify that, in addition to the costs incurred by the core supervisory functions (i.e. in respect of the ECB's Directorates General Micro-Prudential Supervision I, II, III

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<sup>7</sup> This implies that the allocation key should reflect as much as possible the causal relationship between the key selected and the resources required.

and IV, its SSM-related macro-prudential policy and the Secretariat to the Supervisory Board), the costs incurred by shared services (e.g. legal services, statistics, IT, communications, human resources and premises) to support the core supervisory functions will also be recovered via fees. In order to ensure that the fees do not exceed expenditure, the ECB will adopt a cautious approach when allocating the costs of support functions to the SSM.

#### **D.3.4 INCLUSION OF DAMAGES IN THE SUPERVISORY FEE**

- 40 **Recovery of damages paid by the ECB through fees:** *A large number of respondents suggested the deletion of Article 6(2)(b) of the draft fee regulation. They did not consider it justified that supervised entities should have to bear any damages awarded against the ECB in favour of third parties. In their assessment, the recovery of damages through supervisory fees lacks a legal basis and involves the transfer of a substantial financial risk to the fee-paying entities.*
- 41 **Recovery of damages excluded from the Regulation on supervisory fees:** After careful consideration, Article 6(2)(b) of the draft fee regulation has been deleted. The ECB will therefore not recover damages payable to third parties via the supervisory fees. The amended draft ensures that neither damages payable to third parties nor sanctions payable to the ECB by credit institutions have any influence on the supervisory fee.

#### **D.3.5 INCLUSION OF INCOME DERIVED FROM PECUNIARY SANCTIONS IN THE SUPERVISORY FEE**

- 42 **Proposal to use the income generated by pecuniary sanctions to reduce fees:** *A number of respondents suggested that income derived from pecuniary sanctions should be allocated towards the payment of supervisory fees and not assigned to the general budget of the ECB.*
- 43 **The purpose of pecuniary sanctions is not to reduce supervisory fees:** The ECB considers the inclusion of income received from pecuniary sanctions inappropriate for the following reasons.
- (a) The SSM Regulation does not provide a legal basis to reduce fees by income arising from sanctions. Article 30(1) of the SSM Regulation specifies that expenditure incurred must be recovered through fees, but does not provide for a reduction on account of pecuniary income received.

- (b) The purpose of pecuniary sanctions is to penalise supervised entities following a breach of supervisory obligations. Reducing the fees by the income derived from sanctions would mean that supervised entities (including those on which sanctions are imposed) obtain a benefit from wrongdoing.
- (c) The ECB has agreed on corresponding treatment for damages paid and income derived from sanctions, meaning that neither damages payable to third parties nor sanctions payable to the ECB will influence the supervisory fee.

### D.3.6 INCLUSION OF OTHER AMOUNTS IN THE SUPERVISORY FEE

- 44 **Fees considered as not collectible:** *Some respondents called for further clarification and clear rules regarding the process of considering fees as not collectible with a view to reassuring fee-paying entities on the likely impact of Article 6(3)(a) of the draft fee regulation. In addition, the deletion of Article 6(3)(a) was also proposed on the basis that supervised entities have no influence over the ECB's measures to avoid insolvency and operational risks.*
- 45 **Fees are considered not collectible in line with financial accounting rules:** Fees that have not been paid by supervised entities will be considered as not collectible at the time when they are written off according to financial accounting rules. The amount written off will be added to the next annual supervisory fee, as provided for in Article 6(3)(a) of the draft fee regulation. If the fee is in fact subsequently paid, the amount received will be used to reduce the annual supervisory fee in the year thereafter.
- 46 **The ECB is committed to taking appropriate steps to ensure that fees are paid:** The ECB is committed to ensuring a sound invoicing procedure and has a number of means available to follow up in the event of non-payment. These measures include a sound dunning procedure and immediate legal follow-up if the dunning is unsuccessful. Late-payment interest will accrue on a daily basis from the due date.
- 47 **Comparable treatment between fees written off and interest income from late payments:** Although supervised entities are required to pay for fees considered as not collectible, Article 6(3)(b) of the draft fee regulation specifies that, under the same mechanism, they will benefit from all income derived from interest charged in the case of late payment.
- 48 **Fees not collectible from previous periods could relate to costs incurred before November 2014:** *One respondent requested reassurance that the wording of Article 6(3)(a) of the draft fee regulation ('any fee amounts related to previous fee periods that*

*were not collectible') does not cover costs incurred before the start of the SSM on 4 November 2014, e.g. the costs of the comprehensive assessment.*

- 49 **Costs incurred before November 2014 will not be recovered:** Article 6(3)(a) of the draft fee regulation cannot be used to recover costs incurred before November 2014.

