

Table of Contents

7. Directorate General Micro Prudential Supervision 4	55
a) Legal basis	55
b) Internal structure of DGMS 4	55
c) Tasks of DGMS 4 and attribution of activities to the ECB	56
8. The SB-Secretary and the SB-Secretariat	58
9. The Supervisory Law Division of the Directorate General Legal Services	59
10. The Supervisory Board (SB)	60
a) Introduction	60
b) Composition, term, appointment and removal process	62
c) Functions	65
d) Operation, voting	66
e) Steering Committee of the SB	70
11. The Governing Council	71
a) Composition, operation, voting, function	71
b) The inherent conflict	72
12. The Mediation Panel (MP)	73
13. The Executive Board (EB)	74
14. The interconnection with the NCAs	76
15. Immunities	77
II. The principle of separation	78
1. Limited involvement of the Governing Council and Executive Board	79
2. Separation of objectives	79
3. Separation of tasks and organisation	79
4. Separation of procedures	81
III. Delegation	81
1. Is a delegation at all permissible?	81
2. Is an explicit legal basis required?	82
3. To whom may the exercise of supervisory tasks and powers be delegated?	83
4. What is the scope of a permissible delegation?	84
5. How can delegation be effected?	85
IV. Decision making within the SSM	86
1. Differentiate between the decision making process in monetary policy matters, supervisory matters, and current business matters – the scope of the non-objection procedure	86
2. The non-objection procedure	91
D. The Applicable Substantive and Procedural law	95
I. The Substantive Law to be applied by ECB	95
1. Primary law	95
2. Regulations	95
3. National law making use of options under regulations	96
4. National law transposing directives	97
5. “Gold-plated” provisions	97
6. Implementing technical and regulatory technical standards	97
7. Guidelines of EBA	97
8. Prudential provisions neither provided for in CRR nor in CRD IV	98
II. The Legal Instruments available to the ECB	98
1. Introduction	98
2. Regulations	101
3. Guidelines	102
4. Decisions, instructions, requests	104
5. Recommendations	105
6. Informal supervisory measures	106
7. Agreements	106
III. The procedural law to be applied by ECB	107
1. The concept of ECB supervisory procedure and ECB supervisory decision	107
2. No application of national administrative procedural law by the ECB?	108
3. Sources of the procedural law of the SSM	109
4. The Language Regime	110
5. The parties and their representation	112
6. Ex officio principle and further general provisions	113
7. Right to be heard	114
8. Access to files	116

Table of Contents

9. Motivation	119
10. Suspensive effect	120
11. Notification	121
12. Reporting of breaches – “Whistle blowing”	124
13. Conditions precedent, conditions subsequent, and obligations	125
14. Legal succession	127
15. Revocation of lawful and unlawful ECB supervisory decisions	128
16. Professional secrecy	129
17. Exchange of Information	131
18. Public access	134
E. Determining the Significance of Credit Institutions and the Begin/End of Direct Supervision by the ECB	137
I. Introduction	137
II. General concepts in connection with the determination of significance and the taking over of direct supervision by the ECB	137
1. Supervised Entity	138
2. Established in a participating Member State	139
3. Significance is determined for a group at the highest level of consolidation based on the prudential perimeter of consolidation	140
a) Determination on individual basis	140
b) Determination of significance at supervised group level	140
c) Determination of the prudential perimeter of consolidation	141
d) Determination at highest level of consolidation within participating Member States	142
e) Joint ventures	143
4. All members of a group are either significant or less significant	144
5. Stability of the status as significant supervised entity – the three years rule	144
6. Order of the application of the significance criteria	145
7. Determining the significance status and the begin/end of direct supervision	145
III. The criteria for determining the status as significant or less significant supervised entity	146
1. The criterion of size	146
2. The criterion of relevance for the economy	147
3. The criterion of cross border activities	148
4. The criterion of direct public assistance	149
5. The criterion of the three most significant credit institutions	150
6. Particular circumstances	151
7. Assumption of direct supervision over a less significant supervised entity, Article 6 (5) (b) SSMR	152
IV. The ending of the status as significant and procedural aspects	153
1. The ending of the status as significant	154
2. Procedural Aspects	154
a) The initial assessment of significance and assumption of direct supervision	154
b) Significance review and take-over of supervision in an operating SSM	155
c) Pending procedures, Article 48 FR	157
F. Tasks and Powers Relating to all Credit Institutions	159
I. Introduction	159
II. Common Procedures	159
1. Authorisation, Article 14 (1) to (4) FR	159
a) Task, power, substantive and procedural law, scope	159
b) Substantial requirements	162
c) Procedure	164
2. Withdrawal of authorisation, Article 14 (5) and (6) SSMR	166
a) Task, power, substantive and procedural law, scope	166
b) Substantial requirements	167
c) Procedure	168
3. Acquisition of qualifying holdings, Article 15 SSMR	171
a) Task, power, substantive and procedural law, scope	171
b) Substantial requirements	173
c) Procedure	174
III. Investigatory powers, Article 10 to 13 SSMR	176
1. Overview	176

