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European Central Bank

Secretariat to the Supervisory Board

“Public consultation on the review of the ECB Regulation on supervisory fees”

60640 Frankfurt am Main

Germany

17 July 2017

**Public Consultation on the review of the ECB Regulation on supervisory fees**

RK/FAC

Dear Madam or Sir,

Deutsche Börse Group (DBG) welcomes the opportunity to comment on the “Review of the ECB Regulation on supervisory fees” issued on 02 June 2017.

DBG is operating in the area of financial markets along the complete chain of trading, clearing, settlement and custody for securities, derivatives and other financial instruments and as such mainly active with regulated Financial Market Infrastructure (FMI) providers. Among others, Clearstream Banking S.A., Luxembourg (CBL) and Clearstream Banking AG, Frankfurt/Main, who act as (I)CSD as well as Eurex Clearing AG, Frankfurt/Main as the leading European Central Counterparty (CCP), are classified as credit institutions and are therefore within the scope of the SSM. Clearstream subgroup is supervised on a consolidated level as a financial holding group. Currently, all of our group entities are less significant institutions in the meaning of Article 6 SSM Regulation<sup>1</sup>.

In this context we intend to share our views and perspective on the review of the supervisory fees.

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<sup>1</sup> Regulation (EU) No 1024/2013.

## **A. General comments**

In balancing out simplicity of the proposal with the allocation of costs according to concrete efforts we nevertheless see the approach of simple allocation of all costs to the supervised entities based on key figures only as being too simplistic. We see the necessity to split total supervisory fees in fees concerning specific/non-recurring tasks and general supervision as it doesn't seem appropriate to mutualise costs which can also be easily dedicated to a specific counterpart. The ECB should consider dedicated fees for (selected) dedicated services and distribute only the remaining costs for the general supervision between all supervised entities. The proposed approach to distribute general supervision costs is however supported with the exemption for some inconsistencies which need adjustments.

We want to urge the ECB to initiate/request to the Member States to take the ECB fees into account when determining the fees for additional NCA supervision.

## **B. Detailed comments on the ECB regulation**

For the following topics we see the need for adjustments and refinement:

### **I. Scope of application**

As proposed in our comments in the consultation on the draft regulation on supervisory fees in July 2014<sup>2</sup>, we see a need to clarify the scope of the related regulation. According to Article 2 No 6 and No 7 of the ECB Regulation on supervisory fees<sup>3</sup> the fee-paying entities are credit institutions established in the participating Member States and branches established in participating Member States by a credit institution established in a non-participating Member State. The SSM Regulation includes in Article 4 Paragraph 1 lit. g in addition financial holding companies and mixed financial holding companies under the SSM Framework. Therefore, the ECB Regulation on supervisory fees should also include the entities mentioned in the scope of the SSM Regulation as stated above in order to be consistent.

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<sup>2</sup> <https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/fees/CP2-DeutscheBorseGroup.pdf>;

<sup>3</sup> If it is not stated otherwise articles refer to the Regulation (EU) No 1163/2014 of the ECB of 22 October 2014 on supervisory fees (ECB/2014/41).

We propose to include an Article 1a like follows:

***“Article 1a Scope of application***

*This Regulation applies to:*

- 1. credit institutions established in the participating Member States;*
- 2. branches established in participating Member States by a credit institution established in a non-participating Member State;*
- 3. financial holding companies in the participating Member States;*
- 4. mixed financial holding companies in the participating Member States.”*

**II. Level of fee application**

In addition to the question who is the addressee of this Regulation, we see a need to clarify and streamline the regulation in regards to the level of fee application. Article 1 Paragraph 4 is defining the consolidated level as basis for the calculation (in line with Article 2 (10)) while Article 2 Paragraph 3 in connection with Article 2 Paragraph 6 and Paragraph 7 exclude financial holding companies and mixed financial holding companies as fee debtors.

In order to fix inconsistencies of the text that exist in our view, we propose to adjust regulation as follows<sup>4</sup>:

- Article 1 Paragraph 4:  
*“The total amount of the annual supervisory fees shall encompass the annual supervisory fee in respect of each significant supervised entity and each less significant supervised entity and shall be calculated by the ECB **only** at the highest level of consolidation within participating Member States;”*
- Article 2 Paragraph 3:  
*“‘fee debtor’ means the fee-paying credit institution or fee-paying branch **or other fee-paying entity** determined in accordance with Article 4 and to which the fee notice is addressed;”*
- Article 2 Paragraph 7a: (to be added)

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<sup>4</sup> Proposed changes are in bold letters.

**“'other fee-paying entity' means any legal entity of a group of fee-paying entities being determined as fee debtor in accordance with Article 4, being neither a credit institution nor a branch.”**

### III. Fees for dedicated business

As already mentioned in our general comments in Part A, for specific and non-recurring tasks the related supervisory fee should be directly allocated instead of being mutualised. Otherwise all related costs are incurred by the community of supervised entities. § 14 of the German law on the Federal Financial Supervisory Authority (BaFin) (Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht; Finanzdienstleistungsaufsichtsgesetz - FinDAG) might be an example for such approach. If our proposal is followed in principle adjustments to the Regulation as follows are necessary:

- A dedicated paragraph must be included for all services which can be directly allocated to the supervised entities and as such have to be deducted from the amount to be levied. We propose to include a Paragraph 3 in Article 9;
- In the newly proposed Article 1a has to be amended that the legal entity or person causing the dedicated service needs to be included as another addressee this regulation applies to, e.g. as No 5:

**“5. Any person or company requiring services which are subject to fees in accordance with Article 9 Paragraph 3”;**

- An additional paragraph needs to be added to Article 2, e.g. as Paragraph 7b for ‘service requesting fee-payer’;
- Article 2 Paragraph 3 needs to be amended to include the debtor for the service requesting fee-payer;
- Further, in Article 5 Paragraph 2 not only the annual fees but also individual fees should be covered as we see the necessity that dedicated services should not be mutualised via gross annual fees but allocated to the dedicated debtor. Individual fees collected need to be dedicated before the remaining total expenditure are allocated

to the community of supervised entities;

- A new paragraph needs to be added at the end of Article 5 to clarify the fee-paying rules for the service requesting fee-payer as described. To clarify i.a. following topics:
  - The legal entity which runs for application must pay all respective fees and not the super-ordinated company or the group debtor;
  - In an owner control investigation not the target company but the company initiating such process must be charged.

#### IV. Simplified rules for fee periods

In general, we support any simplification where possible. Nevertheless, we propose to amend the current applicable Article.

Per-se we prefer an approach charging all months of supervision instead of the relevant portion. Therefore, we propose to start charging supervisory fees with the first full month of supervision and charge the month in which the supervision ceases (e.g. due to termination of the authorisation as credit institution) in full as well.

We propose to adjust Paragraph 1 of Article 7 as follows:

*“Where a supervised entity or a supervised group is supervised for only part of the fee period, the annual supervisory fee shall be calculated by **the costs occurred in the respective** ~~reference to the number of full~~ months of the fee period for which the supervised entity or the supervised group is supervised. **The calculation starts with the first full month of supervision and ends with the month in which the supervision ceases.**”*

#### V. No overruling by ECB if debtor is nominated by a group of fee-paying entities

In Article 4 Paragraph 2 it is stated that each group of fee-paying entities shall nominate the fee debtor for the whole group. Nevertheless, in Article 4 Paragraph 3 it is stated that the ECB reserves the right to determine the fee

debtor. From our perspective, this is not justified. In case a group of fee-paying entities has named the fee debtor it shouldn't be possible for the ECB to intervene and name another fee debtor. We totally agree to include a right of ECB to determine the debtor in case no fee debtor is nominated (as proposed in the draft regulation in May 2014). We propose to re-include the sentence at the end of Article 4 Paragraph 2:

***“If the ECB does not receive notification of the identity of the fee debtor by 1 July of each year, the fee debtor shall be determined by the ECB.”***

#### **VI. Clear specification of the allocation of fees**

In Article 8 Paragraph 2 we miss a clear specification what are the main drivers for the allocation of costs to significant and less significant institutions, branches, etc. We clearly disagree to the formulation and ask for at least a generic specification on the vague principles how allocation is derived.

#### **VII. Simplified solution for branch fees**

We agree to the idea of simplified solutions, but these must be reasonable and appropriate.

In Article 10 Paragraph 3 lit. a ii) it is stated that in case of a fee-paying branch, total risk exposure is considered zero. This is clearly rejected by us. For fee-paying branches of course the risk exposure must be considered as well, otherwise branches with high risk exposures compared to their balance sheet would be incentivised and vice-versa. Therefore, Article 10 Paragraph 3 lit. a ii) must be adjusted.

From our perspective, we see no reason why risk exposures should not be used, they are readily available for solvency and Large Exposures purposes. If these branches are treated differently as credit institutions in scope the level playing field is harmed and regulatory arbitrage would become possible to some extent. We can follow the idea to exempt operational risk for simplicity, but at least figures for credit risk and market risk are available.

In general, the rules for branches and subsidiaries of supervised credit institutions or other group entities of a group of supervised entities outside the participating member states need to be built in the same way. As the treatment

according to Recital 12 and Article 10 Paragraph 3 lit. c currently only covers subsidiaries, it has to be amended in order to exclude assets of branches in non-participating Member States as well. Here, equal treatment in both directions in general is mandatory.

#### **VIII. Minimum Fees**

Related to the approach for minimum fees in Article 10 Paragraph 6 lit. b we would prefer a specific amount that has to be paid as minimum fee per supervised entity or group per category (significant/less significant). This would reduce the complexity of calculation supervisory fees and makes it more transparent and predictable.

#### **IX. Balance between factors**

In Article 10 Paragraph 3 total assets and total risk exposures are the (only) factors for determination of fees. Both are weighted with 50%.

We assume that the efforts for supervision of the supervised entities are depending on quite a few parameters. Having proposed dedicated fees for some specific individual cases, we believe some of this complexity for the distribution of the general supervisory fees could be taken out already. However, we see other important factors that could be taken into account: Number of jurisdictions being active in, number of legal entities within a consolidated group, differentiated efforts depending on prevailing risk category expressed in the capital charge (credit, market or operational risk), etc.

Having said this, without a sound database of cost of ECB supervision and its drivers we cannot make a valid statement or a proposal how to adjust the regulation. In order to reflect a reasonable simple but also cost adequate distribution mechanism, we propose to publicly consult on a redesign of the determination of the annual supervisory fee considering certain important factors.

#### **X. Interest on delayed payment:**

In case a fee-paying entity is in delay of its payment, the regulation defines 8% as interest rate to be paid. Considering the current interest rate environment

this seems hardly plausible. If the ECB prefers a fixed rate we propose 6% as maximum, although we prefer a variable rate with an add-on of 2%.

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We hope our comments are seen as a useful contribution to the discussion and will be considered in future issuances.

Yours faithfully,

Jürgen Hillen  
Executive Director

Ralph Kowitz  
Regulatory Expert