## D.4 FEE FACTORS

### D.4.1 GENERAL OBSERVATIONS ON FEE FACTORS

- 50 **Criteria for the selection of fee factors:** *A number of respondents requested clarification on the criteria for choosing total assets and total risk exposure as factors.*
- 51 **External analysis of fee factors:** The ECB engaged an external firm to provide an independent assessment of the feasibility of various options for the calculation of fee factors. This feasibility study covered the validity of the selected fee factor, its objectivity, the availability of data, the comparability of results, the issue of timeliness and the administrative burden involved.
- 52 **The chosen fee factors are supported:** The outcome of the feasibility study has been broad support for the parameters proposed by the ECB in the draft Regulation on supervisory fees, namely the selection of total assets as the variable to measure an entity's importance and total risk exposure as the variable to measure its risk profile, including risk-weighted assets.
- 53 **Legal basis for the determination of fee factors:** *Some respondents called on the ECB to provide further legally binding rules on the fee factors to avoid legal uncertainties.*
- 54 **An ECB decision on the calculation and collection of data on fee factors will be adopted:** As mentioned in Article 10(3) of the draft fee regulation, the methodology and procedures for the calculation and collection of data on fee factors will be established by the ECB and published on its website. Although the Regulation on supervisory fees incorporates the key variables to establish the fee factors, the ECB intends to lay down more detailed procedures for the calculation of the fee factors in a separate decision. This would allow the calculation procedure to be adapted to future legislative or regulatory amendments. Taking the comments received into account, and with a view to ensuring the appropriate legal certainty, the ECB intends to specify the methodology and procedures by means of an ECB decision which is under preparation and likely to be published soon.

- 55 **Consequences of a failure to provide data on fee factors:** *It was suggested that the Regulation on supervisory fees should include clarification of the legal consequences and the approach the ECB will follow in the event that banks fail to provide data on fee factors.*
- 56 **Non-provision of data on fee factors may trigger sanctions and their determination by the ECB:** For the sake of clarity, the Regulation on supervisory fees expressly states that, in the event that the supervised entities do not comply with the obligation to provide fee factors, the ECB will determine the missing fee factors. The missing fee factors will be determined in such a way that appropriate figures are obtained, i.e. figures that are not below those that would otherwise have been provided. It is further specified in the Regulation on supervisory fees that non-provision of fee factors constitutes a breach of the Regulation and, as such, may trigger sanctions in accordance with Council Regulation (EC) No 2532/98<sup>8</sup>, in conjunction with the SSM Framework Regulation. Pursuant to Article 1(7) of Regulation (EC) No 2532/98 sanctions means fines and periodic penalty payments. Under the current legal framework the sanctions for violations of ECB regulations and decisions are those currently provided for in Article 2 of Regulation No 2532/98, i.e. (i) fines of up to €500,000; and (ii) periodic penalty payments of up to €10,000 per day of infringement.
- 57 **Total assets as a variable to measure the importance of an entity:** *Respondents generally accepted the proposal to use total assets (TA) as the indicator of the importance of a supervised entity. However, a number of comments pointed to potential disparities in measuring this factor arising from the application of differing accounting standards, i.e. International Financial Reporting Standards (IFRS) and national Generally Accepted Accounting Principles (GAAP).*
- 58 **The variable TA is aligned with the determination of significance:** As the SSM Regulation defines TA as a primary parameter for assessing significance, the ECB selected the same variable for determining the importance of an entity for the purpose of calculating individual supervisory fees. To calculate the TA factor, the ECB intends to use the methodology specified in Articles 51 and 55 of the SSM Framework Regulation, excluding subsidiaries established in non-participating Member States and third countries where appropriate (see section D.4.4).

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<sup>8</sup> Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions (OJ L 318, 27.11.1998, p. 4).

59 **The definition of TA is aligned with the SSM Framework Regulation:** The methodology specified in the SSM Framework Regulation establishes that, for a supervised entity, the total value of its assets shall be derived from the line ‘total assets’ on a balance sheet prepared in accordance with Union law for prudential purposes. Figures based on the accounting scope of consolidation, as reported in the credit institutions’ audited financial statements, are considered a fall-back option to be used for credit institutions that currently do not prepare and/or are not required to report figures in accordance with Union law for prudential purposes based on the prudential scope of consolidation.

**The accounting regime cannot be changed for SSM purposes:** To require the calculation of total assets on the basis of a uniform accounting regime (whether IFRS or in accordance with Directive 2013/34/EU of the European Parliament and of the Council<sup>9</sup>) might indeed enhance consistency, but would not be feasible in view of current accounting requirements. Recital 19 of the SSM Regulation states that nothing in that Regulation should be understood as changing the accounting framework applicable pursuant to other acts of Union and national law. Therefore, whilst recognising that variation may occur, the ECB cannot make amendments to address this aspect of the fee factor. The use of alternative variables may be reconsidered when the planned review of the Regulation on supervisory fees takes place (this is to be conducted by 2017).

#### D.4.2 TOTAL RISK EXPOSURE

60 **Total risk exposure as a variable to measure the risk profile, including risk-weighted assets:** *The selection of total risk exposure (TRE) as the appropriate variable for measuring the risk profile, including risk-weighted assets, was the subject of several comments and observations.*

61 **Requirement for a fee factor that takes account of the risk profile:** Article 30(3) of the SSM Regulation specifies that supervisory fees shall be based on objective criteria relating to the importance of the supervised entity and its risk profile and taking account of its risk-weighted assets. Therefore, a supervisory fee calculation based solely on total assets would not comply with the SSM Regulation.