Table of Contents

2. Information Provider	177
3. Legal form, procedural requirements and decision making process	178
4. Requests for information, Article 10 SSM	179
a) Ad-hoc information requests	179
b) Reporting requests	180
5. General investigations, Article 11 SSMR	181
6. On-site inspections, Article 12 and 13 SSMR	181
a) Overview	181
b) Planning of on-site inspections	182
c) Preparation of an on-site inspection	182
d) Carrying out of an on-site inspection	184
e) Reporting	184
f) Follow-up	185
g) Article 12 (5) and Article 13 SSMR	185
IV. Macro-prudential tasks and powers, Article 5 SSMR	186
1. Overview	186
2. Macro-prudential supervisory instruments	187
3. The task and power of the ECB	188
4. Procedural aspects	188
a) The procedure pursuant Article 5 SSMR	188
b) The internal procedure at the ECB	189
c) Procedure vis-à-vis the affected credit institutions	190
V. Making use of the EU passport	190
1. Introduction	190
2. The scope of the task and power	192
3. Intra SSM scenario	192
4. Out-in scenario	194
5. In-out scenario	194
6. EEA and third countries	194
G. Tasks and Powers Relating to the On-Going Supervision of Significant Credit Institutions ...	195
I. Introduction	195
II. Micro-prudential supervisory tasks of the ECB	196
1. Exclusive tasks but not in respect to all credit institutions	196
2. No definitive list of tasks	197
3. Personal scope of the tasks and powers	197
4. Article 4 (1) (d) SSMR	197
5. Article 4 (1) (e) SSMR	200
6. Article 4 (1) (f) SSMR	201
7. Article 4 (1) (g) SSMR	203
8. Article 4 (1) (h) SSMR	204
9. Article 4 (1) (i) SSMR	204
III. Micro-prudential supervisory powers of the ECB	205
1. Introduction	205
2. Article 16 (1) SSMR	206
3. Article 16 (2) SSMR	207
4. Proportionality	210
5. Procedural aspects	210
H. Enforcement and Sanctioning powers	211
I. Introduction	211
1. Types of measures/powers	211
2. Relevance of the FR and Council Regulation (EC) No. 2532/98	213
II. Article 18 (1) SSMR	214
1. Scope, conditions	214
2. Procedure for the imposition of administrative pecuniary penalties	215
a) Legal basis for the applicable procedure	215
b) Description of the applicable procedure	215
3. Amount of possible administrative pecuniary penalties and publication	216
III. Article 18 (5) SSMR	217
IV. Other issues	219

Table of Contents

V. Article 18 (7) SSMR	219
1. Scope of the competence	219
2. Procedural aspects	220
a) Fines	220
b) Periodic penalty payments	220
3. Amount of periodic penalty payments	220
I. The indirect supervision of less significant credit institutions	221
I. Introduction	221
II. Harmonising supervisory standards and coordinating the cooperation between the ECB and the NCAs	222
III. Assessing specific supervisory actions	223
1. Prioritisation of LSEs	224
2. Ex ante assessment of supervisory actions	224
3. Ex post assessment of supervisory actions	225
IV. Further issues	225
J. Close Cooperation	227
I. Introduction	227
II. The underlying issues	227
III. The process to establish a close cooperation	228
IV. The close cooperation	229
K. Supervisory fees	231
I. Introduction	231
II. The concept of fee debtor	232
III. The expenditures that can be allocated	233
IV. The distribution of the fees	234
L. Contesting ECB Supervisory Decisions in front of the ABoR	237
I. Introduction	237
II. The composition and internal organisation of the ABoR and the role of the secretary	238
1. Personal and professional eligibility criteria	238
2. The alternate members	239
3. The appointment procedure	240
4. The internal structure of the ABoR	240
III. Admissibility of a review by the ABoR	241
1. Subject matter of a review	241
2. Eligible applicant	242
3. Time frame for application	243
4. Necessary form and content of a notice of review	243
5. Language	244
6. Procedure in case of inadmissibility	244
IV. The procedure before the ABoR	245
1. The steps of the proceeding	245
2. Hearing	246
3. Evidence	247
4. Access to files	248
V. The scope of review by the ABoR and its opinion	248
VI. Suspensive effect	249
VII. Costs	249
VIII. Practical deliberations	250
M. Contesting ECB supervisory decisions in front of the ECJ	251
I. Introduction	251
II. Contesting ECB supervisory decisions	251
1. Admissibility of an action for annulment	252
2. Merits of the action for annulment	253
III. Contesting measures of NCAs carried out in connection with ECB supervisory procedures	254
IV. Actions of NCAs and against NCAs	256

Table of Contents

N. Non-contractual Liability of the ECB for ECB supervisory decisions	259
I. Introduction	259
II. Non-contractual liability towards the Supervised Entities	259
III. Non-contractual liability towards third parties	260
Index	263