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<sup>9</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

- 62 **TRE considered most appropriate:** TRE was selected as the fee factor for measuring the risk profile, including risk-weighted assets, of the supervised entities as it has a better cost-benefit ratio than alternative measures. TRE covers the key aspects of the supervised entities' risk profile and is widely used by credit institutions. In addition, TRE is determined on the basis of clear definitions that are in line with the harmonised common reporting framework (COREP)<sup>10</sup> applied throughout the EU. This is crucial in terms of the comparability of results and their timeliness, and minimises the administrative burden on the supervised banks.
- 63 **Alternatives proposed have been duly considered:** A number of the alternative variables proposed by respondents, such as measures under Union legislation on banking, a complexity factor, the leverage ratio and Pillar 2<sup>11</sup> risk measures, had already been considered and discarded before the publication of the consultation document. Based on the comments received, a further cross-check was made by the ECB, aiming for the best representation of the risk profile, as required by the SSM Regulation.
- 64 **Alternative fee factors did not meet the requirements:** A common characteristic of most of the alternative factors analysed is that they raise issues concerning data availability or objectivity. In particular, the assessment of variables such as the leverage ratio and Pillar 2<sup>12</sup> risk measures in an objective and standardised way and future standardised approaches regarding Basel III have not yet progressed sufficiently. Hence, every alternative variable for measuring the risk profile had to be rejected. The use of alternative variables may be reconsidered when the planned review of the Regulation on supervisory fees takes place (this is to be conducted by 2017).
- 65 **Total risk exposure for branches:** *Several participants in the consultation commented on the proposal to set the TRE factor for branches at zero. They expressed concern that a different treatment for branches may lead to distortions depending on the structure of banking groups.*
- 66 **The exception for branches is confirmed following an impact analysis:** It should be emphasised that the exception for branches only applies if the branch concerned is at the highest level of consolidation within a participating Member State. At that level, no separate COREP-data on TRE are available. As a consequence, the parent undertaking would need to provide such data (at a single branch level or even aggregated across

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<sup>10</sup> This framework was developed by the European Banking Authority.

<sup>11</sup> see Basel III Accord

<sup>12</sup> see Basel III Accord

branches per Member State) solely for fee calculation purposes. The ECB assessment, confirmed by the feasibility study, is that, in comparison with the level of fees levied on the branches concerned, it would be disproportionate to require these to provide data solely for the purposes of the ECB supervisory fee.

#### **D.4.3 EXCLUSION OF THE ASSETS OF SUBSIDIARIES ESTABLISHED IN NON-PARTICIPATING MEMBER STATES AND THIRD COUNTRIES FROM THE FEE CALCULATION**

- 67 **Considerable efforts are required to exclude subsidiaries in non-participating Member States and third countries:** *Responses highlighted the fact that the exclusion of assets of subsidiaries established in non-participating Member States and third countries is likely to require a significant effort, and the related administrative cost may outweigh the reduction in fees that a supervised entity can achieve by this exclusion.*
- 68 **The ECB understands industry concerns about the effort and costs involved in excluding such subsidiaries:** In devising the supervisory fee framework, simplicity and efficiency have been key objectives so as to ensure that the legal obligations imposed by the SSM Regulation can be met with a minimal operational and administrative burden on the supervised entities. In the light of the comments received, the ECB has accepted that a solution to this issue should be provided.
- 69 **External analysis has confirmed the substantial efforts involved in deconsolidation:** The ECB requested an external assessment of the effort credit institutions are likely to be required to undertake in order to meet a requirement to exclude the assets of subsidiaries based outside the SSM area. This study supports the view of the ECB that a requirement to perform a deconsolidation of the balance sheet solely for the purpose of calculating the supervisory fee may not be cost-efficient. The feasibility study has confirmed that the reduction in the individual annual supervisory fee triggered by the exclusion of assets of subsidiaries based outside the SSM area may be outweighed by the additional cost of providing such audited fee-factor data to the ECB. The analysis performed took account of factors such as the number of SSM/non-SSM subsidiaries, the volume of SSM/non-SSM business, required adjustments to IT systems and processes (including data availability) and the increased scope of the annual audit.
- 70 **Supervised entities are given the choice to exclude assets of subsidiaries in non-participating Member States:** Based on the comments received and the subsequent analysis, the Regulation on supervisory fees now establishes a voluntary regime in relation to the aim of exclusion specified in recital 77 of the SSM Regulation. Allowing

for voluntary compliance is considered a fair approach. Exclusion of assets of subsidiaries in non-participating Member States and third countries is not mandatory: this option is there for the benefit of the credit institutions affected, as it lowers the fees that they would otherwise have to pay. However, if the burden of calculation is greater than the expected reduction in fees, it is more efficient for the credit institution to opt out. At the same time, since the non-exclusion of subsidiaries established in non-participating Member States and third countries will result in a higher supervisory fee for the supervised group concerned, this will benefit all other supervised entities in the same category, as the fee to be paid by them will decrease.

#### **D.4.4 SUBMISSION OF DATA ON FEE FACTORS**

- 71 **A postponement of the deadline for submitting data on fee factors is proposed:** *The ECB received a number of comments related to the annual deadline for the submission of data on the relevant fee factors. Several respondents called on the ECB to postpone this date. In addition, the ECB was urged to minimise the reporting and reprocessing costs for banks.*
- 72 **Submission deadline for data on fee factors is postponed:** The ECB agrees with the view of respondents that, for reliability, the fee factors should be based on audited financial accounts. Hence, the ECB has extended the deadline to 1 July of the following year. By this date, audited financial statements should be available in all Member States.
- 73 **Reference date for fee factors remains unchanged:** The reference date for the fee factors, which is the end of the calendar year (i.e. 31 December) of the year preceding the fee period, remains unaffected by the change in the submission date. However, in accordance with the principle that the costs of providing the required data should not be disproportionate to the fees levied, supervised entities will be allowed to use the latest available audited financial statements as a basis for the calculation of the fee factors if the year end is not the balance sheet date for their financial statements.
- 74 **Fee factors to be submitted using a dedicated reporting scheme:** *Many respondents advocated an approach that minimises the reprocessing and reporting requirements for the supervised banks.* The ECB has selected fee factors that minimise the operational and administrative burden on the supervised entities. To ensure the highest level of data quality and consistency for all fee-paying entities, the ECB will require data on fee factors to be provided in a separate data submission based on the audited financial statements.

#### D.4.5 OTHER ISSUES RELATED TO FEE FACTORS

- 75 **Weighting of the fee factors:** *The ECB received comments concerning the relative weighting of the two fee factors, i.e. importance (total assets) and risk profile (total risk exposure), included in the fee calculation. Some respondents suggested lowering the weighting of total risk exposure while others recommended that it be raised. As there is no consensus view and no compelling reason for changing the weighting, the ECB will maintain equal weighting for both factors.*
- 76 **Branches located outside the participating Member States:** *A respondent asked if branches located outside participating Member States owned by supervised entities based in participating Member States are excluded and whether assets allocated to those branches have to be excluded. The SSM Regulation expressly states that subsidiaries established in non-participating Member States and third countries are to be excluded, but there is no corresponding provision to the effect that assets allocated to branches outside the participating Member States should also be excluded. As a consequence, these assets must be included when calculating the fee factors.*

#### D.5 METHODOLOGY FOR THE CALCULATION OF THE INDIVIDUAL SUPERVISORY FEE

##### D.5.1 ALLOCATION OF ANNUAL SUPERVISORY FEES TO INDIVIDUAL SUPERVISED ENTITIES

- 77 **The relationship between supervisory effort and the supervisory fee:** *Several respondents called for a close link between the fee charged to an individual supervised entity and the supervisory effort dedicated to that entity, in particular having regard to the effort involved in authorising new entities and on-site inspections.*
- 78 **The SSM Regulation mandates the use of objective criteria:** *According to Article 30(3) of the SSM Regulation, ‘fees [...] shall be based on objective criteria relating to the importance and risk profile of the credit institution concerned [...]’. Although both criteria are closely related to the supervisory effort involved, linking the fee to the supervisory effort spent, whether directly or indirectly, would not meet the requirements of the SSM Regulation.*
- 79 **The division between the categories of significant and less significant entities reflects the ECB’s supervisory effort:** *In addition, it should be understood that the separate calculation of supervisory fees for the categories of significant and less significant entities reflects the main difference in the supervisory effort required on the*

part of the ECB. All supervised entities will derive important benefits from a sound banking system.

- 80 **Supervised entities classified as less significant on the basis of Article 6(4) of the SSM Regulation:** Article 6(4) of the SSM Regulation, read in conjunction with Article 70 of the SSM Framework Regulation, provides that under particular circumstances a supervised entity can be classified as less significant, even though the criteria for classification as significant are fulfilled. This situation requires specific treatment in order to maintain proportionality and fairness in the methodology. Therefore, when calculating the supervisory fee for banks or banking groups that are classified as less significant on the basis of Article 6(4) of the SSM Regulation, the supervised entity's TA are capped at EUR 30 billion, i.e. the threshold specified in the SSM Regulation for the size criterion used for assessing significance.

This provision is consistent with the principle of ensuring proportionality for all supervised entities. A similar issue regarding proportionality was resolved by introducing a discount for institutions that are classified significant because they belong to the three largest institutions in their country, even though their TA may be far lower than EUR 30 billion.

- 81 **The relationship between fees and country size:** *Respondents suggested that supervisory fees should be proportional to the size of the country in which the supervised entity is operating. Compliance costs are considered proportionally higher in smaller countries due to a lack of economies of scale and scope.*
- 82 **The specific situation of small significant banks is addressed:** The SSM Regulation provides that the three largest supervised entities of a country are considered significant, irrespective of their size. The Regulation on supervisory fees takes account of this in the minimum fee component if these entities are indeed very small. This ensures that the supervisory fee stays proportional to the size and risk profile of the entities to which the SSM Regulation applies.
- 83 **SSM fees are not linked to national supervisory frameworks:** Bearing in mind that the SSM is a European supervisory mechanism, economies of scale due to the size of the country in which the supervised entity is located should no longer apply. Moreover, the fee is calculated at the highest level of consolidation within the SSM area and is not influenced by the participating Member State(s) in which the supervised entity is located. Article 30(5) of the SSM Regulation also clarifies that the provisions on SSM fees are without prejudice to the right of national competent authorities to levy fees

under national law, including those expenses incurred by NCAs in the context of the assistance provided by them to the ECB when directly supervising significant banks.

## D.5.2 THE DIVISION OF COSTS BETWEEN SIGNIFICANT AND LESS SIGNIFICANT ENTITIES

- 84 **Request for further information on the allocation of costs between significant and less significant entities:** *A number of respondents requested further information on how costs will be divided between significant and less significant supervised entities.*
- 85 **The division of costs arising from support functions:** Article 9(2) of the draft fee regulation specifies that the annual costs will be allocated to the categories of significant and less significant entities on the basis of the costs assigned to the relevant ECB functions responsible for direct supervision (significant entities) and indirect supervision (less significant entities). This allocation is actually performed in two steps.
- (a) In a **first step**, the relevant costs of the support functions are allocated to core supervisory functions, i.e. as regards direct supervision of significant institutions, indirect supervision of less significant institutions, and horizontal functions (i.e. all supervisory functions that do not perform direct or indirect supervision of entities). This is performed in accordance with the ECB's cost accounting framework, as outlined above.
- (b) In a **second step**, the costs of the horizontal functions are divided between the significant and the less significant categories on the basis of each category's share of the costs allocated in the first step. The percentages of costs allocated to each category may thus vary somewhat from year to year.

## D.5.3 MINIMUM FEE COMPONENT

- 86 **Legal feasibility of the minimum fee:** *Some respondents queried whether applying a minimum fee component would satisfy the requirement of Article 30(3) of the SSM Regulation to base the fee calculation on 'objective criteria relating to the importance and risk profile of the credit institutions concerned' and whether it would apply to individual institutions and banking groups in the same way.*
- 87 **Establishing a minimum fee is considered legally feasible:** Article 30(3) of the SSM Regulation does not prevent the ECB from applying a minimum fee component to the extent that this is based on objective criteria relating to the importance of the institution concerned. The minimum fee component reflects a contribution for participating in the

system itself and the related reputational benefits, while taking into account the difference between significant banks (which are directly supervised by the ECB) and less significant banks (which are indirectly supervised by the ECB).

88 **The defined minimum fee component is generally supported:** *In general, respondents supported the percentage of costs (10%) that the ECB proposes to recover via the minimum fee component. A few comments were received proposing (i) a percentage higher or lower than 10%, (ii) the determination of the minimum fee component as an absolute amount per supervised entity, or (iii) the introduction of a floor contribution per supervised entity.*

89 **The level of the minimum fee component has been duly considered:** In developing the concept of the minimum fee component, the ECB analysed how to best implement such a feature and reached the following conclusions.

- (a) A level of 10% strikes a balance between the minimum supervisory effort to be spent on small entities in each of the two categories and the burden put on these entities by the minimum fee.
- (b) Defining the minimum fee component as a percentage of the total costs involved has the clear advantage that the minimum fee component automatically adapts to changes in the amount to be recovered and the number of supervised banks. As a consequence, frequent updates of the Regulation on supervisory fees for this reason will not be required.
- (c) The minimum fee component is an appropriate measure to introduce a floor in the fee per supervised entity.

90 **Discount for small significant entities:** *The discount for small significant entities was not in itself questioned by respondents. Some requested further clarification, e.g. on how the discount will be recovered or where this is laid down in the draft Regulation on supervisory fees. Article 10(5)(c) of the draft fee regulation specifies that the difference between the total amount to be recovered and the minimum fee component will be recovered via the variable component. This difference thus also includes the discount granted to small significant entities. In this regard, it must also be understood that the smallest significant entities are much smaller in terms of their total assets and total risk exposure than the largest less significant entities.*

91 **Possibility of a discount for small less significant entities:** *A number of respondents also called on the ECB to introduce a discount for small less significant entities.*

- 92 **The situation of the smallest less significant entities differs from that of the smallest significant entities:** In considering a discount for the smallest less significant entities, the reason underlying the discount for small significant entities must be taken into consideration. The discount for the smallest significant entities is justified because of their specific situation (described above), which does not apply to the smallest less significant entities. Therefore, the ECB's proposal ensures proportionality.

#### **D.5.4 PROVISIONS COVERING A CHANGE IN STATUS**

- 93 **Clarifications regarding a change in status:** *Since very few comments were received on this topic, the related rules in Article 8 of the draft fee regulation may be considered uncontroversial. Nevertheless, certain clarifications were requested, e.g. regarding changes within a group of supervised entities during the course of the year (for instance owing to a merger or downsizing) or regarding a change in status (namely, moving between the two categories of banks and becoming a significant or less significant entity).*
- 94 **In general, the fee is based on the 'snapshot' taken at the end of each year:** For the calculation of the supervisory fees to be levied within a given year, the situation of the supervised entities on 31 December of the previous year is essentially decisive. This is reflected in the reference date for the fee factors. Any changes (such as mergers of entities, downsizing or selling of subsidiaries) that take place after the reference date are only considered relevant if they result in a change in status, as specified in Article 8 of the draft fee regulation. This arises where (i) an entity, which will not form part of an existing supervised group, is newly authorised, (ii) there is withdrawal of the authorisation of a group of entities or of an individual entity which is not part of an existing supervised group, or (iii) the categorisation of the group or the individual entity changes from less significant to significant or vice versa.
- 95 **The treatment of supervised entities considered significant by the ECB:** *Clarification was also requested on how the annual supervisory fee will be calculated for less significant supervised entities for which the ECB assumes direct responsibility in accordance with the SSM Regulation. Article 39 of the SSM Framework Regulation specifies that, in such circumstances, the supervised entity will be classified as significant. In this situation, the normal procedure for the determination of the annual supervisory fee will apply. This includes the rules on the halving of the minimum fee component under Article 10(5) and the provisions on a change of status under Article 8 of the draft fee regulation. Where the ECB determines that a supervised entity must be*

given a different status, this will be laid down in an ECB decision that will also specify the date on which the change in status comes into effect.

## D.6 INVOICING PROCEDURE

- 96 **Payment period for fees:** *A number of respondents commented on when the 30-day period to pay the amount due starts and suggested replacing the date of issuance of the fee notice with the date on which the fee notice is received by the addressee.*
- 97 **Time for payment extended by five days to 35 days:** Accepting that the time elapsing between the issuance and receipt of the fee notice could reduce the time available for supervised entities to prepare their fee payment, albeit marginally, the ECB has increased the number of days after which the payment is due to 35 days. The additional five days are considered sufficient to ensure that, in every case, supervised entities have a full 30 days available to ensure payment by the due date. Replacing the date of issuance with the date of receipt would prevent the ECB from calculating the due date with any certainty. In any case, this issue is assumed to be only of minor importance, as the time elapsing between the issuance and receipt of the fee notice is expected to be extremely short as the ECB intends to issue fee notices electronically.
- 98 **The interest rate charged for late payment is considered too high:** *A comment was received arguing that the interest rate charged in the case of a late payment (the ECB's main refinancing rate plus 8 percentage points) is too high. However, since the proposed rate is aligned with the Late Payments Directive<sup>13</sup>, it has been left unchanged in the Regulation on supervisory fees. Moreover, as explained in paragraph 47, income from interest charged for late payments will be used to reduce the fees charged in subsequent periods.*
- 99 **Specification of the means of communication:** *Comments were received suggesting that the ECB should elaborate on the 'other comparable means of communication' mentioned in Article 15(2)(a) of the draft fee regulation. Given the speed at which new IT solutions are developing, the Regulation on supervisory fees has kept this phrase so that the ECB can adapt to technological innovations, as appropriate.*

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<sup>13</sup> Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ L 48, 23.2.2011, p. 1).

## D.7 ROLE OF THE FEE DEBTOR

- 100 **Clarification is sought on the identification and role of the fee debtor:** *A number of respondents requested the ECB to provide further information on the fee debtor specified in Articles 5 and 15 of the draft fee regulation.*
- 101 **Identification of the fee debtor:** The Regulation on supervisory fees clearly states that the fee debtor should be a fee-paying credit institution or a fee-paying branch. Therefore, a natural person should not be identified as fee debtor. Moreover, it provides that supervised credit institutions or branches that are not part of a group are considered, by definition, fee debtors. Where credit institutions belong to a supervised group, all supervised entities that are part of the supervised group need to identify a single entity, a fee-paying credit institution or a fee-paying branch, that will take the role of fee debtor on behalf of the whole group. For the initial set-up, the ECB should be notified of the nomination of the fee debtor by 31 December 2014.
- 102 **The addressee of the fee notice:** The fee notice will be addressed to the fee debtor as a legal person. To facilitate internal processing, Article 15(1) of the draft fee regulation requires the fee debtor to provide the ECB with a limited number of contact addresses to which the fee notice will be sent in copy. These e-mail addresses can be owned by a natural person, or, preferably, by a function within the fee debtor organisation.
- 103 **Updating fee debtor information:** The annual deadline to update the fee debtor information is 30 June. It is the responsibility of the fee debtor to keep all contact information up to date. However, there is no obligation to provide an update on an annual basis if no changes are required. For the initial set-up, fee debtor information should be provided to the ECB by 1 March 2015.
- 104 **Role of the fee debtor:** The fee debtor will serve as a contact point (also on behalf of a group) for the ECB in respect of the annual supervisory fees. Its functions will include:
- (a) acting as addressee and recipient of a fee notice issued by the ECB;
  - (b) having responsibility for paying by the due date the supervisory fee, as notified in a fee notice addressed to the fee debtor;
  - (c) having responsibility for paying interest on overdue payments for supervisory fees;
  - (d) serving as a contact entity for all communications from the ECB regarding the invoicing of supervisory fees;
  - (e) having responsibility for the provision of fee factors necessary for the calculation of individual supervisory fees.

105 **Determination of the fee debtor by the ECB:** *Some responses queried Article 5(6) of the draft fee regulation by which the ECB reserves the right to determine the fee debtor. They pointed out that, if a group nominates a fee debtor in accordance with Article 5(2) and promptly notifies the ECB of its decision, there will be no need for the ECB to determine the debtor. If, nonetheless, the ECB wishes to determine the fee debtor, the reasons for this should be mentioned explicitly in the Regulation on supervisory fees.*

106 **The ECB's right to determine the fee debtor:** In accordance with Article 5(2) of the draft fee regulation, each supervised group must nominate the fee debtor for the whole group. The fee debtor will be individually responsible for paying the supervisory fee for all the supervised entities of the group. There is no joint liability of supervised entities within the group in respect of the obligation to pay the supervisory fee. In order to control the credit risk and to ensure that there is always an identified fee debtor, the ECB needs to have the right, in exceptional cases, to unilaterally determine the fee debtor.

## D.8 THE FEE NOTICE, APPEALS PROCESS AND SANCTIONS

### D.8.1 THE FEE NOTICE AND APPEALS PROCESS

107 **Appeals and the nature of the fee notice:** *Some respondents suggested that the ECB should include in the Regulation on supervisory fees details concerning the appeals process, the steps taken to adopt a fee notice and its legal character. The decisions taken by the ECB in the exercise of its supervisory tasks can be challenged before the Court of Justice of the European Union (CJEU) under Article 263 of the TFEU. The Regulation on supervisory fees does not need to include a reference to Article 263 of the TFEU as a party's right to challenge an ECB decision that is of direct and individual concern to it derives directly from the Treaty. In addition, without prejudice to the right to bring proceedings before the CJEU, ECB decisions on supervisory fees may be subject to internal review. Furthermore, in accordance with Article 24(5) of the SSM Regulation, a fee debtor may request the internal administrative review of a fee notice by the Administrative Board of Review (ABoR). Since the SSM Regulation already provides for an administrative review of ECB decisions, there is no need to repeat the same provision in the Regulation on supervisory fees.*

## D.8.2 SANCTIONS

- 108 **Clarification of the sanctions regime:** *A number of comments were received regarding sanctions and the interest due in the case of non-payment. More information was requested on the sanctions as well as their relationship with the interest charged for non-payment of supervisory fees*
- 109 **The ECB's power to impose sanctions:** Each breach of the Regulation on supervisory fees may trigger a sanctions procedure. The ECB may impose sanctions on supervised entities in accordance with Regulation (EC) No 2532/98 and the SSM Framework Regulation. Therefore, the ECB is empowered to impose sanctions on supervised entities in the case of non-payment of supervisory fees. It is a general principle of law that the same breach cannot be sanctioned twice (*ne bis in idem*). Therefore, the ECB will not sanction an entity more than once for not paying the same fee notice.
- 110 **No risk that two sanctions will be imposed for one mistake:** Interest charged for late payment does not have the character of a sanction. The purpose of interest is to compensate the ECB for late payment or temporary non-payment and not to punish or to compel the fee debtor to fulfil its obligation.
- 111 **Administrative penalty decisions will be published:** In accordance with Article 120(b) of the SSM Framework Regulation, fines and periodic penalty payments provided for in Article 2 of Regulation (EC) No 2532/98 and imposed under Article 18(7) of the SSM Regulation are considered to be administrative penalties. Given this background, and as required by Article 132(1) of the SSM Framework Regulation, the ECB will publish on its website any decision imposing an administrative penalty unless certain defined circumstances exist. The procedure to specify the supervisory fee payable by supervised entities does not constitute a supervisory procedure for the purposes of Chapter 1 of Part III of the SSM Framework Regulation (i.e. it is not a procedure initiated in accordance with Article 4 and Section 2 of Chapter III of the SSM Regulation) and, therefore, it is not subject to the procedural rules established in those provisions.

## D.9 COMMUNICATION WITH AND SUPPORT OF NATIONAL COMPETENT AUTHORITIES

- 112 **Impact on fees charged at the national level:** *A number of comments expressed the expectation that transferring the supervision of significant entities from national competent authorities (NCAs) to the ECB will have an impact on the fees due at the national level. Respondents also requested the ECB to provide further details on the*

*procedures to be followed for the communication required under Article 30(3) of the SSM Regulation.*

- 113 **The SSM Regulation is without prejudice to the right of NCAs to charge fees:** Article 30(5) of the SSM Regulation expressly reserves the right of NCAs to levy fees in accordance with national law. The ECB has no authority with regard to the setting of fees at the national level.
- 114 **The ECB will establish meaningful communication with NCAs on fees:** In keeping with the principles of implementing a simple, straightforward and cost-effective methodology for levying fees, the comments received will be taken into account when establishing the appropriate mechanisms for communication between the ECB and NCAs.

#### **D.10 OTHER COMMENTS**

- 115 **Review of the Regulation on supervisory fees:** *The review scheduled to be carried out by 2017, as provided for in Article 18 of the draft fee regulation, was welcomed by respondents. Some proposed conducting a review on a regular basis.*
- 116 **A review is scheduled:** Article 18(2) of the draft fee regulation specifies that the ECB will conduct a review of the fee regulation by 2017. As part of that review, a timeframe for a possible further review can be considered.
- 117 **Requirements governing website publication:** *Some responses suggested that the Regulation on supervisory fees should specify in detail the content of the web page dedicated to promoting an understanding of the arrangements for determination of the supervisory fees.*
- 118 **There should be flexibility as regards the content of the website:** The ECB considers the Regulation on supervisory fees as the instrument which provides the legal basis for the determination of supervisory fees. Using dedicated web pages, the ECB shall offer practical information aimed at further explaining the calculation methodology and other relevant approaches and procedures, including some practical examples (if deemed useful). Specifying the content of these web pages in the Regulation on supervisory fees is considered counterproductive, as this would mean that any adaptations to requirements identified after its adoption would not be possible.
- 119 **Close cooperation:** *One respondent suggested adding a provision regarding the close cooperation with NCAs in participating Member States outside the Eurosystem as*

*regards sanctions and interest on late payments. It was proposed that such a provision could be similar to Article 113 of the SSM Framework Regulation.*

120 **The legal framework for close cooperation is in place:** In accordance with Article 139(2)(e) of the TFEU, ECB legal acts do not apply to non-euro area Member States. Nevertheless, fees need to be collected from all credit institutions in the participating Member States. This is achieved by the existing SSM provisions on close cooperation which provide that, before establishing close cooperation with a Member State whose currency is not the euro, the Member State concerned must ensure that its NCA will be obliged to adopt any measure in relation to credit institutions requested by the ECB<sup>14</sup>. On the basis of Article 7(4) of the SSM Regulation, the ECB will address instructions to an NCA where the ECB considers that that NCA should adopt a measure relating to the ECB's supervisory tasks in relation to a credit institution. In accordance with this framework, and on the basis of close cooperation, the ECB will issue instructions to NCAs of Member States specifying the fee to be paid by supervised entities.

#### **D.11 DRAFTING SUGGESTIONS FOR CLARIFICATION**

121 **Drafting suggestions have been duly assessed:** A number of drafting suggestions were provided to the ECB, aimed at clarifying the text of the draft Regulation on supervisory fees without changing its content. Those suggestions have been duly assessed and implemented whenever beneficial.

## **E AMENDMENTS MADE TO THE DRAFT REGULATION ON SUPERVISORY FEES**

Changes to the Regulation on supervisory fees have been incorporated as a result of the comments received during the public consultation period. The following table explains those changes; purely editorial changes are not mentioned.

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<sup>14</sup> Article 7(2)(c) of the SSM Regulation.

Provisions of the Regulation on supervisory fees as adopted	Former provisions of the draft Regulation on supervisory fees	Heading	Amendment
<b>Recital 10</b>			An additional recital has been inserted to reflect the fact that fees must be based on objective criteria relating to the importance and risk profile of the credit institutions concerned, including risk weighted assets (Article 30(3) of the SSM Regulation).
<b>Recital 11</b>			The recital introduced is intended to explain that the fees must be calculated and paid at group level.
<b>Recital 12</b>			This additional recital is intended to explain the option for credit institutions to provide consolidated data including subsidiaries established outside the participating Member States for the purposes of calculating the supervisory fees.
<b>Recital 13</b>			The recital clarifies that institutions excluded from supervisory tasks shall not have supervisory fees levied on them.
<b>Article 1</b>	<b>Recital 11</b>  <b>Article 1</b>	Subject matter and scope	The recital has been deleted as it was considered simply to repeat the substance of Article 1.  Article 1 now states that ‘supervised groups’ are also included. The term ‘methodology’ has been changed to ‘arrangements’ to avoid confusion with the methodology specified in Article 10(3). Point (d) has been deleted to ensure consistency with Article 11.
	<b>Article 2</b>	Scope	Article has been merged with Article 1.
<b>Article 2</b>	<b>Article 3</b>	Definitions	This article has been changed to include the definitions set out in the SSM Framework Regulation. This ensures consistency and allows for clarification of the obligations imposed by this Regulation on supervised entities and supervised groups.  As a result, a number of definitions have been deleted as they are no longer necessary. The definition of ‘total assets’ has been amended to include a reference to prudential consolidated reporting (Article 51 of the SSM Framework Regulation) such as to clarify that the assets of institutions not supervised by the ECB are excluded.
<b>Article 3</b>	<b>Article 4</b>	General obligation to pay the annual supervisory fee	This article has been amended to specify the obligations of the fee debtor.  New paragraphs 3 and 4 have been moved from Article 4 as they are general provisions which do not simply concern the nomination of the fee debtor.

<b>Article 4</b>	<b>Article 5</b>	Fee debtor	<p>Paragraph 2 now provides that the fee debtor must be established in a participating Member State.</p> <p>Paragraphs 3, 4 and 5 have been moved to Article 3(3) and (4) and Article 10(3). This is because they are relevant not only for the purpose of nominating the fee debtor but also for other provisions of the Regulation.</p> <p>In accordance with the view expressed by the majority of respondents, it has been decided to delete former paragraph 2(a) and thus not to include any damages to be paid to a third party as costs to be recovered as supervisory fees.</p> <p>A reference to ‘supervised groups’ has been added to paragraphs 1 and 2 to ensure that provisions also apply in relation to supervised groups.</p> <p>Paragraph 3 has been amended to clarify that a refund or any additional invoice shall be issued to the fee debtor.</p>
<b>Article 5</b>	<b>Article 6</b>	Annual costs	<p>A reference to ‘supervised groups’ has been added to paragraph 1 to clarify that the provision also applies in relation to supervised groups.</p>
<b>Article 7</b>	<b>Article 8</b>	New supervised entities or change of status	<p>The former Article 13 has been moved to Part III ‘Determining the annual supervisory fee’.</p> <p>Paragraph 2 has been amended to specify that the total amount to be levied shall be published on the ECB’s website by 30 April of each fee period.</p> <p>Paragraphs 1, 2, and 3 have been amended to add a reference to ‘supervised groups’.</p> <p>Paragraph 3 has been supplemented by a provision providing supervised groups with the option to submit consolidated accounts that include subsidiaries established in non-participating Member States.</p> <p>In addition, a new subparagraph has been introduced which provides that the fee factor of the total assets shall not exceed EUR 30 billion for those supervised entities or supervised groups that are classified as less significant on the basis of particular circumstances (Article 6(4) of SSM Regulation).</p> <p>Paragraph 4 has been amended to allow fee debtors to submit their fee factors to the relevant NCA by 1 July or by the reference date of their accounting year end where their accounting year end deviates from the calendar year.</p> <p>A new paragraph 5 has been introduced to cover the cases where the fee debtor fails to provide the fee factors. The failure shall be considered as a breach of the Regulation. The ECB may then determine the fee factors.</p>
<b>Article 8</b>	<b>Article 9</b>	Split of annual costs between significant and less significant supervised entities	
<b>Article 9</b>	<b>Article 13</b>	Amounts to be levied	
<b>Article 10</b>	<b>Article 10</b>	Annual supervisory fee payable in respect of supervised entities and groups	
<b>Article 12</b>	<b>Article 14</b>	Fee notice	<p>Paragraph 3 has been amended in order to give fee debtors 35 days to pay the fee notice instead of 30 days.</p>

<b>Article 13</b>	<b>Article 15</b>	Notification of the fee notice	The Article has been amended to specify that the fee debtor is responsible for keeping up to date the contact details for the submission of the fee notice.
<b>Article 14</b>	<b>Article 11</b>	Interest in case of non-payment	This article has been moved to Part V 'Invoicing'.
<b>Article 15</b>	<b>Article 16</b>	Sanctions	The relationship between Regulation (EC) No 2532/98 and Article 121 of the SSM Framework Regulation has been clarified.
<b>Article 18</b>	<b>Article 19</b>	Entry into force	The article is amended to say that the Regulation shall enter into force on the following day of its publication in the Official Journal of European Union.